

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

**PLANNED PARENTHOOD SOUTHEAST,
INC.; PLANNED PARENTHOOD GREATER
MEMPHIS REGION, INC.; JANE DOE; and
JANE DOE #2,**

PLAINTIFFS

VS.

CIVIL ACTION NO. 3:16cv454-DPJ-FKB

**DAVID J. DZIELAK, Executive Director,
Mississippi Division of Medicaid, in his official
capacity,**

DEFENDANT

**DEFENDANT’S RESPONSE TO PLAINTIFF’S NOTICE OF SUPPLEMENTAL
AUTHORITY**

Plaintiffs filed a Notice of Supplemental Authority, arguing that the Fifth Circuit’s recent decision in *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 2016 WL 4895921 (5th Cir. Sept. 14, 2016) requires this Court to grant them summary judgment on their claim that Senate Bill 2238 violates the Medicaid statute’s free-choice-of-provider requirement, 42 U.S.C. § 1396a(a)(23). [Docket No. 22]. The Division of Medicaid concedes that the panel’s decision in *Gee* is controlling and dispositive as to the Jane Doe Plaintiffs’ claims under the free-choice-of-provider requirement. The panel held that § 1396a(a)(23) creates a private right of action and gives “individuals the right to demand care from a qualified provider when access to that provider is foreclosed by reasons *unrelated* to that provider’s qualifications.” *Gee*, 2016 WL 4895921, at *9 (emphasis in original). Further, the panel held, *inter alia*, that § 1396a(a)(23) prohibits states from “exclud[ing] a provider simply based on the scope of services it provides.” *Id.* at *14.

Although the Division of Medicaid recognizes that at this time *Gee* is controlling law and

binding on this Court,¹ the Division of Medicaid respectfully disagrees with the panel decision in *Gee* and expressly reserves the right to ask that it be overruled by the Fifth Circuit *en banc* or the United States Supreme Court.

THIS the 19th day of October, 2016.

Respectfully submitted,

**DR. DAVID J. DZIELAK, in his official
capacity as the Executive Director of the
Mississippi Division of Medicaid,
Defendant**

By: **JIM HOOD, ATTORNEY GENERAL**

By: /s Wilson Minor
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¹ It should be noted that the State of Louisiana has filed a Petition for Rehearing *En Banc* in *Gee*.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been filed electronically with the Clerk of Court and thereby served on all counsel of record who have appeared in this action.

THIS the 19th day of October, 2016.

/s Wilson Minor
Wilson Minor