No. 12-56352

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

P. VICTOR GONZALEZ, Qui Tam Plaintiff, on Behalf of Himself, the United States of America, & the State of California,

Plaintiff-Appellant,

v.

PLANNED PARENTHOOD LOS ANGELES, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
(No. 2:05-cv-08818-AHM-FMO Hon. A. Howard Matz)

Amicus Curiae Brief of
Concerned Women for America
in Support of Petition for Rehearing and Rehearing En Banc

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CORPORATE DISCLOSURE STATEMENT

Amicus Concerned Women for America (CWA) is not a publicly held corporation and has no parent corporations or stock of which a publicly held corporation can hold.

s/ Denise M. Burke
Counsel for Amicus

Dated August 15, 2014

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Concerned Women for America ("CWA") is the largest public policy women's organization in the United States, with 500,000 members from all 50 states. Through its grassroots organization, CWA advocates the traditional virtues that are central to America's cultural health and welfare and protecting the sanctity of life is one of CWA's seven core issues. CWA actively promotes legislation, education, and policymaking consistent with its philosophy.

CWA has been at the forefront of pointing out the problems of waste, abuse, and potential fraud at Planned Parenthood affiliates, including allegations of improperly using taxpayer dollars for abortion-related services. CWA has an interest in ensuring that these allegations of misuse of taxpayer dollars are thoroughly investigated. This Circuit has stressed the importance of scienter in *U.S. ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991), which reversed a dismissal at the pleadings stage on scienter grounds, saying that issue must await trial or summary judgment.

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[1]In accordance with Fed. R. App. 29(b), *Amicus* simultaneously filed a motion for leave to file the brief. No party's counsel has authored the brief in whole or in part. No party or party's counsel has contributed money intended to fund preparing or submitting this brief. No person other than *Amicus*, its members, or its counsel has contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

The federal False Claims Act, which prohibits frauds against the federal government, defines the scienter of "knowing" to include "reckless disregard," 31 U.S.C. §3729(b). Publicly available state and federal audit reports document inappropriate billing practices at Planned Parenthood clinics and affiliates across the nation. These audits suggest that a systemic problem exists at Planned Parenthood and support Mr. Gonzalez's allegation that certain California Planned Parenthood affiliates (at least) recklessly disregarded billing standards, illegally overbilling both the state and federal government by charging marked-up amounts for birth control drugs and devices rather than charging their acquisition cost, as required at the time by state and federal law.

Former Planned Parenthood employees, including clinic managers, have written to Congress indicating that they are "prepared to testify" about inappropriate and illegal practices that they witnessed at Planned Parenthood clinics across the nation. They assert that Planned Parenthood is "an entity that, as we can personally attest, has operated as a law unto itself…claim[ing] exemption from the normal standards and accountability that every other recipient of public funds is expected to meet."

Further, the allegations of former Planned Parenthood employees in several unsealed whistleblower lawsuits corroborate Mr. Gonzalez's allegation that

Planned Parenthood sought to conceal its overbilling practices. Indeed, these lawsuits suggest that Planned Parenthood trains its employees to disregard the law and to engage in improper billing practices.

This Court has held that where two plausible interpretations follow from the complaint, the plaintiff's complaint survives. *Starr v. Baca*, 652 F.3d 1202 (9th Cir. 2011). While Mr. Gonzalez's claims stand on their own merit, state and federal audit reports, as well as allegations from other former employees suggest a systemic problem at Planned Parenthood affiliates nationwide, buttressing the plausibility of his claims.

I. State and federal audit reports detail a pattern of misuse of healthcare and family planning funds by Planned Parenthood affiliates.

In addition to the audit reports documenting overbilling that have already been provided to this Court by Mr. Gonzalez, Planned Parenthood clinics and affiliates in Connecticut, Illinois, Maine, New Jersey, New York, Washington State, and Wisconsin have also been exposed for misusing taxpayer dollars.

A. An audit report of family planning providers in New Jersey uncovered billing abuses by "especially Planned Parenthood providers."

In 2008, the U.S. Inspector General for the U.S. Department of Health and Human Services (HHS) uncovered the misuse of federal funds by approved providers including New Jersey Planned Parenthood affiliates. The State

improperly received an estimated $597,496 in federal Medicaid funds,[2] and Planned Parenthood clinics were found to be a significant part of the problem. As detailed in the investigation:

> **Improper Claims from Family Planning Clinics**
> During our visits to family planning clinics throughout the State, many providers (especially Planned Parenthood providers) stated that they billed all claims to Medicaid as "family planning." Officials at these clinics stated that they believed that all of the services they provided were related to family planning. Therefore, officials at these clinics often populated the family planning indicator field on Medicaid claims even though the service provided did not meet the criteria for 90-percent Federal funding. By populating this field, the [Medicaid Management Information System (MMIS)] designated the claim as eligible for 90-percent Federal funding.[3]

According to the audit report, of the 107 claims sampled, "43 claims did not qualify as family planning services, and therefore were not eligible for Federal Medicaid reimbursement at the 90 percent rate."

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[2] Letter from James Edert, Regional Inspector Gen., Office of the Inspector Gen., U.S. Dep't of Health & Human Servs., to Jennifer Velez, Comm'r, N.J. Dep't of Human Servs. (June 17, 2008); OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., REVIEW OF OUTPATIENT MEDICAID CLAIMS BILLED AS FAMILY PLANNING BY NEW JERSEY (2008).

[3] OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., REVIEW OF OUTPATIENT MEDICAID CLAIMS BILLED AS FAMILY PLANNING BY NEW JERSEY 5 (2008).

B. State and federal audits have uncovered wrongful billing practices at Planned Parenthood affiliates in New York.

In 2008, HHS similarly determined that the misuse of federal funds by approved family planning providers in New York was committed "especially" by Planned Parenthood affiliates.[4]

In 2009, the Office of the Medicaid Inspector General for the State of New York issued reports demonstrating a pattern of overbilling at the Margaret Sanger Center in New York City. A letter, dated January 20, 2009, confirmed Planned Parenthood's request to settle one audit for $207,809.00.[5] A second audit report issued on June 9, 2009 found the "lower confidence limit of the amount overpaid" to the Sanger Center for the period examined was $1,245,603.00.[6] The report noted, "We are 95% certain that the amount of the overpayment is greater than the lower confidence limit." The State of New York, however, permitted Planned Parenthood to settle for the proposed amount.

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[4] OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., REVIEW OF FEDERAL MEDICAID CLAIMS MADE FOR THE BENEFICIARIES IN THE FAMILY PLANNING BENEFIT PROGRAM IN NEW YORK STATE. 6 (2008).

[5] Letter from Craig C. Francis, Dir., Bureau of Medicaid Audit, N.Y. City, N.Y. Office of the Medicaid Inspector Gen., to Caroline Greene, Chief Fin. Officer, Margaret Sanger Ctr., Planned Parenthood Diagnostic & Treatment Ctr. (Jan. 20, 2009).

[6] Letter from Craig C. Francis, Dir., Div. of Medicaid Audit, N.Y. City, N.Y. Office of the Medicaid Inspector Gen., to Jane Florek, Chief Fin. Officer, Margaret Sanger Ctr., Planned Parenthood Diagnostic & Treatment Ctr. (June 9, 2009). The audit examined Medicaid claims from January 1, 2004 through December 31, 2005.

C. Publicly available audit reports suggest a systemic problem, identifying overbilling and improper billing practices at Planned Parenthood affiliates in Connecticut, Illinois, Maine, Washington, and Wisconsin.

The known overbilling and improper billing practices at Planned Parenthood are not isolated at one clinic, affiliate, state, or region. Publicly available audit reports suggest that a systemic problem exists at Planned Parenthood affiliates across the country.

For example, a final audit report for Planned Parenthood of the Inland Northwest (PPINW) conducted by the State of Washington's Department of Social and Health Services found "that an excess payment of $629,142.88" was made to PPINW between 2004 through 2007.[7] The audit was launched after staff with the Washington Department of Social and Health Services grew suspicious of the frequency of purported clinic visits to PPINW by Medicaid patients. "Most birth control clinics will see a woman and usually determine what method of birth control is best and then they will prescribe six months to a year right then and

[7] Letter from Steve Wilson, Auditor, Office of Program Integrity, Wash. Dep't of Soc. & Health Servs., to David B. Robbins, Attorney, Bennett Bigelow & Leedom, P.S. (July 20, 2009); OFFICE OF PROGRAM INTEGRITY, WASH. DEP'T OF SOC. & HEALTH SERVS., FINAL AUDIT REPORT OF PLANNED PARENTHOOD OF THE INLAND NORTHWEST (2009). The audit reviewed 333 procedures performed from March 15, 2004 through February 26, 2007. Based on the review, the auditors applied the sample findings to all 267,815 procedures performed during that timeframe to calculate the overpayment.

there," said Doug Porter, Washington's Medicaid director, whereas Medicaid patients at PPINW were allegedly coming into PPINW every month.[8]

The audit report uncovered overbilling and other improper billing practices, including a medication incorrectly billed under the family planning program that was an antibiotic routinely prescribed as part of a surgical abortion.[9]

PPINW was ordered to reimburse the government $629,143 (with interest), but was permitted to settle with the Washington State Department of Social and Health Services for $345,000.[10]

Overbilling or improper billing practices have also been documented in Connecticut,[11] Illinois,[12] Maine,[13] and Wisconsin.[14]

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[8] *Audit finds Planned Parenthood affiliate overcharged $629,000 to Medicaid*, Catholic News Agency (Aug. 13, 2009), http://www.catholicnewsagency.com/news/audit_finds_planned_parenthood_affiliate_overcharged_629000_to_medicaid/ (last visited Aug. 12, 2014).

[9] OFFICE OF PROGRAM INTEGRITY, WASH. DEP'T OF SOC. & HEALTH SERVS., FINAL AUDIT REPORT OF PLANNED PARENTHOOD OF THE INLAND NORTHWEST 14 (2009) ("This med should have been included in the bundled facility fee and not billed under this provider number.").

[10] Press Release, Wash. Dep't of Soc. & Health Servs., *Washington State Medicaid, Planned Parenthood of the Inland Northwest Settle 2009 Audit Findings* (Oct. 29, 2010), *available at* http://www.dshs.wa.gov/mediareleases/2010/pr10098.shtml (last visited Aug. 12, 2014).

[11] A-01-99-59104, released Aug. 1999. *See* U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE OF INSPECTOR GENERAL, SEMIANNUAL REPORT OCTOBER 1, 1999-MARCH 31, 2000 (2000), at D-8, *available at* https://oig.hhs.gov/publications/docs/semiannual/2000/00ssemi.pdf (last visited Aug. 12, 2014).

II. Former Planned Parenthood employees—including former clinic directors and an abortion doctor—from across the nation have written to Congress about the serious and systemic misuse of taxpayer dollars at Planned Parenthood affiliates.

In December 2011, seven former Planned Parenthood employees wrote a letter to Congress stating that they were "prepared to testify" about the transgressions they witnessed at Planned Parenthood clinics across the nation.[15] According to these former clinic employees, clinic managers, and abortion doctor, the incidents they witnessed at Planned Parenthood include:

- Failure to properly account for and maintain separation between government funds prohibited for use for elective abortions and those funds derived from other sources that are not subject to such limitations.

- Failure to engage in appropriate financial controls and billing practices to ensure compliance with applicable state and federal laws.

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[12] *See* Andrew L. Wang, *Planned Parenthood Settles with Illinois on Medicaid Payments*, CRAIN'S CHICAGO BUSINESS, Sept. 5, 2012, http://www.chicagobusiness.com/article/20120905/NEWS03/120909935/planned-parenthood-settles-with-state-on-medicaid-payments# (last visited Aug. 12, 2014).
[13] *See Profit. No Matter What.*, Alliance Defending Freedom (2014) at 14, http://www.adfmedia.org/files/ProfitNoMatterWhatReport.pdf (last visited Aug. 12, 2014). Letter from Herbert F. Downs, Director of Audit, Maine Department of Health and Human Services, to Michael Barewicz, Associate Vice President, Planned Parenthood of Northern New England (June 21, 2012) (on file with Alliance Defending Freedom).
[14] *Id.* at 25-30.
[15] Letter from Catherine Adair, et al., Former Employees of Planned Parenthood, to Hon. Fred Upton , Chairman, U.S. House of Representatives Energy and Commerce Comm. & Hon. Henry Waxman, Ranking Member, U.S. House of Representatives Energy and Commerce Comm. (Dec. 7, 2011), *available at* http://www.sba-list.org/sites/default/files/content/shared/12.7.11_former_employees_of_planned_parenthood_letter_to_congress_2.pdf (last visited Aug. 7, 2014).

- Failure to notify parents, including instances when a minor girl was the victim of statutory rape, under applicable state law.

The former employees worked at Planned Parenthood clinics across the country: Sacramento, California; San Jose, California; Storm Lake, Iowa; Boston, Massachusetts; Sioux Falls, South Dakota; Bryan, Texas; and Sherman, Texas. They told Congress that they were "of one mind that the extent of these problems with the organization [was] not fully understood by the American people…"[16] They stated further that Planned Parenthood is "an entity that, as we can personally attest, has operated as a law unto itself…claim[ing] exemption from the normal standards and accountability that every other recipient of public funds is expected to meet."[17]

III. Several "whistleblower" lawsuits suggest that Planned Parenthood trains its employees to disregard the law and to engage in improper billing practices.

Unsealed whistleblower lawsuits from Texas and Iowa support the allegations of Mr. Gonzalez and suggest that Planned Parenthood trains its employees to disregard the law and to engage in improper billing practices.

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[16] *Id.* at 2.
[17] *Id.*

A. Improper billing practices stem from Planned Parenthood's corporate policies.

Karen Reynolds, a "Health Center Assistant" for nearly 10 years at a Planned Parenthood clinic in Lufkin, Texas, alleges that, in several government-funded programs, Planned Parenthood Gulf Coast (PPGC) employees were trained to and did bill the government for medical services *never actually provided*, as well as for services that were not medically necessary. Third Amended Complaint, *U.S. ex rel. Reynolds v. Planned Parenthood Gulf Coast*, No. 9-09-cv-124 (E.D. Tex. Oct. 28, 2011).

In August 2012, a federal district court found that the facts as alleged by Ms. Reynolds "create[d] a plausible claim for relief" under both the federal False Claims Act and the Texas Medicaid Fraud Protection Act. *U.S. ex rel. Reynolds v. Planned Parenthood Gulf Coast*, No. 9-09-cv-124 (E.D. Tex. Aug. 10, 2012). The court, therefore, rejected Planned Parenthood's attempt to have the case summarily dismissed. In August 2013, Planned Parenthood agreed to pay a $4.3 million settlement.[18]

According to Ms. Reynolds' complaint, "the express policy" of PPGC was to bill the government for a predetermined list of services for every eligible patient

[18] *See* Nathan Koppel, *Planned Parenthood Settles in Fraud Case*, The Wall Street Journal, Aug. 16, 2013, *available at* http://online.wsj.com/news/articles/SB10001424127887323455104579016951262314732 (last visited Aug. 12, 2014).

who visited the clinic. Third Amended Complaint, *Reynolds* (No. 9-09-cv-124) at 12. Ms. Reynolds alleges that "PPGC employees were trained to fill out the patient's bill *before* services were rendered," and that employees were also trained to "bill automatically the pre-determined list of procedures and services based on whether the patient was self-pay, Medicaid, or Title XX" rather than using the patient chart and actual services provided to determine what to bill. *Id.* at 18-20

Ms. Reynolds alleges that she and other PPGC employees:

> [W]ere instructed, through policies handed down by PPGC corporate officers… and reiterated and enforced by local clinic directors… that if they had a patient using a single method of birth control…they should simply hand her a brown paper bag containing condoms and vaginal film as she walked out the door.

Id. at 14. After handing the patient this bag, PPGC would then charge the government for "counseling" the patient and claim reimbursement for products never requested by the patient.

As Ms. Reynolds describes, "[T]he decision about what services to provide patients was driven by what services the various government programs would pay for, as opposed to the medical necessity of the various procedures and tests." *Id.* at 16. Ms. Reynolds states that these wrongful billing practices were part of PPGC's corporate policy, "issued company-wide to all clinics," to increase the amount of money it received from government programs. *Id.* at 9. According to Ms. Reynolds' complaint, Planned Parenthood required its clinics to post monthly

"revenue goals" for each funding source, including individual government healthcare programs (such as the Texas Women's Health Program (WHP), Medicaid, and Title XX), with the aim of "constantly remind[ing] employees of the need to maximize government billing so the clinic could 'make its revenue goals.'" *Id.* at 9.

The allegations in *U.S. ex rel. Johnson v. Planned Parenthood Gulf Coast,* No. 4:10-CV-3496 (S.D. Tex. Dec. 20, 2011), corroborate Ms. Reynolds' claims.[19] Abby Johnson worked at PPGC's clinic in Bryan, Texas from September 2001 until she resigned in October 2009. Ms. Johnson alleges that, from the beginning of the Texas WHP program in January 2007, managers of each of PPGC's 10 Texas clinics were instructed to bill for products and services ineligible for reimbursement under the program. Second Amended Complaint at 26, *U.S. ex rel. Johnson v. Planned Parenthood Gulf Coast,* No. No. 4:10-CV-3496 (S.D. Tex. Dec. 20, 2011).

[19] Although Ms. Johnson argues there are legally significant distinctions between her claims and those of Ms. Reynolds, a Fifth Circuit panel recently held that "both complaints essentially allege that fraud was committed by altering patient records and billing Medicaid programs for services other than those rendered…" and, therefore, issued an order to dismiss Ms. Johnson's suit under the FCA's first-to-file bar. *U.S. ex rel. Johnson v. Planned Parenthood Gulf Coast,* No. 13-20206 (S.D. Tex. Jul. 1, 2014). ("[w]hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action" (citing 31 U.S.C. § 3730(b)(5))).

According to Ms. Johnson, PPGC authorities not only *approved* these practices, they *instructed* their managers "to bill every product and service provided by PPGC to a client to the Texas WHP program …" Second Amended Complaint, *Johnson*, No. 4:10-CV-3496 at 27. Specifically, when Ms. Johnson became Health Center Director for PPGC's Bryan Clinic in September 2007, she "directly received written and oral instructions, including billing instructions, from members of Planned Parenthood's Key Management Team…" to this effect. *Id.* at 25-26.

According to Ms. Johnson's allegations, through its billing scheme, PPGC improperly received over $5 million in taxpayer funding.

B. Planned Parenthood affiliates "fix" patients' charts to hide illegal and improper practices.

Ms. Reynolds also alleges that PPGC routinely "fixed" charts. In her 10 years of experience, Ms. Reynolds estimates that

> [A]pproximately 1/3 of the patient files would contain charges on the super bill[20] with no underlying documentation in the patient's chart to indicate the corresponding service was ever performed.

Third Amended Complaint, *Reynolds* (No. 9-09-cv-124) at 21. According to Ms. Reynolds, when a bill did not reflect the services documented in a patient's chart,

[20] A "super bill" is an itemized form used by healthcare providers for reflecting rendered services to be submitted to payers (*e.g.*, insurance companies and other funds and programs) for reimbursement.

employees were instructed to "fix" the chart to match the bill. *Id*. at 21. This was, according to Ms. Reynolds, "standard practice at PPGC clinics" during the entire time of her employment. *Id*.

Ms. Reynolds contends that "PPGC trained its employees to create false and misleading patient chart entries" in order to support reimbursements for services which were not permitted under the Texas Women's Health Program (WHP) or Medicaid, including "obtaining payment for abortion-related services." *Id*. at 15.

Ms. Johnson similarly details that Planned Parenthood employees were expected to and did alter information on patient charts to conceal its failure to comply with the law. Her complaint states that PPGC would "pre-select" and "purge" its client files to make them appear to be in compliance with state and federal law and regulations. Second Amended Complaint, *Johnson,* No. 4:10-CV-3496 at 35. Ms. Johnson alleges that where disparities existed between billing documents and patient charts, PPGC employees "were instructed by members of [PPGC's] Key Management Team…to 'make it right' by fixing charts before auditors arrived." *Id*. at 37.

Ms. Johnson alleges that even after clinic managers were made aware that PPGC was improperly billing the Texas WHP program for products and services not covered under that program, she and other managers were "instructed…to *continue* to seek Texas WHP-eligible reimbursements by *falsely notating* the

patient charts of women with infections to indicate that Texas WHP-eligible services had been provided, when, in fact, Texas WHP-eligible services had not been provided to such women." *Id*. at 36.

Ms. Johnson also alleges PPGC altered its charts to cover up their failure to comply with state laws and policies, including Texas' parental consent law, designed to protect minors and vulnerable women. *Id*. at 37.

C. Planned Parenthood affiliates improperly bill taxpayer-funded programs for abortion-related services.

Sue Thayer, a former manager for Planned Parenthood of the Heartland (PPH), explains how Planned Parenthood's "fragmentation" billing practice improperly billed for abortion-related services.

> [I]n a practice commonly referred to as "fragmentation," Defendant Planned Parenthood of the Heartland knowingly and intentionally separated out charges for services and products rendered in connection with such abortions, including, without limitation, office visits, ultrasounds, Rh factor tests, lab work, general counseling, and abortion aftercare, and submitted such separate "fragmented" charges as claims for Title XIX-Medicaid reimbursement to Iowa Medicaid Enterprise and/or Iowa Family Planning Network.

Second Amended Complaint at 96, *U.S. ex rel. Thayer v. Planned Parenthood of the Heartland*, No. 4:11-cv-00129 (S.D. Iowa July 26, 2012). Ms. Thayer alleges that "in anticipation of the receipt of reimbursements for such separate 'fragmented' charges…Planned Parenthood of the Heartland then reduced the usual and customary charges to clients to whom abortions had been provided."

Second Amended Complaint, *Thayer* (No. 4:11-cv-00129) at 97. Ms. Thayer states that "[t]he unbundling or fragmentation scheme was applied systematically to virtually every client who received an abortion." *Id*. at 99.

D. Planned Parenthood designed programs to overbill for services.

Ms. Thayer alleges that PPH filed nearly one-half million false claims with Medicaid, resulting in PPH fraudulently receiving and retaining nearly $28 million in taxpayer funding through abusive billing practices. Second Amended Complaint, *Thayer* (No. 4:11-cv-00129) at 45.

Ms. Thayer specifically attests that to enhance revenues, PPH implemented a "C-Mail" program that effectively mailed thousands of unrequested birth control pills to women, and then billed the government for these pills. According to Ms. Thayer, the C-Mail program was particularly designed for Medicaid-eligible patients "due to its revenue potential to Planned Parenthood." *Id.* at 15.

In some cases, patients had moved, so the Postal Service returned the birth control pills to PPH. Instead of crediting the government or making an adjustment to its billing or reimbursements, Ms. Thayer states in her complaint that PPH "instructed its staff" to re-use these pills and send them to future patients, effectively billing government healthcare programs at least twice for the same birth control pills. *Id.* at 20. Even when patients contacted PPH and requested that they cease sending the birth control pills, Ms. Thayer states that PPH persisted in

fraudulent billing habits. *Id.* at 20. In addition, Ms. Thayer alleges that PPH's C-Mail program "created a medically unnecessary surplus of at least 120.96 doses (approximately a four-month supply)…for each client each year." *Id*. at 22.

The scheme was lucrative for PPH. Ms. Thayer states that PPH's cost for a 28-day supply of birth control pills (one menstrual cycle) was $2.98, yet PPH was reimbursed $26.32 from Medicaid for each individual menstrual cycle supply provided to a patient. *Id*. at 17. Ms. Thayer's complaint estimates that the program resulted in over $14 million in taxpayer funds that were misappropriated by PPH. *Id*. at 25.

E. Planned Parenthood inappropriately takes money from low-income women by convincing them to pay for services already covered in full.

Ms. Thayer further states in her complaint that PPH trained its employees to (and did) solicit money from Medicaid clients at the time services were rendered. Employees recommended to patients that they give "50 percent of the amount of the bill" to PPH. Second Amended Complaint, *Thayer* (No. 4:11-cv-00129) at 33. In soliciting these "suggested donations," as PPH called them, PPH failed to inform patients that *the entire amount of the bill* would be reimbursed by the government. *Id.* at 35.

After receiving "hundreds of thousands of dollars" from these patients, PPH would then bill Medicaid for the same services in full, which violates its legal duty

to submit accurate claims to the government for payment. *Id.* at 33. *See also*, 31 U.S.C. § 3729 (a)(1)(A)-(B). Ms. Thayer alleges that PPH used the money it collected from the pockets of its Medicaid patients "for purposes unrelated to the provisions of Title XIX-Medicaid services to such patients." Second Amended Complaint, *Thayer* (No. 4:11-cv-00129) at 34.

CONCLUSION

This Court should grant rehearing and/or rehearing en banc.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)because it brief contains **3,966** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Further, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007, Times New Roman font, size 14.

s/ Denise M. Burke
Counsel for Amicus

Dated August 15, 2014

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 15, 2014.

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s/ Denise M. Burke
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