Nos. 25-1698, 25-1755

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.; PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS; PLANNED PARENTHOOD ASSOCIATION OF UTAH,

Plaintiffs-Appellees,

v.

ROBERT F. KENNEDY, JR., in his official capacity as Secretary of the United States Department of Health & Human Services; MEHMET OZ, in his official capacity as Administrator of the Centers for Medicare & Medicaid Services; CENTERS FOR MEDICARE & MEDICAID SERVICES,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Massachusetts
Case No. 1:25-cv-11913-IT

BRIEF FOR THE LAWYERING PROJECT AS AMICUS CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Lawyering Project Inc. (the "Lawyering Project") is a non-profit corporation that does not have a parent corporation and does not issue stock.

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INTEREST OF AMICUS CURIAE

Among the grounds asserted by Appellees in the court below to support entry of a preliminary injunction was the First Amendment's prohibition on governmental retaliation against private actors for engaging in protected activities. The Lawyering Project is a legal advocacy organization that blends traditional impact litigation with movement lawyering to promote reproductive health, rights, and justice throughout the United States. The rights protected by the First Amendment—especially the rights to speech, expressive association, and petition—are vital to the Lawyering Project's ability to serve its mission. Not only does the Lawyering Project depend on its own First Amendment rights to accomplish its work, but it regularly files lawsuits to vindicate the First Amendment rights of its clients. *See, e.g.*, *Matsumoto v. Labrador*, 122 F.4th 787, 804 (9th Cir. 2024) (affirming in part a preliminary injunction against enforcement of a state statute that prohibits, among other things, providing certain information to minors seeking abortion care); *Yellowhammer Fund v. Marshall*, 776 F. Supp. 3d 1071, 1117-18 (M.D. Ala. 2025) (entering a declaratory judgment that a state attorney general's threats to prosecute people helping others leave the state to obtain lawful abortion care violated both the First Amendment and right to travel).[1]

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no one besides the Lawyering Project contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

This case concerns the constitutionality of Section 7113 of the One Big Beautiful Bill Act, Pub. L. No. 119-21, 139 Stat. 72, 300-01 (July 4, 2025) (the "Defund Provision"), which strips organizations that provide healthcare under the Planned Parenthood banner of eligibility to participate in the federal Medicaid program. Although the district court preliminarily enjoined the Defund Provision, it declined to reach the merits of Plaintiffs' First Amendment retaliation claim. That claim provides an alternate ground for affirmance because it was fully briefed in the court below and does not require this Court to make any additional factual findings. *Infra* at 5.

To succeed on a First Amendment retaliation claim in this Circuit, a party must demonstrate three things: (1) the party engaged in constitutionally protected expression, (2) the party was subjected to an adverse action by the government, and (3) retaliatory animus toward the protected expression was the but-for cause of the adverse action. *Infra* at 7-8. Plaintiffs (collectively, "Planned Parenthood") are likely to succeed in making the required showing.

First, Planned Parenthood engaged in constitutionally protected expression in the form of association with separately funded Section 501(c)(4) organizations that supported Democratic candidates for office and state ballot initiatives to secure abortion rights. *Infra* at 11-13. Planned Parenthood also engaged in unapologetic

advocacy to promote abortion rights and public acceptance of abortion as an essential reproductive health option. *Infra* at 13-14.

Second, the Defund Provision subjected Planned Parenthood to adverse action by stripping its healthcare providing organizations of eligibility to participate in the federal Medicaid program. *Infra* at 14. Under well-settled precedent, the denial of a valuable government benefit constitutes an adverse action when constitutionally protected interests are at stake. *Infra* at 14.

Third, retaliatory animus was the but-for cause of Congress' enactment of the Defund Provision. Contrary to the Government's argument, courts are not barred from invalidating a statute based on a finding that it was motivated by an illicit purpose. *Infra* at 14-16. Although the Supreme Court has wavered on the probative value of statements by individual legislators as evidence of a statute's purpose, it has consistently endorsed other methods of establishing discriminatory or retaliatory animus. *Infra* at 16-18. These include examining a statute's practical effect and the fit between its means and ends. *Infra* at 18-20.

Here, the Government claims that the purpose of the Defund Provision is to stop "major" abortion providers from receiving federal Medicaid funds. *Infra* at 20. But as a practical matter, the Defund Provision applies almost exclusively to Planned Parenthood. *Infra* at 21. Moreover, none of the criteria for its application correspond to the volume or proportion of abortions that an entity provides. *Infra* at 22-23. This

is strong evidence that the statute's true purpose is not to bar entities from receiving federal Medicaid funds if they provide abortions, but to punish Planned Parenthood for its protected political speech and association. *Infra* at 23-24.

Recent efforts by the Trump administration and its allies in Congress to use the levers of government to retaliate against their perceived political enemies have been well documented, including by other federal courts. *Infra* at 24-27. In light of this, it is imperative that Planned Parenthood's First Amendment retaliation claim be given serious consideration and the Defund Provision be subjected to rigorous judicial review.

ARGUMENT

I. Introduction

The freedom of expression protected by the First Amendment is a vital element of democratic society. The Defund Provision retaliates against Planned Parenthood for its unapologetic abortion advocacy and association with organizations that support Democratic candidates for public office, activities that garner the highest level of First Amendment protection. It does so by stripping organizations that provide healthcare under the Planned Parenthood banner of eligibility to participate in the federal Medicaid program. Although the district court preliminarily enjoined the Defund Provision, it declined to reach the merits of Plaintiffs' First

Amendment retaliation claim. That claim provides an alternate ground for affirming entry of the preliminary injunction.

II. Planned Parenthood's First Amendment Retaliation Claim Provides an Alternate Ground for Affirmance

"[A]n appellee is free to defend the judgment below on any other ground made manifest by the record." *McGuire v. Reilly*, 260 F.3d 36, 50 (1st Cir. 2001) (considering an alternate ground for affirming a preliminary injunction entered by the district court). Although the court of appeals ordinarily will not uphold a preliminary injunction on a ground that was not fully addressed by the trial court, it has discretion to depart from this general rule, particularly in cases like this one that turn on disputed questions of law rather than disputed questions of fact. *New Comm Wireless Servs., Inc. v. Sprintcom, Inc.*, 287 F.3d 1, 13 (1st Cir. 2002).

Here, Plaintiffs' First Amendment retaliation claim was fully briefed in the court below, and the relevant facts concerning Planned Parenthood's corporate structure and expressive activities are not in dispute. Instead, the dispute centers on questions of statutory interpretation and constitutional law. These "abstract legal questions" are ripe for review by this Court. *Id.*

Moreover, "[i]n the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis." *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 10 (1st Cir. 2012). "[I]rreparable injury is presumed upon a determination that the movants are likely to prevail on

their First Amendment claim." *Fortuno*, 699 F.3d at 11. Accordingly, if the Court concludes that Planned Parenthood is likely to succeed on the merits of its First Amendment retaliation claim, it should affirm entry of the preliminary injunction.

III. Planned Parenthood is Likely to Succeed on the Merits of Its First Amendment Retaliation Claim

A. The First Amendment Prohibits Governmental Retaliation for Engaging in Protected Expression

Government actions that impermissibly infringe on expression protected by the First Amendment may take many forms. For example, the government may not ban protected expression nor burden it with regulation without satisfying the applicable level of constitutional scrutiny. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) ("Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content."). Further, the government may not sidestep First Amendment constraints on its own actions by enlisting private parties to suppress protected expression. *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 180 (2024).

Nor may the government "deny a benefit to a person because of his constitutionally protected speech or associations." *Perry v. Sinderman*, 408 U.S. 593, 597 (1972); *see generally Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) ("We have said in a variety of contexts that 'the government may not deny a benefit to a person because he exercises a constitutional right.'" (citations

omitted)). This is true even when "a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons." *Perry*, 408 U.S. at 597.

Most relevant here, the government may not retaliate against someone for engaging in protected expression. *Lozman v. City of Riviera Beach*, 585 U.S. 87, 90 (2018). Doing so would be contrary to the very "purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." *Powell v. Alexander*, 391 F.3d 1, 16 (1st Cir. 2004) (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995)). When unconstitutional retaliation is accomplished through the adoption of a policy, rather than through the individual action of a government official, the need for an effective remedy is heightened. *Lozman*, 585 U.S. at 100 ("A citizen who suffers retaliation by an individual officer can seek to have the officer disciplined or removed from service, but there may be little practical recourse when the government itself orchestrates the retaliation. For these reasons, when retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress.").

To succeed on a First Amendment retaliation claim in this Circuit, a party must demonstrate three things: (1) the party engaged in constitutionally protected expression, (2) the party was subjected to an adverse action by the government, and

(3) retaliatory animus toward the protected expression was the but-for cause of the adverse action. *See Gattineri v. Town of Lynnfield*, 58 F.4th 512, 514-15 (1st Cir. 2023). Planned Parenthood is likely to succeed in making the required showing.

B. Planned Parenthood Engaged in Constitutionally Protected Expression

1. Political Speech and Association Are Accorded the Highest Level of First Amendment Protection

"Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010); *accord N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (recognizing a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"). The framers recognized that "the freedom of thought and speech is 'indispensable to the discovery and spread of political truth.'" *303 Creative LLC v. Elenis*, 600 U.S. 570, 584 (2023) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

As a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or

its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).[2] Among other things, the First Amendment protects speech that is false, *United States v. Alvarez*, 567 U.S. 709, 721-22 (2012) (plurality opinion); offensive, *Matal v. Tam*, 582 U.S. 218, 244 (2017) (plurality opinion); vile, *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 44 (1977) (per curiam); cruel, *Snyder v. Phelps*, 562 U.S. 443, 456 (2011); purely commercial, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561-62 (1980); and unsuitable for minors, *Brown*, 564 U.S. at 795. The provision "reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *United States v. Stevens*, 559 U.S. 460, 470 (2010).

"[S]peech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 443 (2015) (plurality opinion); *accord Eu v. S.F. Cnty.*

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[2] A handful of "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," are exempt from First Amendment protection, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), most notably: fighting words, *id.* at 572; speech integral to criminal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949); defamation, *Beauharnais v. Illinois*, 343 U.S. 250, 254-55 (1952); obscenity, *Roth v. United States*, 354 U.S. 476, 485 (1957); true threats, *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam); incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (per curiam); fraud, *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976); and child pornography, *New York v. Ferber*, 458 U.S. 747, 763-64 (1982). "[N]ew categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 791 (2011).

Democratic Cent. Comm., 489 U.S. 214, 223 (1989) ("[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.") (citing *Monitor Patriot Co. v. Roy*, 401 U.S. 256, 271 (1971)); *see also McIntyre*, 514 U.S. at 347 (explaining that "core political speech" also encompasses "issue-based elections"). The right to participate in democracy through political contributions is therefore protected by the First Amendment. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 191 (2014) (plurality opinion); *accord id.* at 228 (Thomas, J., concurring in the judgment) ("Contributions to political campaigns . . . 'generate essential political speech' by fostering discussion of public issues and candidate qualifications." (citations omitted)).

"Equally, the First Amendment protects acts of expressive association." *Elenis*, 600 U.S. at 586. "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000). "[T]he First Amendment safeguards an individual's right to participate in the public debate through . . . political association." *McCutcheon*, 572 U.S. at 203.

2. Plaintiffs in This Case Associate With Other Planned Parenthood Entities in Pursuit of Political Objectives

Plaintiffs are nonprofit corporations that are exempt from federal taxation under 26 U.S.C. § 501(c)(3). App. at A171. As such, they are prohibited from directly engaging in substantial lobbying activities as well as supporting the political

campaigns of candidates for public office. *See* 26 U.S.C. § 501(c)(3); *Regan v. Tax'n With Representation of Wash.*, 461 U.S. 540, 543 (1983). They may, however, form related but separately funded organizations that qualify for tax exemption under 26 U.S.C. § 501(c)(4) and are permitted to engage in those activities in furtherance of the Section 501(c)(3) organizations' mission. *See Regan*, 461 U.S. at 544. This "dual structure" ensures that an organization's First Amendment rights are not unduly burdened by the restrictions contained in Section 501(c)(3). *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 215 (2013); *see also Regan*, 461 U.S. at 553 (Blackmun, J., joined by Brennan & Marshall, JJ., concurring) ("It must be remembered that § 501(c)(3) organizations retain their constitutional right to speak and to petition the Government."). Thus, while Plaintiffs do not directly engage in substantial lobbying or any campaign activities, their related, separately funded Section 501(c)(4) organizations advance their legislative and political agenda in furtherance of their mission. *See* App. at A171, A173, A192. All of these entities use the name "Planned Parenthood." *See id.*

In recent years, national, state, and local Planned Parenthood Section 501(c)(4) organizations and their related political action committees have invested large sums of money to support candidates for public office committed to advancing sexual and reproductive health and rights, the vast majority of whom have been Democrats; this support includes making direct campaign contributions where

permitted by law. *See* Casey Harper, *Planned Parenthood spends big for Democrats, faces cuts under Republican control*, Center Square (Apr. 12, 2025), https://www.thecentersquare.com/national/article_2c5a0c4d-7c29-4756-8308-0fa29ead85aa.html (discussing the $5,144,579 in political donations and independent expenditures made by Planned Parenthood political advocacy organizations in 2024, "nearly all for liberal groups or Democrats, including former Vice President Kamala Harris in her bid against President Donald Trump"); Joe Souka, *Where campaign cash is coming from in race for Ky. Governor—and how it's getting spent*, Ky. Public Radio (Oct. 31, 2023, 5:55 AM EDT), https://www.lpm.org/news/2023-10-31/where-campaign-cash-is-coming-from-in-race-for-ky-governor-and-how-its-getting-spent ("Another PAC assisting [Democratic incumbent Governor Andy] Beshear is Planned Parenthood Action Kentucky, which purchased a $175,000 digital ad campaign hitting Cameron on his support for Kentucky's near total abortion ban with no exceptions for rape and incest. Planned Parenthood Action Fund, the national [Section 501(c)(4)] arm of the abortion provider, has contributed $200,000 to the local PAC."); Donna King, *Planned Parenthood PAC spent $10 million in NC's last 4 state-level elections*, Carolina Journal, May 16, 2023, https://www.carolinajournal.com/planned-parenthood-pac-spent-10-million-in-ncs-last-4-elections/ (describing Planned Parenthood Action of North Carolina as a major donor to state Democrats, "spending nearly $10 million since 2016 on their legislative- and

executive-branch campaigns."); Amy B. Wang, *Planned Parenthood to spend record $50 million on midterm elections*, Wash. Post, Aug. 17, 2022, https://www.washingtonpost.com/politics/2022/08/17/planned-parenthood-50million-midterms-abortion (reporting that Planned Parenthood's political advocacy organizations would focus on nine states "where gubernatorial or down-ballot races could determine abortion access in the state or federally" and noting that many of those states "also have competitive Senate races that could determine which party has control of the chamber."); Jessie Hellman, *Planned Parenthood announces $45M campaign to defeat Trump, flip Senate*, The Hill (Oct. 9, 2019, 7:04 AM ET), https://thehill.com/policy/healthcare/464961-planned-parenthood-announces-45-million-campaign-to-defeat-trump-flip ("Planned Parenthood [Action Fund]'s super PAC announced a $45 million electoral campaign on Wednesday to defeat President Trump and Republicans in key Senate races."); *see generally* Appellants' Br. add. at A51; App. at A192. Planned Parenthood political advocacy organizations have also supported campaigns for state ballot initiatives securing abortion rights. Appellants' Br. add. at A51; App. A192. As explained above, Plaintiffs' association with these organizations constitutes core political expression that is afforded the highest level of First Amendment protection. *See supra* at 9-10.

In addition, all Planned Parenthood organizations engage in unapologetic advocacy to promote abortion rights and public acceptance of abortion as an essential

reproductive health option. *See* Appellants' Br. add. at A50-51; App. at A173, A192.

C. Planned Parenthood Was Subjected to Adverse Action by the Government

The Defund Provision strips Planned Parenthood Section 501(c)(3) organizations of eligibility to participate in the federal Medicaid program, a benefit those organizations had long enjoyed. *See* App. at A180-83. The denial of a valuable governmental benefit constitutes an adverse action when constitutionally protected interests are at stake. *See Koontz*, 570 U.S. at 604; *Perry*, 408 U.S. at 597 ("[The Government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or association, his exercise of those freedoms would in effect be penalized and inhibited."); *Barton v. Clancy*, 632 F.3d 9, 23 (1st Cir. 2011) ("As a general matter, the government may not deprive an individual of a 'valuable government benefit[]' in retaliation for his or her exercise of First Amendment rights.").

D. Retaliatory Animus Was the But-For Cause of the Adverse Action

1. There Are Well-Established and Reliable Methods for Determining Whether a Statute is Motivated by Retaliatory Animus

Contrary to the Government's argument, courts are not barred from invalidating a statute based on a finding that it was motivated by an illicit purpose. *Contra*

Appellants' Br. at 33. Indeed, many areas of constitutional law require courts to determine whether animus toward a particular practice, person, or group improperly motivated the enactment of a law. *See, e.g.*, *Sorrell*, 564 U.S. at 566 (free speech); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (religious liberty); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (equal protection).

The Supreme Court has made clear that courts engaging in judicial review of a legislative enactment must look beyond the text of the statute because even facially neutral laws may be a vehicle for discriminatory or retaliatory animus. *See Sorrell*, 564 U.S. at 566 ("A government bent on frustrating an impending demonstration might pass a law demanding two years' notice before the issuance of parade permits. Even if the hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional."); *Church of the Lukumi*, 508 U.S. at 534 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against government hostility which is masked, as well as overt."); *Regan*, 461 U.S. at 548 (explaining that an otherwise constitutional statute awarding government subsidies on a selective basis would violate the First Amendment "if Congress were to discriminate invidiously in its subsidies in such a way as to 'aim at the

suppression of dangerous ideas.'" (cleaned up) (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)). This basic principle is well-settled and not in serious dispute.

Less well-settled is the extent to which courts may rely on the statements of individual legislators as evidence of legislative motive. In *United States v. O'Brien*, 391 U.S. 367, 383-85 (1968), the Supreme Court held that, in general, statements by individual legislators are poor evidence of the intent of the legislature as a whole and should not serve as the basis for invalidating a statute. It explained:

> When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

Id. at 384 (footnote omitted). In that case, the Court considered whether a statute prohibiting destruction of a Selective Service registration certificate violated the First Amendment rights of a defendant who burned his certificate as part of a public demonstration. *Id.* at 372. The defendant relied "principally on the basis of statements by … three Congressmen" in arguing that the statute was motivated by a

congressional desire to suppress disfavored ideas, and the Supreme Court found this evidence unpersuasive. *Id.* at 385.[3]

Subsequently, in *Village of Arlington Heights*, the Supreme Court expressed a different view, holding that statements by individual legislators may be probative evidence of discriminatory legislative intent. 429 U.S. at 268. The Court stated: "The legislative … history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* More recently, in *Church of the Lukumi*, a plurality of the Supreme Court, citing *Village of Arlington Heights* among other cases, considered contemporaneous statements by city council members and other city officials as evidence that a set of local ordinances were motivated at least in part by animus toward the Santeria religion, but that evidence was not essential to the majority's ultimate conclusion that the legislation had an improper purpose. *Compare Church of the Lukumi*, 508 U.S. at 540-42 (plurality opinion), *with id.* at 558 (Scalia, J., joined by Rehnquist, CJ., concurring in part and concurring in the judgment) ("I do not join

[3] Here, the Government quotes selectively from the decision in *O'Brien* to make it seem as if the Supreme Court held that courts may not consider the purpose of a law when reviewing its constitutionality, *see* Appellants' Br. at 33, when the Court's focus in that case was on the method used to establish purpose, *O'Brien*, 391 U.S. at 383-85. Indeed, the Court held that the First Amendment prohibits Congress from advancing interests "[]related to the suppression of free expression." *Id.* at 377.

that section because it departs from the opinion's general focus on the object of the *laws* at issue to consider the subjective motivation of the *lawmakers* ….").

Although the Supreme Court has wavered on the probative value of statements by individual legislators, it has consistently endorsed other methods of establishing discriminatory or retaliatory animus as a motivation for legislation. Notably, the Court has long held that the practical effect of a law is strong evidence of its purpose. *See, e.g.*, *Church of the Lukumi*, 508 U.S. at 535 ("[T]he effect of a law in its real operation is strong evidence of its object."); *see also United States v. Windsor*, 570 U.S. 744, 771 (2013) ("DOMA's operation in practice confirms [its] purpose."); *Vill. of Arlington Heights*, 429 U.S. at 266 ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-37 (1973) (concluding that the purpose of a statute was to discriminate against hippies and not to minimize fraud in the administration of the food stamp program) ("[I]n practical effect, the challenged classification simply does not operate so as rationally to further the prevention of fraud."); *O'Brien*, 391 U.S. at 384 ("[T]he inevitable effect of a statute may render it unconstitutional.").

For example, in *Church of the Lukumi*, the Supreme Court held that a set of local ordinances banning ritual animal sacrifice violated the Free Exercise Clause because they "had an impermissible object," *id.* at 524; namely, to suppress practices

central to the Santeria religion, *id.* at 534. It found that the laws at issue were carefully crafted to impact the religious exercise of Santeria adherents and virtually no other conduct. *Id.* ("It is a necessary conclusion that almost the only conduct subject to Ordinances 87-40, 87-52, and 87-71 is the religious exercise of Santeria church members."); *id.* at 536 ("Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished."); *id.* ("[T]he burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others."). This led the Court to conclude "that Santeria alone was the exclusive legislative concern." *Id. Cf. Sorrell*, 564 U.S. at 564 ("Vermont's law thus has the effect of preventing detailers—and only detailers—from communicating with physicians in an effective and informative manner.").

The Supreme Court has also found lack of fit between a statute's means and ends to be strong evidence of improper motivation. In *Sorrell*, for example, where the Supreme Court invalidated on First Amendment free speech grounds a state statute restricting the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors, the Court reasoned that: "[The challenged statute] permits extensive use of prescriber-identifying information and so does not advance the State's asserted interest in physician confidentiality. The limited range of available privacy options instead reflects the State's impermissible purpose to

burden disfavored speech." 564 U.S. at 574-75. Similarly, in *Church of the Lukumi*, the Supreme Court stated that: "We also find significant evidence of the ordinances' improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends." 508 U.S. at 538.

Thus, controlling precedent establishes both that this Court has a duty to examine whether the Defund Provision is motivated by retaliatory animus, and that there are well-established and reliable methods for doing so.

2. Use of These Methods Shows That Congress Enacted the Defund Provision to Retaliate Against Planned Parenthood for Its Political Speech and Association

Although contemporaneous statements by legislators and other government officials support the conclusion that retaliatory animus motivated Congress to enact the law, *see* Appellees' Br. at 10-13, 16-17, this Court need not rely on that evidence. Additional, indisputably probative, evidence demonstrates that retaliatory animus against Planned Parenthood's political speech and association was the but-for cause of the Defund Provision's enactment. The Government claims that the purpose of the Defund Provision is "halting federal Medicaid funding for abortion providers," Appellants' Br. at 12, or at least "major" abortion providers, *id.* at 13, to avoid subsidizing abortion care. But the practical effect of the Defund Provision and the lack of fit between its means and alleged ends show that these stated objectives are a mere

pretext for punishing Planned Parenthood for political speech and association that Congress does not like.

The practical effect of the Defund Provision is not to halt federal Medicaid funding to abortion providers—or even "major" abortion providers—generally. Rather, it is to halt such funding to Planned Parenthood organizations specifically. Pub. L. No. 119-21, § 7113(a), 139 Stat. 72, 300-01 (July 4, 2025); Appellants' Br. add. at A52-53, A71-72, A83-84. Just as the local ordinances at issue in *Church of the Lukumi* were carefully tailored to impact Santeria practitioners and few others, amounting to what the Supreme Court called a "religious gerrymander," 508 U.S. at 535, the Defund Provision is carefully tailored to impact Planned Parenthood organizations and few others. Pub. L. No. 119-21, § 7113(b)(1); Appellants' Br. add. at A52-53, A71-72, A83-84. It expressly exempts abortion providers who are not Section 501(c)(3) organizations, including for-profit abortion clinics; abortion providers who are not essential community providers specializing in family planning and reproductive health, including large hospitals and health systems; and abortion providers who received less than $800,000 in Medicaid funding in fiscal year 2023, including nonprofit clinics that may provide more abortions on an annual basis than the local Planned Parenthood clinic but provide fewer services that are eligible for Medicaid coverage. *See* Pub. L. No. 119-21, § 7113(b)(1).

Likewise, the Defund Provision is both substantially overinclusive and substantially underinclusive. It is substantially overinclusive because, as the district court held, it applies to Planned Parenthood entities that do not provide abortions at all. Appellants' Br. add. at A50; App. at A187. It is substantially underinclusive because it does not apply to providers of the vast majority of abortions in the United States. App. at A191. Moreover, the Defund Provision is simply not designed to achieve the objectives proffered by the Government. First, although the Government does not define "major" abortion provider, presumably it means an organization that provides a large number of abortions. The Defund Provision, however, does not apply based on how many abortions an organization provides; it applies based on how much Medicaid funding an organization received in 2023. Pub. L. No. 119-21, § 7113(b)(1). The two things are not correlated. Federal law independently prohibits Medicaid funding for abortion care, except in very limited circumstances. Appellants' Br. add. at A46; App. at A182. Thus, an organization may receive a lot of Medicaid funding but provide few abortions or vice versa. Second, the Defund Provision defines "prohibited entity" in a manner that excludes many entities that are likely to be "major" abortion providers, including large abortion clinics that are not Section 501(c)(3) organizations and large hospitals and health systems that are not essential community providers specializing in family planning and reproductive health. Pub. L. No. 119-21, § 7113(b)(1). Indeed, none of the criteria that define

prohibited entity are directly—or even indirectly—related to the number of abortions an entity provides or the proportion of an entity's services that are abortion-related.[4]

In sum, the Defund Provision is simply not designed to prevent "major" abortion providers—or any abortion providers other than those associated with Planned Parenthood—from receiving Medicaid funding for non-abortion services. If Congress' true aim were to defund high-volume abortion providers, it would have defined "prohibited entity" based on the annual number of abortions an entity performs. Instead, it defined "prohibited entity" using a set of criteria certain to apply to Planned Parenthood but wholly unrelated to the number of abortions an entity performs. Pub. L. No. 119-21, § 7113(b)(1). *Cf. Church of the Lukumi*, 508 U.S. at 536 ("It suffices to recite this feature of the law as support for our conclusion that Santeria alone was the exclusive legislative concern.").

What distinguishes Planned Parenthood from other "major" abortion providers is its advocacy work, including its tireless defense of abortion rights, its outspoken promotion of abortion as an essential reproductive health option, and its extensive support of candidates for office—nearly all Democratic—who support sexual and reproductive health and rights through its separately funded Section 501(c)(4) organizations and their political action committees. *See supra* at 11-14.

[4] Abortions comprise just 4% of the health services that Planned Parenthood provides nationwide. App. at A175.

It is therefore reasonable and appropriate to conclude that retaliatory animus toward this protected speech and association is what motivated Congress to enact the Defund Provision. But for Planned Parenthood's protected speech and association, Congress would not have targeted it for exclusion from the Medicaid program. We know this because Congress did not exclude other abortion providers—including other "major" abortion providers—who lack a similar history of high-profile advocacy for abortion rights and support of Democratic candidates for office.[5]

IV. At a Time When First Amendment Freedoms Are Under Attack, it is Imperative That Federal Courts Take Claims of First Amendment Retaliation Seriously and Engage in Rigorous Judicial Review.

The First Amendment is "[p]remised on mistrust of governmental power." *Citizens United*, 558 U.S. at 340. Thus, it requires courts to look skeptically on governmental action alleged to burden protected expression and subject such action to rigorous judicial review.

This is especially important in the current political climate. It has been well documented that the Trump administration is seeking to test the limits of constitutional protection for free expression and use the levers of government to target and

[5] Notably, the One Big Beautiful Bill Act passed largely along party lines, with nearly every Republican in Congress voting for it and all Democrats voting against it. Michael Gold, et al., *Trump Policy Bill Clears Congress After House G.O.P. Quells Revolt*, N.Y. Times, July 4, 2025, https://www.nytimes.com/2025/07/03/us/politics/house-trump-bill-obbb.html; Catie Edmondson, et al., *After Narrow Senate Passage, Trump's Policy Bill faces Resistance in House*, N.Y. Times, July 2, 2025, https://www.nytimes.com/2025/07/01/us/politics/senate-trump-bill.html.

suppress its perceived political enemies. *See, e.g.*, Jeremy Herb, et al., *Trump is using the power of government to punish opponents. They're struggling to respond*, CNN (Mar. 30, 2025, 5:00 AM EDT), https://www.cnn.com/2025/03/30/politics/trump-punish-opponents ("President Donald Trump is using the power of the federal government to intimidate or neuter political sources of opposition to him: The legal establishment, academia and prominent cultural institutions, the media, the judiciary, the Democratic Party, Congress and independent government oversight."); Nandita Bose, et al., *Trump's war on the left: Inside the plan to investigate liberal groups*, Reuters (Oct. 9, 2025, 4:43 PM EDT), https://www.reuters.com/legal/government/trumps-war-left-inside-plan-investigate-liberal-groups-2025-10-09 ("President Donald Trump's threatened crackdown on the finances and activities of liberal nonprofits and groups opposed to his agenda is a multi-agency effort ….").

The Republican Congress, far from acting as a check on executive power, has largely fallen in line to do the President's bidding. *See* Lisa Mascaro, *With gavel in hand, Trump chisels away at the power of a compliant Congress*, AP (July 19, 2025, 8:44 AM EDT), https://apnews.com/article/trump-congress-compliant-ceding-power-republicans-4508b5e6f893da17e9064426e6fefc6c ("Since Trump's return to the White House in January, and particularly in the past few weeks, Republicans in control of the House and Senate have shown an unusual willingness to give the president of their party what he wants, regardless of the potential risk to themselves, their

constituents and Congress itself."); Jessica Piper & Hailey Fuchs, *House GOP issues new subpoenas, ramping up Act Blue investigation*, Politico (June 25, 2025, 6:10 PM EDT), https://www.politico.com/news/2025/06/25/actblue-subpoena-house-gop-investigation-00424703 ("House GOP committees have issued new subpoenas to Act Blue, intensifying their probe of the Democratic fundraising platform.").

In a shocking number of recent cases, federal courts have found that the Government retaliated, or likely retaliated, against individuals and organizations based on their exercise of First Amendment rights. *See, e.g.*, *United States v. Abrego*, No. 3:25-CR-115, 2025 WL 2814712, *8 (M.D. Tenn. Oct. 3, 2025) (criminal defendant who filed a lawsuit challenging his removal to El Salvador); *Am. Assoc. of Univ. Professors v. Rubio*, No. 25-CV-10685-WGY, 2025 WL 2777659, *54 (D. Mass. Sept. 30, 2025) (pro-Palestinian activists); *President & Fellows of Harvard Coll. v. U.S. Dep't of Health & Hum. Servs.*, Nos. 25-CV-11048-ADB, 25-CV-10910-ADB, 2025 WL 2528380, *25 (D. Mass. Sept. 3, 2025) (university exercising academic freedom); *Susman Godfrey LLP v. Exec. Off. of the President*, No. 25-CV-1107, 2025 WL 1779830, *15 (D.D.C. June 27, 2025) (law firm that represented Dominion Voting Systems and certain state officials in cases concerning the integrity of the 2020 presidential election), *appeal filed*, No. 25-5310 (D.C. Cir. Aug. 26, 2025); *President & Fellows of Harvard Coll. v. U.S. Dep't of Homeland Sec.*, No. 25-CV-11472-ADB, 2025 WL 1737493, *17 (D. Mass. June 23, 2025) (university

exercising academic freedom), *appeal filed*, No. 25-1627 (1st Cir. July 1, 2025); *Wilmer Cutler Pickering Hale & Dorr LLP v. Exec. Off. of the President*, 784 F. Supp. 3d 127, 152 (D.D.C. 2025) (law firm that employed Robert Mueller, the special counsel who investigated Russian interference in the 2016 election), *amended by* No. 25-CV-917-RJL, 2025 WL 2105262 (D.D.C. June 26, 2025), *appeal filed*, No. 25-5277 (D.C. Cir. July 28, 2025); *Jenner & Block LLP v. U.S. Dep't of Just.*, 784 F. Supp. 3d 76, 88 (D.D.C. 2025) (law firm that employed Andrew Weissmann, who worked on the special counsel investigation), *appeal filed*, No. 25-5265 (D.C. Cir. July 22, 2025); *Am. Bar Assoc. v. U.S. Dep't of Just.*, 783 F. Supp. 3d 236, 239 (D.D.C. 2025) (professional organization that joined a lawsuit against the Trump administration); *Perkins Coie LLP v. U.S. Dep't of Just.*, 783 F. Supp. 3d 105, 120 (D.D.C. 2025) (law firm that represented Hillary Clinton during the 2016 presidential election), *appeal filed*, No. 25-5241 (D.C. Cir. July 2, 2025).[6]

Amicus Curiae does not provide this context as evidence of unconstitutional retaliation in this case. It does so only to underscore the pressing need for the Court to take Planned Parenthood's claim of First Amendment retaliation seriously. At a different moment in history, a claim that Congress enacted and the President signed a law intended to punish a political opponent for participating in the public debate about individual rights and candidates for office might have seemed far-fetched. But

[6] This list is not exhaustive.

it is not far-fetched in the current political climate. Now more than ever, it is essential to the constitutional order and rule of law that governmental efforts to suppress disfavored speakers and viewpoints be carefully scrutinized and promptly remedied.

CONCLUSION

This Court should affirm the preliminary injunction entered by the district court.

Dated: October 16, 2025

Respectfully submitted,

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Dated: October 16, 2025

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CERTIFICATE OF SERVICE

I hereby certify that, on October 16, 2025, a true and correct copy of the foregoing document was served on all counsel of record via the Court's CM/ECF system.

Dated: October 16, 2025

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