COLORADO COURT OF APPEALS, **STATE OF COLORADO** 2 East 14th Avenue, Suite 300 Denver, CO 80203	DATE FILED: February 13, 2015 9:37 AM FILING ID: AB61D84037D8B CASE NUMBER: 2014CA1816
Appeal from the DISTRICT COURT, CITY & COUNTY OF DENVER Honorable Andrew P. McCallin 1437 Bannock Street Denver, CO 80202 Case No. 2013-CV-34544 **PLAINTIFF- APPELLANT:** JANE E. NORTON, v. **DEFENDANTS-APPELLEES:** ROCKY MOUNTAIN PLANNED PARENTHOOD, INC. a/k/a PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, INC., a Colorado nonprofit corporation; JOHN W. HICKENLOOPER, in his official capacity as Governor of the State of Colorado; SUSAN E. BIRCH, in her official capacity as Executive Director of the Colorado Department of Health Care Policy and Financing; and LARRY WOLK, in his official capacity as Executive Director of the Colorado Department of Public Health & Environment.	▲ **COURT USE ONLY** ▲ Case Number: 2014CA1816
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PLAINTIFF-APPELLANT'S OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

1. The brief complies with C.A.R. 28 (g). It contains 9,187 words.
2. The brief complies with C.A.R. 28(k). It contains under a separate heading: (1) a concise statement of the applicable standard of review with citation to authority; and (2) a citation to the precise location in the record where the issue was raised and ruled on.

s/ Natalie L. Decker

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2. Whether the district court erred in defining the term "indirect," as used in Article V, Section 50, Colo. Const., to permit Colorado to use State taxpayer dollars to subsidize induced abortions.
3. Whether the district court erred in concluding that Plaintiff's claims violated Title XIX-Medicaid's "free-choice-of-provider" provision.

II. STATEMENT OF THE CASE

A. Nature of the case.

Plaintiff-Appellant Jane E. Norton ("Mrs. Norton") appeals the district court's C.R.C.P. 12(b)(5) dismissal of her verified complaint. Her complaint alleges that the State Defendants-Appellees paid $14 million in State taxpayer dollars to Defendant-Appellee Rocky Mountain Planned Parenthood, Inc., also known as Planned Parenthood of the Rocky Mountains, Inc. ("Planned Parenthood") in violation of Article V, § 50, Colo. Const.[1] This Article provides that "[n]o public funds shall be used by the State of Colorado, its agencies or political subdivisions to pay or otherwise reimburse, either directly or indirectly, any person, agency or facility for the performance of any induced abortion" (herein the "Abortion Funding Limitation").

On August 11, 2014, the district court dismissed Mrs. Norton's complaint on grounds that Mrs. Norton had "fail[ed] to identify a specific abortion service that was supported with State funds" and therefore had failed "to allege a violation of

[1] "State Defendants" when used herein refers to the defendants named in Mrs. Norton's complaint, *i.e.,* John W. Hickenlooper, in his official capacity as Governor of the State of Colorado; Susan E. Birch, in her official capacity as Executive Director of the Colorado Department of Health Care Policy and Financing; the Colorado Department of Health Care Policy and Financing; Larry Wolk, in his official capacity as Executive Director of the Colorado Department of Public Health & Environment; and the Colorado Department of Public Health & Environment.

Colorado's Abortion Funding Prohibition Amendment." (CD,[2] pp. 378-388). The district court also erroneously imposed its strained definition of the term "indirect" as used in the Abortion Funding Limitation and inappropriately concluded as a matter of law that no State taxpayer funds had been used to "indirectly" pay for induced abortions.

The district court's order should be reversed and this matter remanded for further proceedings, including discovery on key material facts in dispute.

B. Statement of the facts.

From 2000 to 2004, Mrs. Norton served as executive director of the Colorado Department of Public Health & Environment ("CDPHE") under then-Colorado Governor Bill Owens. (CD, pp.29-30). In 2001, Mrs. Norton, concerned that State taxpayer funds had been used to "directly or indirectly" pay for induced abortions, requested an independent accounting firm to audit Planned Parenthood. This independent accounting firm determined that Planned Parenthood's abortion-performing affiliate Planned Parenthood Rocky Mountain Services Corporation ("PP's Abortion Affiliate") occupied space in Planned Parenthood's facilities, but did not pay fair market rent for the use of such facilities; used Planned Parenthood's medical and administrative personnel, but did not pay fair market

[2] The record from the district court was transmitted on a CD. References to this record are designated "CD."

value for the use of such personnel; and used Planned Parenthood's medical and other equipment, but did not pay fair market value for the use of such equipment.

Mrs. Norton determined, based on this independent accounting firm audit of Planned Parenthood and the advice of CDPHE's legal counsel, that payment of State taxpayer dollars to Planned Parenthood constituted payment of State taxpayer dollars to PP's Abortion Affiliate and, as such, violated the Abortion Funding Limitation.[3] (CD, pp. 1-6, 29-30, 237, 307-312).

Mrs. Norton thereupon informed Planned Parenthood that, in order to continue to receive State taxpayer dollars, including funds from CDPHE, Planned Parenthood would have to separate its operations from the operations of PP's Abortion Affiliate and otherwise bring itself into compliance with the Abortion Funding Limitation. (CD, p. 6, 30, ¶¶17-19). When Planned Parenthood refused to take these actions, Mrs. Norton ordered that all further State taxpayer funds then being paid to Planned Parenthood cease. (CD, p. 4-6, 29-30, 318).

In about 2007, notwithstanding the fact that the subsidization arrangement between Planned Parenthood and its Abortion Affiliate had not changed (CD, p. 30, ¶¶ 20-22), then-Governor Bill Ritter announced that he had ordered the State

[3] *See, e.g.*, April 10, 2002 statement by Cynthia S. Honssinger (now Cynthia S. Coffman), Director, Office of Legal and Regulatory Affairs, CDPHE, regarding CDPHE's "responsibilities for distribution of state family planning funds." Ms. Coffman is the current Attorney General for the State of Colorado. (CD, p. 229, 237, 307- 310).

Defendants (as well as other State agencies) to resume payment of State taxpayer dollars to Planned Parenthood. (CD, p. 30, 230, 236, 241, 251). Mrs. Norton was informed and believes that then-Governor Ritter had received no advice from counsel or any other information to verify that the subsidization arrangement between Planned Parenthood and its Abortion Affiliate had changed since her late 2001 order and that then-Governor Ritter had made a political decision without any regard for the requirements of the Abortion Funding Limitation. (CD, pp. 4-6, 30, ¶¶ 21, 22, pp. 229, 230, 237, 241, 252, 282-284, 307-310; CD-Transcript pp. 29-30, line 25-21).

As this political directive was continued by now-Governor John Hickenlooper, Mrs. Norton's complaint alleges that the State Defendants had, since about 2009 to date, unlawfully paid $14 million of State taxpayer dollars to Planned Parenthood which funds, "directly or indirectly," paid for induced abortions in violation of the Abortion Funding Limitation. (CD, p. 29, ¶13, p. 30, ¶21- p.33, ¶ 34).

Mrs. Norton's complaint sought declaratory judgment that these resumed payments of State taxpayer dollars to Planned Parenthood violated the Abortion Funding Limitation. (CD, p. 30, ¶21-p. 33, ¶ 33). Mrs. Norton's complaint also sought injunctive relief to prohibit future such payments (CD, p. 30, ¶21-p. 33, ¶ 33; p. 34, ¶¶ 38-41; p. 35, ¶45; p. 36) and restitution from Planned Parenthood of the funds it had unlawfully received. (CD, p. 35, ¶¶46-51; p. 36).

The State Defendants, admitting that "a small amount [*i.e.*, at least $1.4 million] of State funds were spent on Planned Parenthood" (CD, p. 74), filed a combined Rule 12(b)(1)/12(b)(5) motion to dismiss. Planned Parenthood filed a Rule 12(b)(5) motion to dismiss.

The State Defendants' Rule 12(b)(1) motion challenged Mrs. Norton's standing to dispute the State Defendants' expenditure of federal dollars and represented, in affidavits to and supporting their Rule 12(b)(1) motion, that such federal funds related to the federal Title XIX-Medicaid program. (CD, pp. 92-203).

Mrs. Norton, in her response to the State Defendants' Rule 12(b)(1) motion, represented that she did challenge the State Defendants' expenditure of federal funds. Rather, she challenged the State Defendants' expenditure of State taxpayer dollars to support, directly or indirectly, induced abortions. (CD, pp. 228). Mrs. Norton requested in her response that, "in dealing with the State Defendant's Rule 12(b)(1) motion, if the [district] Court [must] consider the affidavits and documents attached to the parties' pleadings, . . . the Court [must] conduct an evidentiary hearing to resolve the issue of jurisdiction." (CD, pp. 253). This affirmation by Mrs. Norton mooted the State Defendants' Rule 12(b)(1) motion.[4] (Order, CD, p. 403).

[4] Although in *Freedom From Religion Foundation v. Hickenlooper*, 338 P.3d 1002 (Colo. 2014), the Colorado Supreme Court reversed the Court of Appeals' standing decision in *Freedom From Religion Foundation v. Hickenlooper*, 2012

The State Defendants' and Planned Parenthood's Rule 12(b)(5) motion contended that Mrs. Norton's 2001 interpretation application of the Abortion Funding Limitation was wrong. (CD, pp. 72-218). Defendants' Rule 12(b)(5) motions further represented that Planned Parenthood itself did not perform induced abortions. The Defendants asked the district court to ignore the inter-relationship between Planned Parenthood and its Abortion Affiliate and to dismiss Mrs. Norton's complaint for failure to state a claim on grounds the State Defendants had not improperly paid State taxpayer funds to Planned Parenthood which "either directly or indirectly" paid for induced abortions. (CD, p. 206, ¶22; p.124, ¶11; p. 12, ¶11).

Mrs. Norton, in her response, argued that these Rule 12(b)(5) motions should be denied as the district was required to: (a) accept as true all matters of material fact pleaded in Mrs. Norton's complaint; (b) view the allegations in Mrs. Norton's complaint in the light most favorable to her; (c) draw all inferences in Mrs. Norton's favor; and (d) grant the 12(b)(5) motions only if Mrs. Norton's factual allegations could not support a claim as a matter of law. Mrs. Norton reiterated her request that the district court "disregard, as it must, all affidavits [submitted in

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WL 1638718 (Colo. App. 2012), as Defendants conceded, the case had no bearing on Mrs. Norton's standing to challenge expenditure of State taxpayer funds. CD-Transcript, p. 18-19, lines 18-2.

support of the State Defendants' Rule 12(b)(1) motion] in resolving Defendants' Rule 12(b)(5) motion to dismiss." (CD, pp. 253).

On April 25, 2014, the district court heard oral argument on these motions. Thereafter, on August 11, 2014, the district court denied State Defendants' Rule 12(b)(1) motion challenging Mrs. Norton's standing. However, without advising the parties it was converting Defendants' Rule 12(b)(5) motions into a summary judgment motion and without giving Mrs. Norton the opportunity she had requested to present evidence or to conduct discovery, the district court granted Defendants' Rule 12(b)(5) motions.

On August 11, 2014, the district court ruled that Mrs. Norton had standing to challenge the expenditure of State taxpayer dollars and denied the State Defendants' Rule 12(b)(1) motion.[5] The district court ignored Mrs. Norton's request to disregard the State Defendants' Rule 12(b)(1) affidavits in resolving Defendants' Rule 12(b)(5) motions, converted Defendants' Rule 12(b)(5) motions into summary judgment motions, and dismissed Mrs. Norton's complaint on grounds that Mrs. Norton had "fail[ed] to identify a specific abortion service that was supported with State funds" and therefore had failed "to allege a violation of

[5] Planned Parenthood likely does not have standing to challenge Mrs. Norton's standing on her claim of unlawful expenditures of State taxpayer funds by the State Defendants. Planned Parenthood nevertheless joined in this standing challenge in its Rule 12(b)(5) motion. (CD, p. 211). The same presumptions that apply to the State Defendants' 12(b)(5) motion govern Planned Parenthood's Rule 12(b)(5) motion.

Colorado's Abortion Funding Prohibition Amendment." (CD, pp. 378-388). The district court also fashioned a strained definition of the term "indirect" as used in the Abortion Funding Limitation and inappropriately concluded, as a matter of law, that no State taxpayer funds had been used to indirectly pay for induced abortions.

Though there had been no pleadings filed responsive to Mrs. Norton's complaint, no evidentiary hearing, and no discovery, the district court improperly considered affidavits relating to the State Defendants' Rule 12(b)(1) motion on standing and, in determining the Defendants' Rule 12(b)(5) motions, held that Mrs. Norton had "fail[ed] to identify a specific abortion service that was supported with State funds" and therefore failed "to allege a violation of Colorado's Abortion Funding Limitation." (CD, pp. 378-3808). The district court improperly concluded, on virtually no record, that Mrs. Norton's "theory of subsidization is not encompassed within" Colorado's Abortion Funding Limitation and that her complaint must be dismissed pursuant to Rule 12(b)(5) for failure to state a claim. (CD, p. 388).

The district court's order should be reversed and this matter remanded for further proceedings, including discovery on key material facts in dispute.

III. SUMMARY OF THE ARGUMENT

The district court, without notice and over the objections of Mrs. Norton, improperly considered affidavits relating only to the State Defendants' Rule

12(b)(1) motion and converted Defendants' Rule 12(b)(5) motions into a summary judgment motion.

Without, as it must, assuming that the material facts alleged in Mrs. Norton's complaint to be true; viewing the allegations of Mrs. Norton's complaint in the light most favorable to her complaint; and drawing all inferences in Mrs. Norton's favor, the district court improperly accepted the "facts" contained in these extraneous Rule 12(b)(1) affidavits, documents clearly outside of the four corners of Mrs. Norton's complaint, as "true." Though these "facts" are vigorously contested, the district court improperly converted Defendants' Rule 12(b)(5) motions into a summary judgment motion.

Then, ignoring rules of statutory construction, the district court ignored the Abortion Funding Limitation term "direct" and crafted its own strained definition of what the Abortion Funding Limitation term "indirect" meant by, among other things, considering the impact on the federal Title XIX-Medicaid program should Mrs. Norton prevail. The district court, making what amounts to a public policy judgment, entered summary judgment against Mrs. Norton and concluded that, as "a matter of law," Mrs. Norton's "theory of subsidization was not encompassed within" Colorado's Abortion Funding Limitation.

IV. ARGUMENT

A. The district court erred in granting Defendants' Rule 12(b)(5) motion to dismiss.

The State Defendants and Planned Parenthood each filed Rule 12(b)(5) motions to dismiss which sought dismissal of Mrs. Norton's complaint on grounds it failed to state a claim for relief.

1. Rule 12(b)(5) motion standard of review.

Appellate courts review Rule 12(b)(5) dismissals *de novo*. *Yadon v. Lowery*, 126 P.3d 332, 336 (Colo. App. 2005). Rule 12(b)(5) dismissal is highly disfavored. Such motions are to be granted rarely and only under the most extraordinary of circumstances when it appears beyond doubt that plaintiff can prove no set of facts which would entitle her to relief. *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1098-1099 (Colo. 1995) (citations omitted). Dismissal "prior to allowing the parties an opportunity to engage in discovery and develop a more complete understanding of the facts and circumstances surrounding the issues raised in an action is a 'harsh remedy which must be cautiously studied, not only to effectuate the rules of pleading but also to protect the interests of justice.'" *In re Eilertsen*, 2003 WL 1960351 (Bkrtcy. D. Colo. 2003) (citing *Morgan v. City of Rawlins*, 792 F.2d 975, 978 (10th Cir. 1986)).[6] This issue was preserved for appeal. (CD, pp. 227-320, 399-409).

[6] While *Eilertsen* and *Rawlins* involved the Federal Rules of Civil Procedure, federal law is instructive on the issue of construction of Colorado rules or statutes when the state and federal provisions are identical or substantially so as is the case

2. Mrs. Norton's complaint states claims for relief.

As Mrs. Norton's complaint alleged violations of the Abortion Funding Limitation, it need only to have alleged, *not proved*, three elements to state a claim for relief and to defeat Defendants' Rule 12(b)(5) motions, *i.e.*, (1) that public funds (*i.e.*, State taxpayer dollars) were expended; (2) by the State or a State agency (*i.e.*, the State Defendants); (3) to pay for or otherwise reimburse, either directly *or indirectly*, any person, agency or facility (*i.e.*, Planned Parenthood and/or its Abortion Affiliate) for induced abortions or services relating thereto.

Without dispute, Mrs. Norton's complaint alleges that State taxpayer dollars were expended. (CD, pp. 7-25, 28, 31-33). The State Defendants even concede they paid at least $1.4 million of State taxpayer dollars to Planned Parenthood. *See, e.g.*, CD, p. 74, 75, 78-80, 85. Planned Parenthood did not disagree. While there may be a factual dispute to resolve in discovery[7] as to the actual amount of State taxpayer dollars paid to Planned Parenthood and for what purpose, it is *undisputed* that the State Defendants paid State taxpayer dollars to Planned Parenthood. *See, e.g.*, CD, p. 85 ("CDPHE and HCPF did make payments with State funds to Planned Parenthood."). Furthermore, the attachments to Plaintiff's complaint,

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here. *Colonial Bank v. Colo. Financial Services Bd*., 961 P.2d 579, 583 (Colo. App. 1998).

[7] In resolving a Rule 12(b)(5) motion to dismiss, plaintiffs, not defendants, are entitled to every favorable inference and the evidence is to be viewed in a light most favorable to plaintiffs. See, *e.g., Rosenthal*, 908 P.2d at 1098.

which can and should have been considered by the district court in disposing of the Defendants' Rule 12(b)(5) motions, support her allegations that the State Defendants paid $14 million in State taxpayer dollars to Planned Parenthood. (CD, pp. 7-25, 30-33). Simply because the State Defendants say so, does not make it so. Neither Mrs. Norton nor the district court should be obliged to rely on the State Defendants' self-serving assurances that they did not violate the Abortion Funding Limitation. (CD, pp. 7-25, 77-78, 92-207).

It is also undisputed that Mrs. Norton's complaint alleges that the State Defendants and other State agencies paid State taxpayer dollars. (CD, pp. 7-25, 28, 31-33, 74, 75, 78-80, 85).

Finally, Mrs. Norton's complaint alleges that such State taxpayer dollars directly or indirectly paid or reimbursed for induced abortions. Defendants, again for self-serving reasons, dispute Mrs. Norton's 2001 application of the Abortion Funding Limitation. This is vigorously disputed, as is whether Planned Parenthood and its Abortion Affiliate are still essentially one and the same as Mrs. Norton so-found in 2001. These are disputed material facts which should not have been resolved in the Defendants' favor in determining a Rule 12(b)(5) motion.

Thus, in resolving Defendants' Rule 12(b)(5) motions, the only issue before the district court was whether Mrs. Norton's complaint arguably stated any claim upon which relief could be granted under *any* theory. A review of the four corners of her

complaint demonstrates that Mrs. Norton sufficiently stated a claim and the district court improperly granted Defendants' Rule 12(b)(5) motions.

3. The district court erred in converting Defendants' Rule 12(b)(5) motions to a summary judgment motion.

The district court erred in considering, over Mrs. Norton's objections, the affidavits submitted with the State Defendants' Rule 12(b)(1) motion in resolving Defendants' Rule 12(b)(5) motions.

Unlike a Rule 12(b)(1) motion, in considering a Rule 12(b)(5) motion, the court must consider only the allegations of a plaintiff's complaint and may not go beyond the confines of the pleadings. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001); *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1290 (Colo. 1992); *McDonald v. Lakewood Country Club*, 461 P.2d 437, 440 (Colo. 1969). Moreover, summary judgment is only appropriate when there are *no* disputed material facts and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c).

As is evident from the foregoing, that is clearly not the case. Indeed, *most* of the material facts in this case are in dispute. There are factual disputes as to whether funds were "federal" funds or "state" funds, what the funds were paid for, whether Planned Parenthood performs induced abortions, and whether payment of State taxpayer funds to Planned Parenthood, directly or indirectly, paid for induced abortions performed by its Abortion Affiliate. *See also People in the Interest of*

S.N., 329 P.3d 276, 281-82 (Colo. 2014) (summary judgment is not a substitute for trial and is only appropriate when there are not disputed material facts and reasonable minds could draw only one inference from those undisputed facts).

In responding to a summary judgment motion, the non-moving party is entitled to resist such a motion with evidence, including affidavits and information obtained through discovery and depositions. C.R.C.P. 56(c). In addition, just as Mrs. Norton did here, the opposing party may seek relief from the court and the court may "refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make other order as is just." C.R.C.P. 56(f).

In addition, affidavits submitted pursuant to C.R.C.P. 56 (which these were not) must be based on personal knowledge and must set forth such facts as would be admissible in evidence. C.R.C.P. 56(e). However, the affidavits submitted by the State Defendants were signed by persons with *no personal knowledge* regarding Planned Parenthood and what occurs at Planned Parenthood facilities or at PP's Abortion Affiliate.

Affiant Danielle Shoots, an employee of CDPHE, has no personal knowledge about the purposes for which Planned Parenthood actually used State taxpayer funds; at most, she may have knowledge as to what Planned Parenthood's invoices requested payments for. (CD, p. 204-206).

Affiant Lisa Miller, an employee of CDPHE, has no personal knowledge about the purposes for which Planned Parenthood actually used State taxpayer funds; at most, she may have knowledge as to what Planned Parenthood's invoices requested payments for. (CD, p. 123-124).

Robert Douglas, the Director of the Legal Division, CDHCPF, is responsible for coordinating responses to Colorado Open Records Act ("CORA") requests – one of which was made to CDPHE by Mrs. Norton's attorneys in preparation for Mrs. Norton's lawsuit. (CD, pp. 120-121). Mr. Douglas, who did not purport to be custodian of these records, has no personal knowledge of the veracity of the contents of the documents produced, other than that the documents were produced in connection with a CORA request to CDPHE.

The only fact(s) of which the State Defendants' affiants had personal knowledge was that Planned Parenthood had submitted invoices to the State Defendants and that the State Defendants had paid those invoices with State taxpayer funds. The district court denied Mrs. Norton's request that, in resolving Defendants Rule 12(b)(5) motions, it ignore, as it is required to do, affidavits submitted in support of the State Defendants Rule 12(b)(1) motion. The district court also disregarded Mrs. Norton's request for an evidentiary hearing on disputed issues of fact. (CD, p. 360, 368-369).

Instead, the district court concluded that the State Defendants' Rule 12(b)(1)affidavits "defined the amount of the federal funds paid to Planned Parenthood" and "clarifie[d] that the state funding of Planned Parenthood was for services unrelated to the performance of abortions," and thus there was no "factual dispute on a material issue" (CD, p.381). Without crediting the allegations of Mrs. Norton's complaint or giving Mrs. Norton an opportunity to present opposing evidence or testimony or conduct discovery, concluded from Defendants' affidavits submitted with the State Defendants' Rule 12(b)(1) motion,[8] that no State taxpayer funds had ever directly or indirectly paid for induced abortions.

The district court did not inform the parties that it intended to consider evidence outside of the four corners of the complaint for anything other than the Rule 12(b)(1) motion. Mrs. Norton objected to the district court doing so and specifically requested a hearing if the district court should be inclined to do so. (CD-Transcript pp. 30-31; CD-Transcript pp. 30-31). Mrs. Norton was not

[8] Defendants erroneously claimed Mrs. Norton referred to these CORA requests and responses in her complaint and that those documents were therefore incorporated in her complaint by reference. Mrs. Norton's complaint does not refer to the contents of any CORA responses. Mrs. Norton's complaint states only that "[a]ccording to Colorado government records obtained via Colorado's 'Transparency Online Project,' responses to CORA requests, and from other sources…" (CD, pp. 31, 32). The numeric allegations in Mrs. Norton's complaint were derived from the documents attached to Mrs. Norton's complaint; not from CORA responses. In any event, the State Defendants did not submit all CORA-responsive documents to the district court with its affidavits nor did the State Defendant s account for all State taxpayer dollars paid to Planned Parenthood.

afforded the evidentiary hearing she requested, much less an opportunity for discovery. (CD, pp. 253, 360, 368-369). Neither the Defendants nor Mrs. Norton anticipated or intended the Rule 12(b)(5) motions to be treated as a summary judgment motion. (CD, p. 75, 80, 84, 84 fn. 4; CD-Transcript p. 30- 31). The State Defendants, who submitted the affidavits as part of their Rule 12(b)(1) motion, stated, the "documents may properly be considered by this Court in a motion to dismiss without converting the motion to summary judgment…The references to the affidavit are solely to authenticate these exhibits and do not introduce any other facts." (CD, p. 84).

In resolving the Defendants' Rule 12(b)(5) motions, the district court should not have considered anything beyond the four corners of Mrs. Norton's complaint. The State Defendants acknowledged this to be the correct procedural requirement in their objection to Mrs. Norton's request for an evidentiary hearing on these issues. (CD, p. 365). Improperly using the State Defendants' Rule 12(b)(1) affidavits, the district court determined that Defendants' Rule 12(b)(5) motions presented "a pure question of law" and thereupon erroneously converted Defendants' Rule 12(b)(5) motions into a summary judgment motion and ordered dismissal, with prejudice, of Mrs. Norton's complaint. (CD, p. 380, 378).

4. The district court erred in resolving factual disputes in favor of Defendants in ruling on Defendants' Rule 12(b)(5) motion to dismiss.

In granting Defendants' Rule 12(b)(5) motions to dismiss, the district court resolved disputed material matters of fact in Defendants' favor. The district court noted that no evidence had been presented that Planned Parenthood performed induced abortions[9] and that no evidence had been presented or allegations made that any State taxpayer funds were paid directly to PP's Abortion Affiliate. (CD, p. 379). Additionally, the district court factually determined from the State Defendants' "affidavits and documentary evidence" that State taxpayer funds paid to Planned Parenthood "are not related to abortions." (CD, p. 380).

[9] Mrs. Norton respectfully requests that this Court take judicial notice, pursuant to C.R.E. 201(b) and (c) of *Sisk, et al., v. Rocky Mountain Planned Parenthood, Inc*., 14CV31778, Denver District Court. In this case, currently being litigated in Denver District Court, Planned Parenthood, represented, as in this case, by Heizer Paul LLP, has *admitted* that it *performs abortions. See* Defendant Planned Parenthood's Answer to Second Amended Complaint and Jury Demand (Filing *Id*. F175262FBE2C1), p. 3, ¶¶ 13, 14, 20. The *Sisk* pleadings reflect that Planned Parenthood performed an abortion on a 13-year old child who had been the victim of sexual assault by her step-father. The step-father presented the 13-year old girl to Planned Parenthood for an abortion, without notice to her mother. Following the abortion, Planned Parenthood released the 13-year old girl to the step-father who continued the sexual abuse. The step-father plead guilty to attempted sexual assault on a child by a person in a position of trust and first degree assault. *See People v. Timothy Smith*, 12CR2061 (Adams County Dist. Court). *Sisk* is a civil negligence action which seeks to recover damages for the 13-year old girl and her mother. This Court may appropriately take judicial notice of the contents of court files such as *Sisk* and may do so at any stage of the proceedings, including on appeal. C.R.E. 201; *see also People v. Linares – Guzman*, 195 P.3d 1130, 1135–36 (Colo.App.2008)*; People v. Sa'ra*, 117 P.3d 51, 56 (Colo. App. 2004); Chief Justice Directive 05–01 (providing that a "court record" includes "any document, information, or other item that is collected, received, or maintained by a court or clerk of court in connection with a judicial proceeding," and includes the court register of actions or minute orders)).

Mrs. Norton informed the district court of a number of disputed factual matters that needed to be resolved through discovery, including, but not limited to:

- Whether the same number of abortions could have been performed by PP's Abortion Affiliate (or by Planned Parenthood) if Planned Parenthood had not received State taxpayer funds during the period of time relevant to Mrs. Norton's complaint. (CD-Transcript p. 35, Lines 1-24).[10]
- Whether, as alleged in Mrs. Norton's complaint, the relationship between Planned Parenthood and PP's Abortion Affiliate is the same today as it was in 2001 when Mrs. Norton, as executive director of CDPHE, defunded Planned Parenthood for the same reasons. Given the allegations of Mrs. Norton's complaint, the district court was obliged to conclude that the relationship is the same today as it was in 2001.
- Whether the "office visits" and ultrasounds paid for by State taxpayer funds were related to the performance of induced abortions. (CD, p. 74, 107-108, 110-111, 113-114, 118-119; CD-Transcript p. 36).

[10] Notably, according to Planned Parenthood Federation of America's ("PPFA") recently released Annual Report, PPFA affiliates, including the Planned Parenthood Defendant here, performed 327,653 abortions last year. See PPFA Annual Report 2013-2014, available at http://www.plannedparenthood.org/about-us/annual-report. See also footnote 11 concerning the *Sisk* case, *supra*.

- Whether the equipment paid for by the State Defendants for Planned Parenthood, including autoclaves,[11] was related to the performance of induced abortions. (CD, p. 205, ¶13; CD-Transcript p. 36).
- Whether taxpayer funds have been paid to Planned Parenthood and, if so, whether those funds are federal funds or State taxpayer dollars.

Frankly, the district court could not know at this stage of this case what Planned Parenthood even does in its offices, including whether and to what extent Planned Parenthood performs induced abortions, or whether and to what extent Planned Parenthood performs other services related to induced abortions; or whether the induced abortions performed by PP's Abortion Affiliate are funded or subsidized by Planned Parenthood; or whether PP's Abortion Affiliate could perform any or all of these induced abortions without this support.

However, the requirements of Colorado's Abortion Funding Limitation are clear. The allegations of Mrs. Norton's complaint have not been refuted. The only reasonable inference the district court could have drawn at this Rule 12(b)(5) motions' stage was that payment of State taxpayer dollars to Planned Parenthood was equivalent to payment of State taxpayer dollars to PP's Abortion Affiliate (which undisputedly performs induced abortions). The only reasonable conclusion the district court could have drawn was that such payments violated Colorado's

[11] Autoclaves are used to sterilize medical instruments.

Abortion Funding Limitation, just as Mrs. Norton determined to be the case in 2001. (CD, pp. 2, 3, 4-6, 29, 33).

Giving all favorable inferences of the facts alleged in Mrs. Norton's complaint as it was required to do, the district court erred in dismissing Mrs. Norton's complaint pursuant to the Defendants' Rule 12(b)(5) motions. The district court inappropriately discounted Mrs. Norton's official decision in 2001 and then deprived her of the opportunity to conduct discovery on these and many other critical and material facts that are in dispute.

B. The district court erred in concluding that Colorado's Abortion Funding Limitation permits the subsidization of induced abortions.

1. Standard of review.

The interpretation of a constitutional provision is a question of law reviewed *de novo*. *Arthur v. City and County of Denver*, 198 P.3d 1285, 1287 (Colo. App. 2008). This issue was preserved for appeal. (CD, pp. 227-320, 399-409).

In giving effect to a constitutional provision, courts must give effect to the intent of the provision, must give words their plain meaning, and "read applicable provisions as a whole, harmonizing them if possible." *Lobato v. State*, 304 P.3d 1132, 1138 (Colo. 2013); *Danielson v. Dennis*, 139 P.3d 688, 691 (Colo. 2006). A "court's duty in interpreting a constitutional amendment is to give effect to the will of the people adopting" it. *In re Interrogatories Relating to the Great Outdoors Colo. Trust Fund*, 913 P.2d 533, 538 (Colo. 1996). Only where constitutional

provisions are *ambiguous*, should courts favor a construction that harmonizes different constitutional [or statutory] provisions. *Id*.

2. The district court erred in not giving the term "indirect" its plain, ordinary meaning.

The terms "direct" and "indirect" are used in Colorado's Abortion Funding Limitation. Both "direct" and "indirect" funding in support of induced abortions are prohibited. These words have everyday, simple, understandable, and ordinary meanings. There is no reason not to utilize those plain, ordinary meanings with these words with respect to Colorado's Abortion Funding Limitation. *See Lobato*, 304 P.3d at 1138.

Yet, that is just what the district court, without any evidence to support its conclusion, did. It first ruled, with virtually no supporting facts and in the context of Rule 12(b)(5) motions, that no State taxpayer dollars had "directly" paid for induced abortions. Then the district court created a strained definition of the term "indirect" in a manner that, though not consistent with its every day, simple, understandable, and ordinary meaning, resulted in dismissal of Mrs. Norton's complaint notwithstanding that the known facts of the case are vigorously disputed and the unknown facts have yet to be determined.

Moreover, regardless of the definition ascribed to the word "indirect," it was error to apply the word "indirect" in such a fashion so as to make determinations of

"facts" either alleged in Mrs. Norton's complaint and not refuted or not even developed as yet in discovery.

3. Colorado's Abortion Funding Limitation is clear and unambiguous.

Colorado's Abortion Funding Limitation clearly and unambiguously provides:

> No **public funds** shall be used by the State of Colorado, its agencies or political subdivisions to **pay or otherwise reimburse, either directly or indirectly,** any person, agency or facility **for the performance of any induced abortion**….

Article V, Section 50, Colo. Constitution. (emphasis added).

The word "indirect" is no more ambiguous today than it was in 2001. It means "not tending to an aim, purpose, or result by the plainest course, or by obvious means, but obliquely or consequentially; **by remote means**…." Webster's Revised Unabridged Dictionary (1996) (emphasis added). According to Merriam-Webster's online dictionary, relied on by the State Defendants (CD, p.83), "indirect" means "not direct": "deviating from a direct line or course . . . **roundabout** . . . not going straight to the point . . . not straightforward and open . . . **deceitful** . . . directly aimed at or achieved…" Merriam Webster, available at http://www.merriam-webster.com/dictionary/ indirect. (emphasis added). According to *Black's Law Dictionary* (6th ed. 1990), "indirect means: "[n]ot direct in relation or connection; not having an immediate bearing or application; not related in the natural way. **Circuitous**, not leading to aim or result by plainest course or method or obvious means, **roundabout**, not resulting directly from an act or cause but more or less

remotely connected with or growing out of it." (emphasis added).

It is evident that the plain and ordinary meaning of the word "indirect" is not direct, not straightforward, but rather **roundabout** and **remotely connected**.

This is precisely the nature of the State Defendants funding of induced abortions by payment of State taxpayer dollars to Planned Parenthood here. Mrs. Norton's complaint affirmatively alleges that the payments and reimbursements of State taxpayer dollars to Planned Parenthood directly or indirectly – that is not direct, not straightforward, roundabout, and more or less remotely connected to—subsidized (*i.e.,* paid for) induced abortions in violation of Colorado's Abortion Funding Limitation.

If this Court should conclude that Colorado's Abortion Funding Limitation is ambiguous or "susceptible to more than one interpretation," then the Court may turn to other materials, such as the Bluebook, in order to ascertain the intent of the voters. *Davidson v. Sandstrom*, 83 P.3d 648, 654 (Colo. 2004); *Grossman v. Dean*, 80 P.2d 952, 962 (Colo. App. 2003) (*citing Macravey v. Hamilton*, 898 P.2d 1076 (Colo.1995) (the Blue Book is a helpful source equivalent to the legislative history of a proposed amendment)).

However, the district court does not appear to have concluded that the language of the Abortion Funding Limitation was ambiguous ("[n]o insight could be provided by extraneous materials" (*i.e.,* the Bluebook)). It stated that it would

"interpret[] the Amendment as a whole, using its plain language and reading it in harmony with other laws." (CD, p. 383). The district court concluded that the term "indirect" required a "connection between the payment and the performance of an abortion." (CD, p. 384), and that "a specific abortion service" must be identified. (CD, p. 378).

A review of the 1984 Blue Book makes it even more clear that the voters' primary concern in enacting Colorado's Abortion Funding Limitation was to establish "a public policy for the state of Colorado that public funds are not to be spent for the destruction of prenatal life through abortion procedures," and to make "a value judgment favoring childbirth over abortion and implementing that judgment by the allocation of public funds." (1984 Blue Book, pg. 6; CD, pp. 99-100). This is a legitimate policy goal as proponents of Colorado's Abortion Funding Limitation did not want Colorado to lend its "imprimatur" to the "direct or indirect" funding of induced abortions. *Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey*, 167 F.3d 458, 460 (8th Cir. 1999) (upholding Missouri statute designed to prevent the "imprimatur" of the state from being given to abortion providers).

Thus, even if this Court were to conclude that the term "indirectly" is ambiguous, the Blue Book provides evidence that Colorado voters intended Colorado's Abortion Funding Limitation to be interpreted broadly and in such a

manner as to prevent the use of any State taxpayer funds to pay for or subsidize, directly or indirectly, induced abortions. The 1984 Blue Book specifically alerted voters that the amendment could prohibit political subdivisions from contracting for any services with agencies or institutions which provided abortion services. Additionally, the 1984 Blue Book utilized the term "subsidize" and noted that under Supreme Court jurisprudence, "taxpayers are not required to subsidize [induced] abortions." *Id.* at 7.

The district court's definition and application of the word "indirectly" contradicts basic principle of constitutional construction that every word be given its plain and ordinary meaning, and not be construed in a way that renders any part of it meaningless. *See Mayo v. People*, 181 P.3d 1207, 1210 (Colo. App. 2008) (citation omitted); *Danielson*, 139 P.3d 688. The State Defendants suggested that the term "indirect" referred to a hospital billing Medicaid for an abortion, Medicaid pays the hospital, and the hospital reimburses the provider. (CD-Transcript p.5). However, that scenario constitutes a direct reimbursement for an abortion.

The district court failed to both give the words of Colorado's Abortion Funding Limitation their plain meaning and to read Colorado's Abortion Funding Limitation as a whole. The district court, concluding that Mrs. Norton's complaint "depend[ed] on the meaning of the term 'indirectly,'" "interpret[ed] [Colorado's Abortion Funding Prohibition] Amendment as a whole, using its plain language

and *reading it in harmony with other laws*," including "other laws" and court opinions from other circuits. (CD, pp. 382-383).

One of those other laws the district court relied upon to reach its definition of the term "indirect" and to conclude that Mrs. Norton's "subsidization theory" had no merit was the federal Title XIX-Medicaid Act's "free-choice-of-provider" provision discussed below. The district court seemed concerned that, if Mrs. Norton's challenge to the expenditure of State taxpayer funds was upheld, it could wreak havoc with the Title XIX-Medicaid program by depriving the program of the State's required match. Thus, the district court found that Mrs. Norton's application of Colorado's Abortion Funding Limitation was "inconsistent with federal Medicaid law."

To reach its conclusion that this Medicaid free-choice-of-provider provision was a factor in determining just what the word "indirectly" meant, the district court relied on *Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995), *cert. denied*, 516 U.S. 1011 (1995). However, all that *Hern* held was that Colorado could not, having chosen to participate in the federal Title XIX-Medicaid program, refuse to provide Medicaid reimbursement for the limited number of abortions that, pursuant to the Hyde Amendment, Congress has approved be covered under the federal Title XIX-Medicaid program.

While Planned Parenthood contends that it does not perform abortions, whether Hyde-qualified abortions or otherwise, the *Sisk* case, see Footnote 11, *supra*, suggests otherwise. This is obviously an important and disputed fact.

Given that the language of Colorado's Abortion Funding Limitation is clear and unambiguous, it was thus improper for the district court to base its definition of "indirect" on a perceived potential funding conflict with federal Medicaid law. Moreover, Defendants' free-choice-of-provider argument is not the law in the Tenth Circuit (or in Colorado state decisions). If at some later date it should be held to be the law in Colorado, State taxpayer dollars expenditures for the State's federal Title XIX-Medicaid match may be a violation of Colorado's Abortion Funding Limitation, however, that would then present a public policy issue to be decided by the people of the State of Colorado, through their elected representatives.

Mrs. Norton's 2001 application of Colorado's Abortion Funding Limitation when she was executive director of CDPHE was (and is) correct. The State Defendants have presented no evidence to support their contention that they should be entitled to interpret and enforce Colorado's Abortion Funding Limitation in any different way. The district court was, as is this Court, bound by the terms of Colorado's Abortion Funding Limitation as determined by Mrs. Norton in 2001. *In re Interrogatories - Great Outdoors*, 913 P.2d at 538.

4. The district court failed to understand that money is fungible.

Providing State taxpayer funds to Planned Parenthood to subsidize induced abortions by its Abortion Affiliate constitutes indirect payments for induced abortions. In this regard, it is important to note that "money is fungible." *Sabri v. United States*, 541 U.S. 600, 606 (2004). (CD, p.245). This is no doubt why the drafters of the amendment included the term "indirect."

The concept that money is fungible is evident in a variety of contexts. *Rush University Medical Center v. Leavitt*, 535 F.3d 735, 743 (7th Cir. 2008) (health care appropriations); *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685, 698 (7th Cir. 2008) (liability for donations made to terrorist organizations).[12] Here, whether the money comes out of one "pocket" or the other, the money is clearly coming out the pockets of Colorado taxpayers, with taxpayers indirectly (or possibly directly) funding or subsidizing induced abortions.

Mrs. Norton's complaint alleges that PP's Abortion Affiliate performs induced abortions; none of the Defendants disputed this allegation. Mrs. Norton's complaint also alleges that the State Defendants paid State taxpayer funds to Planned Parenthood; none of the Defendants disputed this allegation either. Thus,

[12] The fungibility of money was also raised in the context of excessive executive bonuses paid by banks who had received federal bailout money. *See* http://dailybail.com/home/2009/2/12/bank-bailout-congressional-video-house-rep-brad-sherman-will.html (Representative Brad Sherman (D-Calif.) rebuking bank executives at a House Financial Services Committee hearing).

the only issue was whether the State Defendants payment of State taxpayer funds to Planned Parenthood directly or indirectly subsidized induced abortions. Even assuming that Planned Parenthood itself performed no induced abortions or induced abortions-related services (which is unknown at this time), as money is fungible, there can be no doubt (and certainly Mrs. Norton's complaint alleges it) that the payment by the State Defendants of State taxpayer funds to Planned Parenthood is the equivalent of the payment of State taxpayer funds to PP's Abortion Affiliate.

One can scarcely imagine a factual issue more inappropriate for resolution by motion to dismiss or motion for summary judgment than whether an "indirect" subsidy occurred. Common sense compels the conclusion that issues of "indirect" conduct are inherently factually-intensive inquiries. *See Wackenhut Corp. v. NLRB*, 178 F.3d 543, 554 (D.C.Cir 1999) (indirect affiliation a "fact intensive inquiry"); *cf.*, *Telsmith, Inc. v. Bosch Rexroth Corp*., 945 F. Supp. 2d 1012, 1016 (E.D. Wis. 2013) (direct/indirect inquiry "fact intensive").

Defendants' interpretation of the Abortion Funding Limitation renders it a practical nullity. Under Defendants' reasoning, adopted by the district court, there would be no violation even if the State knew for certain that Planned Parenthood paid all proceeds from its State contracts to the PP Abortion Affiliate for the express purpose of paying for induced abortions, so long as the funds were filtered

through a separation entity even if that entity had no real economic existence. Moreover, under Defendants' interpretation there would be no violation even if the PP Abortion Affiliate exclusively used Planned Parenthood's financial resources and staff to provide induced abortions without paying a cent to Planned Parenthood for such use. Surely, this is not a result contemplated by the Coloradans who approved Colorado's Abortion Funding Limitation or otherwise inherent in the plain meaning of this provision.

C. The district court erred in concluding that federal Medicaid's "free-choice-of-provider" provision was implicated by Mrs. Norton's complaint.

1. Standard of Review.

The cardinal canon of statutory construction is that the Congress "says in a statute what it means and means in a statute what it says there." *Planned Parenthood Arizona v. Betlach*, 727 F.3d 960, 968 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1283 (July 24, 2014) (emphasis added) (citing *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992). *See also Moskal v. United States*, 498 U.S. 103, 108 (1990) ("In determining the scope of a statute," we "giv[e] the words used their ordinary meaning" unless Congress has directed us to do otherwise). This issue was preserved for appeal. (CD, pp. 227-320, 399-409).

2. The Medicaid "free-of-choice-of-provider" provision.

Title XIX-Medicaid is a jointly funded federal-state healthcare program pursuant to which a state matches, with State taxpayer funds, from approximately

10 to 45 % of the federal taxpayer contribution. The "free-choice-of-provider" provision provides that a individual Medicaid recipient is free to choose any provider so long as: (1) the provider is "qualified to perform the service or services required," and (2) the provider "undertakes to provide [the Medicaid recipient] such services." 42 U.S.C. § 1396a(a)(23).

Mrs. Norton does not challenge the State Defendants' payment of State taxpayer funds to Planned Parenthood as a Medicaid recipient. Rather, she challenges the State Defendants' violation of Colorado's Abortion Funding Limitation by paying State taxpayer dollars to Planned Parenthood which directly or indirectly pay for induced abortions. Thus, her complaint has nothing to do with whether or not Planned Parenthood is or is not a "qualified" provider under the Medicaid free-choice-of-provider provision.[13]

In response to her allegations that the State Defendants paid Planned Parenthood State taxpayer funds of $14 million, the State Defendants admitted that they had really only paid Planned Parenthood State taxpayer funds of at least $1.4 million and the balance, *i.e.,* $12.6 million or less, constituted federal funds. Because there has been no discovery, it is unknown if this $12.6 million or less

[13] Medicaid's "free-choice-of-provider" was simply not properly before the district court. The doctrine of ripeness requires there to be an actual case or controversy between the parties. *See, e.g., Metal Management West, Inc. v. State,* 251 P.3d 1164, 1174 (Colo. App. 2010) (noting that declaratory proceedings to determine questions of construction or declaration of rights or legal relations affected by statutes must be based on an actual controversy).

was actually federal funds managed by the State of Colorado or State taxpayer funds paid by the State Defendants to Planned Parenthood as the State of Colorado's required match under the federal Title XIX-Medicaid program.

3. The Defendants do not have standing to raise the free-choice-of-provider issue in this case

Mrs. Norton's lawsuit is an appropriate case in which to determine whether her reasoned 2001 decision as executive director of CDPHE, based upon advice of counsel and an independent accounting firm study that concluded that Planned Parenthood subsidized its Abortion Affiliate, was and is correct; or whether a political decision by former Governor Ritter without advice of counsel, a political decision continued by now-Governor Hickenlooper and accepted by the district court, is correct.

However, Mrs. Norton's lawsuit is not an appropriate case in which Defendants may contend that this Medicaid free-choice-of-provider provision applies. Neither the State Defendants nor Planned Parenthood have standing to raise this Medicaid free-choice-of-provider provision in Mrs. Norton's lawsuit. *See, e.g., Silver v. Baggiano,* 804 F.2d 1211**,** 1216–18 (11th Cir. 1986), *abrogated on other grounds by Lapides v. Bd. of Regents of Univ. Sys. of Ga.,* 535 U.S. 613 (2002) (free choice of provider provision does not create a private right enforceable by providers on their own behalf); *Blessing v. Freestone*, 520 U.S. 329, 340-341 (1997) (setting

forth analysis for determining whether a statutory provision gives rise to a federal right and, consequently, a private right of action under 42 U.S.C. § 1983).

Additionally, even assuming Planned Parenthood or the State Defendants did have requisite standing, Medicaid law requires that administrative remedies be first exhausted. See, *e.g.*, *Betlach*, 727 F.3d at 963 ("If a state Medicaid plan fails to conform to the statutory criteria, the Secretary of Health and Human Services…may withhold Medicaid funds from the state…"); *Salas v. Grancare*, 22 P.3d 568, 571-573 (Colo. App. 2001) (citing *State v. Golden's Concrete Co.,* 962 P.2d 919 (Colo. 1998)) (doctrine of exhaustion of administrative remedies requires parties pursue available statutory remedies before filing suit and failure to do so deprives court of jurisdiction generally applies to claims arising under Medicaid).

The district court relied on Seventh and Ninth Circuit decisions that held that, on the basis of this Medicaid free-choice-of-provider provision, States in those Circuits could not exclude otherwise qualified family planning service providers from participation in their State-administered federal Title XIX-Medicaid program just because those providers performed induced abortions that were not Medicaid reimbursable. *Betlach*, 727 F.3d 960; *Planned Parenthood of Indiana, Inc. v. Comm'r of the Ind. State Dept. of Health*, 699 F.3d 962, 978 (7th Cir. 2012), *cert. denied* 133 S. Ct. 2736 (2013).

While that is not the issue in this case and, in any event, the Tenth Circuit has not reached this issue, there is no evidence in the record as to whether or not Planned Parenthood has been determined, since Mrs. Norton's 2001 decision to defund it, to be a "qualified" Medicaid provider. There is likewise no undisputed evidence in the record as to whether any of the $14 million in State taxpayer dollars paid by the State Defendants to Planned Parenthood constituted the State's Medicaid match.

It is Mrs. Norton's position that these two Seventh and Ninth Circuit decisions presented different facts and different issues than are presented here and were wrongly decided and, in any event, are not binding authority in Colorado or in the Tenth Circuit.[14]

[14] The Ninth Circuit in *Betlach* and the Seventh Circuit in *Planned Parenthood of Indiana*, by construing this Medicaid free-choice-of-provider provision in terms of who is "qualified" to *render* Medicaid services in the Arizona (*Betlach*) or Indiana (*Planned Parenthood of Indiana*), rather than, as argued by those States, in terms of who is qualified to *participate* as a Medicaid provider based on the State's rational policy decisions, fundamentally alters the choice criterion provision. The federal Title XIX-Medicaid Act provides that States retain the right to determine which individuals and entities are qualified to perform services required. 42 U.S.C. § 1396a(p)(1) ("In addition to any other authority, a State may exclude any individual or entity for purposes of participant under the State plan under this subchapter for any reason for which the Secretary could exclude the individual or entity from participation. . . ."). *See Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906, 911 (7th Cir. 2003) (observing that "the aim" of § 1396a(a)(23) "is to give the recipient a choice among available facilities, not to require the creation or authorization of new facilities"). Colorado's right to set reasonable provider qualifications, including the right to exclude those who violate Colorado's Abortion Funding Limitation by providing induced abortions, inheres in its

Nevertheless, even assuming that this Court or the federal Tenth Circuit were to reach conclusions similar to those reached in the Seventh Circuit case *Planned Parenthood of Indiana* and Ninth Circuit case *Betlach*, this Medicaid free-choice-of-provider argument would not apply to State taxpayer funds which do not relate to the Medicaid program and which the State Defendants acknowledge to have been paid to Planned Parenthood. Such a result would only affect, if at all, the amounts the State Defendants seem to contend have been the State's Medicaid match.

Clearly, all of these facts and issues may only be determined by discovery. That means, as only discovery can reveal, that if some or all of the $14 million in State taxpayer dollars (Mrs. Norton alleges the State Defendants paid to Planned Parented in violation of Colorado's Abortion Funding Limitation) did not

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sovereignty. Recognizing this, 42 U.S.C. § 1396a(p)(1) is a dual statement that State authority is co-extensive with the Secretary's authority in acting upon certain enumerated grounds for discretionary exclusion, *and* an explicit reservation of existing and inherent State authority to exclude providers for reasons germane to State law and policy. To conclude that Colorado cannot determine for itself who is a qualified provider violates the Tenth Amendment by encroaching on the State's power to regulate healthcare in furtherance of State law and policy and to disqualify from Medicaid participation those providers who perform non-federally qualified abortions. The State of Colorado thus has authority to set reasonable provider qualifications and the "choice" intended in the Medicaid Act is the free choice of *qualified* providers as determined by the State of Colorado. *See,* e.g., *Kelley Kare, Ltd. v. O'Rourke,* 930 F.2d 170 (2d Cir. 1991) (disqualification of a single provider was only an "incidental burden on [beneficiaries'] right to chose").

constitute the State's Title XIX-Medicaid match, Mrs. Norton should be entitled to the relief which she has sought in her complaint.

That further means that, as only discovery can reveal, Planned Parenthood must simply prove that it is not using State taxpayer funds to either directly *or indirectly* pay for induced abortions. As executive director of CDPHE, Mrs. Norton provided Planned Parenthood with an easy way to do that -- establish, as only discovery can reveal, that it has completely separated itself from PP's Abortion Affiliate. Certainly, from the facts alleged in Mrs. Norton's complaint, which must be assumed as true, and the facts and admissions in the *Sisk* case,[15] the district court had no basis upon which to conclude otherwise.

Quite simply, the State Defendants and Planned Parenthood should prevail only in the event that Planned Parenthood can demonstrate that its Abortion Affiliate, or even Planned Parenthood itself, does not perform induced abortions or, assuming, *arguendo,* that induced abortions are performed only by PP's Abortion Affiliate, this Abortion Affiliate could perform the same number of induced abortions without State taxpayer dollars flowing to Planned Parenthood which, in turn, subsidize its Abortion Affiliate. But, the record is devoid of any such facts.

V. Conclusion

[15] See footnote 11 and the *Sisk* case, *supra.*

Abortion is "inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 324 (1980) (upholding federal statute, *i.e.*, Hyde Amendment, prohibiting use of Medicaid funding for certain abortions).

Undeniably, therefore, the citizens of Colorado have a justifiably strong interest in preserving life – an interest that they have expressed in Colorado's Abortion Funding Limitation. The citizens of Colorado adopted Colorado's Abortion Funding Limitation at the ballot box in 1984. In 1986, the citizens of Colorado voted at the ballot box against the repeal of Colorado's Abortion Funding Limitation. Colorado's Abortion Funding Limitation and implementing state laws and regulations limit the use of State taxpayer funds to pay, directly or indirectly, for induced abortions.

The district court order of dismissal constituted a policy choice that a contrary result would be disruptive to the federal Medicaid program if Mrs. Norton's complaint were allowed to proceed. The district court improperly considered affidavits submitted with the State Defendants' Rule 12(b)(1) motion in disposing of the Defendants Rule 12(b)(5) motions. The district court improperly failed to permit disputed facts to be determined in discovery and improperly assumed that the $14 million in State taxpayer funds Mrs. Norton's complaint alleges were improperly paid by the State Defendants to Planned Parenthood related to the

federal Medicaid program. Some may; some may not. But that is not known at this stage. And, on behalf of the people of the State of Colorado and their Abortion Funding Limitation, Mrs. Norton should be entitled to her day in court.

Plaintiff respectfully requests that the district court's order dismissing her complaint be reversed and this case remanded for further proceedings.

Dated this 13th day of February, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 13th day of February, 2015, a true and correct copy of the foregoing **PLAINTIFF-APPELLANT'S OPENING BRIEF** was filed with the Colorado Court of Appeals via ICCES and served via ICCES on the parties and/or their counsel of record as follows:

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