PETITION APPENDIX TABLE OF CONTENTS

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-30987

United States Court of
Appeals Fifth Circuit
FILED
June 29, 2017
Lyle W. Cayce
Clerk

PLANNED PARENTHOOD OF GULF COAST, INCORPORATED; JANE DOE #1; JANE DOE #2; JANE DOE #3,

Plaintiffs - Appellees

v.

REBEKAH GEE, Secretary, Louisiana Department of Health and Hospitals,

Defendant - Appellant

Appeal from the United States District Court
for the Middle District of Louisiana

Before WIENER, PRADO, and OWEN, Circuit Judges.

WIENER, Circuit Judge:

After this panel filed a unanimous opinion affirming the district court and a judge on this court then held the mandate, a panel member changed her position from agreeing to affirm the district court to advocating reversal. We therefore withdraw our

original, unanimous opinion and replace it with two opinions: this one from the panel majority and another from our now-dissenting panel member.

NARROW FRAMEWORK

First, the one and only act of the district court that is at issue in this appeal is its temporary injunction, granted at the outset of this litigation to preserve the status quo among all the parties pending resolution of the substantive issues of this case. The parties to whom we refer are the defendant, the State of Louisiana, and the plaintiffs, Planned Parenthood of Gulf Coast, Incorporated ("PPGC") and three of its patients, each of whom is so financially disadvantaged as to qualify for Medicaid. The district court granted its injunction in recognition of the fact that, if the State's revocation of PPGC's Medicaid qualification was to become effective immediately, only to be reversed after months or years of litigation, the clinics' poorest patients would nevertheless have suffered permanent harm.

Second, the State is not attempting to completely shut down the two PPGC clinics in question; it seeks only to deny Medicaid coverage for the clinics' treatment of their most needy patients, i.e., those who qualify for Medicaid. It is only that threatened act of the State that the district court has temporarily enjoined pending the orderly disposition of the Medicaid issue in this litigation. The merits of this case are not now before us; this litigation has not even reached the summary judgment stage, much less the merits, but only the initial, Rule 12(b) stage.

Third, neither of PPGC's two Louisiana clinics threatened here with Medicaid decertification by the State performs abortions or has ever participated in

a program involving donation of fetal tissue. We emphasize this facet of the litigation's framework for the benefit of those of our colleagues and our readership whose overarching anathema to Planned Parenthood is grounded in their opposition to abortions or donations of fetal tissue, or both.

It is within this narrow framework that we now address the sole issue of this appeal, the district court's pre-merits, status quo, injunction.

BACKGROUND

Medicaid's free-choice-of-provider provision, 42 U.S.C. § 1396a(a)(23), guarantees that Medicaid beneficiaries will be able to obtain medical care from the qualified and willing medical provider of their choice. In response to secretly recorded videos released by the anti-abortion Center for Medical Progress depicting conversations with employees of an unrelated Planned Parenthood in a different state, Defendant-Appellant Louisiana Department of Health and Hospitals ("LDHH") terminated only the Medicaid provider agreement of Plaintiff-Appellee PPGC, leaving it licensed to provide its services to any and all non-Medicaid patients. PPGC and the individual Plaintiffs-Appellees Jane Doe #1, Jane Doe #2, and Jane Doe #3 (the "Individual Plaintiffs")—women who are Medicaid beneficiaries and receive medical care provided at one of PPGC's Louisiana facilities—(collectively "the Plaintiffs") filed this suit against LDHH under 42 U.S.C. § 1983, alleging violations of 42 U.S.C. § 1396a(a)(23) and the First and Fourteenth Amendments of the U.S. Constitution. Each Individual Plaintiff seeks to continue receiving care from PPGC's facilities, and each specifically contends that LDHH's termination action will deprive her of access to the qualified and

willing provider of her choice, in violation of Medicaid's free-choice-of-provider provision.

The district court entered a preliminary injunction against LDHH's termination of PPGC's Medicaid provider agreements pending the eventual outcome of this litigation on the merits. LDHH appeals.

FACTS

A. Plaintiffs-Appellees

1. PPGC is a non-profit corporation domiciled in Texas and licensed to do business in Louisiana. It operates two clinics in Louisiana: the Baton Rouge Health Center and the New Orleans Health Center. Both centers participate in Louisiana's Medicaid program. PPGC's two clinics provide care to over 5200 Medicaid beneficiaries, who comprise more than half of the patients they serve in Louisiana. Both clinics offer physical exams, contraception and contraceptive counseling, screening for breast cancer, screening and treatment for cervical cancer, testing and treating specified sexually transmitted diseases, pregnancy testing and counseling, and other listed procedures, including colposcopy. Again, neither clinic performs abortions nor has either ever participated in a fetal tissue donation program.

2. Doe #1 relies on PPGC's health center in Baton Rouge for her annual examinations. According to Doe #1, PPGC also helped her obtain treatment for cancer in December 2013. Her cancer is now in remission, but it has rendered her unable to take birth control pills. She does not wish to have any more children and continues to rely on PPGC to advise her on future contraception options. Doe #1 wishes to continue receiving health care at PPGC

because she does not know of any other providers that will take her insurance. She prefers to receive care at PPGC because she is comfortable with the staff, trusts the providers, and is easily able to make appointments.

3. Doe #2 is enrolled in Louisiana's Take Charge Plus program[1] and has received care at PPGC's health center in New Orleans since 2012. Until health issues left her unable to work full time, at which point she lost her private health insurance, Doe #2 had used a private obstetrician-gynecologist. That physician stopped treating Doe #2 once she lost her private insurance. Doe #2 now visits PPGC every year for her annual gynecological examination. She prefers to continue receiving it from PPGC and does not know where else she could obtain this care under Medicaid.

4. Doe #3 is a patient of PPGC's health center in Baton Rouge. There, she receives pap smears, testing for sexually transmitted diseases, and cancer screenings. Doe #3 prefers receiving care at PPGC and finds it is easy to make appointments there. She states that it "is very difficult to find doctors in Baton Rouge who will accept Medicaid." Doe #3 needed to visit another Baton Rouge clinic for a necessary gynecological procedure, but was given an appointment for a day seven months later.

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[1] The Take Charge Plus program provides family planning services to eligible women and men with incomes at or below 138 percent of the federal poverty level.

B. History

In July 2015, the anti-abortion Center for Medical Progress, released a series of undercover videos and allegations purporting to show that Planned Parenthood and its affiliates were contracting to sell aborted human fetal tissue and body parts. At a later hearing, the district court found that "none of the conduct in question [depicted in the videos] occurred at PPGC's two Louisiana facilities." Nevertheless, then-Louisiana Governor Bobby Jindal directed LDHH and the State Inspector General to investigate PPGC.

On July 15, 2015, then-secretary of LDHH, Kathy Kliebert, wrote to PPGC requesting responses to a range of questions about its activities. PPGC promptly responded on July 24, 2015, relevantly stating that (1) it "does not offer abortion services," and (2) it does not sell or donate any unborn baby organs or body parts. PPGC acknowledged that Planned Parenthood Center for Choice, Inc. ("PPCFC"), a separate corporation,[2] provides abortions in Texas, but that PPCFC does not operate a fetal tissue donation program.

Secretary Kliebert wrote to PPGC on August 4, 2015, claiming that several of PPGC's responses "directly contradict" the recently released videos. According to her, one video taken in Houston, Texas, depicted Melissa Farrell, Director of Research at PPGC, "discuss[ing] existing contracts for fetal tissue

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[2] As PPGC's letter indicates, PPCFC was operated as a division of PPGC until 2005, at which point it was separately incorporated in Texas. PPCFC also has a Certificate of Authority to Transact Business in Louisiana.

donation for the purpose of research." Secretary Kliebert emphasized that LDHH "is extremely concerned that [PPGC or PPCFC], or both have not only participated in the sale or donation of fetal tissue, but also deliberately misinformed [LDHH] about this practice in its July 24 response letter." In that same letter, Secretary Kliebert requested more information about the practices of PPGC and PPCFC.

PPGC responded on August 14, 2015, repeating that neither PPGC nor PPCFC sells or donates fetal tissue. PPGC explained that the secretly recorded conversation "does not discuss existing contracts for fetal tissue donation," but rather, "concerns a list of tissue specimens a major Texas research institution had expressed interest in obtaining, in discussions about a possible future fetal tissue donation program."

In the midst of these communications, LDHH notified PPGC on August 3, 2015, that it would terminate PPGC's Medicaid provider agreements. Secretary Kliebert stated no basis for the termination. She noted only that under La. R.S. § 46:437.11 the provider agreements are voluntary contracts subject to termination "by either party 30 days after receipt of written notice." That same day, then-Governor Jindal published the following press release: "Governor Jindal and DHH decided to give the required 30-day notice to terminate the Planned Parenthood Medicaid provider contract because Planned Parenthood does not represent the values of the State of Louisiana in regards to respecting human life." Secretary Kliebert's letter notified PPGC of its right to a hearing and stated that PPGC may request an administrative appeal within 30 days. At a subsequent hearing before the district

court, LDHH's counsel clarified that this termination action by the state did *not* relate to PPGC's ability to continue providing adequate care to its non-Medicaid patients.[3]

C. The Instant Proceedings

On August 25, 2015, the Plaintiffs filed suit under 42 U.S.C. § 1983, contending that LDHH's termination of PPGC's Medicaid provider agreements violated Medicaid's free-choice-of-provider requirement, 42 U.S.C. § 1396a(a)(23), and the U.S. Constitution. On that date, the Plaintiffs also moved for entry of a temporary restraining order and preliminary injunction, which the district court eventually granted. The validity of that *preliminary* injunction is the one and only issue of this appeal.

LDHH voluntarily rescinded the August 4, 2015 "at will" termination letters on September 14, 2015. On that same day, LDHH advised the district court by letter that it believed that the Plaintiffs' claims and pending motions were now moot. But the very next day, September 15, 2015, LDHH notified PPGC that it was "terminating/revoking" PPGC's Medicaid

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[3] The district court asked LDHH's counsel several questions pertaining to this issue:

> **THE COURT:** All right. So the reason [for LDHH's termination action] is unrelated to the ability of these two facilities to provide adequate care to their patients; is that true?
>
> **MR. RUSSO:** That I would agree with, yes, sir.
>
> **THE COURT:** So Ms. Kliebert's position is that these are terminated without a relationship of any kind to the adequacy of care; correct?
>
> **MR. RUSSO:** Correct, at this time, your honor, exactly.

provider agreements for "cause" under La. R.S. §§ 46:437.11(D)(2) and 437.14, and Title 50 of the Louisiana Administrative Code. LDHH also informed PPGC that it could request an informal hearing or suspensive administrative appeal within 30 days (PPGC has not requested either a hearing or an administrative appeal). LDHH further notified PPGC that the effected terminations would be suspended during this 30-day period.

LDHH has advanced three grounds for termination. First, LDHH identified PPGC's settlement of a qui tam False Claims Act ("FCA") claim in *Reynolds v. Planned Parenthood Gulf Coast, Inc.*, [4]—in which PPGC disclaimed all liability—and its failure to notify LDHH of that settlement and any corresponding violations. LDHH categorized these acts as "fraud." LDHH identified a second qui tam FCA claim against PPGC in *Carroll v. Planned Parenthood Gulf Coast*.[5] At the time of the proceedings before the district court in the instant case, the court in *Carroll* had denied PPGC's motion to dismiss. LDHH identified the *Carroll* suit as another example of PPGC's failure to comply with applicable laws and to notify LDHH of such violations. PPGC subsequently settled that suit, again disclaiming all liability.

Second, LDHH stated that PPGC's responses in its July and August letters contained misrepresentations. LDHH did not identify any particular misrepresentations either in its August 3 termination letter or before the district court. At most, LDHH urged

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[4] No. 9:09-cv-124-RC (E.D. Tex.).

[5] No. 4:12-cv-03505 (S.D. Tex.).

that PPGC's responses differed from the content of the videos released by the Center for Medical Progress.

Finally, LDHH claimed that PPGC was subject to termination because it was being investigated by LDHH and the Louisiana Office of Inspector General.

On October 7, 2015, the Plaintiffs filed a motion to amend their complaint, seeking to continue asserting their claims under Medicaid's free-choice-of-provider provision and to add claims under the First and Fourteenth Amendments of the U.S. Constitution. Two days later, the Plaintiffs also renewed their request for a temporary restraining order and preliminary injunction.

LDHH moved to dismiss the Plaintiffs' amended complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). After a hearing on the parties' motions, the district court granted in part the Plaintiffs' motion for temporary restraining order and preliminary injunction and denied LDHH's motion to dismiss. The district court held a subsequent telephone conference with the parties, at which point both sides consented to converting the temporary restraining order to a preliminary injunction to allow for an immediate appeal. The parties agreed that no evidentiary matters required further discovery.

The district court issued an amended ruling and order in October 2015, granting the Plaintiffs' renewed motion for temporary restraining order and for preliminary injunction and denying LDHH's motion to dismiss. The district court thus preliminarily enjoined LDHH from terminating PPGC's Medicaid provider agreements during the pendency of this

litigation. In a lengthy and detailed opinion, the district court rejected LDHH's standing, ripeness, and abstention challenges to the Plaintiffs' claims. The court also found sufficient grounds to issue a preliminary injunction on the basis of the Individual Plaintiffs' claim under Medicaid's free-choice-of-provider provision. The district court specifically held that 42 U.S.C. § 1396a(a)(23) affords the Individual Plaintiffs a private right of action enforceable under 42 U.S.C. § 1983. The court expressly declined to determine whether PPGC possesses such a right. The court then held that the Individual Plaintiffs' claims are substantially likely to succeed and that the remaining factors— irreparable injury to the Plaintiffs, balancing of the injury to the Plaintiffs versus the harm to the defendant, and the public interest—weigh in favor of issuing a preliminary injunction.

LDHH appealed, contending that the district court erred in concluding that the Individual Plaintiffs have standing and that their claims are ripe for review. It further asserts that the district court erred in entering a preliminary injunction.

JUSTICIABILITY

Article III of the U.S. Constitution extends the federal judicial power to "Cases" and "Controversies."[6] The justiciability requirements of standing and ripeness animate Article III's cases-and-controversies requirement in this appeal. LDHH maintains that the Plaintiffs lack standing to bring their claims and that their claims are not ripe for review. The

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[6] U.S. CONST. art. III, § 2, cl. 1.

district court issued the preliminary injunction as to the Individual Plaintiffs' claims alone, so we confine our analysis to the justiciability of those plaintiffs' claims.[7]

A. Standing

LDHH first avers that the Individual Plaintiffs lack standing to assert their claims. We review challenges to standing de novo.[8] To establish standing, a plaintiff must prove that (1) he has sustained an "injury in fact" that is both (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical," (2) there is "a causal connection between the injury and the conduct complained of," and (3) a favorable decision is likely to redress the injury.[9] "An allegation of future injury may suffice if the threatened injury is certainly impending or there is a substantial risk that the harm will occur."[10]

LDHH posits that the Individual Plaintiffs have failed to demonstrate an injury because PPGC's Medicaid provider agreements have not yet been terminated and the Individual Plaintiffs have not yet been denied access to PPGC's services. LDHH further maintains that any injury will result not from

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[7] Therefore, we decline to address LDHH's arguments related to the justiciability of PPGC's claims.

[8] *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 428 (5th Cir. 2011).

[9] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks and citations omitted).

[10] *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (internal quotation marks omitted) (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147, 1150, n.5 (2013)).

its actions, but from PPGC's failure to avail itself of its administrative appeal rights.

The Individual Plaintiffs counter that they have standing because LDHH has acted to terminate PPGC's Medicaid provider agreements, which will (1) deny them access to the healthcare services they seek and (2) deny them a legal right, *viz.*, access to the qualified and willing provider of their choice under 42 U.S.C. § 1396a(a)(23). Stated differently, the Individual Plaintiffs will sustain a concrete and particular injury (denial of services from PPGC and a legal right to the qualified provider of their choice) caused by LDHH (termination of PPGC's Medicaid provider agreements) that will be redressed by a favorable decision (an injunction barring LDHH from terminating PPGC's Medicaid provider agreements).

At the heart of LDHH's challenge to the Individual Plaintiffs' standing is its insistence that, because PPGC's Medicaid provider agreements have not yet been terminated, the Individual Plaintiffs have not sustained injury. This argument ignores the well-established principle that a threatened injury may be sufficient to establish standing.[11] As LDHH itself says, "[t]hreatened injury must be certainly impending to constitute injury in fact."[12] LDHH has notified

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[11] *See Comsat Corp. v. FCC*, 250 F.3d 931, 936 (5th Cir. 2001) ("A threatened injury satisfies the injury in fact requirement so long as that threat is real rather than speculative."); *Loa-Herrera v. Trominski*, 231 F.3d 984, 988 (5th Cir. 2000) ("Mere threatened injury is sufficient, and the threat in this case is real.").

[12] *Clapper*, 133 S. Ct. at 1147–48 (2013) (internal quotation marks omitted) (quoting *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990)).

PPGC that it has terminated PPGC's Medicaid provider agreements, but has suspended the effect of those terminations pending PPGC's decision whether to pursue an administrative appeal. PPGC has stated that it will not avail itself of administrative appeal. In other words, LDHH has already acted to terminate PPGC's Medicaid provider agreements; only the *effect* of that termination has yet to be implemented. And, importantly, the Individual Plaintiffs have no administrative appeal rights, and they are not subject to (nor could they be) any administrative exhaustion requirement under 42 U.S.C. § 1983.[13] The Individual Plaintiffs thus need not wait to file suit until PPGC is forced to close its doors to them and all other Medicaid beneficiaries.

LDHH also argues that the Individual Plaintiffs have not and will not sustain any legal injury—presumably even when the termination of PPGC's provider agreements takes effect—because the Individual Plaintiffs have a right to choose only a "qualified" provider, and PPGC is no longer a qualified provider. This contention turns on the sole substantive question before us on appeal, and we decline to allow LDHH to bootstrap this issue into our standing inquiry. We also note that a violation of a statutory right, even standing alone, may be sufficient to satisfy the injury requirement: "Congress may create a statutory right of entitlement the alleged deprivation of which can confer standing to sue even where

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[13] LDHH concedes separately that "exhaustion is often not a barrier to a claim based on 42 U.S.C. § 1983."

the plaintiff would have suffered no judicially cognizable injury in the absence of statute."[14]

LDHH finally contends that even if an injury exists, it is not fairly traceable to LDHH. Instead, asserts LDHH, PPGC's decision not to avail itself of an administrative appeal will alone be the cause of the Individual Plaintiffs' injury. The Supreme Court has warned against "wrongly equat[ing] injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation."[15] Although injury resulting from "the *independent* action of some third party not before the court" will not suffice, "that does not exclude injury produced by determinative or coercive effect upon the action of someone else."[16] LDHH is essentially asking us to conduct a proximate cause analysis to determine the immediate cause of the Individual Plaintiffs' injuries, but this is not what the Supreme Court requires.[17] We therefore affirm the district court's determination that the Individual Plaintiffs have standing to pursue their claims.

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[14] *Warth v. Seldin*, 422 U.S. 490, 514 (1975); *see also Spokeo v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.").

[15] *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997).

[16] *Id.* at 169 (internal citations omitted) (emphasis in original).

[17] *See City of Boerne*, 659 F.3d at 431 ("The causation element does not require a party to establish proximate causation, but only requires that the injury be 'fairly traceable' to the defendant." (citing *Bennett*, 520 U.S. at 168–69)).

B. Ripeness

LDHH next asserts that the Individual Plaintiffs' claims are not ripe. It argues that those claims are not fit for review because no injury has occurred and that the administrative process and the factual development it entails are still pending. LDHH goes so far as to claim that, for an issue to be ripe for review, this court requires a full administrative record.

We review de novo the issue of ripeness.[18] In evaluating whether a case is ripe for adjudication, we balance "(1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration."[19] "A case is generally ripe if any remaining questions are purely legal ones."[20]

We conclude that the Individual Plaintiffs' claims are ripe for review because the issues before us present purely legal questions. LDHH has already terminated PPGC's Medicaid provider agreements, and it has proffered three specific grounds for doing so. The operative question on appeal is whether, as a matter of law, any of those grounds permit LDHH to terminate PPGC's Medicaid provider agreement without violating Medicaid's free-choice-of-provider requirement. Further, although PPGC had the option to engage in the administrative appeal process, it has elected not to do so. And, as noted by the district court, LDHH had already terminated PPGC's

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[18] *Venator Grp. Specialty, Inc. v. Matthew/Muniot Family, LLC*, 322 F.3d 835, 838 (5th Cir. 2003).

[19] *Texas v. United States*, 497 F.3d 491, 498 (5th Cir. 2007) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

[20] *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 833 F.2d 583, 587 (5th Cir. 1987).

provider agreements with "its 'effect' alone delayed." LDHH's own briefing implies the same: "The initial decision maker, the State of Louisiana, through LDHH, has not taken final action on the issue of whether PPGC's provider contracts *were properly terminated*."[21]

The Individual Plaintiffs' injuries are "sufficiently likely to happen to justify judicial intervention."[22] The Individual Plaintiffs, as already discussed, are also likely to suffer hardship by being denied access to the provider of their choice under 42 U.S.C. § 1396a(a)(23) and to medical services at PPGC's facilities. The Individual Plaintiffs' claims are ripe.

PRELIMINARY INJUNCTION

Concluding that the Individual Plaintiffs have standing to bring their claims and that such claims are ripe for review, we turn to LDHH's challenge to the district court's entry of a preliminary injunction.

A plaintiff seeking a preliminary injunction must clearly show

> (1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) grant-

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[21] (emphasis added).

[22] *Pearson v. Holder*, 624 F.3d 682, 684 (5th Cir. 2010) (quoting *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993)).

> ing the preliminary injunction will not disserve the public interest.[23]

We "review the district court's determination on each of these elements for clear error, its conclusions of law de novo, and the ultimate decision whether to grant relief for abuse of discretion."[24]

The district court entered a preliminary injunction on the basis of the Individual Plaintiffs' claims that LDHH's termination of PPGC's Medicaid provider agreements violates their free-choice-of-provider rights under 42 U.S.C. § 1396a(a)(23). LDHH raises multiple challenges to the grant of the preliminary injunction. First, it insists that the district court erred in holding that the Individual Plaintiffs claims are substantially likely to succeed because (1) 42 U.S.C. § 1396a(a)(23) does not afford the Individual Plaintiffs a private right of action, and, in the alternative, (2) its termination action does not violate the Individual Plaintiffs' free-choice-of-provider rights. Second, LDHH contends that the district court committed clear error in holding that the remaining factors—irreparable injury to the plaintiffs, balancing of the injury to the plaintiffs versus the harm to the defendant, and the public interest—weigh in favor of issuing the preliminary injunction.

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[23] *Google, Inc. v. Hood*, 822 F.3d 212, 220 (5th Cir. 2016) (quoting *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 195–96 (5th Cir. 2003)).

[24] *Id.* (citing *Bluefield Water Ass'n v. City of Starkville*, 577 F.3d 250, 253 (5th Cir. 2009)).

A. Substantial Likelihood of Success

We first address whether 42 U.S.C. § 1396a(a)(23) affords the Individual Plaintiffs a private right of action and, if so, whether the Individual Plaintiffs are substantially likely to succeed in their claim that LDHH's termination of PPGC's provider agreements runs afoul of that right.

1. Private Right of Action

Joining every other circuit that has addressed this issue, we conclude that § 1396a(a)(23) affords the Individual Plaintiffs a private right of action under § 1983. Medicaid is a cooperative program between the federal government and the states under which the federal government gives financial assistance to states to provide medical services to Medicaid-eligible individuals. The federal government and participating states share the costs of Medicaid.[25] "In return, participating States are to comply with requirements imposed by the Act and by the Secretary of Health and Human Services."[26] This means that states "must comply with federal criteria governing matters such as who receives care and what services are provided at what cost."[27] In other words, "Medicaid offers the States a bargain: Congress provided federal funds in exchange for the

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[25] *Atkins v. Rivera*, 477 U.S. 154, 156–57 (1986) ("The Federal Government shares the costs of Medicaid with States that elect to participate in the program.").

[26] *Id.* at 157 (citing 42 U.S.C. § 1396a; *Schweiker v. Gray Panthers*, 453 U.S. 34, 36– 37 (1981)).

[27] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2581 (2012).

States' agreement to spend them in accordance with congressionally imposed conditions."[28]

This appeal concerns the contours of the federal Medicaid statute's free-choice-of-provider requirement, 42 U.S.C. § 1396a(a)(23). That provision mandates that "any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide him such services."[29] Discussing this provision in *O'Bannon v. Town Court Nursing Center*, the Supreme Court explained that it "gives recipients the right to choose among a range of *qualified* providers, without government interference."[30] Most recently, the Ninth Circuit explained that "[t]he provision specifies that any individual Medicaid recipient is free to choose any provider so long as two criteria are met: (1) the provider is 'qualified to perform the service or services required,' and (2) the provider 'undertakes to provide [the recipient] such services.'"[31]

Because the Individual Plaintiffs assert their claims under 42 U.S.C. § 1983, we analyze whether § 1396a(a)(23) creates a right of action under that statute. Title 42 U.S.C. § 1983 "provides redress only for a plaintiff who asserts a 'violation of a federal

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[28] *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1382 (2015) (Scalia, J.) (plurality opinion).

[29] 42 U.S.C. § 1396a(a)(23)(A).

[30] 447 U.S. 773, 785 (1980) (emphasis in original).

[31] *Planned Parenthood of Ariz. Inc. v. Betlach*, 727 F.3d 960, 967 (9th Cir. 2013) (second alteration in original) (quoting 42 U.S.C. § 1396a(a)(23)(A)).

right, not merely a violation of federal *law*.'"[32] To determine whether a federal statute provides a right of action enforceable under § 1983, we must determine "(1) whether Congress intended for the provision to benefit the plaintiff; (2) whether the plaintiff can show that the right in question is not so 'vague and amorphous' that its enforcement would 'strain judicial competence'; and (3) whether the statute unambiguously imposes a binding obligation on the states."[33]

Every circuit court to have addressed this issue, as well as multiple district courts, has concluded that § 1396a(a)(23) creates a private right enforceable under § 1983.[34] The Ninth Circuit in *Planned Parenthood Arizona Inc. v. Betlach* addressed this question most recently. As to the first element, that court held:

> The statutory language unambiguously confers [an individual] right upon Medicaid-eligible patients, mandating that all state

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[32] *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 602 (5th Cir. 2004) (quoting *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (emphasis in original)).

[33] *Id.*

[34] *See Planned Parenthood of Ariz.*, 727 F.3d 960; *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012); *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006); *Planned Parenthood of Kan. & Mid-Mo. v. Mosier*, No. 16-2284-JAR-GLR, 2016 WL 3597457 (D. Kan. July 5, 2016); *Planned Parenthood Se., Inc. v. Bentley*, 141 F. Supp. 3d 1207 (M.D. Ala. 2015); *Planned Parenthood Ark. & E. Okla. v. Selig*, No. 4:15-cv-566, slip op. (E.D. Ark. Oct. 2, 2015); *Women's Hosp. Found. v. Townsend*, No. 07-711, 2008 WL 2743284 (M.D. La. July 10, 2008).

> Medicaid plans provide that '*any individual* eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required.'[35]

As to the second element, the court held that "[t]he free-choice-of-provider requirement does 'supply concrete and objective standards for enforcement,'"[36] which are "well within judicial competence to apply."[37] It recognized that under the statute, Medicaid recipients have the right to choose any provider so long as "(1) the provider is 'qualified to perform service or services required,' and (2) the provider 'undertakes to provide [the recipient] such services.'"[38] According to the Ninth Circuit, courts addressing this provision confront "a simple factual question no different from those courts decide every day," and free from "any balancing of competing concerns or subjective policy judgments."[39]

In so holding, the Ninth Circuit rejected Arizona's contention that "qualified," as used in 42 U.S.C. § 1396a(a)(23)(A), is too vague to enforce. Because the term "is tethered to an objective benchmark"—"qualified *to perform the service or services required*"—"[a] court can readily determine whether a particular health care provider is qualified

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35 727 F.3d at 966 (quoting 42 U.S.C. § 1396a(a)(23)(A)).

36 *Id.* at 967 (quoting *Watson v. Weeks*, 436 F.3d 1152, 1161 (9th Cir. 2006)).

37 *Id.*

38 *Id.* (alteration in original) (quoting 42 U.S.C. § 1396a(a)(23)(A)).

39 *Id.*

to perform a particular medical service, drawing on evidence such as descriptions of the service required; state licensing requirements; the provider's credentials, licenses, and experience; and the expert testimony regarding the appropriate credentials for providing the service."[40]

The Seventh Circuit reached the same conclusion in *Planned Parenthood of Indiana, Inc. v. Commissioner of the Indiana State Department of Health*.[41] As to the third element—which the Ninth Circuit did not discuss at length because Arizona had not challenged that point—the Seventh Circuit held that the free-choice-of-provider requirement is couched in mandatory terms: "[T]he free-choice-of-provider statute explicitly refers to a specific class of people—Medicaid-eligible patients—and confers on them an individual entitlement—the right to receive reimbursable medical services from any qualified provider."[42] Likewise, the Sixth Circuit in *Harris v. Olszewski*[43] held that the free-choice-of-provider requirement provides a private right of action enforceable under § 1983.

We agree with the Sixth, Seventh, and Ninth Circuits and hold that 42 U.S.C. § 1396a(a)(23) creates a private right of action that these Individual Plaintiffs can enforce through 42 U.S.C. § 1983. LDHH's remaining arguments fail to convince us otherwise.

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[40] *Id.* at 967–68.

[41] 699 F.3d 962 (2012).

[42] *Id.* at 974.

[43] 442 F.3d 456 (2006).

LDHH and our dissenter rely on the Supreme Court's decision in *O'Bannon v. Town Court Nursing Center*[44] for the proposition that the Individual Plaintiffs have no right to challenge LDHH's provider-qualifications determination. That case is inapposite. There, the patient-plaintiffs' injuries were alleged to stem from a deprivation of due process rights, specifically, the right to a hearing to contest the state's decertification of a health care provider, not just its Medicaid qualification.[45] Specifically, the nursing home in question was found to not comply with statutes governing: (1) body and management, (2) medical direction, (3) physical services, (4) nursing services, (5) pharmaceutical services, (6) medical records, and (7) physical environment.[46] In contrast, the Individual Plaintiffs here assert the violation of a substantive right.[47] The Supreme Court's holding in *O'Bannon* that "while a patient has a right to continued benefits to pay for care in the qualified institution of his choice, he has no enforceable expectation of continued benefits to pay for care in an institution that has been determined to be unqualified,"[48] is thus not applicable here.

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[44] 447 U.S. 773 (1980).

[45] *Id.* at 776 n.3.

[46] *Id.*

[47] *See Planned Parenthood of Ind.*, 699 F.3d at 977 (distinguishing *O'Bannon* on the same basis). LDHH also relies on *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170 (2d Cir. 1991), but that case is distinguishable for the same reason as *O'Bannon*. *See Planned Parenthood of Ind.*, 699 F.3d at 977 (distinguishing *Kelly Kare* on the same basis).

[48] 447 U.S. at 786.

The statute speaks only in terms of recipients' rights rather than providers' rights, so the right guaranteed by § 1396a(a)(23) is vested in Medicaid recipients rather than providers. Providers like PPGC cannot bring a challenge pursuant to § 1396a(a)(23).[49] Reading *O'Bannon* to foreclose *every recipient's* right to challenge a disqualification decision would render the right guaranteed by § 1396a(a)(23) nugatory.

Notably, the Court decided *O'Bannon* in the context of a state's enforcement action. In that case, Pennsylvania had decertified Town Court Nursing Center ("Town Court") because "it no longer met the statutory and regulatory standards for skilled nursing facilities."[50] Three days later, Pennsylvania terminated the Medicaid provider agreement with Town Court.[51] The Supreme Court held:

> When *enforcement of [minimum standards of care] requires decertification of a facility*, there may be an immediate, adverse impact

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[49] *See* § 1396a(a)(23) (requiring state plans provide that "any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide him such services"); *cf. Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990) (finding that provision requiring states to reimburse providers at reasonable and adequate rates gave providers an enforceable right under the Medicaid law). Providers might have an administrative remedy in state court—as PPGC did in this case—but "[t]he availability of state administrative procedures ordinarily does not foreclose resort to § 1983." *Id.* at 523.

[50] *O'Bannon*, 447 U.S. at 775–76.

[51] *Id.* at 776.

> on some residents. But surely that impact, which is an indirect and incidental result of the Government's enforcement action, does not amount to a deprivation of any interest in life, liberty, or property.[52]

In other words, the plaintiffs had no right to reside in an unqualified facility *when the disqualification decision was connected to the state's enforcement of its health and safety regulations*.[53] This makes sense: If it were otherwise, patients could freely intervene in state enforcement actions against facilities that violate health and safety standards.

This case is different. Louisiana has never complained that PPGC is not competent to render the relevant medical services, and it has taken no independent action to limit or terminate PPGC's entitlement to render medical services to the general population, for example, by revoking its license. Instead, Louisiana terminated only PPGC's Medicaid provider agreement. The Individual Plaintiffs in this case are not challenging "the merits of the decertification decision," as did the plaintiffs in *O'Bannon*, because here there was no decertification decision. When, as here, a state terminates only a Medicaid provider agreement, independent of any action to

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[52] *Id.* at 787 (emphasis added); *see also id.* at 790 (concluding that "the enforcement by [Pennsylvania] of [its] valid regulations did not directly affect the patients' legal rights or deprive them of any constitutionally protected interest in life, liberty, or property").

[53] *See Kelly Kare*, 930 F.2d at 178 ("In *O'Bannon*, the Supreme Court held that Medicaid-eligible nursing home patients did not have a vested right to choose a nursing home *that was being decertified as a health-care provider*." (emphasis added)).

enforce statutory and regulatory standards, *O'Bannon* is inapposite. The Individual Plaintiffs in this case are trying to sustain their "right to choose among a range of *qualified* providers, without government interference"—a right explicitly recognized in *O'Bannon*.[54]

LDHH's reliance on the recent Supreme Court opinion, *Armstrong v. Exceptional Child Center, Inc.*,[55] is equally misplaced. There, the relevant issue was whether 42 U.S.C. § 1396a(a)(30)(A)—not § 1396a(a)(23) —creates a private right of action.[56] Writing for a plurality, Justice Scalia noted that this provision "lacks the sort of rights-creating language needed to imply a private right of action," because it "is phrased as a directive to the federal agency . . . , not as a conferral of the right to sue upon the beneficiaries of the State's decision to participate in Medicaid."[57] Justice Scalia also observed that § 1396a(a)(30)(A) was "judicially unadministrable": "It is difficult to imagine a requirement broader and

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[54] 447 U.S. at 785 (emphasis in original).

[55] 135 S. Ct. 1378 (2015).

[56] That provision of the Medicaid statute requires state plans to "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area[.]" 42 U.S.C. § 1396a(a)(30)(A).

[57] *Armstrong*, 135 S. Ct. at 1387.

less specific than § 30(A)'s mandate that state plans provide for payments that are 'consistent with efficiency, economy, and quality of care,' all the while 'safeguard[ing] against unnecessary utilization of . . . care and services.'"[58] In contrast, § 1396a(a)(23)—the provision at issue here—is phrased in individual terms that are specific and judicially administrable, as recognized by the Sixth, Seventh, and Ninth Circuits.

LDHH finally insists that § 1396a(a)(23) provides Medicaid recipients with only the right to choose a qualified provider, not the right to choose a provider that LDHH has deemed unqualified. Understandably, LDHH does not take the next inferential step, but it follows that the free-choice-of-provider requirement 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. Otherwise, any right to which the Individual Plaintiffs are entitled to under § 1396a(a)(23) would be hollow.[59] Importantly, the Individual Plaintiffs insist that LDHH has deprived them of their choice to receive care from PPGC—a provider that LDHH has conceded is competent to render the relevant medical services—for reasons *unrelated to its competence*. The operative issue,

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[58] *Id.* at 1385 (alteration and omission in original).

[59] *See Planned Parenthood Se.*, 141 F. Supp. 3d at 1218 ("If [it] were correct that allegedly unlawful terminations of provider agreements could not be challenged by recipients pursuant to the free-choice-of-provider provision, that provision's '*individual* entitlement,' the 'personal right' it gives recipients, would be an empty one." (quoting *Planned Parenthood of Ind.*, 699 F.3d at 974)).

therefore, is resolved by determining whether LDHH terminated PPGC's Medicaid provider agreements based on its qualifications or based on some unrelated reason.

2. Likelihood of Success

Having concluded that § 1396a(a)(23) affords the Individual Plaintiffs a right of action, we next ask whether they are likely to substantially succeed on their claim that LDHH's termination of PPGC's Medicaid provider agreements violates their rights under § 1396a(a)(23).

a. Statutory Background

The free-choice-of-provider requirement mandates that a state's Medicaid plan must allow beneficiaries to obtain medical care from *any* entity or person who is "qualified to perform the service or services required" and "who undertakes to provide him such services."[60] Medicaid regulations allow states to set "reasonable standards relating to the qualifications of providers."[61] The Medicaid statute does not define the term "qualified," but LDHH concedes that, as held by the Seventh and Ninth Circuits, "[t]o be 'qualified' in the relevant sense is to be capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner."[62] Separately, Medicaid's exclusion

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60 42 U.S.C. § 1396a(a)(23)(A).

61 42 C.F.R. § 431.51(c)(2).

62 *Planned Parenthood of Ind.*, 699 F.3d at 978; *see also Planned Parenthood of Ariz.*, 727 F.3d at 969 ("We agree with the Seventh Circuit that '[r]ead in context, the term 'qualified' as used in § 1396a(a)(23) unambiguously relates to a provider's . . . capab[ility] of performing the needed medical services in a

[Footnote continued on next page]

provision, 42 U.S.C. § 1396a(p)(1), provides, "[i]n addition to any other authority," mandatory and permissive grounds—including fraud, drug crimes, and failure to disclose necessary information to regulators—under which a state may terminate a provider's Medicaid agreements. That provision's implementing regulation states that "[n]othing contained in this part should be construed to limit a State's own authority to exclude an individual or entity from Medicaid for any reason or period authorized by State law."[63]

Against this backdrop, the Seventh Circuit, in *Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana State Department of Health*, upheld a district court's entry of a preliminary injunction that prevented Indiana from enforcing a law that "excludes a class of providers from Medicaid for reasons unrelated to provider qualifications" because Planned Parenthood was likely to succeed on its claim that the law violated 42 U.S.C. § 1396a(a)(23).[64] The law at issue prohibited state agencies from providing state or federal funds to "any entity that performs abortions or maintains or operates a facility where abortions are performed."[65] The Seventh Circuit recognized that "[a]lthough Indiana has broad authority to exclude unqualified

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professionally competent, safe, legal, and ethical manner.'" (alterations and omissions in original) (quoting *Planned Parenthood of Ind.*, 699 F.3d at 978)).

63 42 C.F.R. § 1002.2.

64 *Planned Parenthood of Ind.*, 699 F.3d at 980.

65 *Id.* at 967 (quoting Ind. Code § 5-22-17-5.5(b)).

providers from its Medicaid program, the State does not have plenary authority to exclude a class of providers for *any* reason—more importantly, for a reason unrelated to provider qualifications."[66] Because the law "exclude[d] Planned Parenthood from Medicaid for a reason unrelated to its fitness to provide medical services, [it] violat[ed] its patients' statutory right to obtain medical care from the qualified provider of their choice."[67]

The Ninth Circuit addressed a similar law in *Planned Parenthood Arizona Inc. v. Betlach*.[68] That court held that the "law violates [the free-choice-of-provider] requirement by precluding Medicaid patients from using medical providers concededly qualified to perform family planning services to patients in Arizona generally, solely on the basis that those providers separately perform privately funded, legal abortions."[69] In doing so, the Ninth Circuit rejected Arizona's contention that it "can determine for any reason that a provider is not qualified for Medicaid purposes, even if the provider *is* otherwise legally qualified, through training and licensure, to provide the requisite medical services within the

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66 *Id.* at 968.

67 *Id.*

68 The law at issue provided: "[Arizona] or any political subdivision of [Arizona] may not enter into a contract with or make a grant to any person that performs nonfederally qualified abortions or maintains or operates a facility where nonfederally qualified abortions are performed for the provision of family planning services." 2012 Ariz. Leg. Serv. Ch. 288 (H.B. 2800) (West) (codified at Ariz. Rev. Stat. § 35-196.05(B)).

69 *Planned Parenthood Ariz.*, 727 F.3d at 963.

state."[70] That court gave four reasons, each of which we view as applicable here.

First, "[n]owhere in the Medicaid Act has Congress given a special definition to 'qualified,' much less indicated that each state is free to define this term for purposes of its own Medicaid program however it sees fit."[71] Second, that reading would "detach[] the word 'qualified' from the phrase in which it is embedded; 'qualified to perform the service or services rendered' (and from the overall context of the Medicaid statute, which governs *medical* services)."[72] Third, that reading would render the free-choice-of-provider requirement "self-eviscerating" because "[i]f states are free to set any qualifications they want—no matter how unrelated to the provider's fitness to treat Medicaid patients—then the free-choice-of-provider requirement could be easily undermined by simply labeling any exclusionary rule as a 'qualification.'"[73] "Giving the word 'qualified' such an expansive meaning would deprive the provision within which it appears of any legal force," and "would permit states freely to erect barriers to Medicaid patients' access to family planning medical providers others in the state are free to use."[74] This "would eliminate 'the broad access to medical care that § 1396a(a)(23) is meant to preserve.'"[75] Finally, "permit[ting] states self-

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[70] *Id.* at 970 (emphasis in original).

[71] *Id.*

[72] *Id.* (emphasis in original).

[73] *Id.* (quoting *Planned Parenthood of Ind.*, 699 F.3d at 978).

[74] *Id.*

[75] *Id.* (quoting *Planned Parenthood of Ind.*, 699 F.3d at 978).

referentially to impose for Medicaid purposes whatever standards for provider participation it wishes" would contravene the "*mandatory* requirements [in the free-choice-of-provider provision] that apply to all state Medicaid plans."[76]

The Seventh and Ninth Circuits have also addressed the impact of Medicaid's exclusion provision, 42 U.S.C. § 1396a(p). LDHH seems to rely on 42 U.S.C. § 1396a(p)(1) for only its introductory phrase: "In addition to any other authority." Like Arizona and Indiana, LDHH contends that this phrase allows a state to exclude a provider for "any" reason supplied by state law. The Seventh and Ninth Circuits flatly rejected that same contention.[77]

In doing so, the Seventh Circuit explained that this argument "reads the phrase for more than it's worth."[78] The phrase—"[i]n addition to any other authority"—"signals only that what follows is a non-exclusive list of specific grounds upon which states may bar providers from participating in Medicaid."[79] "It does not imply that the states have an unlimited

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[76] *Id.* at 971 (emphasis in original).

[77] The First Circuit in *First Medical Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46 (1st Cir. 2007), however, read 42 U.S.C. § 1396a(p)(1)'s "[i]n addition to any other authority" language much more broadly. That court held that the "'any other authority' language was intended to permit a state to exclude an entity from its Medicaid program for *any* reason established by state law." *Id.* at 53. That case is distinguishable because it did not involve § 1396a(a)(23)'s free-choice-of-provider requirement, most notably because § 1396a(a)(23) does not apply in Puerto Rico, the forum from which the dispute arose in *Vega-Ramos*.

[78] *Planned Parenthood of Ind.*, 699 F.3d at 979.

[79] *Id.*

authority to exclude providers for any reason whatsoever."[80]

The Ninth Circuit adopted the Seventh Circuit's reasoning and further explained why this assertion "undermines, rather than aids, [the state's] argument":

> The language refers to "any *other* authority" . . . , followed by a provision providing states with authority to exclude providers on specified grounds. This sequence indicates that the Medicaid Act itself must provide that "other" authority, just as it supplies the "authority" covered by the rest of the subsection. Were it otherwise—were states free to exclude providers as they see fit—then the bulk of § 1396a(p)(1) itself would be unnecessary, as the "authority" it supplies would be superfluous.[81]

According to the Ninth Circuit, this "clause empowers states to exclude individual providers on such grounds directly, without waiting for the Secretary to act, while also reaffirming state authority to exclude individual providers pursuant to analogous state law provisions relating to fraud or misconduct."[82] As to § 1396a(p)'s implementing regulation, 42 C.F.R. § 1002.2, which provides that "[n]othing contained in this part should be construed to limit a State's own authority to exclude an individual or entity from Medicaid for any reason or period authorized by

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[80] *Id.*

[81] *Planned Parenthood of Ariz.*, 727 F.3d at 972.

[82] *Id.*

State law," the Ninth Circuit noted that "[t]hat provision is only a limitation on interpretation of the referenced 'part' of the regulations . . . which does not encompass the free-choice-of-provider requirement."[83]

While as a general rule a state may terminate a provider's Medicaid agreements for reasons bearing on that provider's general qualification to provide medical services, we are not aware of any case that holds a state may do so while continuing to license a provider's authorization to offer those same services to non-Medicaid patients. "Qualified" means "to be capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner."[84] States may also exclude providers on the grounds provided by 42 U.S.C. § 1396a(p)(1) and on analogous state law grounds relating to a provider's qualification. Although states retain broad authority to define provider qualifications and to exclude providers on that basis, their authority is circumscribed by the meaning of "qualified" in this context.

b. Analysis

LDHH insists that its termination of PPGC's Medicaid qualifications do not violate the Individual Plaintiffs' free-choice-of-provider rights because LDHH has determined that PPGC is not "qualified" to render medical services to Medicaid patients. As noted, LDHH offers three grounds for its terminations: (1) two qui tam FCA claims, one that PPGC

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[83] *Id.* at 972 n.8; *accord Planned Parenthood of Se.*, 141 F. Supp. 3d at 1221.

[84] *Planned Parenthood of Ind.*, 699 F.3d at 978.

settled, disclaiming all liability, and another that was pending at the time of LDHH's termination action, but that has recently settled with PPGC disclaiming all liability; (2) unspecified misrepresentations in PPGC's letters responding to LDHH's inquiry into whether PPGC or PPCFC operate a fetal tissue donation program; and (3) LDHH's and the Louisiana Office of Inspector General's pending investigations into PPGC. But, none of these three grounds is directed at PPGC's qualification to render medical services to Medicaid patients.

We agree with the district court that the Individual Plaintiffs are substantially likely to succeed in proving that LDHH's termination of PPGC's Medicaid provider agreements violates their free-choice-of-provider rights. This is because LDHH's grounds for termination (1) do not relate to PPGC's "qualifications," (2) are not authorized by § 1396a(p), and (3), with one exception, are not even authorized by state law.

We observe initially that LDHH does not even attempt to articulate how its grounds for termination relate to PPGC's qualifications. That failure is exacerbated by the fact that LDHH has separately conceded that PPGC is competent to provide the relevant medical services. LDHH adopts the Seventh and Ninth Circuits definition of "qualified" and contends that its grounds for termination fall within the statute's broad meaning of "qualified." But LDHH makes no attempt to reconcile its grounds for termination with its borrowed definition of "qualified." Its briefing is devoid of argument on this point, and LDHH's grounds for termination do not speak for themselves. LDHH cannot show that PPGC's settlement of qui tam FCA claims, in which it *disclaimed*

all liability, constitutes actual fraud or renders PPGC unqualified in some other way. Neither does LDHH explain how unspecified misrepresentations related to a program, the existence of which PPGC unequivocally denies, render PPGC unqualified. Likewise, that PPGC is the subject of an investigation does not alone render PPGC unqualified. Importantly, LDHH raises no separate concerns regarding PPGC's provision of medical services in Louisiana. Indeed, it bears repeating that LDHH has conceded that PPGC is competent to provide the relevant medical services to any and all non-Medicaid patients.

Instead of attempting to show that PPGC is not "qualified" under § 1396a(a)(23), LDHH seems to rely on its bald assertion that it may terminate a provider for *any reason* supplied by state law. In other words, LDHH argues that PPGC is unqualified simply because state law says so. The fallacy of this circular tactic is underscored by LDHH's failure to articulate or apply any limiting principle to its authority to exclude any Medicaid provider. We reject that argument because, as explained by the Ninth Circuit, a state cannot "determine for any reason that a provider is not qualified for Medicaid purposes, even if the provider *is* otherwise legally qualified, through training and licensure, to provide the requisite medical services within the state."[85]

Neither does LDHH even assert that its grounds for termination are consistent or analogous with 42 U.S.C. § 1396a(p)(1)'s enumerated grounds for exclusion. LDHH might have attempted to make

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85 *Planned Parenthood of Ariz.*, 727 F.3d at 970 (emphasis in original).

some argument as to this point, but it has not invoked any of the grounds for termination provided by § 1396a(p)(1). This is likely because, as the United States's amicus curiae brief explains, LDHH's grounds for termination are not authorized by any of the grounds enumerated in § 1396a(p)(1). And, to the extent LDHH relies on that provision's "[i]n addition to any other authority" language, we join the Seventh and Ninth Circuits in rejecting such an overbroad interpretation.

Finally, two of LDHH's grounds for termination—fraud and misrepresentations by PPGC—are not even supported by the state laws it invokes. LDHH labels its first ground for termination as "fraud," citing two FCA suits filed against PPGC by qui tam plaintiffs. As to the first suit, LDHH asserts that it may exclude PPGC for (1) settling a qui tam FCA suit, and (2) failing to notify LDHH of the settlement. We have noted that, in *Reynolds v. Planned Parenthood of Gulf Coast, Inc.*, PPGC settled a qui tam FCA suit *while denying all liability*. Louisiana Administrative Code Title 50 § 4147(A)(12) states that a Medicaid provider may be terminated for "entering into a settlement agreement under . . . the Federal False Claims Act," and further places an "affirmative duty" on a provider to inform LDHH in writing of any violations. But, that same statute states that "[i]f a False Claims Act action or other similar civil action is brought by a Qui-Tam plaintiff, no violation of this provision has occurred until the defendant has been found liable in the action."[86] Because PPGC settled the *Reynolds* qui tam FCA

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[86] LA. ADMIN CODE tit. 50 § 4147(A)(12)(c).

claim without admitting liability, that settlement cannot provide the basis for applying the subject statute.

LDHH next cites another qui tam FCA case against PPGC, *Carroll v. Planned Parenthood Gulf Coast*. At the time of the district court's opinion and the parties' briefing, that case was still pending and the trial court had denied PPGC's motion to dismiss. LDHH argued that this lawsuit creates a violation of Title 50 of the Louisiana Administrative Code because providers

> "are required to ensure that all their agents and affiliates are in compliance with all federal and state laws as well as rules, policies and procedures of the Medicaid program. PPGC and its parent organization PPFA has failed to do so and has failed to notify DHH of violations and misconduct by affiliates and providers-in-fact."

In so arguing, LDHH failed to demonstrate how the district court's denial of a motion to dismiss in a pending lawsuit indicates that PPGC had violated any laws or Medicaid program requirements. More significantly, on May 25, 2016, PPGC filed a Rule 28(j) letter with this court, informing us that PPGC had settled that suit as of February 29, 2016, *without admitting liability*. Accordingly, the *Carroll* case provides no basis for termination.

LDHH's asserted termination on the basis of "misrepresentations" suffers from similar flaws. Louisiana Revised Statute § 46:437.14(A)(1) states that a provider's enrollment may be revoked for a

"[m]isrepresentation."[87] That statute separately defines "misrepresentation" to mean "the knowing failure to truthfully or fully disclose any and all information required, or the concealment of any and all information required on a claim or a provider agreement or the making of a false or misleading statement to the department *relative to the medical assistance programs*."[88]

LDHH posits that PPGC made misrepresentations in responding to questions about whether it operates a fetal tissue donation program, as evidenced by one of the discussed videos, which serves as LDHH's sole basis for application of La. R.S. § 46:437.14(A)(1) and PPGC's termination. Neither in the letters nor at any time during this litigation

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[87] This provision is part of Louisiana's Medical Assistance Programs Integrity Law, La. R.S. § 437.1 *et seq.*, which was "enacted to combat and prevent fraud and abuse committed by some health care providers participating in the medical assistance programs and by other persons and to negate the adverse effects such activities have on fiscal and programmatic integrity." La. R.S. § 437.2(A). More specifically, the Louisiana legislature sought to provide a remedy against "health care providers and other persons who engage in fraud, misrepresentation, abuse, or other ill practices . . . *to obtain payments* to which these health care providers or persons are not entitled." La. R.S. § 437.2(B) (emphasis added).

[88] La. R.S. § 46:437.3(15) (emphasis added); *see also Caldwell v. Janssen Pharm., Inc.*, 144 So. 3d 898, 911 (La. 2014) ("[W]e determine that a 'misrepresentation' under La. Rev. Stat. 46:437.3(15) is (1) the knowing failure to truthfully or full disclose any information required on a claim or provider agreement; (2) the concealment of any and all information required on a claim or provider agreement; or (3) the making of a false or misleading statement to the department relative to the medical assistance programs.").

has LDHH identified a single misrepresentation. Moreover, the undisputed evidence establishes that PPGC does not perform any abortions or operate any fetal tissue donation programs.[89] The district court found that the undisputed evidence revealed no indication that PPGC had made any misrepresentations, and LDHH does not even challenge that factual finding on appeal. LDHH's only response is that its lack of specificity regarding the misrepresentations "should be addressed at an administrative hearing." LDHH's strategy to terminate PPGC's provider agreements for misrepresentations *before* it can even identify a single misrepresentation does not pass muster.

Additionally, the statute cited by LDHH requires the misrepresentation to be made "relative to the medical assistance programs."[90] Because the undisputed evidence establishes that PPGC does not provide abortions or operate a fetal tissue donation program in Louisiana (or elsewhere), any statements contained in PPGC's response to the state's inquiry are likely not "relative to" Louisiana's Medicaid program. This conclusion is bolstered by LDHH's August 4, 2015 letter that cites two statements made in relation to PPCFC, a separate Texas corporation, not to PPGC, as contradicting statements made in one of the videos.[91] LDHH provides no explanation of

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[89] PPGC's August 14, 2015 letter states: "To be very clear, there is no contradiction here. As already stated, neither PPCFC nor PPGC currently has a fetal tissue donation program in Texas, and neither sells nor donates any fetal tissue."

[90] La. R.S. § 46:437.3(15).

[91] In the August 4, 2015, letter, LDHH recites two responses PPGC made in relation to *only* PPCFC's operations. It then

[Footnote continued on next page]

how the unspecified misrepresentations are "relative to" Louisiana's Medicaid program.[92] For this reason alone, the statute is inapplicable.

As to LDHH's final ground for termination—pending investigations—Louisiana Revised Statute § 46:437.11(D)(2) states that the "secretary may terminate a provider agreement immediately and without written notice if a health care provider is the subject of a sanction or of a criminal, civil, or departmental proceeding." That provision appears to be facially applicable to PPGC as it is the subject of ongoing investigations. Regardless, we cannot reconcile the free-choice-of-provider requirement's mandate with a state law that would enable LDHH to terminate a Medicaid provider agreement by simply instigating an investigation, much less on the basis of just *any* pending investigation. If states were able to exclude Medicaid providers on the basis of *any* investigation, § 1396a(a)(23)'s guarantee would be meaningless. And here, the investigations pertain to conduct that, as described, does not independently provide grounds for termination.

c. Limits of Our Opinion

In concluding that the Individual Plaintiffs are likely to succeed in proving that LDHH's termination of PPGC's provider agreements violates their § 1396a(a)(23) rights, we reiterate for emphasis the

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[Footnote continued from previous page]

states that those responses were contradicted by one of the Center for Medical Progress's videos made on April 9, 2015.

[92] Had LDHH come forward with evidence of PPGC's misrepresentations, it is possible LDHH would have had a valid reason for terminating PPGC as a Medicaid provider.

unique circumstances of the instant case. LDHH initially purported to terminate PPGC's agreements "at will," *i.e.*, for no reason at all. That termination would plainly have run afoul of § 1396a(a)(23)'s guarantee. Despite LDHH's categorization of its termination as "at will," then-Governor Jindal released a contemporaneous statement indicating that the state was terminating PPGC's agreements "because Planned Parenthood does not represent the values of the State of Louisiana in regards to respecting human life." Again, that termination would violate the Individual Plaintiffs' § 1396a(a)(23) rights because, as the Seventh and Ninth Circuits have held, a state may not exclude a provider simply based on the scope of the services it provides.

Only after the Plaintiffs filed suit to challenge that termination did LDHH rescind its "at will" terminations and represent to the district court that it believed the Plaintiffs' claims were moot. But, as noted above, LDHH's gamesmanship was not over: The very next day, it issued new termination letters to PPGC, which provided new grounds for termination. LDHH has effectively run circles around PPGC and the district court. This course of conduct further convinces us that LDHH's termination of PPGC's Medicaid provider agreements has nothing to do with PPGC's qualifications.

To be sure, the general grounds for termination invoked by LDHH—fraud, misrepresentations, and investigations—might well relate to a provider's qualifications. States undoubtedly must be able to terminate provider agreements in cases of criminal activity, fraud and abuse, and other instances of malfeasance. Medicaid's 42 U.S.C. § 1396a(p)(1)'s exclusionary provision makes that clear. And, there

is no dispute that Louisiana retains authority to establish licensing standards and other qualifications for providers.[93] Title 42 U.S.C. § 1320a-7(b)(4) expressly contemplates that a state licensing authority may revoke a provider's license "for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity," and that the Secretary may exclude such a provider from any federal health care program under that provision. Hence, 42 U.S.C. § 1396a(p)(1), which cross references § 1320a-7(b)(4), necessarily authorizes states to terminate a Medicaid provider's agreements when that state revokes that provider's license "for reasons bearing on the [provider's] professional competence, professional performance, or financial integrity." It bears repeating, however, that LDHH has taken *no action* to revoke PPGC's license and has not called into question any qualification that enables PPGC to offer medical care generally.

At the most, LDHH has simply pasted the labels of "fraud" and "misrepresentations" on PPGC's conduct, and then insisted that alone these content-less labels somehow insulate its termination actions from any § 1396a(a)(23) challenges. LDHH is seeking to do exactly what the Seventh and Ninth Circuits warned against: "simply labeling any exclusionary rule as a 'qualification'" to evade the mandate of the free-

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93 *See Planned Parenthood of Ind.*, 699 F.3d at 980 ("No one disputes that the states retain considerable authority to establish licensing standards and other related practice qualifications for providers—this residual power is inherent in the cooperative-federalism model of the Medicaid program and expressly recognized in the Medicaid regulations.").

choice-of-provider requirement.[94] PPGC's settlement of qui tam FCA claims *without admitting liability* does not constitute fraud under any definition of that term. And LDHH's accusation that PPGC made misrepresentations related to inquiries into whether it operates a fetal tissue donation program is devoid of any factual support or linkage. Neither can LDHH's labeling of its grounds for termination as fraud and misrepresentations insulate its actions from a § 1396a(a)(23) challenge. If it were otherwise, states could terminate Medicaid providers with impunity and avoid § 1396a(a)(23)'s mandate altogether.

We repeat yet again for emphasis that LDHH has never once complained that PPGC is not competent to render the relevant medical services, and it has taken no independent action to limit or terminate PPGC's entitlement to render medical services to the general population, for example, by revoking its license. As a result, LDHH's termination of PPGC's Medicaid provider agreements would produce precisely the anomalous result that the free-choice-of-provider provision is meant to avoid, *viz.*, LDHH would deny PPGC's services only to Medicaid recipients while leaving all other individuals free to obtain the very same services from PPGC. But, "the free-choice-of-provider provision unambiguously requires that states participating in the Medicaid program allow covered patients to choose among the family planning medical practitioners they could use were they paying out of their own pockets."[95]

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[94] *Id.* at 978; *Planned Parenthood of Ariz.*, 727 F.3d at 970.

[95] *Planned Parenthood of Ariz.*, 727 F.3d at 971.

In sum, we conclude that the Individual Plaintiffs are substantially likely to succeed in showing that LDHH's termination of PPGC's provider agreements violates their rights under § 1396a(a)(23). This is because LDHH seeks to terminate PPGC's Medicaid provider agreements for reasons unrelated to its qualifications.

B. Remaining Factors

Finally, we turn to the other issues weighed by the district court: irreparable injury; harm to the enjoined party; public interest.

As to whether the Individual Plaintiffs will suffer irreparable injury in the absence of a preliminary injunction, LDHH first contends that because § 1396a(a)(23) guarantees the Individual Plaintiffs the right to choose only a *qualified* provider, they will suffer no harm because PPGC is not qualified. We have already rejected that obviously flawed circular argument.

LDHH next asserts that irreparable injury may not be presumed from a statutory violation, and the Individual Plaintiffs' legal injury is not sufficiently concrete, great, and imminent to constitute irreparable harm. LDHH further contends that any inconvenience the Individual Plaintiffs sustain by being forced to seek medical care elsewhere is not signifycant enough to support a finding of irreparable harm.

The district court determined that the Individual Plaintiffs would suffer irreparable injury because they will not be able to obtain medical care from the Medicaid provider of their choice. The court relied on "uncontroverted" declarations, in which the Individual Plaintiffs state that they wish to continue receiving care at PPGC and that they do not know

where else they could get the same kind and quality of care. The court further emphasized that even if the Individual Plaintiffs could find medical care elsewhere, this is beside the point: The Individual Plaintiffs would still be denied the provider of their choice, a right guaranteed under 42 U.S.C § 1396a(a)(23).

The Seventh Circuit squarely addressed this issue, rejecting an identical argument from the state:

> Indiana maintains that any harm to [the] patients is superficial because they have many other qualified Medicaid providers to choose from in every part of the state. This argument misses the mark. That a range of qualified providers remains available is beside the point. Section 1396a(a)(23) gives Medicaid patients the right to receive medical assistance from the provider of their choice without state interference, save on matters of qualifications.[96]

The Ninth Circuit has also stated that "[t]here is no exception to the free-choice-of-provider requirement for 'incidental' burdens on patient choice."[97] Separately, that circuit has "several times held that beneficiaries of public assistance may demonstrate a risk of irreparable injury by showing that enforcement of a proposed rule may deny them needed medical care."[98]

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[96] *Planned Parenthood of Ind.*, 699 F.3d at 981.

[97] *Planned Parenthood of Ariz.*, 727 F.3d at 975.

[98] *M.R. v. Dreyfus*, 697 F.3d 706, 732 (9th Cir. 2011) (internal quotation marks omitted).

We are satisfied that the district court did not clearly err in holding that the Individual Plaintiffs will suffer irreparable harm, absent entry of a preliminary injunction, while this case plays out. Because the Individual Plaintiffs would otherwise be denied both access to a much needed medical provider and the legal right to the qualified provider of their choice, we agree that they would almost certainly suffer irreparable harm in the absence of a preliminary injunction.

LDHH next urges that its substantial interest in administering its Medicaid program—overseeing the expenditures of the state's Medicaid funds and ensuring that Medicaid providers are complying with applicable laws and regulations—outweighs any injury to the Individual Plaintiffs, which it construes as "the mere inconvenience . . . of having longer wait times or longer lead times for appointments for family planning services." The district court rejected this rationale, holding that LDHH will not be deprived of its ability to administer Louisiana's Medicaid program. Rather, the injunction relates only to LDHH's attempt to terminate a single provider. The district court also held that any interest of the state is outweighed by the harm the Individual Plaintiffs will suffer.

The district court did not commit clear error in concluding that the harm to the Individual Plaintiffs will outweigh any harm inflicted on LDHH. As to its interest in administering the state's Medicaid program, LDHH can never have a legitimate interest in administering that program in a manner that violates federal law.

As to LDHH's fiscal interests, the Ninth Circuit addressed a balancing of similar interests in

Independent Living Center of Southern California, Inc. v. Maxwell-Jolly.[99] It explained that because a "budget crisis does not excuse ongoing violations of federal law, particularly when there are no adequate remedies available other than an injunction," "[s]tate budgetary considerations do not therefore, in social welfare cases, constitute a critical public interest that would be injured by the grant of preliminary relief."[100] "In contrast, there is a robust public interest in safeguarding access to health care for those eligible for Medicaid, whom Congress has recognized as 'the most needy in the country.'"[101] The Fourth Circuit has reached a similar conclusion: "Although we understand that the North Carolina legislature must make difficult decisions in an imperfect fiscal climate, the public interest in this case lies with safeguarding public health rather than with assuaging North Carolina's budgetary woes."[102]

For these reasons, we hold that the district court did not commit clear error in ruling that the harm to the Individual Plaintiffs outweighs any harm that the state might experience.

Finally, LDHH challenges the district court's determination that an injunction serves the public interest. It contends that the general public has an interest in the proper expenditure of the state's Medicaid funds, including the oversight of providers

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99 572 F.3d 644 (9th Cir. 2009), *vacated and remanded on other grounds*, 132 S. Ct. 1204 (2012).

100 *Id.* at 659.

101 *Id.* (quoting *Schweiker v. Hogan*, 457 U.S. 569, 590 (1982) (quoting H.R. Rep. No. 89-213, at 66 (1965))).

102 *Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013).

who are receiving those funds. The district court determined that the injunction serves the public interest by ensuring that Medicaid recipients have continuing access to medical care at PPGC.

Because LDHH's termination of PPGC's Medicaid provider agreements likely violates federal law, there is no legitimate public interest in allowing LDHH to complete its planned terminations of those agreements under these immediate facts. Instead, the public interest weighs in favor of preliminarily enforcing the Individual Plaintiffs' rights and thereby allowing some of the state's neediest citizens to continue receiving medical care from a medically qualified provider. We emphasize that "there is a legitimate public interest in safeguarding access to health care for those eligible for Medicaid."[103] The district court did not err in ruling that preliminarily enjoining LDHH's terminations will serve the public interest.

C. The Dissent

We close where we began. Despite the obvious scholarship of its able author, the dissent cannot avoid the determinative distinction between this case and *O'Bannon*. There, because the state decertified the medical provider totally for failure to meet statutory and regulatory requirements for certification as a skilled nursing facility, the Supreme Court held that none of its former clientele – implicitly, whether covered by Medicaid or commercial insurance – had standing to advance constitutional claims because they were only affected incidentally. Here, Louisiana

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[103] *Maxwell-Jolly*, 572 F.3d at 659.

did not decertify PPGC or reference failure to meet any statutory or regulatory requirements. It only prevented it from providing Medicaid funded treatment to the impoverished women of the State: The financially independent women of the State (or at least those covered by commercial health plans or their own bank accounts) can continue to be fully served by PPGC. Although, the opinion in *O'Bannon* does not expressly state whether the state's decertification of the facility caused it to go out of business entirely, we are satisfied that decertification had a crippling effect on the institution even if it did not cause it to shut down totally. Not so in this case. In sum, the institution in *O'Bannon* was decertified for reasons having to do with the quality of care provided to patients. Here, the state has not impugned the quality of PPGC's care, and it will continue in business: Only its Medicaid patients will be prevented from receiving treatment there. Although this fact alone does not automatically confer a private right of action, the dissent cannot avoid this distinction, which makes *O'Bannon* fully inapplicable.

CONCLUSION

We hold that the Individual Plaintiffs met their burden of proving their entitlement to a preliminary injunction. We also hold that the district court did not abuse its discretion in preliminarily enjoining LDHH's termination of PPGC's Medicaid provider agreements. In so doing, we have addressed only the facts and issues necessary to address the district court's preliminary injunction. Our determinations do not bind any future summary judgment or merits

panels.[104] The district court's preliminary injunction is AFFIRMED and this case is REMANDED for further proceedings consistent herewith.

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104 *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013).

PRISCILLA R. OWEN, Circuit Judge, dissenting:

I respectfully dissent because the majority opinion conflicts with the Supreme Court's decision in *O'Bannon v. Town Court Nursing Center*, which held that a Medicaid beneficiary does not have a right based on 42 U.S.C. § 1396a(a)(23) to challenge *the merits* of a State's assertion that a provider of Medicaid services is no longer qualified to provide Medicaid services or to challenge the State's termination of a provider's Medicaid agreements on the basis of the provider's noncompliance with state and federal regulatory requirements.[1] In *O'Bannon*, the Court held that § 1396a(a)(23) did not give Medicaid patients a right to litigate whether a provider was "qualified" within the meaning of that statute.[2] The majority opinion in the present case holds just the opposite, and none of the bases on which it attempts to distinguish *O'Bannon* withstands scrutiny.

In the case before our court, the Secretary of the Louisiana Department of Health and Hospitals (LDHH) gave notice that it intended to terminate the Medicaid provider agreements of Planned Parenthood Gulf Coast, Inc. (PPGC), asserting as its reasons for termination, in part, PPGC's settlement of a federal False Claims Act suit; provider audits regarding false claims; another pending federal False Claims Act suit in which the federal district court had stated that the Complaint's allegations in that case "allow[] the court to draw the reasonable inference that Planned Parenthood knowingly filed

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[1] 447 U.S. 773, 775-77, 785 (1980).

[2] *Id.* at 786.

false claims"; misrepresentations; and a pending investigation into PPGC's conduct. PPGC did not avail itself of state administrative or judicial proceedings to contest any of these grounds, though avenues for such a contest existed. Instead, PPGC and three of its patients sued in federal district court to set aside the proposed terminations. PPGC's claims, asserting Equal Protection and other constitutional violations, were not the basis for the preliminary injunction the district court granted staying the terminations and are not the subject of this interlocutory appeal. The only question before this panel is whether PPGC's *patients* have a right to challenge LDHH's determination that PPGC is not a "qualified" provider. The majority opinion concludes that the so-called "free-choice-of-provider" provision in § 1396a(a)(23) confers such a right upon Medicaid beneficiaries, contrary to the holding in *O'Bannon*.

If and when PPGC successfully challenges LDHH's determination that PPGC is no longer a qualified provider, then PPGC's patients may sue to vindicate rights granted by § 1396a(a)(23). But PPGC has not yet made such a showing.

I

Three of PPGC's patients, Doe #1, Doe #2, and Doe #3 (the "Individual Plaintiffs"), who are recipients of Medicaid benefits, contend that LDHH lacked any legitimate basis for terminating PPGC's Medicaid provider agreements and that PPGC is a "qualified" provider of Medicaid services within the meaning of 42 U.S.C. § 1396a(a)(23). The Individual Plaintiffs have brought an action under 42 U.S.C. § 1983. The federal district court considered only the Individual Plaintiffs' claims in granting the prelimnary injunction that is at issue in the interlocutory

appeal before our court. The Individual Plaintiffs do not have a § 1983 cause of action unless there has been a violation of a federal constitutional or statutory right.

I agree that § 1396a(a)(23), which is set forth in the margin,[3] provides a right upon which a Medicaid patient may base a suit under § 1983 when she has been denied access to a provider that a State has

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[3] 42 U.S.C. § 1396a(a)(23) provides:

(a) Contents

A State plan for medical assistance must— . . .

(23) provide that (A) any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services, and (B) an enrollment of an individual eligible for medical assistance in a primary care case-management system (described in section 1396n(b)(1) of this title), a medicaid managed care organization, or a similar entity shall not restrict the choice of the qualified person from whom the individual may receive services under section 1396d(a)(4)(C) of this title, except as provided in subsection (g) of this section, in section 1396n of this title, and in section 1396u-2(a) of this title, except that this paragraph shall not apply in the case of Puerto Rico, the Virgin Islands, and Guam, and except that nothing in this paragraph shall be construed as requiring a State to provide medical assistance for such services furnished by a person or entity convicted of a felony under Federal or State law for an offense which the State agency determines is inconsistent with the best interests of beneficiaries under the State plan or by a provider or supplier to which a moratorium under subsection (kk)(4) is applied during the period of such moratorium[.]

determined meets all state and federal Medicaid requirements and qualifications. However, § 1396a(a)(23) does not give a patient the right to contest a State's determination that a provider is not "qualified" to provide Medicaid services or a determination that the provider has not otherwise met state or federal statutory requirements. The Supreme Court's decision in *O'Bannon* makes this clear.

The question in *O'Bannon* was whether residents of a nursing home had a "constitutional right to participate in . . . revocation proceedings," in which a federal entity and a state entity sought to revoke the nursing home's authority to provide care to Medicaid recipients.[4] The Court held that the recipients did not have such a right.[5] The Court's due process analysis required it to decide what substantive rights 42 U.S.C. § 1396a(a)(23) bestows upon Medicaid beneficiaries. The Court concluded that this provision "gives [Medicaid] recipients the right to choose among a range of *qualified* providers, without government interference. By implication, it also confers an absolute right to be free from government interference with the choice to remain in a home that continues to be qualified."[6] However, the Court then said, "[b]ut it clearly does not confer a right on a recipient to enter an unqualified home and demand a hearing to certify it, nor does it confer a right on a recipient to continue to receive benefits for care in a home that has been decertified."[7] The nursing home

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[4] 447 U.S. at 775-76.

[5] *Id.* at 775.

[6] *Id.* at 785.

[7] *Id.*

residents had contended that they "were entitled to an evidentiary hearing on the merits of the decertification decision before the Medicaid payments were discontinued."[8] In denying this relief, the Court explained "decertification does not reduce or terminate a patient's financial assistance, but merely requires him to use it for care at a different facility."[9] Because the patients had no *substantive* right to demand care from a provider that had been decertified, they had no due process rights to participate in a hearing regarding certification or decertification of the provider.[10]

The decision in *O'Bannon* controls here. Medicaid patients do not have rights under 42 U.S.C. § 1396a(a)(23) that permit them to sue, under § 1983, to contest *the merits* of LDHH's allegations supporting the proposed termination of PPGC's Medicaid provider agreements.

II

The majority opinion attempts to distinguish *O'Bannon* on various grounds. But none of those grounds are valid.

A

The majority opinion states that *O'Bannon* "is inapposite" because "[t]here, the patient-plaintiffs' injuries were alleged to stem from a deprivation of due process rights" and that "[i]n contrast, the Individual Plaintiffs here assert the violation of a

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[8] *Id.* at 777.

[9] *Id.* at 785-86.

[10] *Id.* at 775, 785.

substantive right."[11] These statements reflect a failure to appreciate that there is no right to due process unless there is a substantive right that may be vindicated if adequate process is accorded. The Supreme Court concluded in *O'Bannon* that when a State declares that a particular provider is not qualified to provide Medicaid services, a Medicaid recipient has no "life, liberty, or property" interest arising from 42 U.S.C. § 1396a(a)(23) that is affected.[12] The Due Process Clause does not confer a "right to a hearing" in the abstract; rather, it does so only as a prerequisite to a deprivation of "life, liberty, or property."[13] Before a plaintiff can prevail on a due process claim, she must show that a liberty or property interest exists and that the State has interfered with that interest.[14]

Though the Medicaid recipients in *O'Bannon* claimed that they were "entitled to an evidentiary hearing on the merits of the decertification decision,"[15] they were first required to show that the State had deprived them of a "liberty or property

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[11] *Ante* at 20.

[12] *O'Bannon*, 447 U.S. at 787.

[13] U.S. CONST. amend. XIV, § 1.

[14] *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) ("We examine procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." (citations omitted) (citing *Hewitt v. Helms*, 459 U.S. 460, 472 (1983) and *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571 (1972))).

[15] *O'Bannon*, 447 U.S. at 777.

interest"[16] by terminating reimbursement agreements with their preferred Medicaid provider.[17] The recipients identified 42 U.S.C. § 1396a(a)(23) as a source of a substantive liberty or property interest.[18] The Supreme Court therefore examined whether § 1396a(a)(23) gives recipients a right to demand care from a particular provider when that provider had been decertified as a Medicaid provider. The Court concluded that recipients do not have such a right.[19] The Court characterized the recipients' argument as claiming that § 1396a(a)(23) "give[s] them a property right to remain in the home of their choice."[20] In rejecting that claim, the Court explained that although Medicaid recipients have a "right to continued benefits to pay for care in the qualified institution of [their] choice," they have "no enforceable expectation of continued benefits to pay for care in an institution that has been determined to be unqualified."[21] In the present case, the majority opinion is plainly mistaken in characterizing the *O'Bannon* decision as dealing only with "due process," but not substantive, rights under 42 U.S.C. § 1396a(a)(23).[22]

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[16] *See Thompson*, 490 U.S. at 460.

[17] *O'Bannon*, 447 U.S. at 784.

[18] *Id.* ("The patients have identified two possible sources of such a right."); *id.* at 784-85 (discussing 42 U.S.C. § 1396a(a)(23) as one of the identified sources).

[19] *Id.* at 785.

[20] *Id.* at 784.

[21] *Id.* at 786.

[22] *But see Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 977 (7th Cir. 2012)

[Footnote continued on next page]

B

1

The majority opinion says "[t]his case is different" from *O'Bannon* because "Louisiana has never complained that PPGC is not competent to render the relevant medical services, and it has taken no independent action to limit or terminate PPGC's entitlement to render medical services to the general population, for example, by revoking its license."[23] The majority opinion concludes that "this distinction . . . makes *O'Bannon* fully inapplicable."[24] As discussed below,[25] *O'Bannon*'s analysis of Medicaid beneficiaries' rights under 42 U.S.C. § 1396a(a)(23) did not turn on whether the State revoked the nursing home's authorization to continue functioning as a nursing home. But before *O'Bannon* is examined on that score, it is important to understand that the majority opinion's interpretation of § 1396a(a)(23) finds no support in its text and conflicts with the Government's understanding of when, based on § 1396a(a)(23), Medicaid patients can and cannot sue to challenge termination of a Medicaid provider's agreement.

The majority opinion concludes that whenever a State terminates a provider's Medicaid agreement,

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[Footnote continued from previous page]

(distinguishing *O'Bannon* on the basis that "the free-choice-of-provider statute was raised in the context of a due-process claim" and that "[t]his is not a due-process case").

[23] *Ante* at 22.

[24] *Ante* at 42.

[25] *See infra* Part II(C)(1).

regardless of the grounds for termination, a patient may sue to contest the termination, unless the State also precludes the provider from providing services or care to all patients, not just Medicaid recipients.[26] This construction of § 1396a(a)(23) is plainly mistaken. Under federal statutory and regulatory provisions, a State may terminate a provider's Medicaid agreement on many grounds, and it is not a prerequisite for such terminations that the State preclude a provider from providing services to any and all patients.

Subsection 1396a(p)(1) provides that "[i]n addition to any other authority, a State may exclude any individual or entity for purposes of participating under the State plan . . . for any reason for which the Secretary could exclude the individual or entity from participation in a program under subchapter XVIII of this chapter under section 1320a-7, 1320a-7a, or

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[26] *Ante* at 36 ("To be sure, the general grounds for termination invoked by LDHH—fraud, misrepresentations, and investigations—might well relate to a provider's qualifications. States undoubtedly must be able to terminate provider agreements in cases of criminal activity, fraud and abuse, and other instances of malfeasance. Medicaid's 42 U.S.C. § 1396a(p)(1)'s exclusionary provision makes that clear. . . . It bears repeating, however, that LDHH has taken no action to revoke PPGC's license and has not called into question any qualification that enables PPGC to offer medical care generally."); *see also ante* at 37 ("We repeat yet again for emphasis that LDHH has never once complained that PPGC is not competent to render the relevant medical services, and it has taken no independent action to limit or terminate PPGC's entitlement to render medical services to the general population, for example, by revoking its license."); *ante* at 37 ("LDHH would deny PPGC's services only to Medicaid recipients while leaving all other individuals free to obtain the very same services from PPGC.").

1395cc(b)(2) of this title."[27] A State may terminate a provider's agreement for many reasons even though the State does not seek to prohibit a provider from providing health care to the "general population" or to "revoke[e] its license."[28]

The United States Government does not agree with the majority opinion's assertion that *O'Bannon* is limited to situations in which a State seeks to prevent a provider from treating or providing services to all patients, not just Medicaid patients. The Government has filed an amicus brief in this case that sets forth a number of grounds on which a State may terminate a provider's agreement.[29] Termination can occur because of, among other acts or omissions,[30] a provider's excessive charges;[31] fraud, kickbacks, or other prohibited activities;[32] failure to

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[27] *See* 42 U.S.C. § 1396a(p)(1) ("In addition to any other authority, a State may exclude any individual or entity for purposes of participating under the State plan under this subchapter for any reason for which the Secretary could exclude the individual or entity from participation in a program under subchapter XVIII of this chapter under section 1320a-7, 1320a-7a, or 1395cc(b)(2) of this title."); § 1320a-7(b)(6) (permitting exclusion for excessive charges or unnecessary services); § 1320a-7(b)(7) (permitting exclusion for "an act which is described in section 1320a-7a, 1320a-7b, or 1320a-8 of this title"); *id.* § 1320a-7a(a)(1)(A) (presenting a claim "for a medical or other item or service that the person knows or should know was not provided as claimed").

[28] *Ante* at 22.

[29] *See* 42 U.S.C. §§ 1396a(p)(1)-(3), 1320a-7, 1395cc(b)(2).

[30] *Id.* § 1320a-7(b).

[31] § 1320a-7(b)(6).

[32] § 1320a-7(b)(7).

provide information;[33] failure to grant immediate access under specified circumstances;[34] default on loan or scholarship obligations;[35] or false statements or material misrepresentations of fact in certain circumstances.[36] The Government acknowledges that a patient has no right under § 1396a(a)(23) on which to base a § 1983 suit challenging a provider's termination on any of these grounds. But the majority opinion appears to limit *O'Bannon*'s application more narrowly than the Government advocates.

The majority opinion says that it "makes sense" that patients cannot "freely intervene in state enforcement actions against facilities that violate health and safety standards."[37] Why, then, does it "make[] sense" to allow patients to "intervene" "freely" when a State asserts, as LDHH asserted, that its basis for termination is that a Medicaid provider has engaged in submitting false claims for services that were never provided and for medically unnecessary services or items, in violation of federal regulations?[38]

2

In the present case, the majority opinion says that PPGC's Medicaid patients who have sued LDHH are not "challenging 'the merits of'" its decision to terminate PPGC's Medicaid provider

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[33] § 1320a-7(b)(9)-(11).

[34] § 1320a-7(b)(12).

[35] § 1320a-7(b)(14).

[36] § 1320a-7(b)(16).

[37] *Ante* at 21-22.

[38] *See* 42 U.S.C. §§ 1396a(p), 1320a-7(b)(6).

agreements.[39] Yet, some of the grounds LDHH gave for termination at least facially pertain to PPGC's qualifications to continue as a Medicaid provider, and the Individual Plaintiffs do in fact contend that, when examined on their merits, none of those grounds is an adequate basis for termination. The majority opinion agrees, concluding that since the Individual Plaintiffs will likely prevail on their contention that PPGC is a qualified provider, the Individual Plaintiffs have the right to sue to obtain Medicaid services from that qualified provider. This reasoning is circular, and it permits Medicaid recipients to do precisely what *O'Bannon* said they have no statutory right to do. The Supreme Court held in *O'Bannon* that Medicaid patients cannot challenge the merits of whether a provider is a qualified Medicaid provider.

The majority opinion relatedly says, "[w]hen, as here, a state terminates only a Medicaid provider agreement, independent of any action to enforce statutory and regulatory standards, *O'Bannon* is inapposite."[40] But LDHH's notice of intent to terminate PPGC's provider agreements did assert acts or omissions that would come within prohibitions in the federal statutory and regulatory scheme.

The majority opinion recognizes that "States may . . . exclude providers on the grounds provided by 42 U.S.C. § 1396a(p)(1) and on analogous state law grounds relating to a provider's qualification,"[41] though apparently the opinion adds the additional

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[39] *Ante* at 22.

[40] *Ante* at 22.

[41] *Ante* at 29.

qualification that a State may not terminate a provider's Medicaid agreement unless the State also precludes the provider from providing services to patients, generally,[42] as already discussed above.[43] Putting that gloss on § 1396a(p)(1) aside for the moment, the opinion also says, "[t]o be sure, the general grounds for termination invoked by LDHH—fraud, misrepresentations, and investigations—might well relate to a provider's qualifications. States undoubtedly must be able to terminate provider agreements in cases of criminal activity, fraud and abuse, and other instances of malfeasance."[44] The opinion notes that "Medicaid's 42 U.S.C. § 1396a(p)(1)'s exclusionary provision makes that clear."[45] The opinion then proceeds to determine, *on*

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[42] *See ante* at 29:

> While as a general rule a state may terminate a provider's Medicaid agreements for reasons bearing on that provider's general qualification to provide medical services, we are not aware of any case that holds a state may do so while continuing to license a provider's authorization to offer those same services to non-Medicaid patients. "Qualified" means "to be capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner." States may also exclude providers on the grounds provided by 42 U.S.C. § 1396a(p)(1) and on analogous state law grounds relating to a provider's qualification. Although states retain broad authority to define provider qualifications and to exclude providers on that basis, their authority is circumscribed by the meaning of "qualified" in this context. (footnote omitted) (quoting *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 978 (7th Cir. 2012)).

[43] *See supra* Part II(B)(1).

[44] *Ante* at 36.

[45] *Ante* at 36.

the merits, that none of the grounds given by LDHH for terminating PPGC's provider agreement are "authorized by § 1396a(p)."[46] The majority opinion errs not only in permitting Medicaid recipients to litigate whether a provider is qualified, but also in incorrectly analyzing the grounds LDHH identified for its proposed termination of PPGC's provider agreements.

The letter informing PPGC of LDHH's intent to terminate its Medicaid provider agreements included several independent grounds for termination. One was that PPGC had filed false Medicaid or Medicare claims. LDHH's stated bases for believing that PPGC had done so were provider audits, settlement of a federal False Claims Act suit, and an opinion and order in a federal False Claims Act case pending at the time, in which the court said that it could draw a reasonable inference from the Complaint in that case that PPGC had knowingly filed false claims. LDHH's letters to PPGC stated:

> Also under consideration in our departmental proceedings are provider audits and federal false claims cases against Planned Parenthood of America (PPFA) affiliates. Included among these are pending federal false claims cases against PPGC, one in which the presiding judge found that the information already provided "allows the court to draw the reasonable inference that Planned Parenthood knowingly filed false claims." Memorandum Opinion and Order at 17, *Carroll v. Planned Parenthood Gulf*

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[46] *Ante* at 30.

> *Coast*, 4:12-cv-03505 (S.D. TX, Houston Div.) (May 14, 2014). Providers and providers-in-fact are required to ensure that all their agents and affiliates are in compliance with all federal and state laws as well as rules, policies and procedures of the Medicaid program.

The panel's majority opinion gives short shrift to this ground for termination. The opinion states that "[a]t the most, LDHH has simply pasted the labels of 'fraud' and 'misrepresentations' on PPGC's conduct."[47] However, LDHH contemplated that there would be administrative proceedings following the letters that expressed its intent to terminate PPGC's provider agreements. The notice letters each advised in their opening paragraph that termination would take effect only after "final determination, judgment, completion, withdrawal from, or termination of all administrative and/or legal proceedings in this matter. Such proceedings include, but are not limited to, informal hearings, administrative appeals, appeals for judicial review, appellate judgments, and/or denials of writ applications." But, as the majority opinion repeatedly recognizes,[48] there was never even an informal hearing at which evidence would be presented because PPGC declined to participate in any administrative proceedings at all.

In any event, at least some of LDHH's grounds for termination were within the scope of the federal statutes and regulations that permit a State to

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[47] *Ante* at 36.

[48] *See, e.g., ante* at 8 ("PPGC has not requested either a hearing or an administrative appeal.").

terminate a provider's Medicaid agreement for fraud or improprieties in billing practices. Details of alleged fraud and improper billing practices were contained in the settlement agreement described in LDHH's notices of termination, which was PPGC's settlement of a federal False Claims Act suit initiated by Karen Reynolds, a former PPGC former employee.[49] The allegations in that suit were serious and included assertions that over a five-and-a-half-year period, PPGC had submitted false claims for medically unnecessary or unneeded items and services, and items and services that were never provided by PPGC. PPGC paid $4,300,000 to settle that suit. The settlement agreement reflects that both the United States and the State of Texas asserted claims against PPGC for fraud in addition to those alleged by the Qui-Tam plaintiff.[50] Though the settlement

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[49] ROA 498, 727.

[50] The settlement agreement recites:

> D. The United States contends that PPGC submitted false claims and made false statements to the United States in connection with claims that PPGC submitted to the United States under the Social Security Block Grant, Tide XX of the Social Security Act, 42 U.S.C. §§ 1397 et seq. (SSBG), the Medicaid Program, Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 et seq. (Medicaid Program), and the Women's Health Program (WHP), a Medicaid research and demonstration waiver created under Section 1115(a) of the Social Security Act, 42 U.S.C. § 1315(a), and implemented by Texas under former Tex. Hum. Res. Code § 32.0248.
>
> E. Texas contends that PPGC submitted false claims and made false statements to Texas in connection with claims that PPGC submitted to Texas under the Medicaid Program and WHP in violation of the TMFPA, Tex. Hum. Res. Code. Ann. § 36.001 et seq.

[Footnote continued on next page]

agreement reflects that PPGC did not admit liability, the agreement memorializes that (1) PPGC agreed to wire transfer to the United States $4,300,000, (2) the United States agreed to pay $1,247,000 of the $4,300,000 to the Qui-Tam plaintiff, (3) the United States paid $500,831 to the State of Texas "which is the Medicaid portion of the Settlement Amount, less Texas' portion of the [Qui-Tam plaintiff's] Share," (4) the balance was retained by the United States Government, and (5) PPGC agreed to pay the Qui-Tam plaintiff's attorney's fees and attorney's costs in a separate written settlement agreement with the Qui-Tam plaintiff. The settlement expressly reserved the rights of the United States and the State of Texas to maintain administrative actions to exclude PPGC from federal health care programs, including Medicare.

[Footnote continued from previous page]

> F. The Government contends that it has certain civil and administrative claims, as specified in Sections III.B, III.C, and III.E below, against PPGC for engaging in the following conduct:
>
> > submission of claims for payment to the United States and the State of Texas during the time period between July 30, 2003, through February 28, 2009, through the Medicaid Program, SSBG, and WHP when such items and services were (i) medically unnecessary or not medically indicated; (ii) not actually provided by PPGC; or (iii) improperly documented in patient charts as being provided even though they had not been performed. Covered Conduct is further limited to claims based on the following Current Procedural Terminology ("CPT") and local codes . . . [detailed listing of codes and terminology omitted in this opinion in the interest of brevity].

The fact that PPGG settled these claims with a disclaimer that it was not admitting liability does not make the factual allegations contained in the settlement agreement disappear. If true, any one of the allegations set forth in the settlement agreement would have been grounds for LDHH's termination of PPGC's Medicaid provider agreements.

The district court proceeded to rule, on the merits, that LDHH had previously analyzed the claims in the Reynold's suit and did not think they had much credence.[51] Even if, ultimately, that is shown to be true, the point is that the district court examined grounds that at least facially were adequate for termination under § 1396a(p)(1), but concluded that, *on the merits*, those grounds were not likely to prevail.

Both the district court, and the panel's majority opinion, permit the Individual Plaintiffs to challenge LDHH's determination that PPGC is not a "qualified" provider under the Medicaid statutes and regulations. In so doing, both courts have failed to adhere to *O'Bannon*, which held that when a State concludes that a provider is not qualified, even if that determination is erroneous, a Medicaid recipient does not have a right by virtue of 42 U.S.C. § 1396a(a)(23) that can be vindicated by a § 1983 suit.

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[51] The district court wrote that "Plaintiffs have credibly shown that DHH was aware of the *Reynolds* Settlement long before October 14, 2015, with Defendant's own emails suggesting that it did not find it sufficient to provide "credible evidence" of Medicaid fraud."

C

The majority opinion concludes that there is a "determinative distinction between this case and *O'Bannon*" and that "this distinction . . . makes *O'Bannon* fully inapplicable."[52] The distinction, the majority opinion asserts, is that in *O'Bannon*, "the Supreme Court held that none of [the nursing home's] former clientele—implicitly, whether covered by Medicaid or commercial insurance—had standing to advance constitutional claims because they were only affected incidentally," and in *O'Bannon*, "the state decertified the medical provider *totally* for failure to meet statutory and regulatory requirements for certification as a skilled nursing facility."[53] Two premises in this assertion are incorrect.

1

The opinion in *O'Bannon* does not say that the nursing home facility was "totally" prohibited from providing care to any nursing home resident. The facility was decertified as a Medicaid provider, not prohibited from operating as a nursing home.[54]

Specifically, as to the factual underpinnings of *O'Bannon*, there is no indication in the Supreme Court's opinion that "decertification" of the nursing home under the Medicaid statutes required it to cease providing nursing home care to patients who were not Medicaid beneficiaries. The Supreme Court's opinion reflects that the nursing home had

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[52] *Ante* at 41-42.

[53] *Ante* at 41-42 (emphasis added).

[54] *See O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 775-76 & nn.2-3 (1980).

first been certified in 1967 by the Department of Health, Education, and Welfare (HEW) as a "skilled nursing facility," which made it eligible to enter into one-year Medicare and Medicaid provider agreements with HEW and the Pennsylvania Department of Public Welfare (DPW).[55] The home "was decertified in 1974 as a result of substantial noncompliance with both state and federal requirements,"[56] but in 1976, it was recertified by HEW.[57] In 1977, HEW once again decertified the nursing home under the Medicaid statutes, and HEW and DPW once again decided not to renew the nursing home's one-year Medicaid provider agreements due to failure to meet statutory and regulatory standards for skilled nursing homes.[58] There is no indication in *O'Bannon*, the Court of Appeals' decision that it reversed,[59] or the briefing in the Supreme Court,[60] that the nursing home was prohibited from providing services to residents who were not Medicaid or Medicare beneficiaries as the majority opinion in the present

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[55] *Id.* at 775 & n.1.

[56] *Id.* at 775 n.1.

[57] *Id.* at 775.

[58] *Id.* at 775-76.

[59] *Town Court Nursing Ctr., Inc. v. Beal*, 586 F.2d 280 (3d Cir. 1978), *rev'd sub nom. O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980).

[60] Brief for Petitioner, *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980) (No. 78-1318), 1979 WL 213543; Brief for Respondents, *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980) (No. 78-1318), 1979 WL 199370; Brief for the Secretary of Health, Education, and Welfare, *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980) (No. 781318), 1979 WL 199369.

case posits, and therefore that the home was required to cease operations "totally,"[61] during the interim between 1974 and 1976, or when the home was again decertified in 1977.

The *O'Bannon* opinion reflects that in response to the 1977 decertification, six Medicaid recipients sued to challenge that determination and the termination of the nursing home's Medicaid provider agreements.[62] Their "complaint alleged that termination of *the [Medicaid] payments* would require [the nursing home] to close,"[63] not that the nursing home had lost its license or had been closed by the State. The home was in jeopardy of closing due to economic factors, since so many of its residents (approximately 180 of 198) were Medicaid recipients,[64] not because the home had been "decertified . . . totally"[65] by State or federal agencies, as the majority opinion in the present case asserts repeatedly.[66] Whether the

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61 *See ante* at 41-42.

62 *O'Bannon*, 447 U.S. at 777.

63 *Id.* (emphasis added).

64 *See id.* at 775-77, 777 n.5 (recounting that Town Court operated a 198-bed facility and six Medicaid recipients residing in the facility "filed their action on behalf of a class of all Medicaid recipients in the home, [though] the District Court never certified the class," while framing the question for decision as "whether approximately 180 elderly residents of a nursing home operated by Town Court Nursing Center, Inc., have a constitutional right to a hearing before a state or federal agency may revoke the home's authority to provide them with nursing care at government expense").

65 *Ante* at 41-42.

66 *See, e.g., ante* at 20 ("[*O'Bannon*] is inapposite. There, the patient-plaintiffs' injuries were alleged to stem from a

[Footnote continued on next page]

nursing home facility in *O'Bannon* was required to cease operations had no bearing on the Supreme Court's holding that 42 U.S.C. § 1396a(a)(23) is not a font of substantive rights flowing to Medicaid patients that permits them to sue to set aside the termination of a provider's Medicaid or Medicare agreements on the basis that the provider failed to comply with certain statutory or regulatory requirements.

The majority opinion in the present case admits that it is on shaky ground in asserting that "decertification" in *O'Bannon* meant complete closure of the home by order of the State. The panel's opinion hedges, saying, "[a]lthough, the opinion in *O'Bannon* does not expressly state whether the state's decertification of the facility caused it to go out of business entirely, we are satisfied that decertification had a

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[Footnote continued from previous page]

deprivation of due process rights, specifically, the right to a hearing to contest the state's decertification of a health care provider, not just its Medicaid qualification."); *ante* at 22 ("This case is different [from *O'Bannon*]. Louisiana has never complained that PPGC is not competent to render the relevant medical services, and it has taken no independent action to limit or terminate PPGC's entitlement to render medical services to the general population, for example, by revoking its license."); *ante* at 36 ("It bears repeating, however, that LDHH has taken *no action* to revoke PPGC's license and has not called into question any qualification that enables PPGC to offer medical care generally."); *ante* at 42 ("[T]he institution in *O'Bannon* was decertified for reasons having to do with the quality of care provided to patients. Here, the state has not impugned the quality of PPGC's care, and it will continue in business: Only its Medicaid patients will be prevented from receiving treatment there. The dissent cannot avoid this distinction, which makes *O'Bannon* fully inapplicable.").

crippling effect on the institution even if it did not cause it to shut down totally."[67] To what statutory language in 42 U.S.C. § 1396a(a)(23) is "a crippling effect on the institution" pertinent? What language in § 1396a(a)(23) differentiates between instances in which termination of a provider's Medicaid agreement results in a "total[]"[68] closure of a facility (or a "crippling effect")[69] and termination of a Medicaid agreement having little impact on the facility's operations? Nothing in the Supreme Court's decision in *O'Bannon* even alludes to such a distinction. The Court's reasoning and its holding in *O'Bannon* would have been the same had the termination of the Medicaid provider agreements in that case affected only a few residents. The residents who sued in *O'Bannon*, all Medicaid beneficiaries, would have had the same arguments that they made in the Supreme Court. They would have been required to move as a result of the decertification, even if scores of other residents (who did not receive Medicaid benefits) remained in the nursing home.

2

Nor was *O'Bannon* decided on standing principles applicable to nursing home residents generally. The question before the Court was whether 42 U.S.C. § 1396a(a)(23) gave Medicaid beneficiaries "a right to continued residence in the home of one's choice."[70] The issue actually decided was not whether a

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[67] *Ante* at 42.

[68] *Ante* at 42.

[69] *Ante* at 42.

[70] *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980).

resident of a nursing home whose care is paid for by private funds has standing to contest a State's closure of the home. As just noted, the State did not require the home to be closed, and the legal question before the Court was whether Medicaid beneficiaries could contest the termination of the nursing home's Medicaid provider agreements by state and federal agencies. The focus of the Supreme Court's decision in *O'Bannon* was the extent of rights granted by the Medicaid and Medicare statutory provisions.[71] The Supreme Court's construction of 42 U.S.C. § 1396a(a)(23) applies in the present case.

D

The panel's majority opinion says that it will not follow *O'Bannon* because "[r]eading *O'Bannon* to foreclose every *recipient's* right to challenge a disqualification decision would render the right guaranteed by § 1396a(a)(23) nugatory."[72] First and foremost, this court is not free to disregard the Supreme Court's holding in *O'Bannon*, which was that § 1396a(a)(23) does not give a Medicaid recipient the right to challenge a determination that a provider is unqualified.[73] Second, *O'Bannon*'s holding does not render rights under § 1396a(a)(23) "nugatory." The Supreme Court held that

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[71] *See id.* ("Whether viewed singly or in combination, the Medicaid provisions relied upon by the Court of Appeals do not confer a right to continued residence in the home of one's choice. Title 42 U.S.C. § 1396a(a)(23) (1976 ed., Supp.II) gives recipients the right to choose among a range of *qualified* providers, without government interference."); *id.* at 785-90.

[72] *Ante* at 21.

[73] *O'Bannon*, 447 U.S. at 785.

§ 1396a(a)(23) "confers an absolute right to be free from government interference with the choice" to receive services from a qualified provider.[74] Under § 1396a(a)(23)(A), "any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required, . . . who undertakes to provide him such services," and under § 1396a(a)(23)(B), the systems and entities specified "shall not restrict the choice of the qualified person from whom the individual may receive services," with certain limitations.

That Medicaid recipients do not have a right to challenge a State's decision that a particular provider is unqualified does not mean that the State's decision is unreviewable. In the present case, for example, the provider, PPGC, had the right to challenge the termination of its provider agreements in state administrative proceedings.[75] It did not do so. However, in the federal district court proceedings, PPGC has asserted constitutional violations and may also have a § 1983 claim based on rights under provisions of the Medicaid statutes and regulations (other than § 1396a(a)(23) and regulations promulgated under it) to challenge the State's termination of its provider agreement. Even if PPGC is limited to state administrative proceedings and state-court review, which is doubtful, that is not a basis for construing § 1396a(a)(23) to allow PPGC's patients to challenge the State's termination of PPGC's provider

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74 *Id.*

75 *See* LA. STAT. ANN. § 46:437.4; LA. ADMIN. CODE tit. 50, §§ 4161, 4211, 4213.

contracts when the Supreme Court has held that § 1396a(a)(23) does not permit them to do so.

The argument that § 1396a(a)(23) should be construed to give patients a right to contest a State's termination of a provider's Medicaid agreement for cause is also undermined by the fact that § 1396a(a)(23) assumes a willing provider who "undertakes to provide . . . such services" to the Medicaid recipient. In instances in which a provider does not challenge the termination of its Medicaid agreement, it cannot be said to be undertaking to provide Medicaid services to its patients. The Medicaid statutory scheme contemplates that only the provider can contest a determination that it is not qualified. There is no need to give Medicaid patients that right. If the provider is successful in its challenge (as PPGC may ultimately be in the present case when *its* claims are addressed) and a State were to *then* seek to prevent patients from seeking treatment or services from that qualified provider, patients could sue based on § 1396a(a)(23).

I submit that the majority opinion has created a right to remedy what it perceives to be a violation of law by the State of Louisiana. But ends do not justify means, and any violation of law by the State can be remedied.

III

The majority opinion relies upon decisions from the Seventh and Ninth Circuits that permitted patients to challenge state laws that excluded Planned Parenthood from providing health-care services to recipients of state-administered funds

unless Planned Parenthood ceased performing privately funded, legal abortions.[76] The purpose of the state laws at issue in those two cases was to prevent indirect subsidization of abortion.[77] In neither case did the State assert that the provider had settled False Claims Act suits, made misrepresentations, or was under investigation. In any event, the reasoning of those decisions is contrary to *O'Bannon* and is undermined by the recognition in those opinions that there are many circumstances in which a State may terminate a provider's Medicaid provider agreement and yet the provider's patients would be unable to sue to challenge those terminations.[78]

The majority opinion in the case before us today cites the Sixth Circuit's decision in *Harris v. Olszewski*.[79] But that decision does not support the majority opinion's conclusion that in some circumstances, a patient may challenge a determination that a provider is not "qualified" to provide services. In *Harris*, as a cost-savings measure, the State contracted with a sole provider of incontinence products after a competitive-bidding process.[80] A Medicaid benefits recipient filed suit seeking to

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[76] *Ante* at 18-20 (citing *Planned Parenthood Ariz., Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013) and *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012)).

[77] *See, e.g.*, *Planned Parenthood of Ind.*, 699 F.3d at 967 ("The point is to eliminate the indirect subsidization of abortion.").

[78] *See Betlach*, 727 F.3d at 973; *Planned Parenthood of Ind.*, 699 F.3d at 979.

[79] *Ante* at 18, 19 (citing *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006)).

[80] *Harris*, 442 F.3d at 460, 463.

certify a class and to enjoin enforcement of the single-source-provider contract.[81] There was no contention that other providers were unqualified; the Medicaid recipients sought to obtain supplies from other qualified providers.[82] The Sixth Circuit concluded that the patients had a right arising from § 1396a(a)(23) to bring a § 1983 claim.[83] That conclusion is entirely consistent with *O'Bannon*, which held that under § 1396a(a)(23), "a patient has a right to continued benefits to pay for care in the qualified institution of his choice."[84] Nevertheless, the Sixth Circuit denied the requested relief, ultimately holding that the "single-source contract for incontinence products complied with statutory and regulatory requirements for an exemption to the freedom-of-choice provision."[85]

IV

The majority opinion observes that because § 1396a(a)(23) "speaks only in terms of recipients' rights rather than providers' rights," "the right guaranteed by § 1396a(a)(23) is vested in Medicaid recipients rather than providers."[86] I agree with that observation and the majority opinion's conclusion

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[81] *Id.* at 460.

[82] *Id.*

[83] *Id.* at 459.

[84] *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 786 (1980).

[85] *Harris*, 442 F.3d at 467, 468-69 (concluding that the State had not violated the freedom-of-choice provision contained in 42 U.S.C. § 1396a(a)(23) because of the statutory exception found in 42 U.S.C. § 1396n(a)(1)(B)).

[86] *Ante* at 20.

that providers "cannot bring a challenge pursuant to § 1396a(a)(23)."[87] However, as discussed above, a provider has other avenues to seek redress when a State terminates its status as a qualified provider for purposes of Medicaid.

* * *

The State of Louisiana may have improperly terminated PPGC's Medicaid provider agreements, and if so, PPGC may pursue remedies. However, the Supreme Court has held that when a State determines that a particular provider is not qualified to provide Medicaid services, *a patient* has no life, liberty, or property interest under 42 U.S.C. § 1396a(a)(23) that is implicated or affected.[88] Because the majority opinion has created patients' rights that are not found in § 1396a(a)(23)'s text and because the majority opinion fails to follow the Supreme Court's decision in *O'Bannon*, I must dissent.

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[87] *Ante* at 20-21. *But see Planned Parenthood Ariz., Inc. v. Betlach*, 727 F.3d 960, 965-67 (9th Cir. 2013) (concluding that Planned Parenthood had stated a cause of action under § 1983 based on rights conferred by § 1396a(a)(23)); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 972-77 (7th Cir. 2012) (drawing no distinction between Planned Parenthood and its patients in concluding that there is an individual right to sue arising from § 1396a(a)(23)).

[88] *O'Bannon*, 447 U.S. at 785-87.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-30987

United States Court of
Appeals Fifth Circuit
FILED
September 14, 2016
Lyle W. Cayce
Clerk

PLANNED PARENTHOOD OF GULF COAST, INCORPORATED; JANE DOE #1; JANE DOE #2; JANE DOE #3,

Plaintiffs - Appellees

v.

REBEKAH GEE, Secretary, Louisiana Department of Health and Hospitals,

Defendant - Appellant

Appeal from the United States District Court
for the Middle District of Louisiana

Before WIENER, PRADO, and OWEN, Circuit Judges.

WIENER, Circuit Judge:

Medicaid's free-choice-of-provider provision, 42 U.S.C. § 1396a(a)(23), guarantees that Medicaid beneficiaries will be able to obtain medical care from the qualified and willing medical provider of their choice. In response to secretly recorded videos

released by the Center for Medical Progress depicting conversations with Planned Parenthood employees elsewhere, Defendant-Appellant Louisiana Department of Health and Hospitals ("LDHH") terminated Plaintiff-Appellee Planned Parenthood Gulf Coast's ("PPGC") Louisiana Medicaid provider agreements. PPGC and the individual Plaintiffs-Appellees Jane Doe #1, Jane Doe #2, and Jane Doe #3 (the "Individual Plaintiffs")—women who receive care at one of PPGC's Louisiana facilities—(collectively "the Plaintiffs") filed this suit against LDHH under 42 U.S.C. § 1983, alleging violations of 42 U.S.C. § 1396a(a)(23) and the First and Fourteenth Amendments of the U.S. Constitution. The Individual Plaintiffs are three women who are Medicaid beneficiaries and who receive medical care from one of PPGC's Louisiana facilities. They seek to continue receiving care from PPGC's facilities. They specifically contend that LDHH's termination action will deprive them of access to the qualified and willing provider of their choice, PPGC, in violation of Medicaid's free-choice-of-provider provision. The district court entered a preliminary injunction against LDHH's termination of PPGC's Medicaid provider agreements. LDHH appeals.

I.

FACTS

PPGC is a non-profit corporation domiciled in Texas and licensed to do business in Louisiana. It operates two clinics in Louisiana: the Baton Rouge Health Center and the New Orleans Health Center. Both centers participate in Louisiana's Medicaid program. PPGC's two clinics provide care to over 5200 Medicaid beneficiaries, which comprise more

than half of the patients they serve in Louisiana. Those clinics offer physical exams, contraception and contraceptive counseling, screening for breast cancer, screening and treatment for cervical cancer, testing and treating specified sexually transmitted diseases, pregnancy testing and counseling, and other listed procedures, including colposcopy. Neither clinic performs abortions, nor have they ever participated in a fetal tissue donation program.

Doe #1 relies on PPGC's health center in Baton Rouge for her annual examinations. According to Doe #1, PPGC also helped her obtain treatment for cancer in December 2013. Her cancer is now in remission, but it has rendered her unable to take birth control pills. She does not wish to have any more children and continues to rely on PPGC to advise her on future contraception options. Doe #1 wishes to continue receiving health care at PPGC because she does not know of any other providers that will take her insurance. She prefers to receive care at PPGC because she is comfortable with the staff, trusts the providers, and is easily able to make appointments.

Doe #2 is enrolled in Louisiana's Take Charge Plus program[1] and has received care at PPGC's health center in New Orleans since 2012. Until health issues left her unable to work full time, at which point she lost her private health insurance, Doe #2 had used a private obstetrician-gynecologist. That physician stopped treating Doe #2 once she lost

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[1] The Take Charge Plus program provides family planning services to eligible women and men with incomes at or below 138 percent of the federal poverty level.

her private insurance. Doe #2 now visits PPGC every year for her annual gynecological examination. She does not know where else she could obtain this care and prefers to continue receiving it from PPGC.

Doe #3 is a patient of PPGC's health center in Baton Rouge. There, she receives pap smears, testing for sexually transmitted diseases, and cancer screenings. Doe #3 prefers receiving care at PPGC and feels that it is easy for her to make appointments there. She states that it "is very difficult to find doctors in Baton Rouge who will accept Medicaid." She needed to visit another Baton Rouge clinic for a necessary gynecological procedure, but had to wait seven months to receive an appointment.

In July 2015, the Center for Medical Progress, an anti-abortion organization, released a series of undercover videos and allegations purportedly showing that Planned Parenthood and its affiliates were contracting to sell aborted human fetal tissue and body parts. At a later hearing, the district court found that "none of the conduct in question [depicted in the videos] occurred at PPGC's two Louisiana facilities." Nevertheless, then-Louisiana Governor Bobby Jindal directed LDHH and the State Inspector General to investigate PPGC.

On July 15, 2015, then-secretary of LDHH, Kathy Kleibert, wrote to PPGC requesting responses to a range of questions about its activities. PPGC promptly responded on July 24, 2015, relevantly stating that (1) it "does not offer abortion services," and (2) it does not sell or donate any unborn baby organs or body parts. PPGC acknowledged that

Planned Parenthood Center for Choice, Inc. ("PPCFC"), a separate corporation,[2] provides abortions in Texas, but that PPCFC does not operate a fetal tissue donation program.

Secretary Kleibert wrote to PPGC on August 4, 2015, claiming that several of PPGC's responses "directly contradict" the recently released videos. According to her, one video taken in Houston, Texas, depicted Melissa Farrell, Director of Research at PPGC, "discuss[ing] existing contracts for fetal tissue donation for the purpose of research." Secretary Kleibert emphasized that LDHH "is extremely concerned that [PPGC or PPCFC], or both have not only participated in the sale or donation of fetal tissue, but also deliberately misinformed [LDHH] about this practice in its July 24 response letter." In that same letter, Secretary Kleibert requested more information about the practices of PPGC and PPCFC.

PPGC responded on August 14, 2015, repeating that neither PPGC nor PPCFC sells or donates fetal tissue. PPGC explained that the secretly recorded conversation "does not discuss existing contracts for fetal tissue donation," but rather, "concerns a list of tissue specimens a major Texas research institution had expressed interest in obtaining, in discussions about a possible future fetal tissue donation program."

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[2] As PPGC's letter indicates, PPCFC was operated as a division of PPGC until 2005, at which point it was separately incorporated in Texas. PPCFC also has a Certificate of Authority to Transact Business in Louisiana.

In the midst of these communications, LDHH notified PPGC on August 3, 2015, that it would terminate PPGC's Medicaid provider agreements. Secretary Kleibert stated no basis for the termination. She noted only that the provider agreements are voluntary contracts subject to termination "by either party 30 days after receipt of written notice" under La. R.S. § 46:437.11. That same day, then-Governor Jindal published a press release: "Governor Jindal and DHH decided to give the required 30-day notice to terminate the Planned Parenthood Medicaid provider contract because Planned Parenthood does not represent the values of the State of Louisiana in regards to respecting human life." Secretary Kleibert's letter notified PPGC of its right to a hearing and stated that PPGC may request an administrative appeal within 30 days. At a subsequent hearing before the district court, LDHH's counsel clarified that this termination action did *not* relate to PPGC's ability to provide adequate care to its patients.[3]

On August 25, 2015, PPGC and the Individual Plaintiffs filed suit under 42 U.S.C. § 1983,

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[3] The district court asked LDHH's counsel several questions pertaining to this issue:

> **THE COURT:** All right. So the reason [for LDHH's termination action] is unrelated to the ability of these two facilities to provide adequate care to their patients; is that true?
>
> **MR. RUSSO:** That I would agree with, yes, sir.
>
> **THE COURT:** So Ms. Kliebert's position is that these are terminated without a relationship of any kind to the adequacy of care; correct?
>
> **MR. RUSSO:** Correct, at this time, your honor, exactly.

contending that LDHH's termination of PPGC's Medicaid provider agreements violated Medicaid's free-choice-of-provider requirement, 42 U.S.C. § 1396a(a)(23), and the U.S. Constitution. On that date, the Plaintiffs also moved for entry of a temporary restraining order and preliminary injunction.

LDHH voluntarily rescinded the August 4, 2015, "at will" termination letters on September 14, 2015. On that same day, LDHH advised the district court by letter that it believed that the Plaintiffs claims and pending motions were now moot. But the next day, September 15, 2015, LDHH notified PPGC that it was "terminating/revoking" PPGC's Medicaid provider agreements for "cause" under La. R.S. §§ 46:437.11(D)(2), 437.14 and Title 50 of the Louisiana Administrative Code. LDHH also informed PPGC that it may request an informal hearing or suspensive administrative appeal within 30 days. PPGC has not requested either a hearing or an appeal. LDHH has further notified PPGC that the effected terminations would be suspended during this 30-day period. LDHH advanced three grounds for termination.

First, LDHH identified PPGC's settlement of a qui tam False Claims Act ("FCA") claim in *Reynolds v. Planned Parenthood Gulf Coast, Inc.*,[4]—in which PPGC disclaimed all liability—and its failure to notify LDHH of that settlement and any corresponding violations. LDHH categorized these actions as "fraud." LDHH identified a second qui tam FCA claim against PPGC in *Carroll v. Planned Parenthood Gulf*

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[4] No. 9:09-cv-124-RC (E.D. Tex.).

Coast.[5] At the time of the proceedings before the district court in the instant case, the court in *Carroll* had denied PPGC's motion to dismiss. LDHH identified the *Carroll* suit as another example of PPGC's failure to comply with applicable laws and to notify LDHH of such violations. PPGC subsequently settled that suit, again disclaiming all liability.

Second, LDHH stated that PPGC's responses in its July and August letters contained misrepresentations. LDHH did not identify any particular misrepresentations either in its August 3 termination letter or before the district court. At most, LDHH urged that PPGC's responses differed from the content of the videos released by the Center for Medical Progress.

Finally, LDHH claimed that PPGC was subject to termination because it was being investigated by LDHH and the Louisiana Office of Inspector General.

On October 7, 2015, the Plaintiffs filed a motion to amend their complaint, seeking to continue asserting their claims under Medicaid's free-choice-of-provider provision and to add claims under the First and Fourteenth Amendments of the U.S. Constitution. Two days later, the Plaintiffs also renewed their request for a temporary restraining order and preliminary injunction.

LDHH moved to dismiss the Plaintiffs' amended complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). After a hearing on the parties' motions, the district court granted in part the

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[5] No. 4:12-cv-03505 (S.D. Tex.).

Plaintiffs' motion for temporary restraining order and preliminary injunction and denied LDHH's motion to dismiss. The district court held a subsequent telephone conference with the parties, at which point both parties consented to converting the temporary restraining order to a preliminary injunction to allow for an immediate appeal. Both parties agreed that no evidentiary matters required further discovery.

The district court issued an amended ruling and order on October 29, 2015, granting the Plaintiffs' renewed motion for temporary restraining order and for preliminary injunction and denying LDHH's motion to dismiss. The district court therefore preliminarily enjoined LDHH from terminating PPGC's Medicaid provider agreements. In a lengthy and detailed opinion, the district court rejected LDHH's standing, ripeness, and abstention challenges to the Plaintiffs' claims. The court also found sufficient grounds to issue a preliminary injunction on the basis of the Individual Plaintiffs' claim under Medicaid's free-choice-of-provider provision. Specifically, the district court held that 42 U.S.C. § 1396a(a)(23) affords the Individual Plaintiffs a private right of action enforceable under 42 U.S.C. § 1983. The district court expressly declined to determine whether PPGC possesses such a right. The court then held that the Individual Plaintiffs' claims are substantially likely to succeed and that the remaining factors—irreparable injury to the plaintiffs, balancing of the injury to the plaintiffs versus the harm to the defendant, and the public interest—weigh in favor of issuing a preliminary injunction.

LDHH appealed. It contends that the district court erred in concluding that the Plaintiffs have

standing and that their claims are ripe for review. It further asserts that the district court erred in entering a preliminary injunction.

II.

JUSTICIABILITY

Article III of the U.S. Constitution extends the federal judicial power to "Cases" and "Controversies."[6] The justiciability requirements of standing and ripeness animate Article III's cases-and-controversies requirement in this appeal. LDHH contends that the Plaintiffs lack standing to bring their claims and that their claims are not ripe for review. Because the district court issued the preliminary injunction as to the Individual Plaintiffs' claims alone, we confine our analysis to the justiciability of the Individual Plaintiffs' claims.[7]

A. Standing

LDHH first contends that the Individual Plaintiffs lack standing to assert their claims. We review issues of standing de novo.[8] To establish standing, a plaintiff must prove that (1) she has sustained an "injury in fact" that is both (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical," (2) there is "a causal connection between the injury and the conduct complained of," and (3) a favorable decision is likely to redress the

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[6] U.S. CONST. art. III, § 2, cl. 1.

[7] Therefore, we decline to address LDHH's arguments related to the justiciability of PPGC's claims.

[8] *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 428 (5th Cir. 2011).

injury.[9] "An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur."[10]

LDHH asserts that the Individual Plaintiffs have failed to demonstrate an injury because PPGC's provider agreements have not yet been terminated and the Individual Plaintiffs have not been denied access to PPGC's services. LDHH further contends that any injury results not from its actions, but from PPGC's failure to avail itself of its administrative appeal rights.

The Individual Plaintiffs counter that they have standing because LDHH has acted to terminate PPGC's Medicaid provider agreements, which will (1) deny them access to the healthcare services they seek and (2) deny them a legal right: access to a qualified and willing provider of their choice under 42 U.S.C. § 1396a(a)(23). In other words, the Individual Plaintiffs will sustain an injury (denial of services from PPGC and a legal right to the qualified provider of their choice) caused by LDHH (LDHH's termination of PPGC's provider agreements) that will be redressed by a favorable decision (an injunction barring LDHH from terminating PPGC's provider agreements).

The heart of LDHH's challenge to the Individual Plaintiffs' standing is its insistence that, because

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[9] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks and citations omitted).

[10] *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (internal quotation marks omitted) (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147, 1150, n.5 (2013)).

PPGC's provider agreements have not yet been terminated, the Individual Plaintiffs have sustained no injury. This argument ignores the well-established principle that a threatened injury may be sufficient to establish standing.[11] As LDHH itself asserts, "[t]hreatened injury must be certainly impending to constitute injury in fact."[12] LDHH has notified PPGC that it has terminated PPGC's provider agreements, but has suspended those terminations pending PPGC's decision whether to pursue an administrative appeal. PPGC has stated that it will not avail itself of administrative appeal. In other words, LDHH has already acted to terminate PPGC's provider agreements; only the effect of that termination has yet to occur. And, importantly, the Individual Plaintiffs have no administrative appeal rights and they are not subject to (nor could they be) any administrative exhaustion requirement under 42 U.S.C. § 1983.[13] The Individual Plaintiffs need not wait to file suit until PPGC is forced to close its doors to them and other Medicaid beneficiaries.

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[11] *See Comsat Corp. v. FCC*, 250 F.3d 931, 936 (5th Cir. 2001) ("A threatened injury satisfies the injury in fact requirement so long as that threat is real rather than speculative."); *Loa-Herrera v. Trominski*, 231 F.3d 984, 988 (5th Cir. 2000) ("Mere threatened injury is sufficient, and the threat in this case is real.").

[12] *Clapper*, 133 S. Ct. at 1147–48 (2013) (internal quotation marks omitted) (quoting *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990)).

[13] LDHH concedes separately that "exhaustion is often not a barrier to a claim based on 42 U.S.C. § 1983."

LDHH also argues that the Individual Plaintiffs have not and will not sustain any legal injury—presumably even when the termination of PPGC's provider agreements takes effect—because the Individual Plaintiffs have a right to choose only a "qualified" provider, and PPGC is not a qualified provider. This issue turns on the substantive issue before us. We decline to allow LDHH to bootstrap this issue into our standing inquiry. And, we note that a violation of a statutory right, even standing alone, is sufficient to satisfy the injury requirement: "Congress may create a statutory right of entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute."[14]

LDHH finally contends that even if an injury exists, it is not fairly traceable to LDHH. Instead, asserts LDHH, PPGC's decision not to avail itself of an administrative appeal will alone be the cause of the Individual Plaintiffs' injury. The Supreme Court has warned against "wrongly equat[ing] injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation."[15] Although injury resulting from "the *independent* action of some third party not before the court" will not suffice, "that does not exclude injury produced by determinative or coercive effect upon the action of someone else."[16] LDHH essentially

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[14] *Warth v. Seldin*, 422 U.S. 490, 514 (1975).

[15] *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997).

[16] *Id.* at 169 (internal citations omitted).

asks us to conduct a proximate cause analysis to determine the immediate cause of the Individual Plaintiffs' injuries, but this is not what the Supreme Court requires.[17] We therefore affirm the district court's determination that the Individual Plaintiffs have standing to pursue their claims.

B. Ripeness

LDHH next contends that the Plaintiffs' claims are not ripe. It asserts that the issues are not fit for review because no injury has occurred and the administrative process and the factual development that it entails are still pending. LDHH goes as far as to claim that, for an issue to be ripe for review, this court requires a full administrative record.

We review de novo the issue of ripeness.[18] In evaluating whether a case is ripe for adjudication, we balance "(1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration."[19] "A case is generally ripe if any remaining questions are purely legal ones."[20]

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[17] *See City of Boerne*, 659 F.3d at 431 ("The causation element does not require a party to establish proximate causation, but only requires that the injury be 'fairly traceable' to the defendant." (citing *Bennett*, 520 U.S. at 168–69)).

[18] *Venator Grp. Specialty, Inc. v. Matthew/Muniot Family, LLC*, 322 F.3d 835, 838 (5th Cir. 2003).

[19] *Texas v. United States*, 497 F.3d 491, 498 (5th Cir. 2007) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

[20] *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 833 F.2d 583, 587 (5th Cir. 1987).

We conclude that the Individual Plaintiffs' claims are ripe for review because the issues before us present purely legal questions. LDHH has already terminated PPGC's provider agreements, and it has proffered three specific grounds for doing so. The operative question on appeal is whether, as a matter of law, any of those grounds permit LDHH to terminate PPGC's provider agreement without violating Medicaid's free-choice-of-provider requirement. Further, although PPGC had the option to engage in the administrative appeal process, it has elected not to do so. And, as noted by the district court, LDHH has already terminated PPGC's provider agreements with "its 'effect' alone delayed." LDHH's own briefing implies the same: "The initial decision maker, the State of Louisiana, through LDHH, has not taken final action on the issue of whether PPGC's provider contracts *were properly terminated*."[21]

The Individual Plaintiffs' injuries are "sufficiently likely to happen to justify judicial intervention."[22] The Individual Plaintiffs, as already discussed, are also likely to suffer hardship by being denied access to the provider of their choice under 42 U.S.C. § 1396a(a)(23) and to medical services at PPGC's facilities. The Individual Plaintiffs' claims are ripe.

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[21] (emphasis added).

[22] *Pearson v. Holder*, 624 F.3d 682, 684 (5th Cir. 2010) (quoting *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993)).

III.

PRELIMINARY INJUNCTION

Concluding that the Individual Plaintiffs have standing to bring their claims and that such claims are ripe for review, we turn to LDHH's challenge to the district court's entry of a preliminary injunction.

A plaintiff seeking a preliminary injunction must clearly show

> (1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) granting the preliminary injunction will not disserve the public interest.[23]

We "review the district court's determination on each of these elements for clear error, its conclusions of law de novo, and the ultimate decision whether to grant relief for abuse of discretion."[24]

The district court entered a preliminary injunction on the basis of the Individual Plaintiffs' claims that LDHH's termination of PPGC's Medicaid provider agreements violates their free-choice-of-provider rights under 42 U.S.C. § 1396a(a)(23).

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[23] *Google, Inc. v. Hood*, 822 F.3d 212, 220 (5th Cir. 2016) (quoting *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 195–96 (5th Cir. 2003)).

[24] *Id.* (citing *Bluefield Water Ass'n v. City of Starkville*, 577 F.3d 250, 253 (5th Cir. 2009)).

LDHH raises multiple challenges to the grant of the preliminary injunction. First, it insists that the district court erred in holding that the Individual Plaintiffs claims are substantially likely to succeed because (1) 42 U.S.C. § 1396a(a)(23) does not afford the Individual Plaintiffs a private right of action, and, in the alternative, (2) its termination action does not violate the Individual Plaintiffs' free-choice-of-provider rights. Second, LDHH contends that the district court committed clear error in holding that the remaining factors—irreparable injury to the plaintiffs, balancing of the injury to the plaintiffs versus the harm to the defendant, and the public interest—weighed in favor of issuing the preliminary injunction.

A. Substantial Likelihood of Success

We turn first to whether 42 U.S.C. § 1396a(a)(23) affords the Individual Plaintiffs a private right of action and, if so, whether the Individual Plaintiffs are substantially likely to succeed in their claim that LDHH's termination of PPGC's provider agreements runs afoul of that right.

1. Private Right of Action

We begin by joining every other circuit to have addressed this issue to conclude that § 1396a(a)(23) affords the Individual Plaintiffs a private right of action under § 1983. Medicaid is a cooperative program between the federal government and the states in which the federal government gives financial assistance to states to provide medical services to Medicaid-eligible individuals. The federal

government and participating states share the costs of Medicaid.[25] "In return, participating States are to comply with requirements imposed by the Act and by the Secretary of Health and Human Services."[26] This means that states "must comply with federal criteria governing matters such as who receives care and what services are provided at what cost."[27] Stated differently, "Medicaid offers the States a bargain: Congress provided federal funds in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions."[28]

This appeal concerns the contours of the federal Medicaid statute's free-choice-of-provider requirement, 42 U.S.C. § 1396a(a)(23). That provision mandates that "any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide him such services."[29] Discussing this provision in *O'Bannon v. Town Court Nursing Center*, the Supreme Court explained that it "gives recipients the right to choose among a range of

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[25] *Atkins v. Rivera*, 477 U.S. 154, 156–57 (1986) ("The Federal Government shares the costs of Medicaid with States that elect to participate in the program.").

[26] *Id.* at 157 (citing 42 U.S.C. § 1396a; *Schweiker v. Gray Panthers*, 453 U.S. 34, 36– 37 (1981)).

[27] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2581 (2012).

[28] *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1382 (2015) (Scalia, J.) (plurality opinion).

[29] 42 U.S.C. § 1396a(a)(23)(A).

qualified providers, without government interference."[30] Most recently, the Ninth Circuit explained that "[t]he provision specifies that any individual Medicaid recipient is free to choose any provider so long as two criteria are met: (1) the provider is 'qualified to perform the service or services required,' and (2) the provider 'undertakes to provide [the recipient] such services.'"[31]

Because the Individual Plaintiffs assert their claim under 42 U.S.C. § 1983, we analyze whether § 1396a(a)(23) creates a right of action under that statute. Title 42 U.S.C. § 1983 "provides redress only for a plaintiff who asserts a 'violation of a federal *right*, not merely a violation of federal *law*.'"[32] To determine whether a federal statute provides a right of action enforceable under § 1983, we consider "(1) whether Congress intended for the provision to benefit the plaintiff; (2) whether the plaintiff can show that the right in question is not so 'vague and amorphous' that its enforcement would 'strain judicial competence'; and (3) whether the statute unambiguously imposes a binding obligation on the states."[33]

Every circuit court to have addressed this issue, as well as multiple district courts, has concluded that

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[30] 447 U.S. 773, 785 (1980).

[31] *Planned Parenthood of Ariz. Inc. v. Betlach*, 727 F.3d 960, 967 (9th Cir. 2013) (second alteration in original) (quoting 42 U.S.C. § 1396a(a)(23)(A)).

[32] *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 602 (5th Cir. 2004) (quoting *Blessing v. Freestone*, 520 U.S. 329, 340 (1997)).

[33] *Id.*

§ 1396a(a)(23) creates a private right enforceable under § 1983.[34] The Ninth Circuit in *Planned Parenthood Arizona Inc. v. Betlach* addressed this question most recently. As to the first element, that court held that "[t]he statutory language unambiguously confers [an individual] right upon Medicaid-eligible patients, mandating that all state Medicaid plans provide that '*any individual* eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required.'"[35] As to the second element, it held that "[t]he free-choice-of-provider requirement does 'supply concrete and objective standards for enforcement,'"[36] which are "well within judicial competence to apply."[37] Under the statute, Medicaid recipients have the right to choose any provider so long as "(1) the provider is 'qualified to perform service or services required,' and (2) the provider 'undertakes to

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[34] *See Planned Parenthood of Ariz.*, 727 F.3d 960; *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012); *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006); *Planned Parenthood of Kan. & Mid-Mo. v. Mosier*, No. 16-2284-JAR-GLR, 2016 WL 3597457 (D. Kan. July 5, 2016); *Planned Parenthood Se., Inc. v. Bentley*, 141 F. Supp. 3d 1207 (M.D. Ala. 2015); *Planned Parenthood Ark. & E. Okla. v. Selig*, No. 4:15-cv-566, slip op. (E.D. Ark. Oct. 2, 2015); *Women's Hosp. Found. v. Townsend*, No. 07-711, 2008 WL 2743284 (M.D. La. July 10, 2008).

[35] 727 F.3d at 966 (quoting 42 U.S.C. § 1396a(a)(23)(A)).

[36] *Id.* at 967 (quoting *Watson v. Weeks*, 436 F.3d 1152, 1161 (9th Cir. 2006)).

[37] *Id.*

provide [the recipient] such services.'"[38] According to the Ninth Circuit, courts addressing this provision confront "a simple factual question no different from those courts decide every day," and free from "any balancing of competing concerns or subjective policy judgments."[39]

In so holding, the Ninth Circuit rejected Arizona's contention that "qualified," as used in 42 U.S.C. § 1396a(a)(23)(A), is too vague to enforce. Because the term "is tethered to an objective benchmark"—"qualified *to perform the service or services required*"—"[a] court can readily determine whether a particular health care provider is qualified to perform a particular medical service, drawing on evidence such as descriptions of the service required; state licensing requirements; the provider's credentials licenses, and experience; and the expert testimony regarding the appropriate credentials for providing the service."[40]

The Seventh Circuit reached the same conclusion in *Planned Parenthood of Indiana, Inc. v. Commissioner of the Indiana State Department of Health*.[41]

As to the third element—which the Ninth Circuit did not discuss at length because Arizona had not challenged that point—the Seventh Circuit held that the free-choice-of-provider requirement is couched in

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38 *Id.* (alteration in original) (quoting 42 U.S.C. § 1396a(a)(23)(A)).

39 *Id.*

40 *Id.* at 967–68.

41 699 F.3d 962 (2012).

mandatory terms: "[T]he free-choice-of-provider statute explicitly refers to a specific class of people—Medicaid-eligible patients—and confers to them an individual entitlement—the right to receive reimbursable medical services from any qualified provider."[42] Likewise, the Sixth Circuit in *Harris v. Olszewski*,[43] held that the free-choice-of-provider requirement provides a private right of action enforceable under § 1983.

We agree with the Sixth, Seventh, and Ninth Circuits and hold that 42 U.S.C. § 1396a(a)(23) creates a private right of action that the Individual Plaintiffs may enforce through 42 U.S.C. § 1983. LDHH's remaining arguments fail to convince us otherwise.

LDHH cites the Supreme Court's decision in *O'Bannon v. Town Court Nursing Center*[44] for the proposition that the Individual Plaintiffs have no right to challenge LDHH's provider-qualifications determination. That case is inapposite because, there, the patient-plaintiffs' injuries stemmed from an alleged deprivation of due process rights: specifically, the right to a hearing to contest the state's disqualification of a health care provider. Accordingly, the Supreme Court's holding that "while a patient has a right to continued benefits to pay for care in the qualified institution of his choice, he has no enforceable expectation of continued benefits to pay

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[42] *Id.* at 974.

[43] 442 F.3d 456 (2006).

[44] 447 U.S. 773 (1980).

for care in an institution that has been determined to be unqualified,"[45] is not probative. The limit of the Court's holding in *O'Bannon* is that § 1396a(a)(23) does not afford a *procedural right* to a hearing. In contrast, here, the Individual Plaintiffs assert a violation of a substantive right.[46]

LDHH's reliance on the recent Supreme Court opinion, *Armstrong v. Exceptional Child Center, Inc.*,[47] is equally unavailing. There, the relevant issue was whether 42 U.S.C. § 1396a(a)(30)(A) creates a private right of action.[48] Writing for a plurality, Justice Scalia noted that this provision "lacks the sort of rights-creating language needed to

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[45] Id. at 786.

[46] *See Planned Parenthood of Ind.*, 699 F.3d at 977 (distinguishing *O'Bannon* on the same basis). LDHH also relies on *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170 (2d Cir. 1991), but that case is distinguishable for the same reason as *O'Bannon*. *See Planned Parenthood of Ind.*, 699 F.3d at 977 (distinguishing *Kelly Kare* on the same basis).

[47] 135 S. Ct. 1378 (2015).

[48] That provision of the Medicaid statute requires state plans to

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area[.]

42 U.S.C. § 1396a(a)(30)(A).

imply a private right of action," because it "is phrased as a directive to the federal agency . . . , not as a conferral of the right to sue upon the beneficiaries of the State's decision to participate in Medicaid."[49] Justice Scalia also observed that § 1396a(a)(30)(A) was "judicially unadministrable": "It is difficult to imagine a requirement broader and less specific than § 30(A)'s mandate that state plans provide for payments that are 'consistent with efficiency, economy, and quality of care,' all the while 'safeguard[ing] against unnecessary utilization of . . . care and services.'"[50] In contrast, the provision at issue here is phrased in individual terms and in specific, judicially administrable terms, as recognized by the Sixth, Seventh, and Ninth Circuits.

LDHH finally argues that § 1396a(a)(23) provides Medicaid recipients with only the right to choose a qualified provider, not to choose a provider that it has deemed unqualified. Understandably, LDHH does not make the next inferential step, but it would follow that the free-choice-of-provider requirement 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. Otherwise, any right the Individual Plaintiffs possess under § 1396a(a)(23) would be hollow.[51] Importantly, the Individual Plaintiffs contend

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[49] *Armstrong*, 135 S. Ct. at 1387.

[50] *Id.* at 1385 (alteration and omission in original).

[51] *See Planned Parenthood Se.*, 141 F. Supp. 3d at 1218 ("If [it] were correct that allegedly unlawful terminations of provider agreements could not be challenged by recipients pursuant to the free-choice-of-provider provision, that provision's '*individ-*

[Footnote continued on next page]

that LDHH has deprived them of their choice to receive care from PPGC—a provider LDHH has conceded is competent to render the relevant medical services—for reasons *unrelated to its qualifications*. The operative issue, therefore, is resolved by determining whether LDHH terminated PPGC's provider agreements based on its qualifications or based on some unrelated reason.

2. Likelihood of Success

Concluding that § 1396a(a)(23) affords the Individual Plaintiffs a right of action, we turn to whether their claim that LDHH's termination of PPGC's provider agreements violates their rights under § 1396a(a)(23) is substantially likely to succeed.

i. Statutory Background

The free-choice-of-provider requirement mandates that a state's Medicaid plan must allow beneficiaries to obtain medical care from *any* entity or person who is "qualified to perform the service or services required" and "who undertakes to provide him such services."[52] Medicaid regulations allow states to set "reasonable standards relating to the qualifications of providers."[53] The Medicaid statute does not define the term "qualified." But LDHH concedes, as held by the Seventh and Ninth Circuits,

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[Footnote continued from previous page]

ual entitlement,' the 'personal right' it gives recipients, would be an empty one." (quoting *Planned Parenthood of Ind.*, 699 F.3d at 974)).

[52] 42 U.S.C. § 1396a(a)(23)(A).

[53] 42 C.F.R. § 431.51(c)(2).

that "[t]o be 'qualified' in the relevant sense is to be capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner."[54] Separately, Medicaid's exclusion provision, 42 U.S.C. § 1396a(p)(1), provides, "[i]n addition to any other authority," mandatory and permissive grounds—including fraud, drug crimes, and failure to disclose necessary information to regulators—under which a state may terminate a provider's Medicaid agreements. That provision's implementing regulation states that "[n]othing contained in this part should be construed to limit a State's own authority to exclude an individual or entity from Medicaid for any reason or period authorized by State law."[55]

Against this backdrop, the Seventh Circuit, in *Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana State Department of Health*, upheld a district court's entry of a preliminary injunction to prevent Indiana from enforcing a law that "excludes a class of providers from Medicaid for reasons unrelated to provider qualifications" because Planned Parenthood was likely to succeed on its claim that the law violated 42 U.S.C. § 1396a(a)(23).[56] The law at

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[54] *Planned Parenthood of Ind.*, 699 F.3d at 978; *see also Planned Parenthood of Ariz.*, 727 F.3d at 969 ("We agree with the Seventh Circuit that '[r]ead in context, the term 'qualified' as used in § 1396a(a)(23) unambiguously relates to a provider's . . . capab[ility] of performing the needed medical services in a professionally competent, safe, legal, and ethical manner.'" (alterations and omissions in original) (quoting *Planned Parenthood of Ind.*, 699 F.3d at 978)).

[55] 42 C.F.R. § 1002.2.

[56] *Planned Parenthood of Ind.*, 699 F.3d at 980.

issue prohibited state agencies from providing state or federal funds to "any entity that performs abortions or maintains or operates a facility where abortions are performed."[57] The Seventh Circuit recognized that "[a]lthough Indiana has broad authority to exclude unqualified providers from its Medicaid program, the State does not have plenary authority to exclude a class of providers for *any* reason—more importantly, for a reason unrelated to provider qualifications."[58] Because the law "exclude[d] Planned Parenthood from Medicaid for a reason unrelated to its fitness to provide medical services, [it] violat[ed] its patients' statutory right to obtain medical care from the qualified provider of their choice."[59]

The Ninth Circuit addressed a similar law in *Planned Parenthood Arizona Inc. v. Betlach*.[60] That court held that the "law violates [the free-choice-of-provider] requirement by precluding Medicaid patients from using medical providers concededly qualified to perform family planning services to patients in Arizona generally, solely on the basis that those providers separately perform privately funded,

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[57] *Id.* at 967 (quoting Ind. Code § 5-22-17-5.5(b)).

[58] *Id.* at 968.

[59] *Id.*

[60] 727 F.3d 960 (9th Cir. 2013). The law at issue provided: "[Arizona] or any political subdivision of [Arizona] may not enter into a contract with or make a grant to any person that performs nonfederally qualified abortions or maintains or operates a facility where nonfederally qualified abortions are performed for the provision of family planning services." 2012 Ariz. Leg. Serv. Ch. 288 (H.B. 2800) (West) (codified at Ariz. Rev. Stat. § 35-196.05(B)).

legal abortions."[61] In doing so, the Ninth Circuit rejected Arizona's contention that it "can determine for any reason that a provider is not qualified for Medicaid purposes, even if the provider *is* otherwise legally qualified, through training and licensure, to provide the requisite medical services within the state."[62] That court gave four reasons.

First, "[n]owhere in the Medicaid Act has Congress given a special definition to 'qualified,' much less indicated that each state is free to define this term for purposes of its own Medicaid program however it sees fit."[63] Second, that reading would "detach[] the word 'qualified' from the phrase in which it is embedded; 'qualified to perform the service or services rendered' (and from the overall context of the Medicaid statute, which governs *medical* services)."[64] Third, that reading would render the free-choice-of-provider requirement "self-eviscerating" because "[i]f states are free to set any qualifications they want—no matter how unrelated to the provider's fitness to treat Medicaid patients—then the free-choice-of-provider requirement could be easily undermined by simply labeling any exclusionary rule as a 'qualification.'"[65] "Giving the word 'qualified' such an expansive meaning would deprive the provision within which it appears of any legal

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61 *Planned Parenthood Ariz.*, 727 F.3d at 963.

62 *Id.* at 970 (emphasis in original).

63 *Id.*

64 *Id.*

65 *Id.* (quoting *Planned Parenthood of Ind.*, 699 F.3d at 978).

force," and "would permit states freely to erect barriers to Medicaid patients' access to family planning medical providers others in the state are free to use."[66] This "would eliminate 'the broad access to medical care that § 1396a(a)(23) is meant to preserve.'"[67] Finally, "permit[ting] states self-referentially to impose for Medicaid purposes whatever standards for provider participation it wishes" would contravene the "*mandatory* requirements [in the free-choice-of-provider provision] that apply to all state Medicaid plans."[68]

The Seventh and Ninth Circuits have also addressed the impact of Medicaid's exclusion provision, 42 U.S.C. § 1396a(p). LDHH seems to rely on 42 U.S.C. § 1396a(p)(1) for only its opening phrase: "In addition to any other authority." Like Arizona and Indiana, LDHH contends that this phrase allows a state to exclude a provider for "any" reason supplied by state law. The Seventh and Ninth Circuits rejected that same contention.[69]

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[66] *Id.*

[67] *Id.* (quoting *Planned Parenthood of Ind.*, 699 F.3d at 978).

[68] *Id.* at 971 (emphasis in original).

[69] The First Circuit in *First Med. Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46 (1st Cir. 2007), however, read 42 U.S.C. § 1396a(p)(1)'s "[i]n addition to any other authority" language much more broadly. That court held that the "'any other authority' language was intended to permit a state to exclude an entity from its Medicaid program for *any* reason established by state law." *Id.* at 53. That case is distinguishable because it did not involve § 1396a(a)(23)'s free-choice-of-provider requirement, most notably because § 1396a(a)(23) does not apply in Puerto Rico, the forum from which the dispute arose in *Vega-Ramos*.

The Seventh Circuit rejected this reasoning, explaining that this argument "reads the phrase for more than it's worth."[70] The phrase—"[i]n addition to any other authority"—"signals only that what follows is a non-exclusive list of specific grounds upon which states may bar providers from participating in Medicaid."[71] "It does not imply that the states have an unlimited authority to exclude providers for any reason whatsoever."[72]

The Ninth Circuit adopted the Seventh Circuit's reasoning and further explained why this assertion "undermines, rather than aids, [the state's] argument":

> The language refers to "any *other* authority" . . . , followed by a provision providing states with authority to exclude providers on specified grounds. This sequence indicates that the Medicaid Act itself must provide that "other" authority, just as it supplies the "authority" covered by the rest of the subsection. Were it otherwise—were states free to exclude providers as they see fit—then the bulk of § 1396a(p)(1) itself would be unnecessary, as the "authority" it supplies would be superfluous.[73]

According to the Ninth Circuit, this "clause empowers states to exclude individual providers on such

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[70] *Planned Parenthood of Ind.*, 699 F.3d at 979.

[71] *Id.*

[72] *Id.*

[73] *Planned Parenthood of Ariz.*, 699 F.3d at 972.

grounds directly, without waiting for the Secretary to act, while also reaffirming state authority to exclude individual providers pursuant to analogous state law provisions relating to fraud or misconduct."[74] As to § 1396a(p)'s implementing regulation, 42 C.F.R. § 1002.2, which provides that "[n]othing contained in this part should be construed to limit a State's own authority to exclude an individual or entity from Medicaid for any reason or period authorized by State law," the Ninth Circuit noted that "[t]hat provision is only a limitation on interpretation of the referenced 'part' of the regulations . . . which does not encompass the free-choice-of-provider requirement."[75]

These cases stand for the general rule that a state may terminate a provider's Medicaid agreements for reasons bearing on that provider's qualification. And "qualified" means "to be capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner."[76] States may also exclude providers on the grounds provided by 42 U.S.C. § 1396a(p)(1) and on analogous state law grounds relating to provider qualification. To be sure, states retain broad authority to define provider qualifications and to exclude providers on that basis. That authority, however, is limited by the meaning of "qualified."

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[74] *Id.*

[75] *Id.* at 972 n.8; *accord Planned Parenthood of Se.*, 141 F. Supp. 3d at 1221.

[76] *Planned Parenthood of Ind.*, 699 F.3d at 978.

ii. Analysis

LDHH asserts that its terminations do not violate the Individual Plaintiffs' free-choice-of-provider rights because LDHH has determined that PPGC is not "qualified" to render medical services. In support, LDHH offers three grounds for its terminations: (1) two qui tam FCA claims, one that PPGC settled, disclaiming all liability, and another that was pending at the time of LDHH's termination action, but that has recently settled with PPGC disclaiming all liability; (2) unspecified misrepresentations in PPGC's letters responding to LDHH's inquiry into whether PPGC or PPCFC operate a fetal tissue donation program; and (3) LDHH's and the Louisiana Office of Inspector General's pending investigations into PPGC.

We conclude that the Individual Plaintiffs are substantially likely to succeed in showing that LDHH's termination of PPGC's provider agreements violates their free-choice-of-provider rights. This is because LDHH's grounds for termination (1) do not relate to PPGC's "qualifications," (2) are not authorized by § 1396a(p), and (3), with one exception, are not even authorized by state law.

We recognize initially that LDHH does not even attempt to articulate how its grounds for termination relate to PPGC's qualifications. That failure is exacerbated by the fact that LDHH has separately conceded that PPGC is competent to provide the relevant medical services. LDHH adopts the Seventh and Ninth Circuits definition of "qualified" and contends that its grounds for termination fall within the statute's broad meaning of "qualified." But LDHH makes no attempt to reconcile its grounds for

termination with its borrowed definition of "qualified." Its briefing is devoid of argument on this point. And LDHH's grounds for termination do not speak for themselves. LDHH cannot show that PPGC's settlement of qui tam FCA claims, in which it *disclaimed all liability*, constitutes actual fraud or renders PPGC unqualified in some other way. Neither does LDHH explain how unspecified misrepresentations related to a program, the existence of which PPGC unequivocally denies, render PPGC unqualified. Likewise, that PPGC is the subject of an investigation alone does not render PPGC unqualified. Importantly, LDHH raises no separate concerns regarding PPGC's provision of medical services in Louisiana. Indeed, it bears repeating that LDHH has conceded that PPGC is competent to provide the relevant medical services.

Instead of attempting to show that PPGC is not "qualified" under § 1396a(a)(23), LDHH seems to rely on its bare assertion that it may terminate a provider for *any reason* supplied by state law. In other words, LDHH argues that PPGC is unqualified simply because state law says so. The fallacy of this tactic is underscored by LDHH's failure to articulate or apply any limiting principle to its authority to exclude a Medicaid provider. We reject that argument because, as explained by the Ninth Circuit, states cannot "determine for any reason that a provider is not qualified for Medicaid purposes, even if the provider *is* otherwise legally qualified, through training and

licensure, to provide the requisite medical services within the state."[77]

Next, LDHH does not even assert that its grounds for termination are consistent or analogous with 42 U.S.C. § 1396a(p)(1)'s enumerated grounds for exclusion. LDHH might have attempted to make some argument as to this point, but it has not invoked any of the grounds for termination provided by § 1396a(p)(1). This is likely because, as the United States's amicus curiae brief explains, LDHH's grounds for termination are not authorized by any of the grounds enumerated in § 1396a(p)(1). And, to the extent LDHH relies on that provision's "[i]n addition to any other authority" language, we join the Seventh and Ninth Circuits in rejecting such a broad interpretation.

Finally, two of LDHH's grounds for termination—fraud and misrepresentations by PPGC—are not even supported by the state laws it invokes. LDHH labels its first ground for termination as "fraud," citing two FCA suits filed against PPGC by qui tam plaintiffs. As to the first suit, LDHH asserts that it may exclude PPGC for (1) settling a qui tam FCA suit, and (2) failing to notify LDHH of the settlement. We have noted that, in *Reynolds v. Planned Parenthood of Gulf Coast, Inc.*, PPGC settled a qui tam FCA suit *without admitting liability*. Louisiana Administrative Code § 50.4147(A)(12) states that a Medicaid provider may be terminated for "entering into a settlement agreement under . . . the Federal

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[77] *Planned Parenthood of Ariz.*, 727 F.3d at 970 (emphasis in original).

False Claims Act," and further places an "affirmative duty" on a provider to inform LDHH in writing of any violations. But, that same statute states that "[i]f a False Claims Act action or other similar civil action is brought by a Qui-Tam plaintiff, no violation of this provision has occurred until the defendant has been found liable in the action."[78] Because PPGC settled the *Reynolds* qui tam FCA claim without admitting liability, that settlement cannot provide the basis for applying the subject statute.

LDHH next cites another qui tam FCA case against PPGC, *Carroll v. Planned Parenthood Gulf Coast*. At the time of the district court's opinion and the parties' briefing, that case was still pending and the district court had denied PPGC's motion to dismiss. LDHH argued that this lawsuit creates a violation of Title 50 of the Louisiana Administrative Code because providers "are required to ensure that all their agents and affiliates are in compliance with all federal and state laws as well as rules, policies and procedures of the Medicaid program. PPGC and its parent organization PPFA has failed to do so and has failed to notify DHH of violations and misconduct by affiliates and providers-in-fact." In so arguing, LDHH failed to demonstrate how the district court's denial of a motion to dismiss in a pending lawsuit indicates that PPGC had violated any laws or Medicaid program requirements. More significantly, on May 25, 2016, PPGC filed a Rule 28(j) letter with this court, informing us that PPGC has settled this matter (as of February 29, 2016) *without admitting*

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[78] La. Admin Code § 4147(A)(12)(c).

liability. Accordingly, the *Carroll* case provides no basis for termination.

LDHH's asserted termination on the basis of "misrepresentations" suffers from similar flaws. Louisiana Revised Statute § 46:437.14(A)(1) states that a provider's enrollment may be revoked for a "[m]isrepresentation."[79] That statute separately defines "misrepresentation" to mean "the knowing failure to truthfully or fully disclose any and all information required, or the concealment of any and all information required on a claim or a provider agreement or the making of a false or misleading statement to the department *relative to the medical assistance programs*."[80]

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[79] This provision is part of Louisiana's Medical Assistance Programs Integrity Law, La. R.S. § 437.1 *et seq.*, which was "enacted to combat and prevent fraud and abuse committed by some health care providers participating in the medical assistance programs and by other persons and to negate the adverse effects such activities have on fiscal and programmatic integrity." La. R.S. § 437.2(A). More specifically, the Louisiana legislature sought to provide a remedy against "health care providers and other persons who engage in fraud, misrepresentation, abuse, or other ill practices . . . *to obtain payments* to which these health care providers or persons are not entitled." La. R.S. § 437.2(B) (emphasis added).

[80] La. R.S. § 46:437.3(15) (emphasis added); *see also Caldwell v. Janssen Pharm., Inc.*, 144 So. 3d 898, 911 (La. 2014) ("[W]e determine that a 'misrepresentation' under La. Rev. Stat. 46:437.3(15) is (1) the knowing failure to truthfully or full disclose any information required on a claim or provider agreement; (2) the concealment of any and all information required on a claim or provider agreement; or (3) the making of a false or misleading statement to the department relative to the medical assistance programs.").

LDHH contends that PPGC made misrepresentations in responding to questions about whether it operates a fetal tissue donation program, as evidenced by one of the discussed videos, which serves as the basis for application of La. R.S. § 46:437.14(A)(1) and PPGC's termination. Neither in the letters nor at any time during this litigation has LDHH identified a single misrepresentation. Moreover, the undisputed evidence establishes that PPGC does not perform any abortions or operate any fetal tissue donation programs.[81] The district court found that the undisputed evidence revealed no indication that PPGC had made any misrepresentations, and LDHH does not even challenge that factual finding on appeal. LDHH's only response is that its lack of specificity regarding the misrepresentations "should be addressed at an administrative hearing." LDHH's strategy to terminate PPGC's provider agreements for misrepresentations *before* it can even identify a single misrepresentation does not pass muster.

Additionally, the statute cited by LDHH requires the misrepresentation to be made "relative to the medical assistance programs."[82] Because the undisputed evidence establishes that PPGC does not provide abortions or operate a fetal tissue donation program in Louisiana (or elsewhere), any statements contained in PPGC's letter are likely not "relative to" Louisiana's Medicaid program. This conclusion is

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[81] PPGC's August 14, 2015, letter states: "To be very clear, there is no contradiction here. As already stated, neither PPCFC nor PPGC currently has a fetal tissue donation program in Texas, and neither sells nor donates any fetal tissue."

[82] La. R.S. § 46:437.3(15)

bolstered by LDHH's August 4, 2015, letter that cites two statements made in relation to PPCFC, a separate Texas corporation, as contradicting statements made in one of the videos.[83] LDHH provides no explanation of how the unspecified misrepresentations are "relative to" Louisiana's Medicaid program. For this reason alone, the statute is inapplicable.

As to LDHH's final ground for termination—pending investigations—Louisiana Revised Statute § 46:437.11(D)(2) states that the "secretary may terminate a provider agreement immediately and without written notice if a health care provider is the subject of a sanction or of a criminal, civil, or departmental proceeding." That provision is facially applicable to PPGC as it is the subject of ongoing investigations. Regardless, we cannot reconcile the free-choice-of-provider requirement's mandate with a state law that would enable LDHH to terminate a provider agreement by simply instigating an investigation, much less on the basis of just *any* investigation. If states were able to exclude Medicaid providers on the basis of *any* investigation, § 1396a(a)(23)'s guarantee would be meaningless. And here, the investigations pertain to conduct that, as described, does not independently provide grounds for termination.

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[83] In the August 4, 2015, letter, LDHH recites two responses PPGC made in relation to *only* PPCFC's operations. It then states that those responses were contradicted by one of the Center for Medical Progress's videos made on April 9, 2015.

iii. Limits of Our Opinion

In concluding that the Individual Plaintiffs are likely to succeed in proving that LDHH's termination of PPGC's provider agreements violates their § 1396a(a)(23) rights, we emphasize the unique circumstances of the instant case. LDHH initially terminated PPGC's agreements "at will," *i.e.*, for no reason at all. That termination would plainly run afoul of § 1396a(a)(23)'s guarantee. Despite LDHH's categorization of its termination as "at will," then-Governor Jindal released a contemporaneous statement indicating that the state was terminating PPGC's agreements "because Planned Parenthood does not represent the values of the State of Louisiana in regards to respecting human life." Again, that termination would violate the Individual Plaintiffs' § 1396a(a)(23) rights because, as the Seventh and Ninth Circuits have held, a state may not exclude a provider simply based on the scope of services it provides. Only after the Plaintiffs filed suit to challenge the terminations did LDHH rescind its "at will" terminations. It then represented to the district court that it believed the Plaintiffs' claims were moot. But, LDHH was not finished: The very next day, it issued new termination letters to PPGC, which provided new grounds for termination. LDHH has effectively run circles around PPGC and the district court. This course of conduct further convinces us that LDHH's termination of PPGC's provider agreements has nothing to do with PPGC's qualifications.

To be sure, the general grounds for termination invoked by LDHH—fraud, misrepresentations, and investigations—will often relate to a provider's

qualifications. States undoubtedly must be able to terminate provider agreements in cases of criminal activity, fraud and abuse, and other instances of malfeasance. Medicaid's 42 U.S.C. § 1396a(p)(1)'s exclusionary provision makes that clear. And, there is no dispute that Louisiana retains authority to establish licensing standards and other qualifications for providers.[84] Title 42 U.S.C. § 1320a-7(b)(4) expressly contemplates that a state licensing authority may revoke a provider's license "for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity," and that the Secretary may exclude such a provider from any federal health care program under that provision. Hence 42 U.S.C. § 1396a(p)(1), which cross references § 1320a-7(b)(4), necessarily authorizes states to terminate a Medicaid provider's agreements when that same state revokes that provider's license "for reasons bearing on the [provider's] professional competence, professional performance, or financial integrity." Here, however, it bears repeating that LDHH has taken no action to revoke PPGC's or its healthcare providers' licenses or any other qualification that it and they might have that enables them to offer medical care generally.

At the most, LDHH has simply pasted the labels of "fraud" and "misrepresentations" on PPGC's

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[84] *See Planned Parenthood of Ind.*, 699 F.3d at 980 ("No one disputes that the states retain considerable authority to establish licensing standards and other related practice qualifications for providers—this residual power is inherent in the cooperative-federalism model of the Medicaid program and expressly recognized in the Medicaid regulations.").

conduct, and then insisted that these labels should insulate its termination actions from any § 1396a(a)(23) challenges. LDHH seeks to do exactly what the Seventh and Ninth Circuits have already warned against: "simply labeling any exclusionary rule as a 'qualification'" to evade the mandate of the free-choice-of-provider requirement.[85] PPGC's settlement of qui tam FCA claims *without admitting liability* does not constitute fraud under any relevant definition of that term. And LDHH's accusation that PPGC made misrepresentations related to inquiries into whether it operates a fetal tissue donation program is devoid of any factual support or linkage. LDHH's labeling of its grounds for termination as fraud and misrepresentations cannot insulate its actions from a § 1396a(a)(23) challenge. If it were otherwise, states could terminate Medicaid providers with impunity and avoid § 1396a(a)(23)'s mandate altogether.

We further emphasize that LDHH has never complained that PPGC is not competent to render the relevant medical services, and it has taken no independent action to limit PPGC's entitlement to render medical services to the general population, for example, by revoking its license. As a result, LDHH's termination of PPGC's provider agreements appears to produce precisely the result that the free-choice-of-provider provision is meant to avoid: LDHH will deny PPGC's services only to Medicaid recipients, but all other individuals will be free to seek care from PPGC.

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[85] *Planned Parenthood of Ind.*, 699 F.3d at 978; *Planned Parenthood of Ariz.*, 727 F.3d at 970.

But, "the free-choice-of-provider provision unambiguously requires that states participating in the Medicaid program allow covered patients to choose among the family planning medical practitioners they could use were they paying out of their own pockets."[86]

In sum, we conclude that the Individual Plaintiffs are substantially likely to succeed in showing that LDHH's termination of PPGC's provider agreements violates their rights under § 1396a(a)(23). This is because LDHH seeks to terminate PPGC's provider agreements for reasons unrelated to its qualifications.

B. Remaining Factors

Finally, we turn to the other issues weighed by the district court: irreparable injury, harm to the enjoined party, and public interest.

As to whether the Individual Plaintiffs will suffer irreparable injury in the absence of a preliminary injunction, LDHH first argues that because § 1396a(a)(23) guarantees the Individual Plaintiffs the right to choose only a *qualified* provider, they will suffer no harm because PPGC is not qualified. We have already rejected that obviously flawed argument.

LDHH next argues that irreparable injury may not be presumed from a statutory violation, and the Individual Plaintiffs' legal injury is not sufficiently concrete, great, and imminent to constitute irreparable harm. LDHH further contends that any

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86 *Planned Parenthood of Ariz.*, 727 F.3d at 971.

inconvenience the Individual Plaintiffs sustain by being forced to seek medical care elsewhere is not significant enough to support a finding of irreparable harm.

The district court found that the Individual Plaintiffs would suffer irreparable injury because they will be unable to receive medical care from the Medicaid provider of their choice. It relied on "uncontroverted" declarations, in which the Individual Plaintiffs state that they wish to continue receiving care at PPGC and that they do not know where else they could get the same kind and quality of care. The court further emphasized that even if the Individual Plaintiffs could find medical care elsewhere, this is beside the point: The Individual Plaintiffs would be denied the provider of their choice guaranteed under 42 U.S.C § 1396a(a)(23).

The Seventh Circuit squarely addressed this issue, rejecting an identical argument from the state:

> Indiana maintains that any harm to [the] patients is superficial because they have many other qualified Medicaid providers to choose from in every part of the state. This argument misses the mark. That a range of qualified providers remains available is beside the point. Section 1396a(a)(23) gives Medicaid patients the right to receive medical assistance from the provider of their choice without state interference, save on matters of qualifications.[87]

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[87] *Planned Parenthood of Ind.*, 699 F.3d at 981.

The Ninth Circuit has also stated that "[t]here is no exception to the free-choice-of-provider requirement for 'incidental' burdens on patient choice."[88] Separately, that circuit has "several times held that beneficiaries of public assistance may demonstrate a risk of irreparable injury by showing that enforcement of a proposed rule may deny them needed medical care."[89]

We conclude that the district court did not clearly err in holding that the Individual Plaintiffs will suffer irreparable harm, absent entry of a preliminary injunction. Because the Individual Plaintiffs would otherwise be denied both access to a much needed medical provider and the legal right to the qualified provider of their choice, we agree that they will almost certainly suffer irreparable harm in the absence of a preliminary injunction.

LDHH next contends that its substantial interest in administering its Medicaid program, overseeing the expenditures of the state's Medicaid funds, and ensuring that Medicaid providers are complying with applicable laws and regulations, outweighs any injury to the Individual Plaintiffs, which it construes as "the mere inconvenience . . . of having longer wait times or longer lead times for appointments for family planning services." The district court rejected this rationale, holding that LDHH will not be deprived of its ability to administer Louisiana's Medicaid program. Rather, the injunction relates

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88 *Planned Parenthood of Ariz.*, 727 F.3d at 975.

89 *M.R. v. Dreyfus*, 697 F.3d 706, 732 (9th Cir. 2011) (internal quotation marks omitted).

only to LDHH's termination of a single provider. The district court also held that any interest is outweighed by the harm the Individual Plaintiffs will suffer.

The district court did not commit clear error in concluding that the harm to the Individual Plaintiffs will outweigh any harm inflicted on LDHH. As to LDHH's interest in administering the state's Medicaid program, LDHH simply does not have a legitimate interest in administering the state's Medicaid program in a manner that violates federal law.

As to LDHH's fiscal interests, the Ninth Circuit addressed a balancing of similar interests in *Independent Living Center of Southern California, Inc. v. Maxwell-Jolly*.[90] That court explained that because a "budget crisis does not excuse ongoing violations of federal law, particularly when there are no adequate remedies available other than an injunction," "[s]tate budgetary considerations do not therefore, in social welfare cases, constitute a critical public interest that would be injured by the grant of preliminary relief."[91] And, "[i]n contrast, there is a robust public interest in safeguarding access to health care for those eligible for Medicaid, whom Congress has recognized as 'the most needy in the country.'"[92] The Fourth Circuit has reached a similar

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[90] 572 F.3d 644 (9th Cir. 2009) *vacated and remanded on other grounds*, 132 S. Ct. 1204 (2012).

[91] *Id.* at 659.

[92] *Id.* (quoting *Schweiker v. Hogan*, 457 U.S. 569, 590 (1982) (quoting H.R. Rep. No. 213 89th Conf. 1st Sess., 66 (1965))).

conclusion: "Although we understand that the North Carolina legislature must make difficult decisions in an imperfect fiscal climate, the public interest in this case lies with safeguarding public health rather than with assuaging North Carolina's budgetary woes."[93]

For these reasons, we conclude that the district court did not commit clear error in holding that the harm to the Individual Plaintiffs outweighs that to LDHH.

LDHH finally challenges the district court's determination that an injunction serves the public interest. It contends that the general public has an interest in the proper expenditure of the state's Medicaid funds, including the oversight of providers who are receiving those funds. The district court found that the injunction serves the public interest by ensuring that Medicaid recipients have continuing access to medical care at PPGC.

Because LDHH's termination of PPGC's provider agreements likely violates federal law, there is no legitimate public interest in allowing LDHH to complete its planned terminations of PPGC's provider agreements under these immediate facts. Instead, the public interest weighs in favor of preliminarily enforcing the Individual Plaintiffs' rights and allowing some of the state's neediest individuals to continue receiving medical care from a much needed provider. We emphasize that "there is a legitimate public interest in safeguarding access to health care

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93 *Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013).

for those eligible for Medicaid."[94] The district court did not err in concluding that preliminarily enjoining LDHH's terminations wills serve the public interest.

IV.

CONCLUSION

We hold that the Individual Plaintiffs met their burden to show their entitlement to a preliminary injunction. We also hold that the district court did not abuse its discretion in preliminarily enjoining LDHH's termination of PPGC's provider agreements. The district court's preliminary injunction is AFFIRMED and we REMAND for further proceedings.

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94 *Maxwell-Jolly*, 572 F.3d at 659.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

PLANNED PARENTHOOD GULF COAST, INC.; JANE DOE #1; JANE DOE #2; and JANE DOE #3,

Plaintiffs,

VERSUS

KATHY KLIEBERT, Secretary, Louisiana Department of Health and Hospitals,

Defendant.

CIVIL ACTION

No. 3:15-cv-00565-JWD-SCR

AMENDED RULING ON DEFENDANT'S MOTION TO DISMISS AND RULING ON PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

Before the Court is the Renewed Motion for Temporary Restraining Order and Preliminary Injunction filed by Planned Parenthood Gulf Coast, Inc. ("PPGC" or "Planned Parenthood"), appearing on behalf of both itself and three patients—Jane Does #1, 2, and 3 ("Individual Plaintiffs")[1] (collectively,

[1] The Individual Plaintiffs "appear pseudonymously because of the private and personal nature of the medical care that they receive at PPGC, and their desire not to have that information become public in order for them to assert their legal rights." (Doc. 1 at 5.) Plaintiffs' unopposed motion seeking permission to

[Footnote continued on next page]

"Plaintiffs")—and based on Section 1396a(a)(23)(A) of the United States Code's Forty-Second Title ("Medicaid Act")[2] and the First and Fourteenth Amendments of the United States Constitution. (Doc. 46 at 17–26; Doc. 53 ¶¶ 62–67 at 19–20; Doc. 45 at 1–2.) The arguments made in support of this motion appear in the Memorandum of Law in Support of Plaintiffs' Renewed Motion for Temporary Restraining Order and Preliminary Injunction ("Plaintiffs' Renewed Memorandum"), (Doc. 46), and Memorandum Regarding Availability of State Remedy ("Plaintiffs' Remedy Memorandum"), (Doc. 52). Plaintiffs' request is opposed by Louisiana's Department of Health and Hospitals ("DHH"), whose head, Secretary Kathy H. Kliebert, is being sued in her official capacity and is therefore this matter's named defendant ("Kliebert" or "Defendant").[3] Defendant's

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[Footnote continued from previous page]

use these pseudonyms was filed on August 25, 2015, (Doc. 5), and granted on August 26, 2015, (Doc. 11).

[2] In this opinion, any reference to "Section 1396a(a)" or "§ 1396a(a)" is to this section of the Medicaid Act unless otherwise noted. Section 1396a(a)(23) will thus be referred to as "Section 1396a(a)(23)" or "§ 1396a(a)(23)" or by its oft-used title, "free-choice-of-provider" provision.

[3] As permitted by precedent, *Ex parte Young*, 209 U.S. 123, 152, 28 S. Ct. 441, 451, 52 L. Ed. 714 (1908); *accord Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 530 n.24 (1st Cir. 2009), Plaintiffs sue for injunctive relief against Ms. Kliebert in her official capacity, (Doc. 1 at 5). To wit, the true defendant here is Louisiana, not Ms. Kliebert or even DHH. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). In light of this duality, this Court will therefore alternate between feminine and third person pronouns throughout this opinion.

arguments are put forth in the Motion to Dismiss Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim ("Motion to Dismiss"), (Doc. 53), supported by the attached Memorandum in Support of Motion to Dismiss Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim ("Defendant's Memorandum"), (Doc. 53-1). Although no evidentiary hearing was held, the matter was thoroughly briefed and argued. The Court has carefully considered the pleadings and briefings to date, which are discussed in more detail below.[4] The Court also thoroughly considered the oral arguments and representations of counsel at hearings held on September 2, 2015 ("First Hearing"), and on October 16, 2015 ("Second Hearing").

On Sunday, October 18, this Court issued an order denying Defendant's motion to dismiss and granting Plaintiffs' request for a temporary restraining order, (Doc. 55). It set a status conference for the following day. At that status conference, all parties agreed that no further discovery and no

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[4] These motions include the first Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction ("Motion for TRO"), (Doc. 4); Memorandum of Law in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction ("Plaintiffs' Memorandum"), (Doc. 4-1); Defendant's Opposition to Plaintiffs' Motion for Temporary Restraining Order ("Defendant's Opposition"), (Doc. 13); Plaintiffs' Reply Memorandum of Law in Support of Plaintiffs' Motion for Temporary Restraining Order ("Plaintiffs' Reply Memorandum"), (Doc. 22); the Statement of Interest of the United States ("Statement of Interest"), (Doc. 24); and Defendant's Reply to the U.S. Department of Justice's Statement of Interest ("Defendant's Reply"), (Doc. 31).

further argument was necessary for this Court to make its determination on whether to issue a preliminary injunction, (Doc. 58). Both parties expressed "no objection to converting the temporary restraining order to a preliminary injunction." (*Id.*) This agreement was reaffirmed in a telephone status conference on October 28, 2015. (Doc. 62.) By the Parties' express consent, the evidentiary record has therefore been finalized, and any factual allegations left uncontroverted must be accepted as true.

On October 28, 2015, by way of Notice of Supplemental Authority, Plaintiffs brought to the Court's attention a case decided the same day which addresses the identical issue confronting this Court, in which the court granted a preliminary injunction enjoining the Governor of Alabama and others from suspending Medicaid payments to Planned Parenthood Southeast, Inc. and from failing to reinstate the State's provider agreement with that entity. (Doc. 61 (attaching Doc. 63, *Planned Parenthood Se., Inc. v. Bentley*, No. 2:15-cv-620-MHT-TFM (M.D. Ala. October 28, 2015) (Opinion) ("*Bentley*")).)[5]

For the reasons first set out in the Order on Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, (Doc. 55), and more fully set forth below, the Court determines that Plaintiffs have met their burden for a preliminary injunction to

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[5] In referencing these recent cases, this Court cites to the original decision and docket rather than its number, as an attachment, in this case's docket. For example, the relevant decision in *Bentley* bears Docket Number 63 in its own docket, but it appears in this proceeding as Document Number 61. Both document numbers will be given when the decision is first cited.

maintain the *status quo*. The Court therefore enjoins from suspending Medicaid payments to PPGC for services rendered to Medicaid beneficiaries, including but not limited to the Individual Plaintiffs pursuant to Federal Rule of Civil Procedure 65(b)(2).[6] The preliminary injunction will remain in effect until it is revised, if at all, by this Court's own further order or by a decision of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit"). For the reasons set forth hereinafter, the Court declines to require security under Rule 65(c) from PPGC or the Individual Plaintiffs.

II. FACTUAL AND STATUTORY BACKGROUND

A. PARTIES

Defendant is sued in her official capacity, as she is the head of DHH, (Doc. 1 ¶ 19 at 4; Doc 43 ¶ 20 at 6; Doc. 53-1 at 1). DHH administers this state's Medicaid Program, a dual state-federal assistance program for families and individuals with low income and limited resources encoded in 42 U.S.C. 1396 *et seq*.[7] (*See also, e.g.*, Doc. 1 ¶ 20 at 5; Doc. 13-1

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[6] Any and all references to "Rule" or "Rules" in this order are to the Federal Rules of Civil Procedure unless otherwise noted.

[7] Created by the addition of Title XIX to the Social Security Act, Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended at 42 U.S.C. § 1396 *et seq*.), Medicaid "furnishes . . . medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services," 42 U.S.C. § 1396-1; *see also* John V. Jacobi, *Multiple Medicaid Missions: Targeting, Universalism, or Both?*, 15 YALE J. HEALTH POL'Y L. & ETHICS

[Footnote continued on next page]

¶¶ 1–4 at 1–2; Doc. 43 ¶ 20 at 6; Doc. 53-1 at 1–4.) DHH does so by monitoring the allocation of federal-state funds in Louisiana and submitting a state plan for medical assistance for review and approval to the Centers for Medicare and Medicaid Services ("CMS"), operating under a delegation of authority from the Secretary for the Department of Health and Human Services ("DHHS"). LA. R.S. §§ 46:437:2(B), 46:437.13;[8] 42 U.S.C. § 1396a(a); 42 C.F.R. 431.10. In accordance with the Louisiana Medical Assistance Programs Integrity Law ("MAPIL"), Medicaid providers must sign a contract with DHH and satisfy several requirements. LA. R.S. §§ 46:437:11, 46:437.13. (*See also* Doc. 13-1 ¶¶ 1–4 at 1–2.) DHH's powers are circumscribed by statute while many of its relevant regulations appear in Title 50 of the Louisiana Administrative Code.[9] (Doc. 53-1 at 2–4; *see also* Doc. 13-1 ¶ 3 at 1.) In this case, DHH initially invoked Section 46:437.11(D)(1), (Doc. 13 at 1–2, 13, 18; Doc. 53-1 at 1; Hr'g Tr. 11:25–12:8, Sept. 2, 2015), and presently relies upon Sections

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[Footnote continued from previous page]

89, 89, 91–92, 98 (2015) (discussing the Act's manifold purposes). Medicaid offers the "States a bargain: Congress provides federal funds in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions" and the statute's implementing regulations. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1382, 191 L. Ed. 2d 471 (2015); 42 U.S.C. § 1396a; 42 C.F.R. § 430.15.

[8] In this opinion, any reference to "Section 46:437" or "§ 46:437" is to this statutory section unless otherwise noted.

[9] In this opinion, any reference to "Title 50" is to this part of Louisiana's administrative code.

46.437(D)(2) and 46:437.14(A) and Title 50, (Doc. 39-1 at 1–2, 5–6, 8–9, 11–12; Doc. 53-1 at 3–4, 24).

PPGC is a charitable organization, so classified under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(1), U.S. DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., FORM 990 at 1 (2012). (Doc. 43 ¶ 10 at 4; *see also* Doc. 4-2 ¶ 5 at 2.) Headquartered in Houston, Texas, it maintains its legal domicile in the Lone Star State, FORM 990 at 1, but is licensed to do business in Louisiana, (Doc. 43 ¶ 10 at 4; *see also, e.g.*, Doc. 1 ¶ 9 at 3; Doc. 4-2 ¶ 5 at 2.) PPGC operates family planning centers and clinics in the Houston area of Texas and in Louisiana. (Doc. 43 ¶¶ 10–11 at 4; *see also* Doc. 1 ¶ 10 at 3–4.) Its first center founded in 1984, PPGC's two Louisiana clinics—the Baton Rouge Health Center ("BRHC") and the New Orleans Health Center ("NOHC")—participate in Louisiana's Medicaid Program, "providing medical services to low-income enrollees in both underserved communities." (Doc. 1 ¶ 10 at 3–4; Doc. 43 ¶ 11 at 4; *see also* Hr'g Tr. 10:25–11:6, Sept. 2, 2015.)

In fiscal year 2014, the two facilities in Louisiana served over 5,200 Medicaid patients and were visited by over 10,000 women. (*See, e.g.*, Doc. 43 ¶ 13 at 4; Doc. 1 ¶ 40 at 11; Hr'g Tr. 8:23–24, Sept. 2, 2015.) "Nearly 75%" of the visits to BRHC were by patients enrolled in Medicaid; "[n]early 40%" of appointments at NOHC were with similarly classified individuals. (Doc. 3 ¶¶ 9–10 at 3–4; Doc. 43 ¶ 11 at 4.) "[C]urrently, over 60% of PPGC's Louisiana visits are for patients enrolled in the Medicaid program." (Doc. ¶ 13 at 4.) The services offered by these two centers include "physical exams, contraception and contra-

ceptive counseling, screening for breast cancer, screening and treatment for cervical cancer, testing and treating for certain sexually transmitted diseases . . ., pregnancy testing and counseling, and certain procedures[,] including colposcopy." (Doc. 1 ¶ 10 at 3–4; Doc. 4-2 ¶ 8 at 3; Doc. 43 ¶ 11 at 4; Hr'g Tr. 7:24–8:7, 8:16–9:9, Sept. 2, 2015.)

Neither BRHC nor NOHC performs abortions. (Doc. 1 ¶ 11 at 4; Doc. 43 ¶ 12 at 4; Doc. 46-1 ¶ 5 at 2; Hr'g Tr. 21:22–25:3, Oct. 16, 2015.) Neither currently has or has ever had a fetal tissue donation program. (Doc. 46 at 11; Doc. 46-1 ¶ 21 at 6.)

The Individual Plaintiffs rely upon Medicaid and receive their medical care from one of PPGC's two facilities. (Doc. 4-3, 4-4, 4-5.) They wish to continue to obtain their reproductive care from PPGC and do not know where they could elsewhere get the same kind of care. (Doc. 4-3 ¶¶ 6–7 at 2; Doc. 4-4 ¶ 8 at 2; Doc. 4-5 ¶ 6 at 2; Hr'g Tr. 8:23–9:9, Sept. 2, 2015.) Jane Doe #2 became a patient at NOHC after her former doctor refused to accept Medicaid, (Doc. 4-4 ¶ 3 at 1), and Jane Doe #2 has found it "very difficult to find doctors in Baton Rouge who will accept Medicaid," (Doc. 4-5 ¶ 3 at 1). In this proceeding, they are intended to represent the interests of many of PPGC's other Medicaid patients throughout the state of Louisiana. (*See, e.g.*, Doc. 46 at 29–30; Doc. 49-1 at 10.)

B. PRECIPITATING EVENTS

On February 19, 2014, pursuant to the concurrent resolutions of Louisiana's House of Representatives and Senate, the Louisiana Legislative Auditor ("Auditor") reviewed "a sample of Medicaid payments

DHH during calendar year 2012 to determine if they were appropriate and supported." (Doc. 46-1 at 14 (LOUISIANA LEGISLATIVE AUDITOR, RESPONSE TO SENATE CONCURRENT RESOLUTION NO. 57 AND HOUSE RESOLUTION NO. 105, 2013 REGULAR SESSION 1 (Feb. 19, 2014)).[10] "Overall," the resulting report ("Legislative Audit") "found that DHH [only] made payments to Planned Parenthood for allowable family planning procedure codes under Medicaid" and unearthed no "indication that Planned Parenthood recommended an abortion or performed an abortion for th[ose] patients."[11] (*Id.*) More specifically, having "extracted and analyzed claims data for ***all*** 25,936 claims DHH paid to Planned Parenthood for Medicaid reimbursements during calendar year 2012," the Legislative Auditor "did not find any evidence that Medicaid payments to Planned Parenthood were not made . . . for allowable Family Planning procedure codes." (*Id.* at 15 (emphasis added).) From these 25,936 claims, the Auditor "identified 22 patients that subsequently suffered a miscarriage" and failed to find "any indication that Planned Parenthood recommended an abortion or performed an abortion for these patients." (*Id.*)[12] Under Louisiana law, the

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[10] The Audit Report also appears as an attachment to the Motion for TRO. (Doc. 4-2 at 19–22.)

[11] This report would be mentioned during the First Hearing. (Hr'g Tr. 4:21–5:2, Sept. 2, 2015.)

[12] In essence, therefore, the Legislative Audit seems to ratify a statement made by a DHH official in an email sent on July 25, 2013: "At this point in time, we do not have credible evidence of Medicaid fraud by Planned Parenthood in Louisiana that would permit the Department from withholding or ceasing payment for Medicaid services." (Doc. 46-3 at 2.)

Legislative Audit is "a public document" and was "distributed to appropriate public officials." (*Id.*)

In July 2015, the Center for Medical Progress ("CMP") released a series of edited videos which purported to document discussions regarding the acquisition of tissue samples between various Planned Parenthood affiliates' officials and disguised actors. *See* Kevin Litten, *Bobby Jindal Announces Investigation into Planned Parenthood*, THE TIMES-PICAYUNE, July 14, 2015; *Planned Parenthood Exposed: Examining the Horrific Abortion Practices at the Nation's Largest Abortion Provider: Hearing Before the H. Comm on Judiciary*, 114th Cong. 192–201 (2015) (Analysis of CMP Video by Fusion GPS). Thereafter, DHH exercised its "oversight over all health facilities in the state" and requested that PPGC "answer some simple questions about . . . [its] current operations and planned operations in Louisiana." (Doc. 46-1 at 51–52 (Letter from Kathy Kliebert, Sec'y, Dep't of Health & Hosps., State of Louisiana, to Melaney Linton, Pres., Planned Parenthood Gulf Coast, Inc. (July 15, 2015)) ("Defendant's July Letter"). DHH gave PPGC until July 24, 2015, to respond. (*Id.* at 51.)

On July 24, 2015, PPGC did so. (Doc. 46-1 at 54–58 (Letter from Melaney A. Linton, Pres. & CEO, Planned Parenthood Gulf Coast, Inc., to Kathy Kliebert, Sec'y, Dep't of Health & Hosps., State of Louisiana (July 24, 2015)) ("PPGC's July Letter"). This letter recaps PPGC's history in Louisiana and denies the accusations made by CMP. (*Id.* at 54–55.) In it, Ms. Melaney A. Linton, PPGC's President and Chief Executive Officer and this letter's author ("Ms. Linton"), clarifies that PPGC "does not offer abortion

services" in Louisiana. (*Id.* at 55.) PPGC acknowledged its link to Planned Parenthood Center for Choice, Inc. ("PPCFC"), a "standalone corporation" and a department of PPGC until 2005, and described itself as an "affiliate" of Planned Parenthood Federation of America ("PPFA"). (*Id.*) PPGC then responded to each of Defendant's questions, emphasizing that neither PPGC nor PPCFC provide abortion services in Louisiana. (*Id.* at 55, 57.) To the question of whether any PPGC "facilities, or any affiliates, subsidiaries, or associates thereof, sell or donate any unborn baby organs or body parts,"[13] PPGC answered, "No." (*Id.* at 56.) To another—"How many clinics operated by Planned Parenthood Gulf Coast, or any affiliates, subsidiaries, or associates thereof, do business with . . . any . . . organizations in the business of selling or donating the remains of unborn babies?"—PPGC answered, "None". (*Id.*)

On August 4, 2015, Defendant sent a second letter to PPGC. (*Id.* at 60–61 (Letter from Kathy Kliebert, Sec'y, Dep't of Health & Hosps., State of Louisiana, to Melaney Linton, Pres., Planned Parenthood Gulf Coast, Inc. (Aug. 4, 2015)) ("Defendant's August Letter"). It zeroes in on three statements in PPGC's July Letter: "PPCFC does not have a fetal tissue donation program in Texas currently"; "PPCFC disposes of Pathological Waste

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[13] Texas law apparently allows for the donation of the "products of spontaneous or induced human abortions, regardless of the period of gestation" to certain types of organizations and for particular purposes. 25 TEX. ADMIN. CODE §§ 1.132(40)(B), 1.133(a)(2)(B). In PPGC's July Letter, it admitted that PPCFC disposes of such products in accordance with this law.

through an entity that is licensed for disposal of Special Waste from Health Care-Related Facilities"; and its "No" response to the question of whether "any Planned Parenthood Gulf Coast facilities, or any affiliates, subsidiaries, or associates thereof, sell or donate any unborn baby organs or body parts." (*Id.* at 60.) Defendant characterized these answers as being "directly contradict[ed]" by another "recently released video made on April 9, 2015 at the Planned Parenthood facility in Houston, Texas, in which Melissa Farrell, Director of Research at Planned Parenthood Gulf Coast (PPGC), discusses existing contracts for fetal tissue donation for the purpose of research." (*Id.*)

On August 14, 2015, PPGC responded. (Doc. 46-1 at 63 (Letter from Melaney A. Linton, Pres. & CEO, Planned Parenthood Gulf Coast, Inc., to Kathy Kliebert, Sec'y, Dep't of Health & Hosps., State of Louisiana (Aug. 14, 2015) ("PPGC's August Letter")) ("PPGC's August Letter") On behalf of both PPGC and PPCFC, Ms. Linton denied the existence of any contradiction, as "neither PPCFC nor PPGC currently has a fetal tissue donation program in Texas, and neither sells nor donates fetal tissue." (*Id.* at 63.) The letter proceeds to address each new question posed in Defendant's August Letter. (*Id.* at 64–65.)

C. OVERVIEW OF THE FIRST AND SECOND TERMINATION ACTIONS

1. First Termination Letters, Kennedy Declarations, and CMS' Statement of Interest

On August 3, 2015, Defendant notified PPGC of its intent to terminate the Agreements pursuant to

§ 46:137.11(D)(1) via four letters ("First Termination Letters"). (Doc. 1 ¶ 30 at 8; Doc. 13 at 1.) As this statute required, DHH gave PPGC 30-days' notice from the relevant letters' receipt. (Doc. 13 at 1–2.) The letters gave no reason for DHH's decision. (Doc. 1 ¶ 32 at 8; *see* also Doc. 13 at 18, 20; Hr'g Tr. 14:6–8, Sept. 2, 2015.) In response, Plaintiffs filed their first complaint. (Doc. 1.)

On that day, the Honorable Piyush "Bobby" Jindal, governor of Louisiana ("Jindal" or "Governor"), published a press release announcing the Agreements' looming terminations. Press Release, Hon. Bobby Jindal, Governor of Louisiana, Governor Jindal Announces the Termination of Medicaid Contract with Planned Parenthood (Aug. 3, 2015).[14] This document states: "Governor Jindal and DHH decided to give the required 30-day notice to terminate the Planned Parenthood Medicaid provider contract because Planned Parenthood does not represent the values of the State of Louisiana in regards to respecting human life." *Id.* It continues: "Planned Parenthood does not represent the values of the people of Louisiana and shows a fundamental disrespect for human life," and, "It has become clear that this is not an organization that is worthy of receiving public assistance from the state." *Id.* It refers to the possibility that PPGC "could be acting in violation of Louisiana law that states no person or group contracting with the state or receiving governmental assistance shall require or recommend that

[14] While never submitted as an exhibit, the press release was incorporated by reference in Plaintiffs' first complaint. (Doc. 1 ¶¶ 32–33 at 8.)

any women have an abortion." *Id.* It concludes: "Pending the ongoing investigation, DHH reserves the right to amend the cancellation notice and terminate the provider agreement immediately should cause be determined." *Id.*

During the First Termination Action, among the many documents docketed by the Parties, Defendant submitted a declaration by Ms. J. Ruth Kennedy ("Ms. Kennedy"), the Medicaid Director of DHH ("First Kennedy Declaration"), (Doc. 13-2 ¶¶ 1–5 at 1). (Doc. 13 at 21–22.) The First Kennedy Declaration's sixth paragraph states: "There are no Medicaid services that only family planning clinics provide that could not be[ ]provided by other enrolled Medicaid providers in the State of Louisiana, including in New Orleans and Baton Rouge." (Doc. 13-2 ¶ 6 at 2.) Its seventh further explains: "Any physician/ physician extender and appropriately certified lab can provide family planning and related services as long as it is within their license and scope." (*Id.* ¶ 7, at 2.) Per the next paragraph, "[t]here are 1,146 actively enrolled Medicaid providers in Region 1, covering the Greater New Orleans area, and 864 actively enrolled Medicaid providers in Region 2, covering the Greater Baton Rouge area, that can provide family planning and related services." (*Id.* ¶ 8 at 2; *see also* Doc. 13 at 21.) A sorted provider list is attached; it includes dermatologists, dentists, audiologists, cosmetic surgeons, and orthopedic surgeons. (Doc. 13-2 at 5–41; *see also* Hr'g Tr. 23:18–25:2, Sept. 2, 2015.)

This First Kennedy Declaration also describes two telephonic conferences between CMS and DHH officials. According to Ms. Kennedy, on August 6,

2015, CMS advised DHH that the latter "has the authority to withhold federal Medicaid dollars from Louisiana or seek injunctive relief for the failure to comply with the Medicaid Act." (Doc. 13-2 ¶ 10 at 2.) CMS and DHH held a second conference call on August 21, 2015, in which CMS "advised" DHH "it would be sending a letter . . . confirming what CMS and HHS counsel had verbally conveyed to the Department during the August 6, 2015 conference call." (*Id.* ¶ 11 at 2.)[15]

On August 31, 2015, the United States Department of Justice, on behalf of CMS and DHHS, filed a Statement of Interest. (Doc. 24.) The United States did so due to "its strong interests in the proper operation of the Medicaid program . . . and in ensuring that the [s]tates administer their federally-subsidized Medicaid programs in a manner that is consistent with the Medicaid statute." (*Id.* at 2.) Basically, the Statement of Interest makes three broad points.

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[15] A second declaration submitted by Ms. Kennedy ("Second Kennedy Declaration") gives a somewhat different description of this call with CMS, offering up far more detail about the content of these conversations: "On the August 6, 2015, conference call . . . CMS and HHS told the Department that the any willing provider provisions under § 1396a(a)(23) was not all inclusive, but illustrative and that the Department could have other reasons to remove a provider from its program that were unrelated to the provider's ability to perform the Medicaid-covered services or properly bill for those services." (Doc. 31-1 ¶ 6 at 2.) The Second Kennedy Declaration continues: "CMS and HHS advised the Department that the validity of a state's reasons for terminating a provider are made on a case by case basis." (*Id.*)

First, because DHH has sought to terminate the Agreements "without providing any justification related to PPGC's qualifications to provide medical services," DHH's proposed termination will run afoul of § 1396a(a)(23). (*Id.*; *see also* Doc. 22 at 2, 5, 6.) To read Section 1396a(a)(23) differently would both "strip the Medicaid Act's free choice of provider provision of all meaning." (Doc. 24 at 3.) It would simultaneously "contravene clear congressional intent to give Medicaid beneficiaries the right to receive covered services from any qualified and willing provider." (*Id.*)

Second, the Statement of Interest declares that DHH's interpretation is "inconsistent" with "the overwhelming weight of authority" and with DHHS' own "considered and longstanding views." (*Id.* at 3, 4, 19–22.) It describes DHH's interpretation of Section 1396a(a)(23) as "not even a plausible reading of the statute," "certainly not compelled by the text of the provision," and likely to "undermine[] the provision's intent." (*Id.* at 20.) Meanwhile, DHHS "has repeatedly and consistently interpreted the 'qualified' language in § 1396a(a)(23) to prohibit a State from denying access to a provider for reasons unrelated to the ability of that provider to perform Medicaid-covered services or to properly bill for those services." (*Id.* at 3–4.) Its view "is eminently reasonable," verified by a dictionary, and recognizes "[a] role for States to set reasonable restrictions related to a provider's ability to provide competent and skilled services" without "read[ing]" Section 1396a(a)(23) "out of the statute altogether, as Louisiana desires." (*Id.* at 21.) It contends that this interpretation, made by CMS "under authority delegated to it by Congress," merits deference. (*Id.*)

Finally, the Statement of Interest affirms CMS' view that "Medicaid beneficiaries" like the Individual Plaintiffs "may enforce their statutory rights under § 1396a(a)(23) to their choice of a qualified provider through a private action under 42 U.S.C. § 1983" even after *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1382, 191 L. Ed. 2d 471 (2015) ("*Armstrong*"). (Doc. 24 at 2, 21; *see also* Doc. 22 at 2–5.)

2. First Hearing

On September 2, 2015, the First Hearing was held. (Doc. 30.)

During its course, the Parties' positions on Section 1396a(a)(23) were clarified. Plaintiffs' counsel explained: "We're here because the termination violates the Jane Doe Plaintiffs' . . . right to free choice of provider under Section [1396]a(a)(23) of the Medicaid Act." (Hr'g Tr. 4:10–12, Sept. 2, 2015.) Because PPGC is "competent to provide services," it argued that it was "qualified" within this subsection's meaning. (Hr'g Tr. 4:16–5:12, Sept. 2, 2015.) The claim before the Court in the Motion for TRO was the Individual Plaintiffs' claims under this provision of the "federal Medicaid act," Plaintiffs' counsel emphasized. (Hr'g Tr. 10:17–19, Sept. 2, 2015.) In Plaintiffs" view, whether or not PPGC held some administrative right was irrelevant, as the Individual Plaintiffs always lacked such prerogatives. (Hr'g Tr. 10:15–19, Sept. 2, 2015.) On the Individual Plaintiffs' behalves, PPGC contested Defendant's claim that Section 1396a(a)(23) creates no private cause of action. (Hr'g Tr. 4:10–15, 6:23–7:15, Sept. 2, 2015.) Specifically, it argued that it "clearly fulfills the standard set forth by the

Supreme Court in *Blessing* [*v. Freestone*, 520 U.S. 329, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997) ("*Blessing*"),] and then in the *Gonzaga* [*University v. Doe*, 536 U.S. 273, 153 L. Ed. 2d 309, 122 S. Ct. 2268 (2002) ("*Gonzaga*"),] . . . cases."[16] (Hr'g Tr. 6:13–19, Sept. 2, 2015.) In other words, this subsection uses "rights creating language that unambiguously confers a right on Medicaid patients" and is not "so vague and amorphous that . . . [it would] strain[] judicial competence to enforce." (Hr'g Tr. 6:15–19, Sept. 2, 2015.) Plaintiffs sought to distinguish the more recent *Armstrong* from the body of law spawned by these cases by maintaining that it not only dealt with "a completely different section of the Medicaid Act," one "without the same kind of rights creating language," but also lacked any Section 1983 claim. (Hr'g Tr. 6:24–7:4, 7:7–15, Sept. 2, 2015.)

Defendant's counsel countered that Section 1396a(a)(30) was substantially identical to Section 1396a(a)(23). These two subsections have "the exact same rights creating type of language"; both "say what the state plan should provide." (Hr'g Tr. 16:17–22, Sept. 2, 2015.) He thus urged the Court to adopt the reasoning of the plurality in *Armstrong*. (Hr'g Tr. 14:10–15:8, 16:4–10, 16:13–14, 19:21–24, 22:24, 23:13 14, Sept. 2, 2015.) Defendant's counsel also insisted that Section 1396a(a)(23)'s "qualified" requirement was "a very vague standard." (Hr'g Tr. 18:1–2, Sept. 2, 2015.) Having proposed a number of denotations, (Doc. 13 at 8), Defendant's counsel

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[16] The relevant test is discussed later in this opinion. *See infra* Part V.

based this conclusion on his "conversations" with CMS and the supposed "[un]reasonabl[eness]" of CMS' contrary interpretation, (Hr'g Tr. 16:24–17:10, 17:24–18:9, Sept. 2, 2015). Because "qualified" is inherently vague and ambiguous, Section 1396a(a)(23) cannot meet the *Blessing* test's requirement that a right not be "so vague and amorphous as to be beyond the competence of the judiciary to enforce."[17] (Doc. 13 at 4, 8.) Defendant promised to "flesh out" her position in a response to the Statement of Interest. (Hr'g Tr. 17:1–2, Sept. 2, 2015.)

PPGC's competence to provide the Medicaid services was also discussed. In response to this Court's question regarding whether DHH had yet "raised any suggestion or made any suggestion that the reason for terminating the contract has anything to do with competency or the adequacy of the care that is given" by PPGC "to the patients who get their care at those facilities," Plaintiffs' counsel answered, "No." (Hr'g Tr. 3:19–24, Sept. 2, 2015.) When this Court posed the same question to Defendant's counsel—"There is no question . . . about the competency of these two facilities to provide Medicaid services and adequate care for the patients that they serve, would you agree with that?"—

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[17] It is unclear whether Defendant was also articulating a deference argument on her own behalf or simply trying to meet the second *Blessing* prong. Her statements can be read in both ways, as arguing that "qualified" is either so ambiguous as to confer interpretive discretion on DHH or so vague as to not satisfy *Blessing*. Either approach, however, fails to account for the statute's plain language and much precedent. *See infra* Part V.B.1.

Defendant's counsel answered, "At this time, I would agree with that." (Hr'g Tr. 11:11–16, Sept. 2, 2015.) Additionally, when asked, "They're not qualified because you're terminating their contract?" Defendant's counsel answered, "Exactly," and admitted that DHH's definition of "qualified" was "circular": PPGC was no longer a "qualified" provider because DHH had made it so by terminating their contract, a mechanism he then stated had never before been utilized in quite this manner. (Hr'g Tr. 21:10–13, 22–25, 22:10–13, Sept. 2, 2015.) He also acknowledged that the "current motive" or "the motive leading up to" the Agreements' termination was CMP's video tapes. (Hr'g Tr. 12:8–16, Sept. 2, 2015; *see also* Hr'g Tr. 35:12–19, Oct. 16, 2015.)

The Parties finally contested the capacity of this state's other Medicaid providers to absorb PPGC's patients. PPGC characterized the list included with the First Kennedy Declaration as containing "numerous examples of[,] on their face[,] providers that would not provide the care that Planned Parenthood provides, including dentists, radiologists, nursing homes, [and other] places that are not going to do breast cancer screening or give out birth control." (Hr'g Tr. 8:18–22, Sept. 2, 2015.) PPGC maintained that "there's no way that . . . other alternative providers have the capacity to absorb our patients." (Hr'g Tr. 9:2–4, Sept. 2, 2015.)

Defendant's counsel admitted that the Individual Plaintiffs would suffer "disruption of some kind," being forced, "to get other doctors" and "seek out other places to get their health care." (Hr'g Tr. 13:6–12, Sept. 2, 2105.) Defendant's counsel also clarified the origins of the list of providers referenced in the

Defendant's Opposition and the First Kennedy Declaration. (Hr'g Tr. 23:18–25:9, Sept. 2, 2015.) It reflected "typically billed" codes, and was the result of "a code run" of providers that "can provide family planning services because they have billed for them" by Defendant. (Hr'g Tr. 24:4–6, 25:1–6, Sept. 2, 2015.)

3. Third Kennedy Declaration

After the First Hearing, Defendant sought permission to amend its opposition and substitute new papers "pursuant to . . . [its] duty to provide accurate information to the Court." (Doc. 32 at 1.) Included in Defendant's proposed amendments was a third declaration by Ms. Kennedy ("Third Kennedy Declaration"). This Third Kennedy Declaration corrects Defendant's first list of providers, explaining: "I[, Ms. Kennedy,] ordered a comprehensive review of this exhibit and have since discovered that nursing facilities and dentists should not have been included." (Doc. 34-2 ¶ 8a at 2; *see also* Doc. 34 at 2.) It adds: "The other provider types included in Exhibit 1 are appropriate due to what they are allowed to do under the scope of their license." (Doc. 34-2 ¶ 8a at 2; *see also* Doc. 34 at 2.) It gives two other examples: "[A]nesthesiologists, who can be reimbursed for their role in sterilization procedures[,] and radiologists, who can be reimbursed for reading ultrasounds, etc. related to reproductive/women's health issues." (*Id.*)

This "review of the information in [the First Kennedy Declaration] also revealed a more precise description of Medicaid providers in the New Orleans and Baton Rouge areas other than PPGC who are available to patients seeking family planning and

related services." (Doc. 34 at 2.) Defendant's staff had "gather[ed] information from available Medicaid providers in proximity to the two Planned Parenthood locations in New Orleans and Baton Rouge, Louisiana." (Doc. 34-2 ¶ 8b at 2.)

As a result of this additional inquiry, Ms. Kennedy had decided to cull the list of relevant providers from over one-thousand (2,000) to twenty-nine (29), (*Compare* Doc. 13-2 ¶ 8 at 2, *with* Doc 34-2 at 5–6). This amended document includes two entries for the City of New Orleans Health Department, whose titles suggest one primarily serves and another mostly the homeless. (*Id.* at 5.) The Court also notes that the name of some of the other entities listed suggest that their patent base is similarly limited, e.g. "NO/Aids Task Force," "New Orleans Musicians' Clinic". (*Id.*)

While five providers in the Baton Rouge area are identified in the corrected Declaration, "LSU Health-OLOL" appears twice. (*Id.*) One location's medical doctors do not accept new patients, and neither clinic provides contraception of any kind. (*Id.*) Finally, only one Baton Rouge center has an approximate wait time of less than one week ("1-3 days, same day for est. pt."). (*Id.*)

4. Abandonment of First Termination Action and Commencement of the Second Termination Action

On September 9, 2015, Defendant chose to "rescind" her earlier at-will terminations. (Doc. 38 at 2.) On September 14, 2015, Defendant sent the First Termination Letters, one for each Agreement, to PPGC. (Doc. 38 at 4, 6, 8, 10; Doc. 46-1 at 18–36.) On

September 15, 2015, Defendant followed these rescission letters with four new termination letters ("Second Termination Letters"). (Doc. 39 at 1; Doc. 46-1 at 37–49.) While the First Termination Letters had invoked Section 46:437.11(D)(1), (Doc. 38 at 4, 6, 8, 10), the Second Termination Letters rely on Sections 46:437.11(D)(2) and 46:437.14 and Title 50. (Doc. 39-1 at 2–3, 5–6, 8–9, 11–12; Doc. 46-1 at 37–49). Both MAPIL sub-provisions, Section 46:436.11(D)(2) allows for "for cause" termination of a provider agreement, and Section 46:437.14 identifies a number of violations, LA. R.S. §§ 46:437:11(D)(2), 46:437.14. The Second Termination Letters specify several different grounds.

The first is a settlement in *Reynolds v. Planned Parenthood Gulf Coast, Inc.*, Case Number 9:09-cv-124-RC (E.D. Tex.) ("*Reynolds* Settlement"), a lawsuit pursuant to the False Claims Act ("FCA") in the Eastern District of Texas between PPGC and an FCA plaintiff. (Doc. 39-1 at 2, 5, 8, 11.) According to the letters, two violations of Title 50 were based on this settlement. First, simply by settling this action, PPGC had violated Title 50. (*Id.*) Second, since DHHS had not been informed "within ten (10) working days of when the provider knew or should have known of the violation," another violation of Title 50 had occurred. (*Id.*)

A second (or third) ground consisted of "provider audits and federal false claims cases against PPFA . . . affiliates." (*Id.*) Another Texas case, *Carroll v. Planned Parenthood Gulf Coast*, Case Number 4:12-cv-03505 (S.D. Tex.) ("*Carroll*"), fell within this description. According to the letters, in *Carroll*, "the presiding judge found that the information already

provided allows the court to draw the reasonable inference that Planned Parenthood knowingly filed false claims." (Doc. 39-1 at 2, 5, 8, 11; *see also* Hr'g Tr. 36:2–22, Oct. 16, 2015.) Relying on this interpretation of *Carroll*, the Second Terminations Letters cite Louisiana law—"Providers and providers-in-fact are required to ensure that all their agents and affiliates are in compliance with all federal and state laws as well as rules, policies and procedures of the Medicaid program"—and concluded: "PPGC and its parent organization PPFA has failed to do so and has failed to notify DHH of violations and misconduct by affiliates and providers-in-fact[,] . . . violations of . . . Title 50." (Doc. 39-1 at 2, 5, 8, 11.)

The third basis for termination was Defendant's determination that PPGC's July and August Letters, *see supra* Part II.B, contained "misrepresentations" upon Defendant's further review of CMP's videos. (Doc. 39-1 at 3, 6, 9, 12.) These alleged misrepresentations were described as violations of Sections 46:437.11(D)(2) and 46:437.14(A)(1). (*Id.*) Although other grounds are referenced in these letters, including audits, noncompliance with various Title 50 conditions, and more, unidentified misrepresentations constitute the third effective category.[18] (*Id.*)

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[18] For example, Defendant maintained that, as Section 46:437.11(D)(2) allows for termination "immediately and without notice if a health care provider is the subject of a sanction or of a criminal, civil, or departmental proceeding," it had determined "that PPGC currently fits within this statute due to the investigations of PPGC by both DHH and the Louisiana Office of Inspector General." (Doc. 39-1 at 3, 6, 9, 12.) And finally, pursuant to Section 46:437.14(A)(l0) and (12), Defen-

[Footnote continued on next page]

After receiving these Second Termination Letters, Plaintiffs filed an unopposed motion to amend the complaint on October 7, 2015, (Doc. 41), a request granted on that same day, (Doc. 42). Already attached to the motion to amend, (Doc. 41-1), a new amended complaint ("Amended Complaint") followed on October 7, 2015, (Doc. 43).[19] Two days later, Plaintiffs filed the Renewed Motion for TRO, (Doc. 45), and the Renewed Memorandum, (Doc. 46). Simultaneously, Plaintiffs filed the Plaintiffs' Motion for Limited Expedited Written Discovery, (Doc. 47), and Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Limited Expedited Discovery, (Doc. 48). On October 14, 2015, Plaintiffs docketed the Memorandum Regarding Availability of State Remedy. (Doc. 52 at 1.) Defendant filed the Motion to Dismiss, (Doc. 53), and Defendant's Memorandum on October 14, 2015, (Doc. 53-1). On October 16, 2015, this Court

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[Footnote continued from previous page]

dant claimed that it "may move to revoke enrollment if a provider is found in violation of licensing or certification conditions or professional standards relating to the licensure or certification of health care providers or the required quality of goods, services, or supplies provided" as well as "for failure to meet any condition of enrollment." (*Id.*) PPGC, however, has counted three, and Defendant has not yet contradicted this grouping in writing or during the Second Hearing. (Hr'g Tr. 25:16–29:10, Oct. 16, 2015.)

[19] While many paragraphs in the Amended Complaint mirror exactly those in the First Complaint, (Doc. 4 ¶¶ 1, 2, 3, 4, 9–14, 18–33, 35, 37–49, *with* Doc. 43 ¶¶ 1, 2, 3, 5, 10–15, 19–33, 41, 43–55), or underwent slight alteration (i.e. dates), (Doc. 4 ¶ 5, *with* Doc. 43 ¶ 6), Plaintiffs refined others so as to reflect this case's latest posture and developments, (Doc. 43 ¶¶ 4, 6, 35–36), and class action claims, (Doc. 43 ¶¶ 16–19, 56–61, 68).

held the Second Hearing. The Court orally denied Plaintiffs' Motion for Limited Expedited Written Discovery and took the remaining motions under advisement at the Second Hearing's conclusion. Late that day, Plaintiffs filed a copy of the *Reynolds* Settlement. (Doc. 54.)

On Sunday, October 18, 2015, this Court issued an order denying Defendant's motion to dismiss and granting Plaintiffs' request for a temporary restraining order. (Doc. 55.) It set a status conference for the following day. (*Id.* at 59.) At that status conference, all parties agreed that no further discovery and no further argument was necessary for this Court to make its determination on whether to issue a preliminary injunction. (Doc. 58.) The Parties expressed "no objection to converting the temporary restraining order to a preliminary injunction." (*Id.*)

On October 28, 2015, Plaintiffs filed the Notice of Supplemental Authority. (Doc. 61.) The Notice includes as an attachment a copy of "a preliminary injunction," issued by the Middle District of Alabama, "in a case substantially similar to the instant action." (*Id.* at 1.) Later that same day, at Defendant's request, this Court held a second telephonic status conference. (Doc. 62.) Once more, the Parties affirmed that they regarded the record as complete and sufficient for the issuance of a preliminary injunction. (*Id.*)

D. OVERVIEW OF PARTIES' ARGUMENTS

1. Plaintiffs' Arguments

In their Motion for TRO and Renewed Motion for TRO, Plaintiffs have made four relevant arguments

to why they are entitled to a temporary restraining order.

First, Plaintiffs contend that they will likely prove that Defendant's efforts violate federal statutory and constitutional law. They begin by arguing that Defendant's latest termination, like the first, is prohibited by the plain meaning of Section 1396a(a)(23) and are thus in violation of controlling federal law. (Doc. 46 at 17–22; *see also* Doc. 4-1 at 16.) This Free-Choice-of-Provider Provision bars Defendant from excluding PPGC from Medicaid for a reason unrelated to its fitness to provide medical services. (Doc. 46 at 18, 21, 22; Doc. 4-1 at 11.) Because "Defendant has nowhere suggested that PPGC is not 'qualified to perform' the Medicaid services it provides," its action cannot be cohered with this subsection's language and purpose. (Doc. 4-1 at 15, 16; *see also* Doc. 46 at 17.)

Plaintiffs concurrently maintain that this particular subsection, in contrast with Section 1396a(a)(30), which was the focus in *Armstrong*, does afford the Individual Plaintiffs with a right enforceable via Section 1983. (Doc. 46 at 18–19 & n.9; Doc. 4-1 at 12–13 & n.9; *see also* Hr'g Tr. 6:23–7:4, Sept. 2, 2015.) Throughout their discussion in the Renewed Memorandum, Plaintiffs rely on many of the same cases, including *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1283, 188 L. Ed. 2d 300 (2014) ("*Betlach*"); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2738, 186 L. Ed. 2d 193 (2013), 133 S. Ct. 2736, 186 L. Ed. 2d 193 (2013 ("*Indiana*"); and *Women's Hospital*

Foundation v. Townsend, No. 07-711-JJB-DLD, 2008 U.S. Dist. LEXIS 52549, 2008 WL 2743284 (M.D. La. July 10, 2008) ("*Townsend*"). (*See, e.g.*, Doc. 46 at 17, 18 & 18 n.13.) Repeatedly, Plaintiffs emphasize that even if PPGC's action would be barred by *Armstrong* the Individual Plaintiffs retain a viable cause of action under Section 1983.

In the Renewed Memorandum, Plaintiffs do abandon their procedural due process claim, (Hr'g Tr. 15:19–16:1, Oct. 16, 2015; *compare* Doc. 43 ¶¶ 62–67 at 19–20, *with* Doc. 1 ¶¶ 56–57 at 14), but do reiterate their two constitutional ones, (Doc. 1 ¶¶ 52–55 at 14; Doc. 43 ¶¶ 64–67 at 20). Now, Plaintiffs argue that Defendant, without sufficient justification, is singling them out for unfavorable treatment, violating the Equal Protection Clause of the Constitution's Fourteenth Amendment, U.S. CONST. amend. XIV, § 2, and is attempting to penalize them for freely associating with other related Planned Parenthood entities, thereby contravening the freedom of association guaranteed by the First Amendment, *see* U.S. CONST. amends. I, IX, § 2; *Nat'l Ass'n for Advancement of Colored People v. Ala. ex. rel Patterson*, 357 U.S. 449, 460, 78 S. Ct. 1163, 1498, 2 L. Ed. 2d 1488 (1958); *Arnaud v. Odom*, 870 F.2d 304, 311 (5th Cir. 1989). (*See, e.g.*, Doc. 46 at 22.)

Second, Plaintiffs insist that the harm to PPGC and the Individual Plaintiffs will be irreparable if the termination comes to pass. The Individual Plaintiffs will be deprived of their ability to exercise their federal statutory rights, and will suffer a disruption of their relationship with a preferred (and competent) provider and a reduction of their access to

family planning services. (Doc. 46 at 26; *see also* Doc. 4-1 at 8–9, 17.) PPGC, in turn, will find its budget sharply curtailed, possibly forcing it to close down BRHC permanently, and will never be able to recover any monetary damages from DHH. (Doc. 46 at 27 & n.19; *see also* Doc. 4-1 at 17–18, 18 n.13.)

Third, Plaintiffs argue that the balance of harms favors them. "While PPGC and its patients will suffer serious irreparable harm in the absence of an injunction, the state will suffer no injury at all." (Doc. 46 at 27; *see also* Doc. 4-1 at 18.) The reason, Plaintiffs contend, is because an injunction will do no more than "require the state to maintain the funding [it] ha[s] provided to . . . [PPGC] for years." (Doc. 46 at 27 (internal quotation marks omitted) (alterations in original); *see also* Doc. 4-1 at 18.)

Finally, Plaintiffs assert that the public interest favors their injunctive request. The public has a "strong" interest "in ensuring continued public access to crucial health services, especially for the many underserved and low-income patients PPGC serves." (Doc. 46 at 28; *see also* Doc. 4-1 at 18.) Such an interest is especially "acute with respect to the neediest . . . who depend on publicly funded programs." (Doc. 46 at 28; *see also* Doc. 4-1 at 19.)

As to Defendant's argument that PPGC's failure to pursue a state administrative appeal of the termination renders the controversy not ripe and deprives all Plaintiffs of standing, Plaintiffs argue that PPGC is not required to pursue the state administrative appeal but can instead pursue its rights under Section 1983. (Doc. 52 at 2–3; *see also* Hr'g Tr. 6:6–10, Sept. 2, 2015.) The Individual Plaintiffs argue that they have no right to adminis-

tratively appeal the Agreements' termination and thus could not do so if they wanted to. (Doc. 52 at 3; *see also* Hr'g Tr. 10:15–17, Sept. 2, 2015.) As such, regardless of whether or not PPGC's claims are ripe, their claims are clearly so, and their standing just as much. (*See* Doc. 52 at 1.)

2. Defendant's Arguments

Invoking Rule 12(b)(1) and (6), Defendant makes essentially three arguments.

First, Defendant contends that this Court lacks subject-matter jurisdiction over this dispute because this case is not ripe and Plaintiffs lack prudential and constitutional standing. (Doc. 53-1 at 5–9.) Defendant insists on this case's unripe state for three reasons: (1) "Plaintiffs have suffered no injury"; (2) "further procedural and factual development is required"; and (3) no hardship can be shown. (*Id.* at 6, 8.) As support for his first and second reason, Defendant argues that because PPGC may appeal this termination, during which the Agreements will remain enforce in accordance with Defendant's wishes, this "suspensive" review process leaves *all* Plaintiffs without a cognizable injury. (*Id.* at 6–7 (injury), 8 (hardship), 9 (injury for standing purposes).) Defendant's Memorandum further explains the reasons for a lack of ripeness and standing as such: "In the instant matter, PPGC is asserting a due process violation while simultaneously hinting that it may voluntarily elect ***not*** to participate in the process about which it complains." (*Id.* at 8 (emphasis in original).)

Second, Defendant argues for abstention, emphasizing these doctrines' purpose of "preserv[ing] the

balance between state and federal sovereignty." (*Id.* at 10.) Defendant cites to four abstention doctrine—*Pullman*, *Younger*, *Burford*, and *Colorado River*—and foregoes one—*Thibodaux*. (*Id.* at 10–12.) When cumulatively considered, these doctrine's "animating" principles have a "clear . . . application" to this proceeding: "Plaintiffs should not be indulged in their attempt to invoke the jurisdiction of this Court in the absence of State agency action against them that would delineate . . . [Defendant's] interpretation of the challenged provision, and in the presence of adequate state administrative and judicial procedures if that eventuality were to occur." (*Id.* at 12.)

Third, Defendant insists Plaintiffs cannot prevail on the merits for four reasons. First, "Plaintiffs have no property interest in the Medicaid provider contracts." (*Id.* at 13; *see also* Doc 13 at 14–18.) Second, even if Plaintiffs have a property interest, Louisiana's administrative appellate process "complies with the mandates of due process" and federal regulation, for "the essence of due process is notice plus an opportunity to be heard." (Doc. 53-1 at 17.) Third, Defendant insists that Section 1396a(a)(23) does not afford the Individual Plaintiffs any private cause of action, (*Compare* Doc. 53-1 at 18–22, *with* Doc. 13 at 4–9), and is sufficiently ambiguous to permit Defendant to exercise her discretion to define "qualified" in accordance with her construction of state law, (Doc. 53-1 at 21; *see also* Doc. 4 at 8). Defendant thus insists that her authority under Section 46:437.11(D)(2) is not limited "to determining whether a provider is competent to provide . . . services." (Doc. 53-1 at 22.) She can, instead, invoke any ground derived from state law, including, but not limited, the bases set forth in

Section 46:437.12 and Title 50, to determine whether a provider is "competent" or not. (Doc. 53-1 at 23–24.)

IV. PRELIMINARY ISSUES: JURISDICTION AND ABSTENTION

A. RIPENESS

1. Defendant's Arguments

Defendant provides the correct standard by which to measure its argument that this case is not ripe: for the purposes of this doctrine, "a court must evaluate (1) the fitness of the issues for judicial resolution, and (2) the potential hardship to the parties by declining court consideration," (Doc. 53-1 at 6 (quoting *Lopez v. City of Houston*, 617 F.3d 336, 342 (5th Cir. 2010)). Defendant maintains the case is not ripe for three reasons: (1) "Plaintiffs have suffered no injury"; (2) "[F]urther procedural and factual development is required, as demonstrated by Plaintiffs' due process claim . . . and their request to conduct expedited discovery in this proceeding"; and (3) no hardship exists because "the review process is suspensive," a third point substantively identical to its first (Doc. 53-1 at 6, 8). At the Second Hearing, her counsel stressed one aspect of the Constitution's ripeness requirement: "There is absolutely no injury"; "[T]here is absolutely no harm to them at all"; "[T]hey have no injury"; and, "There's no concrete injury to any of the Planned Parenthood or to any of the Jane Doe Plaintiffs because, again, there simply is no injury." (Hr'g Tr. 4:21–23, 9:2, 17:18–21, Oct. 16, 2015.)

2. Analysis

(a) Existence of Credible Threat of Concrete Harm

Drawn from Article III but incorporating various prudential elements, U.S. CONST. art. III, § 2; *Reno* v. *Catholic Soc. Servs., Inc.,* 509 U.S. 43, 57 n. 18, 113 S. Ct. 2485, 2495 n.18, 125 L. Ed. 2d 38 (1993), ripeness is "a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties," *Nat'l Park Hospitality Ass'n v. U.S. Dep't of Interior*, 538 U.S. 807–08, 123 S. Ct. 2026, 2030, 155 L. Ed. 2d 1017 (2003) (internal quotation marks omitted). It generally incorporates, as Defendant rightly notes, (Doc. 53-1 at 6), consideration of two elements: "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 808 (citing to *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 1515, 18 L. Ed. 2d 681 (1967) ("*Abbott Labs.*"), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99, 105, 97 S. Ct. 980, 984, 51 L. Ed. 2d 192 (1977))).[20]

Defendant argues that Plaintiff has suffered no injury sufficient for ripeness' purposes. This argu-

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[20] *Abbott Labs.*' conclusion as to the Administrative Procedures Act was abrogated. It remains valid as to its ripeness' analysis and continues to be cited in that limited regard.

ment fails for two reasons. The primary reason is well-rooted in ripeness jurisprudence: "In evaluating ripeness, the central focus is on whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *Tarrant Reg'l Water Dist. v. Herrmann*, 656 F.3d 1222, 1250 (10th Cir. 2011) (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1097 (10th Cir. 2006)). However, an injury need not be actual in a physical sense for a plaintiff's case to cross the ripeness threshold. Rather, if a plaintiff is "immediately in danger of sustaining some direct injury as the result of the challenged official conduct," ripeness will often be found. *Pearson v. Holder*, 624 F.3d 682, 684 (5th Cir. 2010); *see also Whole Woman's Health v. Cole*, 790 F.3d 563, 582 (5th Cir. 2015) (quoting *id.*). It is enough that "an injury that has not yet occurred is sufficiently likely to happen to justify judicial intervention" or "when the court would be in no better position to adjudicate the issues in the future than it is now." *Pearson*, 624 F.3d at 684 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02, 103 S. Ct. 1660, 1665, 75 L. Ed. 2d 675 (1983)). A "*future* injury" will be deemed ripe (and establish standing) if either "the injury is certainly *impending*" or "there is substantial *risk* that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341, 189 L. Ed. 2d 246 (2014) (emphasis added); *see also Caprock Plains Fed. Bank Ass'n v. Farm Credit Admin.*, 843 F.2d 840, 845 (5th Cir. 1988) (concluding that "too many ifs" that render an injury a "mere potential[ity]," not just one or two that may render such a result into a substantial possibility or even a probability, will make a case unripe).

Thus, "ripeness is seldom an obstacle to a pre-enforcement challenge . . . where the plaintiff faces a credible threat of enforcement." *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 907 (10th Cir. 2012); *cf. Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 99 S. Ct. 2301,2308, 60 L. Ed. 2d 895 (1979) (finding standing where "a realistic danger of sustaining a direct injury as a result of a statute's operation *or* enforcement" existed (emphasis added)). In such cases, the plaintiff is typically "not . . . required to await and undergo [enforcement] as the sole means of seeking relief." *Consumer Data Indus. Ass'n*, 678 F.3d at 907; *see also, e.g.*, *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 49 (D.C. Cir. 2000) (holding that declaratory judgment action was ripe for judicial review under the Administrative Procedures Act where plaintiff's "only alternative to obtaining judicial review now is to violate EPA's directives . . . and then defend an enforcement proceeding on the grounds it raises here"). As the Supreme Court has recently written, an agency's prospective, not yet consummated, action will be found ripe for review if "the scope of the controversy has been reduced to more manageable proportions . . . by *some concrete action* applying the regulation to the claimant's situation in a fashion that harms or *threatens to harm* him." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 808 (emphasis added).

Under this precedent, Defendant's Second Termination Letters represent certain threats, classifiable as "concrete action[s]" that "threaten to harm" Plaintiffs, *id.*; *see also Alabama-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 491 (5th Cir. 2014). Here, the existing record amply supports this determination: Defendant has made it clear she

intends to terminate the Agreements, the only thing changing since the initial termination letters being the reason. In effect, by her own actions, she has triggered the application of a general rule, federal courts having "consistently found a case or controversy in suits between state officials charged with enforcing a law and private parties potentially subject to enforcement," *Consumer Data Indus. Ass'n*, 678 F.3d at 905. A case's ripeness simply does not depend on whether the injury has already been inflicted; "specific threat[s] of enforcement" like those the Defendant has already made are typically more than enough to satisfy the constitutional minimum. *Reynolds v. City of Valley Park*, No. 4:06CV01487 ERW, 2006 U.S. Dist. LEXIS 83210, at *25, 2006 WL 3331082, at *6 (E.D. Mo. Nov. 15, 2006); *see also, e.g.*, *Cass Cnty. v. United States*, 570 F.2d 737, 740 (8th Cir. 1978) ("Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." (quoting *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 512, 85 L. Ed. 826 (1941)).

In this analysis, Defendant's own description of her actions is pivotal and telling. She has not proposed a new regulation or initiated a new round of rulemaking. (*See, e.g.*, Hr'g Tr. 33:11–14, Oct. 16, 2015; Doc. 53-1 at 1–2.) Instead, per her Second Terminations Letters, she intends to enforce what she perceives to be state law in accordance with her construction of federal statutory law. (Doc. 39-1 at 2–3, 5–6, 8–9, 11–12.) In fact, as the First Termination Letters attest, the Agreements' termination pursu-

ant to a MAPIL section has been threatened since at least August 2015, and Defendant has now only swapped no reason for three. (*Compare* Doc. 13, *with* Doc. 39-1.) As such, in the Tenth Circuit's words, "enforcement" has been "credib[ly] threat[ened]," her actions having made Plaintiffs' case ripe by lending substance to their pre-October 18, 2015, allegations. *Consumer Data Indus. Ass'n v. King*, 678 F.3d at 907. In such a situation, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief," for "the injury is certainly impending"—and "that is enough." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201, 103 S. Ct. 1713, 1721, 75 L. Ed. 2d 752 (1983) (quoting *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 593, 43 S. Ct. 658, 663, 67 L. Ed. 1117 (1923)). Based on these circumstances and the overwhelming weight of precedent, Plaintiffs' threatened and certain injury is clear.

Two general admissions by Defendant's counsel at the Second Hearing strengthen this conclusion. First, though only indirectly, he himself conceded that a kind of "harm" may have already come to pass: in arguing why no cognizable injury had yet transpired, he emphasized possible contingencies: "I think that one of the contingencies that could happen is their rights could be *restored* . . . . [The] suspension could be *lifted*." (Hr'g Tr. 17:23–25, Oct. 16, 2015 (emphases added).) He characterized Defendant's actions as, prior to October 18, 2015, being "suspensive" if PPGC chose to appeal, and "the final action" as "suspended." (Hr'g Tr. 10:4–12, 6:1–6, Oct. 16, 2015.) Both the First and Second Termination Letters imply the same. (Doc. 38 at 4, 6, 8, 10 (informing PPGC that DHH "will be notifying you by separate

communication of an exclusion/termination/ revocation from the Louisiana Medicaid program for cause" and describing PPGC as possessing "rights to a *suspensive* appeal" of this "exclusion/revocation/ termination" (emphasis added)); Doc. 46-1 at 41, 44, 47, 51 ("[Y]ou are hereby notified that the Department of Health and Hospitals (DHH) is hereby terminating *I* revoking the PPGC provider agreement referenced above. This *action* will take *effect* . . . ."(emphases added)).)

This highlighted language implies that Plaintiffs' rights have already been curtailed, a suspension already imposed, and the relevant action, i.e. the Agreements' termination, already undertaken, its "effect" alone delayed.[21] Any one of these imputations would constitute a sufficiently credible threat to render this case ripe. Later, moreover, Defendant's counsel unambiguously confirmed these statements' implications. To the Court's question—"the Secretary has terminated the contract, but . . . has said that termination is suspended pending appeal?"—he answered: "That's correct." (Hr'g Tr. 19:16–19, Oct. 16, 2015; *see also* Doc. 53-1 at 9–10.) Thus, even if the termination is suspended, it will occur automatically but for this Court's intervention. That its practical enforcement may be stayed does not change the key fact: using *Pearson*'s terms, Plaintiffs are in "danger of sustaining some direct injury as the result of the challenged official conduct," *Pearson*, 624 F.3d

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[21] For something to be "restored" it must first have been taken, for something to be "lifted" it must first have been imposed, and for something to be "suspended" it must first have been determined.

at 684. A final exchange cinches this conclusion. When Plaintiffs' counsel revealed PPGC's intent "to proceed in federal court" and not "to pursue the administrative remedy," and the Court observed, "Well, then it seems to me you've got a very, very ripe situation," and asked Defendant's counsel, "Am I missing something on that?" he answered, "No." (Hr'g Tr. 20:18–23, Oct. 16, 2015.)

Equally worthy of note, Defendant quotes but dismisses the import of a principle embedded in ripeness case law: "[A] case is generally ripe if any remaining questions are purely legal ones," *Lopez*, 617 F.3d at 341. This principle holds even if "the application of the disputed rule [or the ultimate decision] remains within the agency's discretion." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005); *see also Nat'l Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 854 (D.C. Cir. 2006) (citing *id.* and finding ripeness when "waiting to observe" an agency's final "actions would only exacerbate the . . . asserted injury while doing nothing to enable judicial review"). In this context, a truly non-legal question, notably, is often one whose resolution is necessarily "reliant on" and demands "agency expertise." *Marcum v . Salazar*, 694 F.3d 123, 129 (D.C. Cir. 2012). As any fair reading of the complaint and motions filed in this case indicates, the issue involves at least one, if not three, "purely . . . legal question[s]": the precise meaning of Section 1396a(a)(23) and the applicability of two constitutional clauses. (*See, e.g.*, Doc. 1 at 1; Doc. 43 at 1.) In *Abbott Labs.*, the seminal case in ripeness jurisprudence, the Court concluded that the issues presented were appropriate for judicial resolution because the facial challenge to

the regulation involved the purely legal question of whether the regulation at issue exceeded the scope permitted by the underlying statute. *See Abbott Labs.*, 387 U.S. at 149. This kind of challenge, found ripe in *Abbott Labs.*, resembles the challenge that PPGC now makes, with "consideration of the underlying legal issues" *not* "necessarily be[ing] facilitated if they were raised in the context of a specific attempt to [apply and/or] enforce the regulations," *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 171, 87 S. Ct. 1526, 1528, 18 L. Ed. 2d 704 (1967). "Predominantly legal questions" like a statute's plain meaning and whether a person's conduct contravenes its unambiguous command are nearly always ripe. *See, e.g.*, *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1164 (11th Cir. 2008) ("The Supreme Court has long since held that where the enforcement of a statute is certain, a preenforcement challenge will not be rejected on ripeness grounds."); *Nat'l Ass'n of Home Builders*, 417 F.3d aat 1282 ("Claims that an agency's action is arbitrary and capricious or contrary to law present purely legal issues."); *cf. LeClerc v. Webb*, 419 F.3d 405, 414 (5th Cir. 2005) (noting that "actions for declaratory relief . . . by design permit pre-enforcement review" and applying two exceptions). Plaintiffs' present action presents precisely such questions.

(b) Existence of Requisite Hardship

The jurisprudence construing the hardship requirement is just as clear. The Fifth Circuit "has found hardship to inhere in legal harms, such as the harmful creation of legal rights or obligations; practical harms on the interests advanced by the party seeking relief; and the harm of being force[d]

. . . to modify [one's] behavior in order to avoid future adverse consequence." *Choice Inc. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012) (alteration in original) (internal quotation marks omitted). Discrete formulations, a plaintiff can meet the ripeness doctrine's hardship prong by satisfying just one. *Id.* As the Court's decisions clarify, the first test has been met when an agency proposes to "grant, withhold, or modify any formal legal license, power or authority," *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733, 118 S. Ct. 1665, 1670, 140 L. Ed. 2d 921 (1988), and the second is fulfilled when "the impact of the administrative action could be said to be felt immediately by those subject to it in conducting their day-to-day affairs," *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164, 87 S. Ct. 1520, 1524, 18 L. Ed. 2d 697 (1967).

Quite simply, Defendant's conduct here cannot be described in any different terms. Since a threat suffices to satisfy ripeness' hardship requirement, to conclude differently would be to find no case ripe when an administrative option remains for one of many plaintiffs and a statutory right and remedy exists for all, a result contrary to the many opinions that have confronted claims under Section 1396a(a)(23). *See infra* Part V; s*ee also, e.g.*, *Sabree v. Richman*, 367 F.3d 180, 193 & n.29 (3d Cir. 2004) ("A] plaintiff's ability to invoke § 1983 cannot be defeated simply by the availability of administrative mechanisms to protect the plaintiff's interests."); *cf. Cathedral Rock of N. Coll. Hill, Inc. v. Shalala*, 223 F.3d 354, 366 (6th Cir. 2000) (noting that "the Medicaid Act does not have a provision . . . incorporating § 405(h) and its exclusive jurisdiction limitation to channel legal challenges through the administrative procedures set forth").

Defendant maintains that the mere suspensive quality of her decision somehow unripens a case in which an injury is reasonably foreseeable and certain. Considering ripeness jurisprudence, this Court disagrees. *See, e.g.*, *Legacy Cmty. Health Servs., Inc. v. Janek*, No. 4:15-CV-25, 2015 U.S. Dist. LEXIS 8610, at *12–13, 2015 WL 4064270, at *5 (S.D Tex. July 2, 2015) (finding case ripe even when a party did not allege any actual instance of enforcement); *see also* Doc. 63 at 18–20, *Bentley* (finding that the fact of state administrative appeals process does not affect the right of the aggrieved individual party to pursue a Section 1983 claim).

(c) Insufficiency of Defendant's Arguments Regarding Ripeness

While a simple application of longstanding law leaves little doubt about this case's ripened state, Defendant's arguments merit some comment. Having examined her reasoning, this Court finds her construction and extension of the ripeness doctrine to be predicated on a fundamental misunderstanding of Plaintiffs' three claims. In its final paragraph, Defendant's Memorandum summarizes DHH's view of Plaintiffs' case: "In the instant matter, PPGC is asserting a due process violation while simultaneously hinting that it may voluntarily elect *not* to participate in the process about which it complains." (Doc. 53-1 at 8 (emphasis in original).) At the Second Hearing, Defendant again reduces all of Plaintiffs' claims to "a disguised due process challenge." (Hr'g Tr. 8:3–4, Oct. 16, 2015.) This focus on procedural due process obscures at least three logical oversights.

First, this assertion ignores Plaintiffs' withdrawal of their due process claim in their Amended

Complaint. (*See, e.g.*, Doc. 1 at 1; Doc. 43 at 1.) In fact, Plaintiffs' counsel expressly confirmed this at the Second Hearing. (Hr'g Tr. 15:19–16:1, Oct. 16, 2015.) Despite this clear abandonment, however, Defendant argues that the claims of the Individual Plaintiffs are "derivative" of PPGC's, (Hr'g Tr. 9:10–11, Oct. 16, 2015), based wholly on cases explicating the requirements of procedural due process. (Doc. 53-1 at 13 (citing *Plaza Health Labs., Inc. v. Perales*, 878 F.2d 577 (2d Cir. 1989); *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 177 (2d Cir. 1991); and *Senape v. Constantino*, 936 F.2d 687 (2d Cir. 1991)); *see also* Doc. 13 at 16–17). But when statutes like Section 1396a(a)(23) provide the case's gravamen and no procedural due process claim is made, Defendant's cases cannot be legally relevant. *See Indiana*, 699 F.3d at 977 (rejecting the relevance of *Kelly Kare* and similar cases because "[t]his is not a due-process case"). In other words, Defendant has reduced Plaintiffs' complaint to one claim already abandoned and relied on case law thereby rendered irrelevant.

Second, Defendant's emphasis on the existence of a "plan process" ignores an equally well-settled axiom when Section 1983 forms the basis of a party's claims. Defendant argues that the administrative appellate process, having been accepted as generally valid by CMS, essentially forecloses both PPGC's and the Individual Plaintiffs' resort to this (and any other) court. (Hr'g Tr. 7:23–8:6, Oct. 16, 2015; *see also* Doc. 53-1 at 3.) The process offered to PPGC (but not to the Individual Plaintiffs) must not be disturbed, she maintains, as it "is a legitimate process that has been approved," the states "required" under the Medicaid Act to "provide[]a process for reviewing grievances by providers." (Hr'g Tr. 8:7–17, Oct. 16,

2015; *see also, e.g.*, Doc. 53-1 at 3–4.) Yet, as one court has observed, "[b]ecause § 1983 is intended to provide a federal forum, however, there will almost always be some sort of administrative or judicial avenue of relief at state law - whether compelled by federal statute or simply available under general state court jurisdiction." *Roach v. Morse*, 440 F.3d 53, 57 (2d Cir. 2006), *cited with approval in Romano v. Greenstein*, 721 F.3d 373, 376 n.8 (5th Cir. 2013) (as to exhaustion only). Thus, a congressional requirement that states establish administrative review procedures, as exists here, rarely, if ever, implies that either § 1983 plaintiffs need exhaust them or a case is unripe when the process has not been invoked but an injury plainly looms. *See Roach*, 440 F.3d at 57; Doc. 63 at 18–19, *Bentley*.

Third, Defendant's two "instructive" cases—*Rush v. Barham*, No. 14-30872, 2015 U.S. App. LEXIS 12886, 2015 WL 4467848 (5th Cir. July 22, 2015), and *Monk v. Huston*, 340 F.3d 279 (5th Cir. 2003) (Doc. 53-1 at 7–8)—do not support her ripeness argument.

Rush, for one, can be distinguished on both the facts and on the law. As a reading of the district court opinion there affirmed shows, "[t]he existence of parallel ['pending'] state proceedings to render[ed] Plaintiffs' cause of action unfit at each step of the fitness inquiry." *Rush v. Barham*, No. 13-cv-00723-BAJ-RLB, 2014 U.S. Dist. LEXIS 97521, at *11 (M.D. La. July 17, 2014). Here, no state proceeding predated the initiation of this federal action, so that

any state action would not post-date and thus cannot parallel this proceeding from its genesis.[22]

In addition, at issue in *Rush* was the propriety of a "administrative actions" within an agency's state-based "authority—specifically, the agency's enforcement of the Louisiana Scenic Rivers[] Act"; "a challenge to *administrative regulations*" was the one before that court. *Rush*, 2014 U.S. Dist. LEXIS 97521, at *11. The basis of the Individual Plaintiffs' claim is the interpretation of Section 1396a(a)(23), a federal statute. More specifically, it is whether, independently of the state law basis of Defendant's present actions, Section 1396a(a)(23)'s plain meaning establishes the outer parameters of Defendant's discretion under state law to render a provider "unqualified." (*See* Doc. 43 ¶¶ 62–63 at 19.) PPGC's allegations, meanwhile, rest on federal constitutional provisions. (*See id.* ¶¶ 64–67 at 20.) This case is not a "challenge" to an "administrative regulation" by the one (and unquestioned) agency entitled to enforce it, but a challenge to the propriety of the secretary's exercise of discretion within and under the constraints imposed by federal statutory law. As a practical and legal matter, it is almost surely not a regulation, *cf.* 5 U.S.C.§ 551, or a formal rule, LA. R.S. § 49:951(6).

In *Rush*, moreover, the Fifth Circuit thusly characterized the lower court's opinion: "The court held that in the circumstances of this particular case, further factual development will result from the

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[22] This issue is also relevant to this Court's abstention analysis. *See infra* Part IV.C.2.

pending state court proceeding and will necessarily affect the claims in this suit." *Rush*, 2015 U.S. App. LEXIS 12886, at *7, 2015 WL 4467848, at *3. As noted above, no factual development is necessary.[23] Rather, the question before this Court is one of "congressional intent" as reflected in the text of Section 1396a(a)(23). *Abbott Labs.*, 387 U.S. at 149. On the facts and the law, then, *Rush* does not fit.

The same can be said about *Monk*. As *Monk* itself states, "[a] case is generally ripe if any remaining questions are purely legal ones," *Monk*, 340 F.3d at 282, and this Court, like others, *see supra* Part IV.A.2, considers the determination of whether a federal statute is unambiguous to be such a question. In addition, *Monk* discussed ripeness in a narrow context: procedural due process. Thus, the opinion specifically found the case not ripe because "[t]he *constitutional right to due process* is not . . . an abstract right to hearings conducted according to fair procedural rules" but is "the right not to be deprived of life, liberty, or property without such procedural protection." *Id.* at 282–83 (emphasis added). Because any such claims have been decidedly and clearly abandoned by Plaintiffs, *Monk* will not do.

As a final note, Defendant oversells the significance of the Plaintiffs' own motion to expedite discovery, (Doc. 47). According to Defendant, this request attests to the need for factual development that

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[23] Had exhaustion been the issue, which Defendant explicitly denies, this factor may have some force. Defendant, however, has stipulated that no additional discovery is needed. (Doc. 58; Doc. 62.)

proves ripeness' absence, (Doc. 53-1 at 6); Plaintiffs disagree, (*See* Hr'g Tr. 41:8–19, Oct. 16, 2015). While the motion makes clear that such discovery is being sought for purposes of strengthening Plaintiffs' animus allegations, (Doc. 48 at 2), the ripeness doctrine demands no more than a threatened injury to the plaintiff, not a complete evidentiary record. Indeed, Defendant's logic would render any federal case unripe where discovery is requested, without any regard for the reason such discovery is needed. Even if Plaintiffs' first amendment claims require, like almost all claims often do, more discovery, that possibility says nothing about the ripeness of their two other claims. In the vast majority of cases in which ripeness is not found, "additional factual development" is absolutely "necessary," a feature wholly absent from a proceeding focused on the outer parameters of a statute's meaning. *See, e.g.*, *John Corp. v. City of Houston*, 214 F.3d 573, 586 (5th Cir. 2000).[24]

(d) Conclusion

For all these reasons, this Court finds this case ripe for its review, joining the Eastern District of Arkansas in *Planned Parenthood Ark. & E. Okla. v. Selig*, Doc. 45 (Amended and Substituted Preliminary Injunction Order), No. 15-cv-00566-KGB ("*Selig*"), (Doc. 46-9), and the District of Utah in *Planned Parenthood Association of Utah v. Herbert*,

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[24] Even in procedural due process cases, ripeness is not an issue when a facial attack is made. *See, e.g.*, *Cornell Cos. v. Borough of New Morgan*, 512 F. Supp. 2d 238, 256 (E.D. Pa. 2007).

Doc. 12 (Temporary Restraining Order), No. 15-cv-693-CW ("*Herbert*"), (Doc. 46-10).[25]

B. STANDING

1. Defendant's Arguments

In contesting standing, Defendant insists PPGC lacks it in full. In her words, "Plaintiffs have not suffered nor are they about to suffer 'an injury in fact' which is concrete and particularized, or actual or imminent." (Doc. 53-1 at 9.) The reason given was that "[t]he termination of PPGC's provider contracts ha[d] not gone into effect" prior to October 19, 2015. (*Id.*) At the Second Hearing, this point was emphasized: "There's no concrete injury to . . . Planned Parenthood or to any of the . . . [Individual] Plaintiffs because, again, there simply is no injury." (Hr'g Tr. 17:18–21, Oct. 16, 2015.)

2. Analysis

Closely related to the ripeness inquiry, *Choice Inc. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012), standing implicates a slightly different series of concerns. Ripeness is concerned with "*when* an action may be brought," but "standing focuses on *who* may

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[25] In concurring with these courts, this Court finds it significant that Defendant has yet to comprehensively address either case. In attempting to distinguish only the former, Defendant offered one reason: "It's my understanding that [the right to an administrative appeal] was not a suspensive process," while "[t]his is a fully suspensive process," (Hr'g Tr. 9:6–7, Oct. 16, 2015). This lone purported difference, however, is incorrect, as Arkansas law, like Louisiana law, apparently suspends a termination's enforcement upon a provider's proper appeal. *See* ARKANSAS MEDICAID PROVIDER MANUAL 161.500.

bring a ripe action." *Jt. Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 174 (3d Cir. 2001) (emphasis added); *see also Ind. Right to Life, Inc. v. Shepard*, 507 F.3d 545, 549 (7th Cir. 2007) (citing *id.*). The "irreducible [constitutional] minimum" of standing contains three elements": "(1) an injury-in-fact," defined as "an invasion of a legally protected interest which is (a) concrete and particularized" and "(b) actual or imminent, not conjectural or hypothetical," that is (2) fairly traceable to the defendant's allegedly unlawful conduct" and that is (3) likely to be redressed by the requested relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). Having both evolved from Article III, "[s]tanding and ripeness are closely related doctrines that overlap most notably in the shared requirement that the plaintiff's injury be imminent rather than conjectural or hypothetical." *New York Civil Liberties Union v. Grandeau*, 528 F.3d 122, 130 n.8 (2d Cir. 2008).

Indeed, "in measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing." *Jt. Stock Soc'y*, 266 F.3d at 174. The injury need not be inflicted already; imminence will do. *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). Naturally, therefore, as more than one court has found, the threat of future harm is sufficiently immediate to constitute a cognizable injury-in-fact for purposes of both the standing and the ripeness doctrines. *E.g.*, *Comsat Corp. v. FCC*, 250 F.3d 931, 936 (5th Cir. 2001) ("A threatened injury satisfies the injury in fact requirement so long as that threat is real[.]"); *Prestage Farms, Inc. v. Bd. of Supervisors*

of Noxubee Cnty., MS, 205 F.3d 265, 268 (5th Cir. 2000) ("[T]he risk of injury may be founded on a likely and credible chain of events."); *see also, e.g.*, *Baur v. Veneman*, 352 F.3d 625, 633 (2d Cir. 2003) (collecting cases standing for the proposition that "threatened harm in the form of an increased risk of future injury may serve as injury-in-fact for Article III standing purposes"); *Employers Ass'n of New Jersey v. State of New Jersey*, 601 F. Supp. 232, 238 (D.N.J. 1985) ("[T]hreatened injury is sufficient for standing . . .without compelling litigants to await the consummation of threatened injury.") (quoting *Pac. Gas & Elec.*, 461 U.S. at 200))). While a truly "uncertain potentiality" may deprive a plaintiff of standing, *Prestage*, 205 F.3d at 268, a decent probability will confer it, *see Walters v. Edgar*, 163 F.3d 430, 434 (7th Cir. 1998) (collecting cases standing for the proposition that "[a] probabilistic harm, if nontrivial, can support standing"); *cf. Loa-Herrera v. Trominski*, 231 F.3d 984, 988 (5th Cir. 2000) ("Mere threatened injury is sufficient" if "the threat . . . is real.").

Per this law, as with this Court's ripeness inquiry, *see supra* Part IV.A.2, Defendant's threat of harm is sufficiently clear to establish Plaintiff's standing. In her motions, as at the First Hearing, Defendant has insisted that she can terminate the Medicaid provider agreement with PPGC for any reason, and she has repeatedly made clear that she intends and hopes to void every Agreement. There is thus no question that she has made a cognizable threat to Plaintiff's interest, having already attempted to do via Section 46:437.11(D)(1) what she now seeks to do via Section 46:437.11(D)(2). (Doc. 38 at 2; Doc. 39-1 at 2 –13.) That she may not succeed concerns the precariousness of her own position, but

has no bearing on whether the threat she poses is not real and the harm her action portends is not imminent. Precisely because it is, Plaintiffs' minimal standing has been established.[26] *See, e.g.*, *Susan J. v. Riley*, 254 F.R.D. 439 (M.D. Ala. 2008) (rejecting a defendant's standing challenge to a plaintiff proceeding under Section 1396a(a)(8)).

C. ABSTENTION

1. Defendant's Arguments

Defendant urges this Court to abstain. (Doc. 53-1 at 10–12.) She argues for the applicability of the four main abstention doctrines—*Pullman*, *Younger*, *Burford*, and *Colorado River*. (*Id.*) Rather than applying the discrete elements of these varied doctrines, Defendant refers to their occasional "overlap to some degree in . . . scope and application" and reduces all four to a single formulation: (1) "where state administrative proceedings and judicial review afford claimants adequate opportunity to test the constitutionality of state law," and (2) "the exercise of federal jurisdiction would jeopardize state efforts to establish state policy on matters of public concern," abstention "should" follow. (*Id.* at 12.)

2. Analysis

In general, "the circumstances in which federal courts should decline to exercise their jurisdiction"

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[26] PPGC's third-party standing may be a more complicated issue. Defendant, however, has raised no such objection, instead focusing on the doctrine's "injury" prong, and PPGC and the Individual Plaintiffs allege discrete, albeit related, harms. (Doc. 1; Doc. 43.)

and abstain "are carefully defined and remain the exception, not the rule." *Hoye v.City of Oakland*, 653 F.3d 835, 844 (9th Cir. 2011) (*Younger*); *see also, e.g.*, *Colorado River Water Conservation Dist. v. U. S.*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976) (*Colorado River*); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996) (*Burford*). Due to this principle, each abstention doctrine must be carefully assessed, and every relevant element must be shown. *Cf. Wilson v. Valley Elec. Membership Corp.*, 8 F.3d 311, 314 (5th Cir. 1993) (commenting that "[m]ultiple factor tests are difficult to apply"). In this case, when one examines the requirements of each of these doctrines, none clearly apply.

(a)* Pullman *Abstention

Named after its founding decision, *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941), *Pullman* abstention is proper only when there is (1) a federal constitutional challenge to a state action and (2) an unclear issue of state law that if resolved would make it unnecessary to rule on the constitutional question. *Nationwide Mut. Ins. Co. v. Unauth. Prac. of L. Comm., State Bar of Tex.*, 283 F.3d 650, 653 (5th Cir. 2002). The Fifth Circuit has also taken the stance that this doctrine should be invoked in only narrow and limited special circumstances and applied where the state court decision could avoid a federal question and would also avoid a possible strain of the federal and state relationship. *Moore v. Tangipahoa Parish Sch. Bd.*, 507 F. App'x 389, 396 (5th Cir. 2013) (citing *Reetz v. Bozanich*, 397 U.S. 82, 86–87, 90 S. Ct. 788, 25 L. Ed. 2d 68 (1970)).

In essence, then, for *Pullman* to govern, an uncertain state law must be central to the federal proceeding. Here, however, there is no state statute central to this controversy. Rather, the Defendant's interpretation of a *federal* statute and the extent to which her termination, regardless of its state law basis, violates the United States Constitution are the only issues. In addition, as *Pullman* requires that state law be confused and uncertain, Defendant's failure to bring to this Court's attention even one Louisiana case evidencing a persistent discord regarding the meaning of either Section 46:437.11(D)(1) or Section 46:437.11(D)(2) counsels against its invocation. On these bare facts, with no clarification of state law needed for this Court to determine whether Defendant's "final action," (Hr'g Tr. 6:2, Oct. 16, 2015), contravenes federal statutory and constitutional law, *Pullman* abstention is inappropriate. *See, e.g.*, *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F. Supp. 2d 1012, 1021 (D. Idaho 2005); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 932 (9th Cir. 2004), *cert. denied*, 544 U.S. 948, 125 S. Ct. 1694, 161 L. Ed. 2d 524 (2005).

(b)* Younger *Abstention

Articulated in *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), *Younger* abstention applies if three circumstances arise: (1) there must be an ongoing state proceeding that is judicial in its nature, (2) the state must have an important interest in regulating the subject matter of that claim, and (3) there must be adequate opportunity in the state proceeding to raise constitutional challenge. *Rickhoff v. Willing*, 457 F. App'x 355, 358 (5th Cir. 2012) (citing *Wightman v. Tex. Supreme Court*, 84

F.3d 188, 189 (5th Cir. 1996)). First and foremost, *Younger* requires an ongoing state proceeding "judicial in nature." *Ohio Civil Rights Comm'n*, 477 U.S. at 627–28.

In light of this key requirement and the suit's present posture, Defendant's own representations render *Younger* inapposite. As Defendant's counsel has conceded, no administrative proceeding commences until or unless PPGC appeals, (Doc. 53-1 at 22; *see also* Hr'g Tr. 16:8–17:9, Oct. 16, 2015), and PPGC has foresworn that option, (Hr'g Tr. 19:6–10, Oct. 16, 2015). Meanwhile, the Individual Plaintiffs cannot possibly initiate such a proceeding as a matter of state law, as Defendant's two lawyers have admitted. (Hr'g Tr. 8:10–9:1, Oct. 16, 2015; Hr'g Tr. 15:22–25, Sept. 2, 2015; Doc. 22 at 2–5; *see also* Doc. 46 at 18 n.13.) Regardless, no evidence has been adduced that any state quasi-judicial action predated the First Complaint's filing; *Younger* requires as much. Indeed, as she has rescinded the First Termination Letters, Defendant's prospective agency action will necessarily post-date the commencement of this federal proceeding. These facts alone render *Younger* inapplicable to this proceeding.[27]

(c) Colorado River *Abstention*

Colorado River abstention, derived from *Colorado River Water Conservation Dist.*, 424 U.S. 800, is exceptionally narrow, *Jackson-Platts v. GE*

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[27] *Younger* is also subject to three exceptions, at least two of which arguably apply. *Bice v. Louisiana Pub. Defender Bd.*, 677 F.3d 712, 716 n.3 (5th Cir. 2012).

Capital Corp., 727 F.3d 1127, 1140 (11th Cir. 2013). In the Fifth Circuit, six elements must be satisfied:

> 1) assumption by either court of jurisdiction over a res, 2) relative inconvenience of the forums, 3) avoidance of piecemeal litigation, 4) the order in which jurisdiction was obtained by the concurrent forums, 5) to what extent federal law provides the rules of decision on the merits, and 6) the adequacy of the state proceedings in protecting the rights of the party invoking federal jurisdiction.

African Methodist Episcopal Church v. Lucien, 756 F.3d 788, 798 (5th Cir. 2014) (citing *Stewart v. W. Heritage Ins. Co.*, 438 F.3d 488, 491 (5th Cir. 2006)). In general, the Fifth Circuit has found *Colorado River* abstention applicable when there is a parallel suit in the state court at the time of the federal suit also being brought with the same parties and the same issues. *Stewart*, 438 F.3d at 491.

As such, as with *Younger*, the absence of any parallel proceeding in a state agency or a state court initiated before this federal suit's filing must foreclose *Colorado River*'s application to the instant matter, with any modicum of doubt favoring the exercise of the federal jurisdiction conferred by Section 1396a(a)(23) and the Constitution. *AAR Int'l, Inc. v. Nimelias Enters. S.A.*, 250 F.3d 510, 520 (7th Cir. 2001) ("[A]ny doubt regarding the parallel nature of the foreign suit should be resolved in favor of exercising jurisdiction[.]"); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 28, 103 S. Ct. 927, 943, 74 L. Ed. 2d 765 (1983) (holding that "[i]f there is any substantial doubt" as to

whether "the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties" it would "be a serious abuse of discretion to grant the stay or dismissal at all" pursuant to *Colorado River*).

(d)* Burford *Abstention

Traceable to *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943), this final doctrine contemplates the presence of a state-created avenue of relief put where the state has a degree of specialized competence to hear such cases is present. *See Romano*, 721 F.3d at 380 (listing five factors). Put another way, *Burford* abstention is only appropriate when there is a danger that federal court review will "disrupt the [s]tate's attempt to ensure uniformity in the treatment of an essentially local problem." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 362, 109 S. Ct. 2506, 2515, 105 L. Ed. 2d 298 (1989). Abstention is thus "not warranted, however, when a claim requires the federal court to decide predominating federal issues that do not require resolution of doubtful questions of local law and policy." *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 474 (1st Cir. 2009) (internal quotation marks omitted).

Such is not the case here. It is the meaning of Section 1396a(a)(23), a federal statute, and two constructional provisions which constitute the central controversies. In fact, in interpreting Section 1396a(a)(8), whose language perfectly mirrors Section 1396a(a)(23), the Fifth Circuit rejected this same Defendant's request for *Burford* abstention in no uncertain terms:

> None of these factors weighs in favor of abstention in this case. The cause of action arises under federal law, there are no apparent issues of state law or local facts, the interest in proper application of federal Medicaid law is paramount, and there is no special state forum for judicial review.

Romano, 721 F.3d at 380; *see also, e.g.*, *Pub. Serv. Co. v. Patch*, 167 F.3d 15, 24 (1st Cir. 1998) ("*Burford* abstention does not bar federal court injunctions against state administrative orders where there are predominating federal issues that do not require resolution of doubtful questions of local law and policy.") As with *Colorado River*, *Younger*, and *Pullman*, the prerequisites for *Burford*'s invocation are absent from this case. *See New Orleans Pub. Serv.*, 491 U.S. at 361 (refusing to abstain under this doctrine when the federal claims were not "in any way entangled in a skein of state law that must be untangled before the federal case can proceed" (citing *McNeese* v. *Bd. of Educ. for Cmty. Unit Sch. Dist. 187, Cahokia*, 373 U.S. 668, 674, 83 S. Ct. 1433, 1437, 10 L. Ed. 2d 622 (1963))). It too is thus inapposite.

D. CONCLUSION

Based on well-settled law, this Court therefore rejects Defendant's jurisdictional challenges and declines to abstain. For purposes of both ripeness and standing, there is an imminent threat of harm. In addition, applying the appropriate abstention factors to the facts of this case one-by-one, as the Fifth Circuit has long required, shows the impropriety of any one's application. Instead, it is the Court's "strict duty to exercise the jurisdiction conferred upon . . . [it] by Congress" via the Medicaid Act and, if later

necessary, by the Constitution. *Quakenbush*, 517 U.S. at 716; *see also Indep. Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d 1050, 1056–57 (9th Cir. 2008) ("It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights.").

V. DISCUSSION: PRELIMINARY INJUNCTION

A. APPLICABLE STANDARDS

A plaintiff must establish four elements to secure a preliminary injunction: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest. *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009); *accord, e.g.*, *Wilson v. Office of Violent Sex Offender Mgmt.*, 584 F. App'x 210, 212 (5th Cir. 2014).[28] Long deemed an extraordinary remedy, *Douthit v. Dean*, 568 F. App'x 336, 337 (5th Cir. 2014); *see also Munaf v. Geren*, 553 U.S. 674, 689, 128 S. Ct. 2207, 2219, 171 L. Ed. 2d 1 (2008); *Anderson v. Jackson*, 556 F.3d 351, 360 (5th Cir. 2009) (similarly characterizing a temporary restraining order), a preliminary injunction aims "to prevent irreparable injury so as to preserve . . . [a] court's ability to render a

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[28] The standard for granting a temporary restraining order is identical. *See, e.g.*, *Janvey v. Alguire,* 647 F.3d 585, 595 (5th Cir. 2011)*; Women's Med. Ctr. of Nw. Houston v. Bell,* 248 F.3d 411, 419, n. 15 (5th Cir. 2001).

meaningful decision on the merits," *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 627 (5th Cir. 1985) (citing to *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1975)); *accord, e.g.*, *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998); *United States v. Alabama*, 791 F.2d 1450, 1460 (11th Cir. 1986) (adding that "[p]reliminary injunctive relief may be necessary to insure that a remedy will be available" at some future date); *cf. Granny Goose Foods v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439, 94 S. Ct. 1113, 1124, 39 L. Ed. 2d 435 (1974) ("*Ex parte* temporary restraining orders . . . under federal law . . . should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer."). By circumstance and necessity, in considering whether either a preliminary injunction or a temporary restraining order should issue, a court is "almost always" forced to rely upon "[an] abbreviated set of facts." *Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955, 958 (3d Cir. 1984); *accord Texas v. Seatrain Int'l, S. A.*, 518 F.2d 175, 180 (5th Cir. 1975); *see also, e.g.*, *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1231 (11th Cir. 2009) (quoting *id.*).

In applying the four factor test, "none of the four prerequisites has a fixed quantitative value. Rather, a sliding scale is utilized, which takes into account the intensity of each in a given calculus." *Seatrain Int'l, S.A.*, 518 F.2d at 180. This often "requir[es] delicate balancing of the probabilities of ultimate success at final hearing with the consequences of

immediate irreparable injury." *Klitzman*, 744 F.3d at 958;

B. FIRST ELEMENT: LIKELY SUCCESS ON THE MERITS

Plaintiffs bring this civil action pursuant to Section 1983 based on Defendant's alleged violation of rights secured by the Medicaid Act and the United States Constitution. Specifically, Plaintiffs claim that Defendant's attempt to terminate the Agreements violates the rights of the Individual Plaintiffs under Section 1396a(a)(23)(A) and PPGC's rights under both the Equal Protection Clause and the Freedom of Speech Clause of the United States Constitution. (Doc. 43 ¶¶ 62–67 at 19–20.) In relevant part,[29] Defendant contends that Section 1396a(a)(23) does not create a private cause of action for either PPGC or the Individual Plaintiffs and relies primarily on *Armstrong*. (Doc. 53-1 at 18–24; *see also* Doc. 13 at 3–13.)

In this first element's analysis, two overarching principles matter. First, if the Plaintiffs were to prevail on their Section 1396a(a)(23) claim and/or PPGC was to prevail on either of its two constitutional claims, the same remedy—a permanent injunction—would be due, and any potential action by Defendant would be similarly affected. Accordingly, this Court need not conclude that all Plaintiffs have a substantial likelihood of prevailing

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[29] Defendant's argument s regarding Plaintiffs' property interest and procedural due process, (Doc. 13 at 14–19; Doc. 53-1 at 13–18), are no longer viable in light of the Amended Complaint, (Doc. 43 ¶¶ 62–67 at 20–21).

on all claims advanced in the Amended Complaint for a preliminary injunction to issue at this time. If Plaintiffs satisfy the elements needed to show a substantial likelihood of success on the Individual Plaintiffs' Section 1396a(a)(23) claim only, so long as the other factors are met, a preliminary injunction is appropriate. *Girl Scouts of Manitou Council, Inc. v Girl Scouts of United States of America*, 549 F.3d 1079, 1096 (7th Cir. 2008) (holding that plaintiff needed to show no more than "[a] chance of success on the merits of at least one of its claims" (internal quotation marks omitted)); *see also, e.g.*, *Jackson v. N'Genuity Enters. Co.*, No. 09 C 6010, 2011 U.S. Dist. LEXIS 113511, at *23, 2011 WL 4628683, at *7 (N.D. Ill. Oct. 3, 2011) (citing *id.*). Accordingly, because the Court finds that the Individual Plaintiffs have a private right of action, *see infra* Part V.B.1, it need (and will) not decide whether PPGC also has such a right, either on its own behalf or on behalf of its recipient patients. *See also* Doc. 63 at 12 n.3, *Bentley*.

Second, the Plaintiffs must establish a "substantial likelihood of success." This phrase has been defined in different ways. *Compare* 11A CHARLES A. WRIGHT *ET AL.*, FEDERAL PRAC. & PROC. § 2948.3 (3d ed.) ("reasonable probability of success"), *with Terex Corp. v. Cubex, Ltd.*, No. 3:06-CV-1649-G ECF, 2006 U.S. Dist. LEXIS 88863, at *7–8, 2006 WL 3542706, at *2 (N.D. Tex. Dec. 7, 2006) ("more than negligible," and noting the existence of a debate regarding this element's extent among the various circuits and summarizing older Fifth Circuit case law); *see also, e.g.*, *Dine Citizens Against Ruining Our Env't v. Jewell*, No. CIV 15-0209 JB/SCY, 2015 U.S. Dist. LEXIS 109986, at *57 n.10, 2015 WL 4997207, at *21 n.10 (D.N.M. Aug. 14, 2015) ("It is

not entirely clear what a preliminary-injunction movant's burden of proof is vis-à-vis the case's merits, as [t]he courts use a bewildering variety of formulations of the need for showing some likelihood of success—the most common being that plaintiff must demonstrate a reasonable probability of success." (alteration in original) (internal quotation marks omitted)); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) ("Under . . . [the sliding scale] approach [employed in several circuits], the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another.")

Still, at such an early stage, courts are not required "to draw the fine line between a mathematical probability and a substantial possibility of success." *Dataphase Sys. v. C L Sys.*, 640 F.2d 109, 113 (8th Cir. 1981); *accord, e.g.*, *KTM N. Am., Inc. v. Cycle Hutt, Inc.*, No. 13-5033-JLV, 2013 U.S. Dist. LEXIS 67209, at *14, 2013 WL 1932797, at *5 (D.S.D. May 8, 2013). And none of the prerequisites for a preliminary injunction have "a fixed quantitative value." *Seatrain Int'l, S. A.*, 518 F.2d at 180; *see also, e.g.*, *EnVerve, Inc. v. Unger Meat Co.*, 779 F. Supp. 2d 840, 843 (N.D. Ill. 2011) ("The sliding scale approach is not mathematical in nature, rather it is more properly characterized as subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief." (internal quotation marks omitted) (citing *Ty, Inc. v. Jones Grp.,* 237 F.3d 891, 895–96 (7th Cir. 2001))); *Louis v. Meissner*, 530 F. Supp. 924, 925 (S.D. Fla. 1981) (citing *Seatrain Int'l, S. A.*, 518 F.2d at 180).

Regardless of what standard is applied to the record before it, and without regard to any "sliding scale," this Court finds that Plaintiffs have established a high likelihood of success on the merits, far beyond the "more than negligible" standard discussed above.

1. Mandate of 1396a(a)(23)

(a) Existence of a Private Right of Action under Section 1396a(a)(23)

Section 1396a(a)(23)[30] reads: "A [s]tate plan for medical assistance *must* . . . provide . . . [that] *any individual* eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . .who undertakes to provide him such services." 42 U.S.C. § 1396a(a)(23) (emphasis added). Plaintiffs pursue their claim as a private right of action under § 1396a(a)(23). Defendant argues that this provision is not enforceable under §1983 because, she argues, § 1396a(a)(23) does not provide a private cause of action. For the reasons which follow, the Court finds that this provision does create a private right of

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[30] Thus, in analyzing the Plaintiffs' success on the merits on this claim, PPGC's right to any administrative remedy cannot be relevant. As Defendant has twice conceded, the Individual Plaintiffs actually have no such remedy. (Hr'g Tr. 8:18–9:12, Oct. 16, 2015; Hr'g Tr. 15:22 –25, Sept. 2, 2015.) Whatever procedural due process rights afforded to PPGC under the state's approved Medicaid plan, therefore, the Individual Plaintiffs demonstrably have none, as Plaintiffs' counsel have emphasized, (Hr'g Tr. 14:17–24, Oct. 16, 2015; Hr'g Tr. 10:16–19, Sept. 2, 2015.)

action which can be pursued via §1983 by the Individual Plaintiffs. *See, e.g.*, Doc. 63 at 12 –13, *Bentley*; Doc. 45 at 12–15, *Selig*; *Betlach*, 727 F.3d at 965–68; *Indiana*, 699 F.3d at 972–77; *Harris v. Olszewski*, 442 F.3d 456, 459 (6th Cir. 2006).

The seminal holdings which support the holding of these courts—*Wilder v. Virginia Hospital Association*, 496 U.S. 498, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990); *Blessing v. Freestone*, 520 U.S. 329, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997); and *Gonzaga University v. Doe*, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 309 (2002)[31]—remain binding and undisturbed. This fact too has been recognized by multiple courts. *See, e.g.*, Doc. 45 at 12, *Selig* ("The Court determines that the Jane Does are likely to succeed in arguing that . . . [Section 1396a(a)(23)] satisfies the factors set forth in *Gonzaga* . . . and *Blessing*[.]"); *see also Briggs v. Bremby*, 792 F.3d 239, 245 (2d Cir. 2015) (applying the *Blessing* test to 7 U.S.C. § 2020(e)(3) and (9)); *Emma C. v. Eastin*, No. 96-cv-04179-TEH, 2015 U.S. Dist. LEXIS 113355, at *17, 2015 WL 5029283, at *5 (N.D. Cal. Aug. 25, 2015) (distinguishing *Armstrong* as "a Medicaid case wherein the Court considered whether there was an implied right of action under the Supremacy Clause"); *cf. Tohono O'odham Nation v. Ducey*, No.

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[31] Leaving *Blessing* unreversed, *Gonzaga* "clarified the application of the first 'benefit' factor [in *Blessing*] and underscored the central focus of this factor should be on whether the statutory provision creates 'rights-creating' language critical to showing the requisite congressional intent to create new rights." *Johnson v. City of Detroit*, 446 F.3d 614, 621 (6th Cir. 2006).

CV-15-01135-PHX-DGC, 2015 U.S. Dist. LEXIS 124979, at *30–31, 2015 WL 5475290, at *10–11 (D. Ariz. Sept. 17, 2015) (distinguishing *Armstrong* in a case not involving the Medicaid Act); *J.E. v. Wong*, No. 14-00399 HG-BMK, 2015 U.S. Dist. LEXIS 114094, at *21–22, 2015 WL 5116774, at *7 (D. Haw. Aug. 27, 2015) (reaching the same conclusion and adding that "[t]he *Armstrong* Court's discussion regarding the lack of a private cause of action to enforce Section 1396a(a)(30) was not a departure from existing precedent"). Equally importantly, it has also been acknowledged by Defendant's counsel. (Hr'g Tr. 14:21–15:14, Sept. 2, 2015.)

These precedents thus supply the three-part test that this Court must employ to determine whether Section 1396a(a)(23) awards the Individual Plaintiff with a right enforceable under § 1983. *Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697, 702 (5th Cir. 2007). Thus, if (1) Congress "intended" that Section 1396a(a)(23) "benefit the [individual] plaintiff[s]," (2) "the right assertedly protected by th[is] statute is not so vague and amorphous that its enforcement would strain judicial competence," and (3) Section 1396a(a)(23) "unambiguously impose[s] a binding obligation on the [s]tates," the Individual Plaintiffs, here represented by all Plaintiffs' counsel, may proceed to sue Defendant for violating Section 1396a(a)(23) pursuant to § 1983, having "advanc[ed] a violation of a 'federal law.'" *Hood*, 235 F.3d at 924–25 (quoting *Blessing*, 520 U.S. at 340–41), *rev'd on other grounds*, *as observed in Hawkins*, 509 F.3d at 701 n.4. Not voidable by one decision's dicta or a plurality's construal of a different subsection, this *Gonzaga* and *Blessing* standard for unearthing

congressional intent to create a private cause of action governs still.

Read plainly, § 1396a(a)(23) easily satisfies each prong. It contains rights-creating and mandatory language, and it has an unmistakable individual focus. 42 U.S.C. § 1396a(a)(23). Indeed, with its terms so comprehensive and clear, court after court forced to peruse this provision has reached the same conclusion: "[W]e hold that the Medicaid Act's free-choice-of-provider requirement confers a private right of action under 42 U.S.C. § 1983." *Betlach*, 727 F.3d at 963; *accord, e.g.*, Doc. 63 at 12–19, *Bentley*; Doc. 45 at 12, *Selig*; *Indiana*, 699 F.3d at 968; *Harris*, 442 F.3d at 459. True, as Defendant notes, some of these courts applied § 1396a(a)(23) pre-*Armstrong*. Yet, their distinctive factual predicates do not affect the more uniform applicability (and cogency) of these courts' interpretation of the unchanged statute at issue here in accordance with the standard laid out in *Wilder* and its progeny. Presented with the same exact subsection, they discerned a private cause of action within it. In following *Betlach*, *Indiana*, *Harris*, and *Selig*, this Court simply endorses a statutory construction predicated on venerable canons and jurisprudence founded on binding Supreme Court precedent, *see* Nicole Huberfeld, *Where There is a Right, There Must be a Remedy (Even in Medicaid)*, 102 KY. L.J. 327, 343 (2013–14) ("When states agree to participate in the Medicaid program, they know that failure to comply with the terms of the Medicaid Act will result in either the Secretary [of DHHS] taking action to bring the state into alignment with the Act or private enforcement of the law . . . . [T]he private enforcement of the Medicaid Act is [therefore] not a

surprise to the states, and it has not been for decades.").

Crucially, this reading of § 1396a(a)(23) is consistent with the construction given to other similar provisions of the Medicaid Act, a fact that triggers the application of another familiar canon of interpretation, *see TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 449, 151 L. Ed. 2d 339 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks omitted)).

For instance, the Medicaid Act's Reasonable Promptness Provision requires that a state plan for medical assistance "provide that *all individuals* wishing to make application for medical assistance under the plan *shall* have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1396a(a)(8) (emphasis added). In the persuasive (and decisive) *Romano*, the Fifth Circuit itself applied *Blessing*'s three-part test as modified by *Gonzaga* and found that this section, linguistically identical to Section 1396a(a)(23), creates a private cause of action enforceable under § 1983. 721 F.3d at 375, 378–80; *accord, e.g.*, *Sabree v. Richman*, 367 F.3d 180, 192 (3d Cir. 2003) (reaching the same conclusion as to Section 1396a(a)(10) and (a)(15)).

Similar in tone to Section 1396a(a)(8) and (a)(23), Section § 1396a(a)(3) reads: "A [s]tate plan for medical assistance must . . . provide for granting an opportunity for a fair hearing before the State agency to *any individual* whose claim for medical assistance under the plan is denied or is not acted upon with

reasonable promptness." 42 U.S.C. § 1396a(a)(3) (emphasis added); *McCarthy v. Hawkins*, 381 F.3d 407, 411 n.3 (5th Cir. 2004) (quoting *id.*). This section self-evidently contains the same words prominent in § 1396a(a)(23), including "individual" and "must." 42 U.S.C. § 1396a(a)(3). Logically, therefore, another court similarly construed it: "[The] language is mandatory, the provision contains rights-creating language, and there is an individual focus." *Detgen v. Janek*, 945 F. Supp. 2d 746, 754 (N.D. Tex. 2013); *see also, e.g.*, *Shakhnes v. Berlin*, 689 F.3d 244, 247, 254, 256-57 (2d Cir. 2012) (concluding that private plaintiffs can sue under § 1983 to enforce Section 1396a(a)(3)).

In a final example, Section 1396a(bb)(5) states: "In the case of services furnished by a [FQHC] . . . pursuant to a contract between the center or clinic and a managed care entity . . ., the State plan *shall* provide for payment to *the center or clinic* by the State." 42 U.S.C. § 1396a(bb)(5) (emphasis added). This subparagraph too, the First Circuit has observed, speaks in "individualistic terms, rather than at the aggregate level of institutional policy or practice," refers to "specific, discrete beneficiary group," and contains mandatory and "highly specific terms," and therefore creates a right subject to enforcement under § 1983. *Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 74, 75 (1st Cir. 2005).

In sum, an overwhelming majority of courts confronted with language in the Medicaid Act identical to that before the Court now have found it to impart a right of action cognizable under § 1983. To read these identical terms differently, as Defendant now proposes, is insupportable pursuant to one "well

established principle[] of statutory construction," *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2073, 182 L. Ed. 2d 967 (2012). To wit, "[t]he normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860, 106 S. Ct. 1600, 1606, 89 L. Ed. 2d 855 (1986); *see also, e.g.*, *United States v. Marshall*, 798 F.3d 296, 309 (5th Cir. 2015) (applying this canon). While this rule "readily yields to context," *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441, 189 L. Ed. 2d 372 (2014), nothing in the language of Section 1396a(a)(23) compels its abandonment.[32]

***(b) Defendant's Misplaced Emphasis on* Armstrong**

Defendant urges this Court to discard this consensus on the basis of the recent *Armstrong* decision, (Hr'g Tr. 19:19–24, Sept. 2, 2015; Hr'g Tr. 8:4–5, Oct. 16, 2015). However, this decision cannot bear the weight placed upon it by Defendant. The *Selig* court said it well: *Armstrong* "does not overrule, or even significantly undermine, the precedent that informed the reasoning of the Sixth, Seventh, and Ninth Circuits in recognizing a private right of action under 42 U.S.C. § 1396a(a)(23)." Doc. 45 at 12, *Selig*. This

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[32] Crucially, Defendant has given no reason reflecting "distinct statutory objects calling for different implementation strategies" that would justify construing Section 1396a(a)(23) differently than 1396a(a)(8). She has pointed the Court to *Armstrong* alone, which, as shown below, will not do. *See infra* Part V.B.1.b.

Court agrees: by its own terms, *Armstrong* cannot control for four different reasons.

First, *Armstrong* is narrower than Defendant says. The *Armstrong* plurality did not dissect § 1396a(a)(23); it did not even delve into the meaning of a similarly worded provision like § 1396a(a)(3) or (a)(8). Instead, *Armstrong* focused on § 1396a(a)(30), which compels a state plan to "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care." 42 U.S.C. § 1396a(a)(30). *Armstrong* stressed that this sub-paragraph, not every paragraph in Section 1396a(a), lacked the "rights-creating" language prominent in statutes in which a private right of action could be discerned. 135 S. Ct. at 1387 (Scalia, J., plurality). Further, the Court noted that it was not focused on the rights of an individual; instead, "[i]t is phrased as a directive to the federal agency charged with approving state Medicaid plans." *Id.* Unlike Section 1396a(a)(30), whose precise text was examined so diligently in *Armstrong*, both "rights-creating" and individual-focused language are prominent in (a)(23). *See supra* Part V.B.1.a.

As a counter, Defendant claims that § 1396a(a)(23) and (a)(30) contain "the exact same rights creating type of language." (Hr'g Tr. 16:17–22, Sept. 2, 2015; *see also* Doc. 53-1 at 20.) This contention is based purely and incorrectly on the introductory words of the overall section ("a [s]tate plan must . . ."), not the precise language of the

controlling paragraph, i.e. Sections 1396a(a)(30). It thus ignores the specific reference to "individual" and the use of the word "may" in Section 1396a(a)(23): "[A]ny individual . . . may obtain from any institution . . . qualified to perform the service or services required . . . who undertakes to provide him [or her] such services." 42 U.S.C. 1396a(a)(23). True, the state "*must*" provide a plan so permitting, but Section 1396a(a)(23) quite clearly empowers a Medicaid eligible "individual" to choose amongst a set of providers competent in their selected medical field. In essence, Defendant is urging this Court to rewrite a plain statute, a task at odds with its judicial duty "to ascertain — neither to add nor to subtract, neither to delete nor to distort" an enactment's final terms. *Ariz. State Bd. For Charter Sch. v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1007 (9th Cir. 2006).

Second, Defendant has extended *Armstrong*'s "rationale" far beyond its own stated limits. True, *four* justices went further, specifically dismissing respondents' arguments for "a cause of action" predicated on "the Medicaid Act itself." *Armstrong*, 135 S. Ct. at 1387 (Scalia, J., plurality). However, *Armstrong*'s next two paragraphs narrowly define the reference to "the Medicaid Act" to Section 1396a(a)(30) alone, and no majority coalesced around the broader proposition embraced by Justice Scalia, *id.* at 1387–88 (Scalia, J., plurality). Instead, Justice Breyer's concurrence, the fifth vote in *Armstrong*, specifically concentrated on the unique text of Section 1396a(a)(30), describing it as "set[ting] forth a federal mandate that is broad and nonspecific" and "appl[ying] its broad standards to the setting of rates." *Id.* at 1388 (Breyer, J., concurring in part and concurring in judgment). Continuing, Justice Breyer

emphasized that "the history of ratemaking demonstrates that administrative agencies are far better suited to this task than judges." *Id.* As such, in accordance with the Fifth Circuit's binding command that a "joint opinion is . . . considered the holding of the Court . . . [only] as [to] the narrowest position supporting the judgment," *Cole*, 790 F.3d at 571, this Court refuses to take *Armstrong* beyond the confines of § 1396a(a)(30), the only provision upon whose interpretation a majority could agree. In fact, as Defendant conceded at the First Hearing, (Hr'g Tr. 15:9–14, Sept. 2, 2015), *Armstrong* did not overrule *Gonzaga* or *Wilder*, and it was *Gonzaga* that formed the basis of the Fifth Circuit's interpretation of § 1396a(a)(8) in *Romano*, 721 F.3d at 378–80. Based on the actual majority's "rationale," (Hr'g Tr. 16:18, Sept. 2, 2015), *Armstrong* can be read as definitive as to the breadth of Section 1396a(a)(30) but of no other section, including the Free-Choice-of-Provider now before this Court.

Third, just because § 1396a(a)(30) and (a)(23) are subparts of one act does not make them identical in form and effect, as Defendant contends in seeking to expand *Armstrong* beyond its express ambit. (*See, e.g.*, Doc. 53-1 at 18–20; Hr'g Tr. 16:17–22, Sept. 2, 2015.) Rather, "[t]he mere fact that all the Medicaid laws are embedded within the requirements for a state plan does not, by itself, make all of the Medicaid provisions into ones stating a mere institutional policy or practice rather than creating an individual right." *Rio Grande Cmty. Health Ctr., Inc.*, 397 F.3d at 74. This command, in fact, is rooted in a whole other subsection: "In an action brought to enforce a provision of this chapter [which includes the Medicaid statutes], such provision is not to be

deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan." 42 U.S.C. § 1320a-2; *BK v. N.H. Dep't of Health & Human Servs.*, 814 F. Supp. 2d 59, 68 (D.N.H. 2011) (citing *id.*); *Watson v. Weeks*, 436 F.3d 1152, 1158 (9th Cir. 2006) ("Congress responded to . . . [*Wilder*] by enacting . . . 32 U.S.C. 1320a-2 which blocks any Medicaid Act provision from being deemed unenforceable by an individual merely because the provision contains state plan requirements.") Based on this subsection's implication, the fact that Section 1396a(a)(23), like Section 1396a(a)(30), commences with the same introductory phrase ("A State plan for medical assistance must . . . ."), 42 U.S.C. § 1396a(a), should not be dispositive here, as Defendant maintains, (Hr'g Tr. 16:17–22, Sept. 2, 2016; *see also* Hr'g Tr. 8:10–17, Oct. 16, 2015). Instead, the entire language of the former, consistently construed to award a private cause of action to Medicaid beneficiaries, *see, e.g.*, *supra* Part V.B.1.a; *see also* Doc. 63 at 18, *Bentley* (finding itself persuaded by "these remarkably consistent holdings"), must be honored.

One final fact weighs against *Armstrong*'s extension. Neither revolutionary nor anomalous, *Armstrong* actually aligned with a majority of federal courts in its construction of Section 1396a(a)(30) as to Medicaid providers in *Gonzaga*'s aftermath. *See, e.g.*, *Equal Access for El Paso*, 509 F.3d at 704; *Mandy v. Owens*, 464 F.3d 1139, 1148 (10th Cir. 2006)*; Westside Mothers v. Olszeqski*, 454 F.3d 532, 542–43 (6th Cir. 2006); *Sanchez v. Johnson*, 416 F.3d 1051, 1059 (9th Cir. 2005); *Long Term Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 57 (1st Cir. 2004); Bradley J. Sayles, *Preemption or Bust: A Review of*

the Recent Trends in Medicaid Preemption Actions, 27 J. CONTEMP. HEALTH L. & POL'Y 120, 130 & nn. 66–67 (2010) (making this point); Nicole Huberfeld, *Bizarre Life Triangle: The Spending Clause, Section 1983, and Medicaid Entitlements*, 42 U.C. DAVIS L. REV. 413, 447–48 (2008) (same). In contrast, Defendant is now asking this Court to expand *Armstrong* not just beyond its limits but as contrary to precedent's overwhelming weight. In its circumstances, not just its legal reasoning, *Armstrong* can therefore be distinguished from the case at bar. *See , e.g.*, *Townsend*, 2008 U.S. Dist. LEXIS 52549, at *23–24, 2008 WL 2743284, at *12 (dismissing some claims under the Medicaid Act but not plaintiffs' Section 1396a(a)(23) one, among others).

(c) Defendant's Misplaced Argument on Section 1396a(a)(23)'s Ambiguity and for Deference

Defendant argues that, even if the Individual Plaintiffs have the right to choose a qualified provider and enforce that right via Section 1983, PPGC is not "qualified" under Section 1396a(a)(23) because DHH can deem it so by exercising Section 46:437.11(D)(2). (Hr'g Tr. 11:3–7, Oct. 16, 2015; Doc. 53-1 at 21; Hr'g Tr. 9:18–10:5, Sept. 2, 2015.) In clear and persuasive terms, the court in *Selig* rightly rejected that argument.

> Here, the dispute is whether the Government, either through the Governor or through [Arkansas Department of Human Services' ("ARDS")] actions, impermissibly interfered with the Jane Does' choice of a qualified provider when it terminated PHH as a provider in the manner and for the

> reason it articulates. If this right found in 42 U.S.C. § 1396a(a)(23) and conferred on Medicaid recipients is to have the meaning, and if it is to have the meaning ascribed to it by the Court in *O'Bannon* [*v. Town Ct. Nursing Ctr.,* 447 U.S. 773, 787 (1980)], ADHS cannot be permitted to declare a provider unqualified and then to use that declaration to put out of reach any future challenges to its conduct by Medicaid recipients.

Doc. 45 at 19, *Selig*.[33] Based on the filings made, Defendant's defense relies on one of two assumptions: either "qualified" is so vague as to fail the *Blessing* test or so ambiguous as to effectively award it discretion to define "qualified" according to a standard of competence circumscribed by her own whims. Her success on this ground depends on showing first that "qualified to perform the service or services required" in Section 1396a(a)(23) is inherently ambiguous and, if so regarded, as an implicit grant of lexicographical discretion by Congress to DHH. Both her first premise and second inference, however, fall before the plain import of Section 1396a(a)(23).

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[33] Indeed, when she first relied on Section 46:437.11(D)(1), counsel for Defendant conceded her reading of Section 1396a(a)(23) is "circular." (Hr'g Tr. 21:12-13, Sept. 2, 2015.) If so, then it cannot stand, for no statute can be interpreted so as to render its specific terms superfluous or divorced from "the phrase in which it is embedded." *Betlach*, 727 F.3d at 960. This Court's duty "to give effect, if possible, to every . . . word of a statute" compels rejecting an interpretation that Defendant herself concedes makes Section 1396a(a)(23) either absurd or illogical. *United States v. Menasche*, 348 U.S. 528, 538, 75 S. Ct. 513, 520, 99 L. Ed. 615 (1955).

In cases of statutory interpretation, no deference is owed where the term in question is clear on its face. In determining the meaning of a statutory term, the rules of interpretation and construction are clear: a court must begin with the relevant language. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685, 105 S. Ct. 2297, 2301, 85 L. Ed. 2d 692 (1985); *see also Temp. Emp't Servs. v. Trinity Marine Grp.*, 261 F.3d 456, 462 (5th Cir. 2001) (citing *id.*). If the meaning is plain and unambiguous and the statutory scheme is both "coherent and consistent," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S. Ct. 843, 846, 136 L. Ed. 2d 808 (1997); *see also Salazar v. Maimon*, 750 F.3d 514, 518 (5th Cir. 2014) (citing *id.*), "the sole function of the courts is to enforce it according to its terms," *Caminetti* v. *United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 194, 61 L. Ed. 442 (1917); *see also, e.g.*, *Meredith v. Time Ins. Co.*, 980 F.2d 352, 356 & n.18 (9th Cir. 1993) (quoting *id.*); *In re McCarthy*, 391 B.R. 372, 375 (Bankr. N.D. Tex. 2008) (same).

Under these rules, Section 1396a(a)(23) is no quandary. Linguistically, "qualified" means "[p]ossessing the necessary qualifications; capable and competent." *Qualified*, BLACK'S LAW DICTIONARY (10th ed. 2014). Inputting this definition of "qualified" into § 1396a(a)(23), it is clear that a provider "qualified to perform the service or services required" is one who is "capable and competent" of "perform[ing]" the "service or services" for which he, she, or it has been contracted by the Medicaid eligible individual seeking "medical assistance." 42 U.S.C. § 1396a(a)(23). If it is competent to offer those services, an individual "may" choose them without a state intruding, and if a state attempts to render it

unqualified based on activities that it does not undertake, it has stripped "qualified" of its natural meaning and effectively removed the phrase "to perform the service or services required" from the explicit text of Section 1396a(a)(23). It requires no specialized agency expertise to reach this conclusion; no factual development is necessary for this language to be so understood. Rather, it follows naturally from this provision's plain meaning, as illuminated by the surrounding text. *See Betlach*, 727 F.3d at 965. "[I]f the intent of Congress is clear," as evidenced by the use of an unambiguous word so clarified, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 2781, 81 L. Ed. 2d 694 (1984).

With this law in mind, one fact matters greatly. On September 2, 2015, Defendant conceded that PPGC is competent to provide the services required by the Agreements and by the Medicaid Act. (Hr'g Tr. 12:17–20, Sept. 2, 2015.) Thereafter, this concession was never retracted. (Hr'g Tr. 22:4–23:5, Oct. 2, 2016.) In so doing, Defendant has admitted that PPGC is "qualified" within the statute's most minimal and straightforward meaning. In concluding that Plaintiffs will likely show that Defendant has contravened Section 1396a(a)(23), this Court echoes the Ninth Circuit: "Nowhere in the Medicaid Act has Congress . . . indicated that each state is free to define . . . ['qualified'] for purposes of its own Medicaid program however it sees fit." *Betlach*, 727 F.3d at 970.

Even if this Court were to regard "qualified" as ambiguous, however, DHH's interpretation would deserve no deference. In essence, Defendant contends that "qualified" is an ineradicably ambiguous term, so unfettered in content that no outer bounds but her own opinion can be set, (Doc. 13 at 8; Doc. 53-1 at 21), so that this one word has become "an interpretive wormhole, whose supposed ambiguity leads to a galaxy of unfettered agency discretion," *Wheaton v. McCarthy*, 800 F.3d 282, 288 (6th Cir. 2015). But, for deference to be extended under well-settled jurisprudence, certain prerequisites must be satisfied. Thus, "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority" to the particular agency. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649, 110 S. Ct. 1384, 1391, 108 L. Ed. 2d 585 (1990), *cited in, e.g.*, *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1219 (9th Cir. 2015). In addition, that same interpretation must be precedential, carrying "the force of law." *Dhuka v. Holder*, 716 F.3d 149, 155 (5th Cir. 2013). If not precedential, a lower form of deference applies, with the weight of an agency's judgment "in a particular case" dependent "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 154 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944)); *accord Rubio v. Lynch*, 787 F.3d 288, 291 (5th Cir. 2015). Even if these requirements are satisfied, deference is only accorded if the statute is truly "ambiguous" regarding the precise "question at issue" and if the agency's interpretation is a "reasonable" and hence "permissi-

ble construction of the statute" at hand. *Orellana-Monson v. Holder*, 685 F.3d 511, 517 (5th Cir. 2012); *see also, e.g.*, *Siew v. Holder*, 742 F.3d 603, 607 n.27 (5th Cir. 2014) (citing *id.*); *United States v. Baptiste*, 34 F. Supp. 3d 662, 670 (W.D. Tex. 2014) (same); *cf.* Carl Sunstein, *Law and Administration after* Chevron, 90 COLUM L. REV. 2071, 2087 (1990) (elaborating upon the reasons for deference to administrative agencies).

Assuming "qualified" is truly "ambiguous," DHH's interpretation does not meet these established predicates. Not the product of considered rulemaking or reflected in a history of enforcement, DHH has yet to provide even one bit of evidence that it has ever so construed "qualified" to exclude a provider whose competence is not at issue. For example, while Section 46:437(D)(1) had been used on "three prior distinguishable occasions," (Doc. 34 at 3), all three involved overpayment that DHH allowed the offender to correct pre-termination, (Doc. 34-1 at 2, 4, 6). The limited case law available to this Court, meanwhile, suggests that Section 46:437.11(D)(2) has been limited to instances where criminal infractions have been credibly alleged and/or financial malfeasance has been plausibly evidenced. *See, e.g.*, *Midtown Med. v. Dep't of Health & Hosps.*, 2012 La. App. Ct. Briefs LEXIS 1889 (La. Ct. App. Oct. 26, 2012) (termination predicated on DHH's attempted "monetary recoupment" and assessment of a "monetary penalty"); *Cmty. Care-Bossier, Inc. v. Foti*, No. 5:06CV181, 2006 WL 811944 (W.D. La. Feb. 7, 2006) ("On or about January 24, 2006, DHH was notified that several employees and/or owners of CCB had been arrested, that bank accounts in the names of CCB and the arrested employees/owners had been

frozen, and that medical records in the possession of CCB had been seized by agents of the Louisiana Department of Justice.").

Additionally, Defendant's present position is not even "embodied in opinion letters, policy statements, agency manuals, and enforcement guidelines," which though "lack[ing] the force of law," elicit some judicial respect. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000). Indeed, in citing the various meanings that "qualified" may have, she gives no source to credit her unique interpretation, (Doc. 13 at 8; Doc. 53-1 at 21), and her own lawyer admitted that at least her original denotation of "qualified" was "circular," (Hr'g Tr. 21:12–13, Sept. 2, 2015), thereby rendering it unpersuasive and raising doubt about her present reasoning's thoroughness. *White v. Black*, 190 F.3d 366, 368-69 (5th Cir. 1999); *see also FAA v. Cooper*, 132 S. Ct. 1441, 1449, 182 L. Ed. 2d 497 (2012) (rejecting the use of "a general (and notably circular) definition"). This decision to adopt a definition of "qualified" divorced from a provider's "competence," then, bears none of the marks of considered rule-making or evidence the exercise of some agency particular expertise, as the most minimal deference doctrines require. *See Vigil v. Leavitt*, 381 F.3d 826, 835 (9th Cir. 2004).

Lastly, this Court finds no merit in Defendant's factual contentions regarding the recent nature of CMS' interpretation. Before this Court, Defendant has claimed that her counsel's conversation with CMS provided "some contending views . . . as to what qualified mean[s]." (Hr'g Tr. 19:2–7, Sept. 2, 2015.) In Defendant's Reply, she adds an additional accusa-

tion, claiming that CMS has propounded an interpretation of "qualified" in the Statement of Interest never before evidenced or proclaimed. (Doc. 31 at 4.) Both these statements, however, are disingenuous.

The first assertion appears to be based on the First (and Second and Third) Kennedy Declarations, yet in none did Ms. Kennedy so describe her conversation with CMS. Rather, per the First Kennedy Declaration, CMS did no more than "advise[]" DHH that it "has the authority to withhold federal Medicaid dollars from Louisiana or seek injunctive relief for failure to comply with the Medicaid Act." Such language, even if it is most generously construed in Defendant's favor, simply does not imply that CMS acceded to Defendant's premise (that "qualified" as sufficiently "ambiguous" as to be indefinable) or that CMS acknowledged DHH's authority to define it in a manner inconsistent with CMS' understanding of § 1396a(a)(23).

Meanwhile, DHH has seemingly overlooked an Informational Bulletin, dated June 1, 2011, sent by CMS to every state Medicaid agency.[34] In this short

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[34] Pursuant to Federal Rule of Evidence 201(b), this Court may take judicial notice of "publically-available documents and transcripts" produced by a state or federal agency "which were matters of public record directly relevant to the issue at hand." *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011); *see also, e.g.*, *Norris v. Hearst Trust*, 500 F.3d 454, 461 n.9 (5th Cir. 2007) ("[I]t is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record."); *Benak v. Alliance Capital Mgmt. L.P.*, 435 F.3d 396, 401 n.15 (3d Cir. 2006) (noting that a court can take judicial notice of newspaper articles to "indicate what was in the public realm at the time"); *Denius v. Dunlap*, 330 F.3d 919, 926–27 (7th Cir. 2003) (taking

[Footnote continued on next page]

bulletin, a matter of public record, CENTER FOR MEDICAID, CHIP AND SURVEY & CERTIFICATIONS, CMS INFORMATIONAL BULLETIN (June 1, 2011), *available at* http://www.medicaid.gov/Federal-Policy-Guidance/downloads/6-1-11-Info-Bulletin.pdf (last visited on Oct. 28, 2015), CMS addressed "some inquiries as to whether States may exclude certain providers from participating in Medicaid based on their scope of practice," offering a cogent "review of longstanding federal law." CMS, CMCS INFORMATIONAL BULLETIN 1 (June 1, 2011). As this bulletin continues, "[s]tates are not . . . permitted to exclude providers from the program solely on the basis of the range of medical services they provide"; a determination of the extent to which a Medicaid provider is "qualified" for purposes of § 1396a(a)(23), it explains, must be related to the actual "scope of services" offered by the relevant provider. *Id.* at 1–2. In other words, more than four years before DHH attempted to terminate the Agreements, CMS endorsed the interpretation of § 1396a(a)(23) substantially echoed in the Statement of Interest: "[T]erminating PPGC from . . . [Louisiana's] Medicaid program without providing any justification related to PPGC's qualifications to provide medical services would violate . . . § 1396a(a)(23)," (Doc. 24 at 2). Because CMS, not DHH, is the agency charged with the Medicaid Act's management and thus the implementation of, among many, Section

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judicial notice of information on official government website*); Cali v. E. Coast Aviation Servs., Ltd.*, 178 F. Supp. 2d 276, 287 n. 6 (E.D.N.Y. 2001) (taking judicial notice of documents from Pennsylvania state agencies and the Federal Aviation Administration). CMS' own informational bulletins surely qualify.

1396a(a)(23), any deference owed would more rightly given to CMS' construction, not DHH's newfangled one, assuming the existence of even minor statutory ambiguity.[35] *See Hood*, 391 F.3d at 590–91 (citing to CMS' interpretation of the Medicaid Act and rejecting a construction advanced by DHH); *see, e.g., St. Mary's Hosp. of Rochester v. Leavitt*, 416 F.3d 906, 914 (8th Cir. 2005) (holding that CMS' interpretation of the Medicaid Act respect, but not deference); *Ctr. for Special Needs Trust Admin., Inc. v. Olson*, 676 F.3d 688, 700–01 (8th Cir. 2012) (emphasizing that even if a CMS letter has persuasive power it cannot override the Medicaid Act's plain language).

(d) Considering Defendants' Reasons for Claiming PPGC is Unqualified

Like the *Selig*, *Herbert* and *Bentley* courts, this Court finds it likely that Plaintiffs will prevail on their Section 1396a(a)(23) claim. This subsection allows a private cause of action, and Defendant has already conceded that PPGC is competent to provide the services it renders in Louisiana. Thus, PPGC is "qualified" as that term must be naturally (and plainly) defined, as the Seventh and Ninth Circuits concluded in *Indiana* and *Betlach*. For the purposes of a preliminary injunction, their likelihood of success has been established. Plaintiffs have provided

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[35] It is worth noting that Congress' delegation to CMS does not necessarily and automatically imply a concurrent delegation to a state actor of the unfettered prerogative to promulgate official and binding interpretations of a federal statute superior to any advanced by the actual federal agency assigned this interpretive power. Defendant has offered no support for such a proposition.

more than enough precedent, evidence and argument to lead this Court to believe they have a reasonable probability of success.

Nonetheless, given Defendant's recent invocation of Section 46:437.11(D)(2) and not Section 46:437.11(D)(1), this Court feels compelled to address the facial credibility of Defendant's new grounds for termination. In the Second Termination Letters, Defendant gives three "violations" justifying its terminations: first, PPGC's settlement of an FCA suit in Texas which it did not report to DHH; second, the involvement of a PPGC affiliate in a pending Texas case which survived a Rule 12(b)(6) dismissal and third, PPGC's alleged misrepresentations in a letter responding to inquiries about the video tapes. (Doc. 39-1.) Having subjected these reasons to scrutiny, this Court concludes that, even if Defendant's definition of "qualified" prevails, DHH's reasons for disqualifying PPGC likely will not.

The first of Defendant's reasons, the *Reynolds* Settlement, is likely to fail. The claim was brought by an FCA plaintiff, not the government, which choose not to intervene.[36] The settlement expressly disavows PPGC's liability. (Doc. 54-1 at 5.) It therefore falls into the exception set forth in Title 50 for certain FCA actions: "If a False Claims Act action or other similar civil action is brought by a Qui-Tam

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[36] That the government had to sign off on an agreement and the case's dismissal is a statutory requirement. 31 USCS § 3730(b)(1). It does not mean that the government was an active party or litigant. *See United States ex rel. Carter v. Bridgepoint Educ., Inc.*, 305 F.R.D. 225, 230–31 (S.D. Cal. 2014) (explaining the complex subtleties involved in the FCA).

plaintiff, no violation of this provision has occurred until the defendant has been ***found*** liable in the action." LA. ADMIN. CODE tit. 50, § 4147(12)(c) (emphasis added). Title 50 plainly and unambiguously requires that liability be "found," whether by admission or by some fact-finder. Since *Reynolds* involved no such finding, Defendant's first stated reason contradicts DHH's own code. With no citation to authority, Defendant's counsel asks the Court to reject the "literal" language of § 4147(12)(c) , (Hr'g Tr. 37:12–14, Oct. 16, 2015), in defiance of every well-known rule of interpretation. Urging the Court to adopt what he "think[s] that means," he asks this Court to revise a plain provision, a task far beyond a judge's proper province and the Secretary's prescribed powers.

One other fact undercuts the *Reynolds* Settlement's significance. Plaintiffs have credibly shown that DHH was aware of the *Reynolds* Settlement long before October 14, 2015, with Defendant's own emails suggesting that it did not find it sufficient to provide "credible evidence" of Medicaid fraud. (Doc. 46-3 at 2.) Thus, in spite of the Second Termination Letters' implications to the contrary, (Doc. 39-1 at 2, 5, 8, 11), DHH knew, having been "notified," of this settlement, (Doc. 46-3 at 2; Hr'g Tr. 41:23–42:11, Oct. 16, 2015). Based on Title 50's simple terms and Defendant's own words from 2013, Plaintiffs are likely to succeed on proving the irrelevance of the *Reynolds* Settlement.

Defendant's second ground for alleging fraud—the *Carroll* case—rests on a quote drawn from a judge's ruling on a motion to dismiss. As revealed by that opinion's full text, per Rule 12(b), "[t]he court

concludes that Carroll has adequately pleaded factual content that allows the court to draw the reasonable inference that Planned Parenthood knowingly filed false claims." Doc. 31 at 17, *Carroll*. Defendant's allegation that the court in *Carroll* found "that the information already provided allows the court to draw the reasonable inference" that fraud took place, (Doc. 39-1 at 2) is clearly wrong. Rather, as counsel for Defendant conceded in oral argument, for purposes of the motion before that court, the plaintiff's allegations were only *assumed* to be true, as Rule 12(b) requires. (Hr'g Tr. 36:2–11, Oct. 16, 2015.) That court never made a factual finding of fraud, as the Second Termination Letters imply by citing to this opinion as proof of "violations and misconduct by affiliates and providers-in-fact" of PPGC, (Doc. 39-1 at 2, 5, 8, 11). Instead, this court ruled only that the plaintiff had plead his case "adequate[ly]." Doc. 31 at 17, *Carroll*. Even today, *Carroll* appears either to still be in discovery or to have not yet been tried, (Hr'g Tr. 27:15–20, Oct. 16, 2015), so that no liability—and no fraud or a violation of the Medicaid Act or relevant regulations—has actually been "found" by a single factfinder. In other words, the second ground in the Second Termination letters cannot satisfy the language of Title 50.

Defendant's third asserted ground is that PPGC made unspecified misrepresentations in violation of Section 46:437.14(A)(1), in response to her letter inquiries. MAPIL defines "misrepresentation" with precision as "the knowing failure to truthfully or fully disclose any and all information required, or the concealment of any and all information required on a claim or a provider agreement or the making of a false or misleading statement to the department

relative to the medical assistance programs." LA. R.S. § 46:437.3(15); *see also Caldwell ex rel. State v. Janssen Pharmaceutica, Inc.*, 144 So. 3d 898, 910 (La. 2014) (citing *id.*). Not one misrepresentation is specified or substantiated in her letter or by her attorneys, and each, on the record now before the Court, has been credibly contradicted in PPGC's August Letter, (Doc. 39-1 at 3, 6, 9, 12; Doc. 46-1 at 63–66.) If this plain statutory law, as interpreted by this state's highest court, is to be respected, it impliedly demands that a misrepresentation be plausibly alleged. None has been so, Defendant merely asserting the existence of "clear violations" without either detail or substantiation. As the evidence is currently constituted, therefore, Defendant's third ground will not likely stand.

In this Court's opinion, two other facts are telling. First, the Second Termination Letters cite no "found" violation of licensure or certification requirements or any specific failure to meet any condition of enrollment. (Doc. 39-1 at 3, 6, 9, 12.) Second, Defendant cites to the final clause of Section 46:437.11(D)(2), which allows for termination if a provider is "the subject of a sanction or of a criminal, civil, or departmental proceeding," and deems sufficient an allusion to investigations by DHH and the Louisiana Office of Inspector General. (Hr'g Tr. 34:8–15, Oct. 16, 2015; *see also* Doc. 39-1 at 3.) That an investigation by DHH can suffice under Section 46:436(D)(2) has been rejected once before. *See New Orleans Home for Incurables, Inc. v. Greenstein*, 911 F. Supp. 2d 410, 411–12 (E.D. La. 2012). As for the second, when this Court asked Defendant's counsel to offer some detail regarding these alleged misrepresentations, he could not. (Hr'g Tr. 38:23–39:10, Oct.

16, 2015.) Considering her failure to articulate one relevant misrepresentation within MAPIL's meaning, and on the record as it now stands, Plaintiffs will likely succeed on this issue.

In fact, the apparent fragility of the Second Termination Letters' stated reasons raises another specter, for not one appears to be a supported factual allegation of the kind of fraud and ill-practice with which MAPIL is concerned. *See Mortg. Elec. Registration Sys. v. Bynum*, 879 So. 2d 807, 811 (La. Ct. App. 2004). Here, this apparent vacuum cannot be ignored, for as the Supreme Court of Louisiana explained in the spring of 2015, "[a]n agency exercising delegated authority is not free to pursue any and all ends, but can assert authority only over those ends which are connected with the task delegated by the legislative body." *Dep't of Children & Family Servs. ex rel. A. L. v. Lowrie*, 167 So. 3d 573, 587–88 (La. 2015); *see also State v. Alfonso*, 753 So. 2d 156, 161 (La. 1999) ("When the legislative body, in delegating powers, clearly expresses its policy and provides sufficient standards, judicial review of the exercise of the means chosen by the agency in exercising its delegated power provides a safeguard against abuse by the agency.") "The open-ended discretion to choose ends is the essence of legislative power; it is this power that the legislative body possesses, but its agents lack." *Lowrie*, 167 So. 3d at 587.

Section 46:437.11(D)(2) is but one part of a law directed towards specific ills. It is reasonable to conclude that the legislature logically expected the powers awarded by this provision to be employed so as "to combat and prevent fraud and abuse" and to

secure the "fiscal and programmatic integrity" of a program otherwise endangered by "persons who engage in fraud, misrepresentation, abuse, or other ill practices" as expressly defined in MAPIL alone. *See* LA. R.S. § 46:437.2.

But, based on the evidence so far presented, no actual evidence of a MAPIL-worthy-misdeed has been presented. Indeed, no misconduct of any kind has been alleged, let alone shown, as it pertains to PPGC's operations in Louisiana. The Parties have stipulated that, for purposes of the Court's consideration of a preliminary injunction, no additional evidence need be offered and no additional argument need be made; consequently, evidentiary support for a single one of Defendant's contentions is absent by Defendant's own volition. By highlighting the suspect underpinning the Second Termination Letters, Plaintiffs have therefore met their burden of showing a likely success on this issue, regardless and apart from the Individual Plaintiffs' likely success on the other issues previously discussed. *See supra* Part V.B.1.a–c.

C. SECOND ELEMENT: IRREPARABLE HARM

"'Irreparable' in the injunction context means not rectifiable by the entry of a final judgment." *Walgreen Co. v. Sara Creek Prop. Co*., 966 F.2d 273, 275 (7th Cir. 1992). On the record before the Court, Plaintiffs have met their burden of showing irreparable harm.

Based on their uncontroverted affidavits, the Individual Plaintiffs depend on PPGC. (Doc. 4-3, 4-4, 4-5.) And if the Agreements are terminated, they

(and Jane Doe #3's daughter) will be unable to visit their Medicaid provider of choice. (Doc. 4-3 ¶¶ 6–7 at 2; Doc. 4-4 ¶¶ 7–8 at 2; Doc. 4-5 ¶¶ 5–6 at 2.) Approximately, 5,200 other women visit BRHC and NOHC and likely depend upon to some degree. (Doc. 41-1 ¶¶ 12–18 at 4–5.) At this stage of the proceeding, the Court is persuaded that, absent this termination, the patients of PPGC in Louisiana will have their healthcare disrupted. Counsel for Defendant has already conceded this to be the case. (Hr'g Tr. 13:1–12, Sept. 2, 2015.) Like the court in *Selig*, this Court credits these women's "statements in the form submitted." Doc. 45 at 20, *Selig*. Presented with similar facts, other courts have found irreparable harm. *See, e.g.*, Doc. 63 at 51–54, *Bentley*; Doc. 45 at 22, *Selig*; Doc. 12 at 1–2, *Herbert*; *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 794 F. Supp. 2d 892, 912–13 (S.D. Ind. 2012), *aff'd in part and rev'd in part on other grounds*, 699 F.3d 962; *Camacho*, 325 F. Supp. 2d 794 at 802.

Based on its own unquestioned assertions, PPGC will also likely suffer irreparable harm. Regardless of the precise dollars in revenue it may receive from the state, PPGC has made clear that it may have to close BRHC upon the Agreements' termination. (Doc. 46 at 27.) Often, such results have been considered irreparable. *Planned Parenthood of Ind., Inc.*, 794 F. Supp. 2d at 912; *see also Canterbury Career Sch., Inc. v. Riley*, 833 F. Supp. 1097, 1105 (D.N.J. 1993) ("Where the result of denying injunctive relief would be the destruction of an on-going business, such a result generally constitutes irreparable injury."). The fact that the Eleventh Amendment forbids PPGC from ever collecting monetary damages, even if

Defendant's conduct is later found illegal, also militates in favor of deeming its likely harm to be irreparable, *Green*, 474 U.S. at 68. In addition, "potential reputational harm is present," Doc. 12 at 1, *Herbert*, as Defendant's termination may lead others to believe PPGC is not a competent provider despite her own failure to offer up relevant and specific evidence to the contrary, (Hr'g Tr. 11:12–16, Sept. 2, 2015). Cumulatively, these harms are irreparable. *See, e.g.*, *United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 741 (8th Cir. 2002); *Pappan Enters., Inc. v. Hardee's Food Sys., Inc.,* 143 F.3d 800, 805 (3d Cir. 1998). This conclusion is especially true when, as here, (Doc. 43 ¶¶ 64–67 at 20), a plaintiff asserts constitutional claims under the First and Fourteenth Amendment. *See, e.g.*, Doc. 12 at 2, *Herbert*.

Defendant has sought to allay these concerns with the First, Second, and Third Kennedy Declarations. (Doc. 13-2 at 1–41; Doc. 31-1 at 1–2; Doc. 34 at 1–2; Doc. 34-2 ¶¶ 8a–8b at 2.) Yet, these declarations' manifold oversights and constant tinkering leave this Court with the decided impression that not even DHH can ensure that PPGC's current patients will have some ready and convenient outlet. Indeed, even the most recent version contains a number of specialized providers who do not accept patients like PPGC's own. *See supra* Part II.C.3.

Furthermore, even if Individual Plaintiffs could get family planning and other comparable care elsewhere (and that has not been convincingly shown), "this does not diminish the injury that will result from [their] inability to see the provider of their choice." Doc. 63 at 54, *Bentley* (citing Doc. 45 at 22,

Selig ("[D]enial of . . . freedom of choice is more likely than not exactly the injury Congress sought to provide when it enacted [the free-choice-of-provider provision]."). On the record before it, the Court finds the second element for a preliminary injunction to have been sufficiently shown.

D. THIRD ELEMENT: BALANCE OF HARMS

By contrast to the Plaintiffs' enumerated harms, Defendant points the Court to only two that it maintains it will suffer if the motion is granted: (1) "The granting of a TRO would prevent the []DHH from their ability to govern the Medicaid program under the authority granted by the Medicaid Act," and, (2) "It would also contravene the Louisiana Legislature's intent to give the []DHH a right to terminate a Medicaid provider agreement at-will when she chooses to do so." (Doc. 13 at 20.) The second obviously bears no more relevance since Defendant has rescinded her letters of termination under Section 46:436.11(D)(1). An injunction will have no financial effect, as DHH will still need to pay the Medicaid benefits of every PPGC Medicaid-eligible patient. *See* Doc. 12 at 1, *Herbert*; *Marlo M. ex rel. Parris v. Cansler*, 679 F. Supp. 2d 635, 638 (E.D.N.C. 2010). In dollars and cents, maintaining this status quo costs DHH nothing.

Furthermore, in terms of her ability to "govern the Medicaid program," an injunction will not strip DHH of its statutory powers. It will not suddenly deprive her of the ability to pursue legitimate claims of Medicaid fraud or ensure that Louisiana citizens are obtaining "competent" medical care; she will still be able "to govern the Medical program." At worst, it will halt its exercise of a particular power as to a

single provider as to whose medical competency it has admitted. Indeed, at worst, such an injunction will do no more than convince DHH to invoke its powers under MAPIL more clearly and consistently in the future. *See New Orleans Home for Incurables, Inc.*, 911 F. Supp. 2d at 411–12. It would, in other words, force DHH to act as the statute implicitly demands. Other cases have so ruled. *See, e.g.*, Doc. 45 at 30, *Selig*. With them, this Court agrees.

At the same time, this Court is not persuaded by Defendant's efforts to distinguish Plaintiffs' cases. One case that Defendant previously attempted to distinguish as being predicated on Section 46:437.11(D)(2), (Doc. 13 at 21), involved the very section she has now invoked. *New Orleans Home for Incurables, Inc.*, 911 F. Supp. 2d at 410–11. By now relying on this very section, Defendant's latest termination has now made this case particularly relevant. It is true that Plaintiffs' second cited case—*Giovanni Carandola, Ltd. v. Bason*, 303 F.3d 507 (4th Cir. 2002)—"involved a State that enforced restrictions likely to be found unconstitutional." (Doc. 13 at 21.) But the balance still favors Plaintiffs where, as here, the injunction is intended to foreclose application of restrictions likely to be found contrary to preeminent federal statutory law designed to help the neediest of this state's citizens.

In sum, even if Defendant's criticism is given weight, the balance of harms would still favor Plaintiffs.

E. FINAL ELEMENT: PUBLIC INTEREST

In light of Plaintiffs' likely irreparable harm and the balanced equities, this final factor favors an

injunctive relief too. For decades, PPGC has served numerous at-risk individuals and helped DHH combat a host of diseases, and, in the process, become the regular provider of over 5,000 women, including the Individual Plaintiff. Like its brethren, this Court "believes that . . . vulnerable population[s] should only be uprooted if practically necessary and legally warranted." *Greenstein*, 911 F. Supp. 2d at 412. As the Ninth Circuit stated in considering this same factor in a Medicaid case, the public interest is most acute in regards to "ensuring access to health care" absent any misdeed's demonstration. *Indep. Living Ctr. of S. Cal, Inc. v. Maxwell-Jolly*, 572 F.3d 644, 659 (9th Cir. 2002), *vacated and remanded on other grounds*, 132 S. Ct. 1204, 182 L. Ed. 2d 101 (2012). Defendant herself has urged this Court to employ this factor: "[I]t is certainly true that the public has an interest in the neediest of its members having access to healthcare." (Doc. 13 at 21.) Like *Selig* and *Herbert*, this Court adopts this reasoning and finds the public interest favors Plaintiffs.

In contesting Plaintiffs' public interest arguments, Defendant has offered up only the following statement of purported fact: "[T]here has been no evidence presented that shows Medicaid recipients in the New Orleans and Baton Rouge areas will not have access to family planning and related services." (Doc. 13 at 21.) As support, she asked this Court to rely upon the First Kennedy Declaration. (*Id.* at 21–22.) As noted above, *see supra* Parts II.C.3, V.C, a Kennedy Declaration has been tendered, retracted, and again proposed, leaving this Court wary of relying on Defendant's protean assertions of fact. It instead turns to the uncontested and unquestioned facts—PPGC serves 5,200 poor and needy women,

and PPGC has repeatedly been deemed a "competent" provider by DHH—and honors the public interest in affording these women access to their provider of choice.

F. CONCLUSION

Four elements are necessary before a court may issue an injunction. Every element has been shown by Plaintiffs in this proceeding in regards to their Section 1396a(a)(23) claim. A preliminary injunction will therefore issue.

VI. FINAL ISSUES

A. NO NEED FOR SECURITY

Rule 65 allows a court to "issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." FED. R. CIV. P. 65(c). This requirement, however, may be waived where the gravity of interest is great and no proper showing of a harm's likelihood or a probable loss is made. *See, e.g.*, *Kaepa, Inc. v. Achilles Corp.,* 76 F.3d 624, 628 (5th Cir. 1996) ("In holding that the amount of security required pursuant to Rule 65(c) is a matter for the discretion of the trial court, we have ruled that the court may elect to require no security at all." (internal quotation marks omitted)); *City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. 1981) (same). Here, as in other courts, *see, e.g.*, Doc. 45 at 31, *Selig*, Defendant has neither requested a security were this Court to issue an injunction nor presented any evidence that it would be financially harmed if it were wrongfully

enjoined. In addition, as Plaintiffs note, "[w]hether these individuals obtain these services at PPGC (their provider of choice) or elsewhere will have no effect on Louisiana's budget." (Doc. 46 at 28.) Based on these facts and on Defendant's failure to ask for a bond or plead an economic harm, this Court sees no credible reason to force a bond's execution.

B. CLASS INJUNCTION

Plaintiffs argue that they have been singled out because of the alleged (but disputed) conduct of a separate but connected company that appeared in one of CMP's videos and that Plaintiffs played no role in that conduct. (Doc. 46 at 1–3.) Plaintiffs argue that Defendant has attempted to terminate its contracts because of the personal animus against it. This animus, they contend, is unrelated to the admittedly competent services that it renders in Louisiana which are, in turn, unrelated to the conduct in the videos. It is, moreover, being punished for being associated with various other Planned Parenthood entities, though it itself has not been demonstrated to have engaged in a single proscribed or illegal action. In fact, the uncontradicted evidence in the record at this time is that PPGC does not perform abortions in Louisiana and is not involved in the sale of fetal tissue and that none of the conduct in question occurred at PPGC's two Louisiana facilities. As such, based on this existing record, it appears likely that Plaintiff will be able to prove that the attempted terminations against it are motivated and driven, at least in large part, by reasons unrelated to its competence and unique to it. However, the Court finds it is not necessary and therefore it need not at this time rule on Plaintiffs' equal

protection argument. *See, e.g.*, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S. Ct. 1319, 1323, 1323, 99 L. Ed. 2d 534 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."); *cf.* BRYAN A. GARNER & ANTONINA SCALIA, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 249–51 (2012) (discussing this rule's bases).

Nonetheless, the uncontradicted evidence in the record is that BRHC relies to a significant degree on Medicaid reimbursements. (*See, e.g.*, Doc. 4-1 at 10; Doc. 46 at 2.) The Court therefore finds that if the Agreements are terminated, this facility would suffer significant financial loss and might have no choice but to close. In order to insure that meaningful relief is given to the Jane Doe Plaintiffs and that these Individual Plaintiffs have their free choice of provider, which claim they have established (at least at this preliminary stage), the Court's preliminary injunction will extend to all DHH-PPGC provider agreements applicable to all Medicaid-enrolled patients. In addition, the Court will defer action on Plaintiffs' alternative request for class certification to a more appropriate date and time.

VII. CONCLUSION

The Parties have agreed that no additional evidence or argument is necessary and that there is no objection to converting the Court's previous temporary restraining order to a preliminary objection. (Docs. 58, 62.) For the foregoing reasons, as corrected, supplemented and clarified herein, PPGC and the Individual Plaintiffs have met their burden,

demonstrating every element necessary for the issuance of a preliminary injunction with credible evidence and persuasive precedent. Accordingly,

Defendant's Motion to Dismiss Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim (Doc. 53) is DENIED.

Plaintiffs' Renewed Motion for Temporary Restraining Order and for Preliminary Injunction (Doc. 45) is GRANTED.

Defendant, and all those acting in concert with her, are PRELIMINARILY ENJOINED from terminating any of its Medicaid provider agreements with Planned Parenthood Gulf Coast Inc., including, but not limited to, Provider Numbers 91338, 133689, 45802, and 133673. The preliminary injunction will remain in force until notified by this Court.

Signed in Baton Rouge, Louisiana, on October 29, 2015

JUDGE JOHN W. deGRAVELLES
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

PLANNED PARENTHOOD GULF COAST, INC.; JANE DOE #1; JANE DOE #2; and JANE DOE #3,

Plaintiffs,

VERSUS

KATHY KLIEBERT, Secretary, Louisiana Department of Health and Hospitals,

Defendant.

CIVIL ACTION

No. 3:15-cv-00565-JWD-SCR

ORDER ON DEFENDANT'S MOTION TO DISMISS AND PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION

In accordance with the opinion entered on this date, (Doc. 63), it is the ORDER of this Court as follows:

(1) Defendant Kathy H. Kliebert's Motion to Dismiss (Doc. 53) is DENIED.

(2) Plaintiffs' Renewed Motion for Temporary Restraining Order and for Preliminary Injunction (Doc. 45) is GRANTED.

(3) Defendant, and all those acting in concert with her, are PRELIMINARILY ENJOINED from terminating any of its Medicaid provider agreements with Planned Parenthood Gulf Coast Inc., including, but not limited to, Provider Numbers 91338, 133689,

45802, and 133673. The preliminary injunction will remain in force until notified by this Court.

Signed in Baton Rouge, Louisiana, on October 29, 2015

JUDGE JOHN W. deGRAVELLES
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-30987

PLANNED PARENTHOOD OF GULF COAST, INCORPORATED; JANE DOE #1; JANE DOE #2; JANE DOE #3,

Plaintiffs - Appellees

v.

REBEKAH GEE, Secretary, Louisiana Department of Health and Hospitals,

Defendant - Appellant

Appeal from the United States District Court
for the Middle District of Louisiana
(862 F.3d 445, June 29, 2017)

ON PETITION FOR REHEARING EN BANC

Before WIENER, PRADO, and OWEN, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

In the poll, 7 judges vote in favor of rehearing en banc, and 7 vote against. Voting in favor are Judges Jolly, Jones, Smith, Clement, Owen, Elrod, and Southwick. Voting against are Chief Judge Stewart, and Judges Dennis, Prado, Haynes, Graves, Higginson, and Costa.

ENTERED FOR THE COURT:
/s/ Jacques L. Wiener, Jr.
United States Circuit Judge

JENNIFER WALKER ELROD, Circuit Judge, joined by JOLLY, JONES, SMITH, CLEMENT, OWEN, and SOUTHWICK, Circuit Judges, dissenting from the denial of rehearing *en banc*:

Today, an equally-divided court denies *en banc* rehearing of a divided panel opinion and deepens the division in the courts of appeals on an issue of great importance: whether a recipient of care can block a state's disqualification of a single health care provider for the purposes of Medicaid. The discord is the result of our disregard for the Supreme Court's binding precedent in *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980). Louisiana, along with fifteen *amici* states, urged us to reconsider our decision because of the significant detrimental impact it would have on the states' abilities to administer their own Medicaid plans. Our decision in equipoise to deny *en banc* rehearing is more than dismaying; it is a departure from our duty. In the ever-expanding Medicaid world in which we live, it is important that we get this decision right.

The panel majority opinion disregards both *O'Bannon*'s discussion of whether 42 U.S.C. § 1396a(a)(23) confers a substantive property right

and its ultimate decision that there is no process due where there is no property right to secure. *O'Bannon* addresses the question of "whether the patients have an interest in receiving benefits for care in a particular facility that entitles them, as a matter of constitutional law, to a hearing before the Government can decertify that facility." *Id.* at 784. Decidedly, the answer is no, with the Court "hold[ing] that the enforcement by HEW and DPW of their valid regulations did not directly affect the patients' legal rights or deprive them of any constitutionally protected interest in life, liberty, or property." *Id.* at 790. Section 1396a(a)(23) does not create a substantive right because, as the Court explains, "while a patient has a right to continued benefits to pay for care in the qualified institution of his choice, he has no enforceable expectation of continued benefits to pay for care in an institution that has been determined to be unqualified." *Id.* at 786.

In its attempt to distinguish *O'Bannon*, the panel majority opinion determines that *O'Bannon* is inapplicable because the *O'Bannon* plaintiffs only asserted a violation of a due process right whereas the plaintiffs here "assert the violation of a substantive right." *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 460 (5th Cir. 2017). This is directly at odds with the Supreme Court's holding in *O'Bannon* that § 1396a(a)(23) does not confer on an individual patient a constitutionally protected substantive property interest in receiving care from a disqualified Medicaid provider. 447 U.S. at 784–85. As Judge Owen's careful dissenting opinion explains, this attempt to distinguish *O'Bannon* "reflect[s] a failure to appreciate that there is no right to due process unless there is a substantive right that may

be vindicated if adequate process is afforded." *Id.* at 475 (Owen, J. dissenting); *accord Doe v. Gillespie*, 867 F.3d 1034, 1046–49 (8th Cir. 2017) (Shepard, J. concurring) (explaining that a patient cannot collaterally attack a provider's decertification because *O'Bannon* holds there is no substantive right to receive care from a decertified provider). The dissenting opinion is simply textbook reasoning. *See* Erwin Chemerinsky, Constitutional Law: Principles and Policies, 588 (Erwin Chemerinsky et al. eds., 5th ed. 2015) (". . . in *O'Bannon v. Town Court Nursing Center*, the Supreme Court held that residents in a nursing home had no property interest and thus no right to due process before a government agency revoked their home's certification to receive payments from the government.").

Similarly dismaying is the panel majority opinion's attempt to distinguish *O'Bannon* because the plaintiffs here are not challenging a decertification decision. There is, in fact, a decertification decision in this case, but the panel majority opinion just determined on the merits that none of the reasons for decertification were valid. *See Planned Parenthood*, 862 F.3d at 478 (Owen, J. dissenting) (noting the majority opinion's circular reasoning, which concludes "that since the Individual Plaintiffs will likely prevail on their contention that [Planned Parenthood] is a qualified provider, the Individual Plaintiffs have the right to sue to obtain Medicaid services from that qualified provider"). The panel majority opinion's determination that *O'Bannon* only bars an individual plaintiff from challenging a disqualification decision related to health and safety regulation enforcement that affects the provider's ability to provide care to the general public does not

fare any better. This limitation finds no support in *O'Bannon*'s text or record. As the dissenting opinion precisely states: "Whether the nursing home facility in *O'Bannon* was required to cease operations had no bearing on the Supreme Court's holding that 42 U.S.C. § 1396a(a)(23) is not a font of substantive rights flowing to Medicaid patients that permits them to sue to set aside the termination of a provider's Medicaid or Medicare agreements on the basis that the provider failed to comply with certain statutory or regulatory requirements." *Id.* at 482–83 (Owen, J. dissenting). The panel majority opinion here makes the very same error that the Court saw fit to correct in *O'Bannon*: "In holding that [§ 1396a(a)(23)] create[s] a substantive right" it "fails to give proper weight to the contours of the right conferred by the statutes and regulations." *See* 447 U.S. at 786.

Importantly, the panel majority opinion's reasoning is not only at odds with *O'Bannon* but also with the entirety of the statutory framework in 42 U.S.C. § 1396a. Under the exclusionary provision in § 1396a(p)(1), a Medicaid provider can be disqualified for reasons unrelated to health and safety that would require the provider to cease dispensing care to the general public. *See* 42 U.S.C. § 1396a(p)(1). Among the grounds for exclusion from Medicaid participation are medically unnecessary charges and false claims for services that were not provided. *Id.* § 1396a(p)(1) (referencing 42 U.S.C. § 1320a-7 and § 1320a-7a). Nowhere does the statute require that the disqualification of a Medicaid provider can occur only if the provider is deemed unfit to provide care for the general public, as the panel majority opinion holds. Moreover, to the extent § 1396a(a)(23) can be

interpreted to secure any private right of action, such a right is surely limited to "qualified" providers and does not include providers who voluntarily choose not to contest their disqualification.[1] Thus, even if *O'Bannon* did not control, and § 1396a(a)(23) were a blank statutory slate, the panel majority opinion's interpretation would still be incorrect because it reads extratextual requirements into the statute and relies on an overbroad interpretation of the term "qualified."

This disjointed reasoning of the panel majority opinion brings us to the procedural elephant in the case: Planned Parenthood Gulf Coast chose to forego its administrative remedies prior to filing this lawsuit. Compounding this procedural irregularity, the preliminary injunction below was issued on the claims of the individual Doe plaintiffs, not on Planned Parenthood's claims. As a result of the majority opinion's holding, a Medicaid provider can now make an end run around the administrative exhaustion requirements in a state's statutory

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[1] Whether § 1396a(a)(23) even confers any private right of action under the framework in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), makes the panel majority opinion further problematic. *See Doe v. Gillespie*, 867 F.3d 1034, 1046 (8th Cir. 2017) (holding that Congress did not unambiguously confer a right in § 1396a(a)(23) that could be enforced by an individual patient under 42 U.S.C. § 1983). Fifteen *amici* states filed a brief urging the *en banc* court to consider the issue of whether there was any private right of action in the statute. As Justice Scalia, writing for the Court, deftly put it, "Congress . . . does not . . . hide elephants in mouseholes." *Whitman v. Am. Trucking. Ass'n*, 531 U.S. 457, 468 (2001).

scheme.[2] Disqualified providers can now circumvent state law because the panel majority opinion deems it unnecessary to have a final administrative determination so long as there are patients to join a lawsuit filed in federal court.

The fact that this case is still at the preliminary injunction stage does not excuse our decision to deny *en banc* rehearing. The panel majority opinion is binding precedent that will guide the development of the law in our circuit. Moreover, at least two other cases are already pending within the circuit and will be immediately impacted by the majority's holding in this case—a holding that cannot be squared with Supreme Court precedent or the statutory text. The ability to correct our deviation from the Supreme Court's precedent in time to prevent further damage remains a distant hope. Accordingly, I respectfully dissent from our denial of rehearing *en banc*.

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[2] Here, under Louisiana law, a party seeking to appeal a termination decision by the Louisiana Department of Health and Hospitals has fifteen days from receipt of notice to request an informal hearing. La. Admin. Code § 50:4203. Following notice of the result of the informal hearing, the provider has thirty days to seek an appeal before the Division of Administrative Law. La. Admin. Code § 50:4211(B).