IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PLANNED PARENTHOOD ARKANSAS & EASTERN OKLAHOMA, d/b/a Planned Parenthood of the Heartland, et al. **APPELLEES**

v. **No. 15-3271**

JOHN SELIG **APPELLANT**

ON INTERLOCUTORY APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. 4:15-CV-566 KGB

THE HONORABLE KRISTINE G. BAKER
UNITED STATES DISTRICT JUDGE

APPELLANT'S REPLY

LESLIE RUTLEDGE
Attorney General of Arkansas

By: **Lee P. Rudofsky**
Solicitor General of Arkansas
Arkansas Bar No. 2015105
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-2007
lee.rudofsky@arkansasag.gov

Continued

C. Joseph Cordi, Jr.
Senior Assistant Attorney General
Arkansas Bar No. 91225
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-2007
joe.cordi@arkansasag.gov

Colin R. Jorgensen
Assistant Attorney General
Arkansas Bar No. 2004078
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-2007
colin.jorgensen@arkansasag.gov

David W. Sterling
Chief Counsel
Arkansas Bar No. 97182
Arkansas Department of Human Services
P.O. Box 1437, Slot S260
Little Rock, AR 72203-1437
(501) 320-6355 (direct)
(501) 682-8009 (fax)
david.sterling@dhs.arkansas.gov

ATTORNEYS FOR APPELLANT

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INTRODUCTION

The three patients recruited by Planned Parenthood for this lawsuit do not contest that 42 U.S.C. § 1396a(a)(23) is a Spending Clause provision. They thus do not contest that a private right of action under 42 U.S.C. § 1983 to enforce 42 U.S.C. § 1396a(a)(23) is only available if and to the extent that "Congress speaks with a clear voice and manifests an unambiguous intent to confer individual rights. . . ." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002). They also do not contest the logical extension of this proposition—that any federal right to be enforced by § 1983 must be strictly limited to the right that Congress clearly and unambiguously intended to confer. *See* Appellant's Brief at 27.

These concessions should be the end of this case. Even assuming *arguendo* that 42 U.S.C. § 1396a(a)(23) could support a private right of action under 42 U.S.C. § 1983, it does not support the type of § 1983 claim that the Patients assert here. The Patients are trying to use an obscure Medicaid Act provision to collaterally challenge a decision made by the Arkansas Department of Human Services ("DHS") to exclude a provider from the Medicaid program for misconduct. But their attempt is based on an enormously sweeping and overbroad reading of § 1396a(a)(23) that was already rejected by the United States Supreme Court in *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 774 (1980). *O'Bannon*

explains that § 1396a(a)(23) concerns Medicaid patients' freedom to choose among the pool of providers deemed qualified by the State, *not* the antecedent question whether a particular provider has been rightly included or excluded by the State from the pool of qualified providers. The Patients argue that *O'Bannon* was a due process case and therefore, somehow, its authoritative interpretation of § 1396a(a)(23) can be ignored. But this argument misses the point. In light of *O'Bannon*, it is simply impossible to conclude that Congress clearly and unambiguously provided the right that the Patients claim—the right to choose a provider that the State has excluded from the Medicaid program for misconduct, even where the provider did not appeal the exclusion.

The Patients argue that their overbroad interpretation of 42 U.S.C. § 1396a(a)(23) is necessary in order to prevent a state from erroneously (or even nefariously) excluding a provider from the pool of qualified providers. *See* Appellees' Brief at 11-12; 47-53. But the Patients never explain why this is true, and they cannot. If the federal government believes that a state has improperly removed a provider from the Medicaid program, it can withhold all or a part of a state's Medicaid funding until the improper removal is reversed. *See* Appellant's Brief at 10. If a provider believes that it has been wrongly excluded from the program, the provider is entitled to an administrative appeal and can even go to state court to attempt to overturn the exclusion. *See id*. at 8-9. The Medicaid

program has been set up specifically to offer this type of check against a state's power to exclude providers for misconduct. It is unreasonable to suggest that Congress intended, *by implication and without directly saying so*, to give patients a right to second-guess (or third-guess) and countermand these decisions regarding whether a provider has been properly or improperly excluded from the Medicaid pool for misconduct.

In this case, Planned Parenthood chose not to appeal DHS's decision to exclude it for misconduct. But assume Planned Parenthood had filed an administrative appeal, lost its appeal, then sought review in state court, and lost in state court. Further assume that the federal government chose not to take any of the actions it could take if it believed the State's decision was erroneous. Under the Patients' interpretation of 42 U.S.C. § 1396a(a)(23), any one patient (or even someone who had never been a patient but would like to be one in the future) may still press a 42 U.S.C. § 1983 claim in federal court seeking to essentially overturn decisions by the state court and the federal government. Congress did not intend this outcome, and § 1396a(a)(23) does not support it.

I. The Patients Lack Standing.

A. 42 U.S.C. § 1396a(a)(23) Does Not Authorize a Private Right of Action Under 42 U.S.C. § 1983 to Collaterally Attack a State Agency's Decision to Exclude a Provider from the Medicaid Program.

The signature legal error made by the Patients in their Appellees' Brief and by the District Court in its Opinion below is the misreading of 42 U.S.C. § 1396a(a)(23). If any 42 U.S.C. § 1983 action could lie in this case, it must be strictly limited to the very specific right that Congress clearly and unambiguously intended to confer on an individual in § 1396a(a)(23). The right to be vindicated by a § 1983 claim simply cannot be read into the statute by implication. *See Gonzaga Univ. v. Doe*, 536 U.S. at 280 (requiring Congress to "speak[] with a clear voice and manifest[] an unambiguous intent to confer individual rights" enforceable by a § 1983 suit).

42 U.S.C. § 1396a(a)(23) explains that a state Medicaid plan should include a provision stating that an "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 . . . ." *Id*. The Patients read into this provision the conferral of an individual right to have the provider of their choice be deemed *qualified* by the State. But such a right is—to say the absolute least—not clear and unambiguous from the text. And it becomes even less plausible when the provision is read in the context of the whole

Medicaid Act, including the provisions of the Act (*e.g.*, 42 U.S.C. § 1396a(p)(1) and the cross-referenced statutes) that expressly permit states to exclude providers from the Medicaid program for ethical, professional, and fiscal misconduct. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole….") (quotations and citations omitted). Indeed, the more straightforward reading of the statute—and the only reading that properly takes into account the exclusionary provisions in the Medicaid Act—is that § 1396a(a)(23) presupposes a pool of qualified providers set up by the State and addresses a Medicaid patient's ability to freely choose among the pool without the State or federal government pushing or steering the patient to a particular qualified provider. Accordingly, if there is any individual federal right clearly and unambiguously conferred, it is only the right of a Medicaid patient to choose among the pool of qualified providers, not the far broader right to have a particular provider deemed qualified. *See* Appellant's Brief at 28-29 (discussing the practical protections provided by such anti-steering and anti-sweetheart-deal rules).

Unlike the interpretation pushed by the Patients, this interpretation has the benefit of aligning perfectly with the Supreme Court's interpretation of the same exact provision in *O'Bannon*. In *O'Bannon*, the Supreme Court was called on to interpret the "contours of the right conferred" by 42 U.S.C. § 1396a(a)(23). 447 U.S. at 786. The Court was very direct about the contours of the substantive right that § 1396a(a)(23) confers on patients. As excerpted in detail in the Appellant's Brief at p. 31, the Court unmistakably held that while the statute provides "the right to choose among a range of qualified providers," it "clearly does not confer a right" to challenge a state's decision to exclude a provider from the group of qualified providers. *O'Bannon*, 447 U.S. at 785.

The best the Patients can do to wish away *O'Bannon* is to assert that *O'Bannon* "concerned only a procedural due process claim" and "did not construe the scope of § 1396a(a)(23) in the context of a Medicaid beneficiaries' substantive § 1983 challenge to the termination of their chosen provider." Appellees' Brief at 51-52. But the meaning of the words of § 1396a(a)(23) does not somehow change based on the purpose for which the statutory interpretation is to be used. And given *O'Bannon*'s interpretation of § 1396a(a)(23), it is impossible to conclude that Congress "clearly and unambiguously" conferred a federal right to challenge a state agency decision that a particular provider should be excluded from the pool of qualified providers. *O'Bannon* goes to great lengths to make clear that the

substantive right granted to an individual by § 1396a(a)(23) is decidedly *not* the right to have a particular provider be considered qualified.

The Patients' fallback argument appears to be that, in spite of *O'Bannon*, the Ninth, Seventh, and Sixth Circuit have found a 42 U.S.C. § 1983 claim to lie for enforcement of 42 U.S.C. § 1396a(a)(23). But the § 1983 claim recognized in each of those cases was not based on a challenge to a state's exclusion of a provider for misconduct. In the Ninth Circuit and Seventh Circuit cases, the right being enforced by § 1983 was the patient's right to freely choose among the pool of qualified providers; the States in those cases did not even suggest that the providers in question had committed misconduct excluding them from the pool of qualified providers. *See Planned Parenthood of Ariz. v. Betlach*, 727 F.3d 960, 973 (9th Cir. 2013); *Planned Parenthood of Ind., Inc. v. Commissioner of Ind. State Dep't of Health*, 699 F.3d 962, 980 (7th Cir. 2012). In the Sixth Circuit case, as explained in DHS's opening brief (*id*. at 35), and as apparently conceded by the Patients, the § 1983 claim had nothing to do with whether a provider was qualified; the claim was about a contract that required all Medicaid patients to receive incontinence products from a single, specific supplier. *See Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006). In short, all of these case are entirely consistent with *O'Bannon*'s understanding of the limited right conferred in § 1396a(a)(23).

In this case, Arkansas is not excluding a group of providers based on the lawful services they provide, nor is Arkansas steering patients to one particular provider within the pool. Rather, Arkansas excluded one particular provider from the pool because of its unethical misconduct. Unlike the Ninth, Seventh, and Sixth Circuit cases, allowing this type of 42 U.S.C. § 1983 claim to lie would be a significant and novel departure from *O'Bannon*. None of the cases provide authority to support a § 1983 claim by a patient to collaterally challenge an exclusion of a particular provider for misconduct.

The Patients also ask this Court to defer to the view of the United States that 42 U.S.C. § 1396a(a)(23) confers a federal right upon Medicaid patients, enforceable by 42 U.S.C. § 1983, to challenge a decision of state agencies to exclude a provider for misconduct. Even if this were something more than a litigation position by the federal government, it would not be entitled to any deference for two reasons. *First*, this is not the sort of expertise-oriented question that is left to be interpreted by the federal agency overseeing the program. Rather, it is a major policy question on which the agency does not deserve deference. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (declining to extend deference to IRS's position regarding whether tax credits are available on Federal Exchanges under the Affordable Care Act because this is a "question of deep 'economic and political significance' that is central to this statutory scheme" and "had Congress

wished to assign that question to an agency, it surely would have done so expressly") (quoting *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014)). *Second*, the very focus of the test (whether the statute's language "clearly and unambiguously" provided a federal right) is answered if there is enough statutory ambiguity to require deference to an agency. If such ambiguity exists, then by definition Congress did not speak clearly and unambiguously, and there can be no conferral of an individual right enforceable under § 1983.

B. 42 U.S.C. § 1396a(a)(23) Does Not Support a Private Right of Action Under the Logic of *Armstrong v. Exceptional Child Center, Inc.*

Even if the Court were to agree with the Patients' overbroad reading of 42 U.S.C. § 1396a(a)(23), the Court should still conclude that the Patients lack standing to bring a private right of action pursuant to 42 U.S.C. § 1983. After *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), no other result makes sense. And hiding one's head in the sand is perhaps the only possible way to ignore the strong implication of *Armstrong* for this case.

Armstrong analyzed another provision of 42 U.S.C. § 1396a(a)—subsection 30(A)—and concluded that "the Medicaid Act implicitly precludes private enforcement of § 30(A), and respondents cannot, by invoking our equitable powers, circumvent Congress's exclusion of private enforcement." 135 S. Ct. at 1385. The *Armstrong* majority's opinion focused on why the text of the provision,

"fairly read in the context of the Medicaid Act," *implicitly* "displays an intent to foreclose" a private right of action, even in the face of a presumption against such implicit preclusion. *Id*. at 1386 (citing *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 647 (2002)). This is the precise question a court must grapple with as the last part of the test governing the availability of 42 U.S.C. § 1983 enforcement. *See Blessing v. Freestone*, 520 U.S. 273, 329, 340 (1997) ("Even if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983. Because our inquiry focuses on congressional intent, dismissal is proper if Congress foreclosed a private remedy" expressly or "impliedly[] by creating a comprehensive enforcement scheme that is incompatible with individual enforcement....").

The Patients' suggestion that *Armstrong* is totally divorced from and changed nothing in the 42 U.S.C. § 1983 context is belied by their apparent concession that *Armstrong* has overruled—expressly or by implication of its logic—this Court's 2006 decision in *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 443 F.3d 1005 (8th Cir. 2006), allowing a § 1983 cause of action to enforce subsection 30(A). *See* Appellees' Brief at 19 (explaining that, under *Armstrong*, § 1396a(a)(30)(A) "lacks . . . individual rights-granting language" and "administrability"). *Armstrong* may not absolutely dictate the outcome of this case

because this case focuses on a separate subdivision of 42 U.S.C. § 1396a(a). But the Patients' attempt to paint *Armstrong* as irrelevant is far from accurate. *Armstrong* should inform the Court's application of the test for a § 1983 action set out in *Blessing* and *Gonzaga*, *supra*. Under a faithful application of the *Armstrong* analysis, § 1396a(a)(23), when "fairly read in context of the Medicaid Act" (*Armstrong*, 135 S. Ct. at 1386), evinces congressional intent to foreclose a private remedy.

As in *Armstrong*, the first indication of implied preclusion is the existence of an expressly provided remedy—the withholding of Medicaid funding in whole or in part by the federal government. Not only was this indicia of preclusion important to the majority in *Armstrong* (*id.*, 135 S. Ct. at 1387), it was important to Justice Breyer's concurrence as well. *See id.* at 1389 (Breyer, J. concurring in part and concurring in judgment) ("For another thing, like the majority I would ask why . . . other forms of relief are inadequate. If the Secretary of Health and Human Services concludes that a state is failing to follow legally required rules, the Secretary can withhold federal funds.").[1]

[1] This is true even if the federal agency chooses not to exercise its power. *Cf.*, *Armstrong*, 135 S. Ct. at 1390 (Breyer, J., concurring in part and concurring in judgment) (recognizing that just "because Congress decided to vest broad discretion in the agency to interpret and to enforce" a particular provision does not provide a "reason for this Court to circumvent that congressional determination by allowing this action to proceed").

On this point, the Patients (and the *amici*) can muster little more than introducing and then vanquishing a strawman. They suggest that both case law and statutory law allow a 42 U.S.C. § 1983 remedy even though the U.S. Department of Health and Human Services ("HHS") can withhold Medicaid funds, because the fact that HHS can withhold funds does not alone preclude a private remedy. *See* Appellees' Brief at 23-25. Neither the majority in *Armstrong* nor DHS in this case suggest that the ability of HHS to withhold funds *alone* precludes private enforcement. Rather, it is one of a number of factors that, when taken together, demonstrate the implied preclusion of a private remedy under § 1983.

For example, the federal government has insisted on additional mechanisms to ensure that states cannot exclude providers from the Medicaid program for illegitimate reasons. *See* Appellants' Brief at 8-9 (provision of administrative appeal and state court access to providers). These additional mechanisms, along with other mechanisms identified in Justice Breyer's concurrence in *Armstrong*, 135 S. Ct. at 1388-90, provide additional evidence that Congress implicitly precluded private enforcement by patients. Indeed, as explained above, a private action by patients is incompatible with the scheme Congress created because it would allow federal court challenges by patients even after a state agency, a state court, and the federal government independently determined that a Medicaid provider was unqualified. The potential for conflicting or inconsistent decisions

was one of the motivating factors leading the *Armstrong* majority and Justice Breyer to find implied preclusion of private enforcement. *See id.* at 1385 (discussing the importance of "avoiding the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action") (quotation marks and citations omitted).

As in *Armstrong*, another indicia of implied preclusion here is the "judicially unadministrable nature of § [23]'s text." 135 S. Ct. at 1385. As in *Armstrong*, the "judgment-laden" nature of the standard suggests that Congress precluded private enforcement to foster "the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking," and in hopes of "avoiding the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action." *Id.* (quotations and citations omitted).

The Patients argue that subsection 30A (at issue in *Armstrong*) is more judgment-laden and unadministrable than subsection 23 (at issue in this case). Appellees' Brief at 22. But *Armstrong* did not set a floor for what constitutes judgment-laden and judicially unadministrable. While *Armstrong* suggests that § 30A set the high-water mark for judicially unadministrable language, it does not in

any way suggest that the analysis would be inapplicable to other Medicaid Act provisions with judgment-laden language. 135 S. Ct. at 1385.

The Patients argue that whether a provider is "qualified" is a "straight-forward" question that "falls comfortably within the judiciary's core competence." Appellees' Brief at 21-22. This argument could be taken a little more seriously if the Appellees' Brief did not include several differing interpretations of the term "qualified," and if the Patients' interpretations did not differ from HHS's interpretation. *Compare* Appellees' Brief at 11 ("qualified" cannot include "reasons unrelated to the provider's ability to provide high-quality services") *with* Appellees' Brief at 28 (admitting that "HHS has repeatedly interpreted the 'qualified' language" to include not just the "provider's ability to perform," but also whether the provider "properly bill[s] for Medicaid covered services") *and* Appellees' Brief at 30-31 (citing cases suggesting that the qualification determination includes whether services can be provided in an "ethical manner" and in a "professionally competent, safe, [and] legal" manner); *compare* Appellees' Brief at 31 (suggesting that the determination of whether a provider is qualified is different and unrelated to the determination of whether a provider can be excluded for cause under § 1396a(p)(1)) *with* Brief of the United States, *Planned Parenthood Gulf Coast v. Gee*, No. 15-30987 (5th Cir. Feb. 17, 2016) (Doc. 00513384431) at 9-11, 15-16 (HHS suggesting that whether a provider is

qualified is based on whether they were "terminated under valid standards" including under § 1396a(p)(1) for "financial integrity" issues, certain criminal offenses, or failing "to meet professionally recognized standards of health care").[2]

In its opening brief, Arkansas DHS explained that the term "qualified" in 42 U.S.C. § 1396a(a)(23) is essentially a placeholder for an intricate and complex web of over 50 federal and state reasons that can be the basis for a state to exclude a provider from the Medicaid program. *See* Appellant's Brief at 6-8. These reasons require value-laden, experienced-based judgments at the state agency level, such as whether a provider is providing services in "an ethical manner" or meeting "professionally recognized standards of care." The reasons also require further value-laden, experienced-based judgments at the federal agency level to determine if the state agency made the right decision. And true to its cooperative federalism nature, the Medicaid Act then requires consultation between the two agencies if there is a disagreement over these value-laden and experienced-based judgments. *See* 42 U.S.C. § 1396c. It is not within the core competency of a federal court to determine whether a service is being provided in "an ethical manner" or in a way that meets "professionally recognized standards" of behavior. At the very least, it involves a balancing of competing interests and judgments best left to agency

[2] The Patients directed the Court to this brief in a letter filed on February 18, 2016, pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure. For the reasons explained in DHS's response letter filed on February 23, 2016, the Court should strike the Patients' Rule 28(j) letter and attached brief.

decision-making that would be made difficult if not impossible by the availability of private enforcement.

II. The Patients Have Not Proven Irreparable Harm.

The Patients are incorrect that the District Court's irreparable harm analysis is entitled to great deference. *See* Appellees' Brief at 56-59. The District Court's factual findings underlying its decision might be entitled to deference. And the District Court's application of these facts to the law might merit deference if the District Court had applied the correct law. But because the District Court got the law wrong, this Court should conduct a *de novo* review of the application of the facts to the law. *See Barrett v. Claycomb*, 705 F.3d 315, 320 (8th Cir. 2013) ("We review a district court's decision to grant a preliminary injunction for an abuse of discretion. An abuse of discretion occurs where the district court rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions. We afford the district court no deference in reviewing its legal conclusions.") (quotations and citations omitted); *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 776 (8th Cir. 2012) ("We review the denial of a preliminary injunction for an abuse of discretion….We review the district court's legal conclusions de novo.") (quotations and citations omitted); *Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, 1000

(8th Cir. 2012) (on review of a preliminary injunction ruling, "[w]e review the district court's legal conclusions de novo").

The legal error made by the District Court, and repeated by the Patients here, is that the three Patients can prove irreparable harm merely by asserting their subjective preference to use Planned Parenthood. *See* Appellees' Brief at 58-59. Under this novel theory, a particular Medicaid patient (even one that is not currently a Planned Parenthood patient) would be considered irreparably harmed even if it were established to an absolute certainty that the patient could and would receive objectively better, quicker, more pleasant, and more convenient service at another provider. The idea that irreparable harm can be established by nothing more than the subjective desire of a patient to use a certain provider is incompatible with the requirement that irreparable harm be "certain and great and of such imminence that there is a clear and present need for equitable relief." *Roudachevski v. All-Am. Care Ctrs., Inc.*, 648 F.3d 701, 706 (8th Cir. 2011) (quoting *Iowa Utils. Bd. v. Fed. Commc'ns Comm'n*, 109 F.3d 771, 779 (8th Cir. 1996)).

The Patients attempt to justify their "subjective desire" standard by characterizing the statute as providing a right to use a preferred provider. But, as made abundantly clear in the Supreme Court's decision in *O'Bannon*, 42 U.S.C. § 1396a(a)(23) does not provide such a right. *See supra* at 6-7. Indeed, the only

right possibly provided by the statute—a right to choose among qualified providers—suggests that patients will not be irreparably harmed so long as they still have a pool of providers to choose from.

The objective harms that the Patients point to illustrate just how de minimis any harm would be during this litigation. *First*, nothing in the Appellees' Brief (or in the Patients' declarations) establishes that they could not find other Medicaid providers. Indeed, the record is clear that the two patients that were Medicaid patients before coming to Planned Parenthood obtained similar services at the County Health Clinic for many years, and could return to that provider. APX 27, 649, 659. *Second*, the Patients do not significantly engage DHS's point that longer lines and longer lead times for appointments, while annoying, are the normal vicissitudes of life and do not constitute the type of certain, great, and imminent harm necessary to support a finding of irreparable harm. Whether marginally longer lines and wait times for appointments constitute irreparable harm is a pure legal question for this Court to decide, and this Court should afford the District Court no deference in reviewing the District Court's resolution of this legal question.

III. The Patients Are Not Likely to Succeed on the Merits of Their 42 U.S.C. § 1396a(a)(23) Claim.

The Medicaid Act gives a state agency like Arkansas DHS the power to exclude providers from the Medicaid program for a large number of reasons

related to unethical and improper behavior or practices. 42 U.S.C. § 1396a(a)(23) provides Medicaid patients a right to choose among *qualified* providers, but the statute does not give Medicaid patients the right to choose providers who have been duly removed from the Medicaid program. Nor does the statute give Medicaid patients a private right of action to challenge state determinations regarding provider qualification. Therefore, the Patients are not likely to succeed on the merits of their § 1396a(a)(23) claim.

The Patients respond to this argument in three ways. *First*, they misconstrue it. They seem to think that, in the foregoing argument, DHS is claiming that the Patients failed to exhaust their administrative remedies. *See* Appellees' Brief at 53–55. DHS has not argued for any exhaustion requirement. Rather, DHS made an exclusion decision based upon unethical conduct. When Planned Parenthood decided to forgo *its* administrative appeal, DHS's decision became final and binding. The Patients are trying to reopen that decision, but they have no right to do so. Therefore, the Patients' first response to DHS's argument is irrelevant.

In the Patients' *second* argument, they claim that DHS never really made a technically sufficient determination that Planned Parenthood is unqualified. *See* Appellees' Brief at 35, 41–43. This argument is demonstrably incorrect. The record reflects both (1) DHS's official determination that Planned Parenthood could no longer be considered a qualified provider and (2) DHS's grounds for that

determination. *See* APX 85, 115, 123; Add. 2. This is, no doubt, why the Patients offer an alternative argument, claiming that DHS's (valid) exclusion of Planned Parenthood as a qualified provider does not bar the Patients' claim under § 1396a(a)(23). Therefore, the Patients' second response to DHS's arguments also fails.

Because the record is so clear that DHS made a valid determination regarding Planned Parenthood's disqualification, the Patients offer a *third* argument: they claim that DHS based its determination on improper grounds. *See* Appellees' Brief at 33-45. And they infer from this claim (1) that DHS's exclusion of Planned Parenthood is inoperative and (2) that the Patients retain a right to choose Planned Parenthood as a provider under 42 U.S.C. § 1396a(a)(23). *See id.* As noted above, and in DHS's initial brief, DHS was fully justified when it determined that Planned Parenthood was disqualified. In the Patients' third argument, they attempt to do what Planned Parenthood declined to do: namely, attempt to show that DHS should reverse its disqualification decision. The appropriate forum for these many pages of arguments was the administrative-appeals process. But when Planned Parenthood chose to forgo the administrative-appeals process, DHS's decision became final. The Patients cannot now attempt to reopen and attack that determination.

The Patients attempt to buttress their attack on DHS's determination by claiming that the Court should defer to HHS's alleged opinion that DHS improperly excluded Planned Parenthood as a qualified provider. *See* Appellees' Brief at 27-30. Citing only a news article, the Patients claim that HHS "warned Arkansas officials" that states may not exclude providers "solely on the basis of the range of medical services they provide." *Id*. at 29.

This Court should give no weight to the HHS citation. First, the newspaper article is, what this Court has called, "rank hearsay."[3] Second, even if the article were allowed to prove the truth of the matter asserted, the article is irrelevant because DHS did not exclude Planned Parenthood "solely on the basis of the range of medical services they provide." Rather, DHS expressly excluded Planned Parenthood on the basis of unethical conduct, which is a valid basis for exclusion under the relevant statutory authority as recognized by this Court's sister circuits. *See Commissioner of Ind.*, 699 F.3d at 978 ("Read in context, the term 'qualified'

[3] In support of the assertions that HHS "warned Arkansas officials" and that "HHS's position is clear[,]" the Patients cite only a news article that, according to the Patients, appeared in the *Arkansas Democrat-Gazette* on August 30, 2015. *See* Appellees' Brief at 29-30 & n.12. Undersigned counsel attempted to access the article at the link provided in the Appellees' Brief, but the link indicated "Page not found." In any event, the Court should not accept the Patients' assertion that "HHS's position is clear" on the basis of a newspaper article. Newspaper articles are "rank hearsay." *Miller v. Tony & Susan Alamo Found.*, 924 F.2d 143, 147 (8th Cir. 1991). The statements allegedly contained in the newspaper article are offered to prove the truth of the matter asserted and are not covered by any hearsay exception. Accordingly, the newspaper article "cannot be admitted for its truth." *U.S. v. Santisteban*, 501 F.3d 873, 878-79 (8th Cir. 2007).

as used in § 1396a(a)(23) unambiguously relates to a provider's . . . capa[bility] of performing the needed medical services in a professionally competent, safe, legal, and ethical manner."); *Betlach*, 727 F.3d at 969 (same).

Finally, the Court should only defer to HHS if HHS takes action on its alleged position regarding DHS's determination, thereby demonstrating that HHS actually *has* a position regarding DHS's determination. But HHS has not taken action consistent with a position that DHS improperly excluded Planned Parenthood, though HHS had every opportunity to do so. HHS has not even required DHS to meet and confer with HHS about this issue pursuant to 42 U.S.C. § 1396c. Especially in light of the fact that HHS has declined to take action consistent with its alleged position as asserted by the Patients, HHS's litigation position should not form the basis of the Court's decision in this case, and the Court should grant no deference to the alleged position of HHS. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) ("We have never applied the principle of [deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question on the ground that 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'") (quoting

Inv. Co. Inst. v. Camp, 401 U.S. 617, 628 (1971)). *See also Gregory v. Ashcroft*, 501 U.S. 452, 485 n.3 (1991) ("The EEOC's position is not embodied in any formal issuance from the agency, such as a regulation, guideline, policy statement, or administrative adjudication. Instead, it is merely the EEOC's *litigating* position in recent lawsuits. Accordingly, it is entitled to little if any deference.") (emphasis in original).

CONCLUSION

In conclusion, the Patients' responses fail to rebut DHS's arguments. Therefore, this Court should reverse the District Court's decision and vacate the preliminary injunction.

Respectfully submitted,

LESLIE RUTLEDGE
Attorney General of Arkansas

By: /s/ Lee P. Rudofsky
Solicitor General of Arkansas

C. Joseph Cordi, Jr.
Senior Assistant Attorney General

Colin R. Jorgensen
Assistant Attorney General

David W. Sterling
Chief Counsel
Arkansas Department of Human Services

ATTORNEYS FOR APPELLANT

CERTIFICATES OF COMPLIANCE & SERVICE FOR ELECTRONIC COPY

Pursuant to FRAP 32(a)(7)(C), undersigned counsel certifies that this brief complies with the type-volume limitations of FRAP 32(a)(7). Excluding those portion of the brief exempted from limitations by FRAP 32(a)(7)(B)(iii), the brief contains 5,474 words. The brief was prepared with Microsoft Word 2010 and typed using Times New Roman 14-point font.

I further certify that on this 26th day of February, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that counsel for the appellees are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I further certify that this PDF file was scanned for viruses, and no viruses were found on the file.

/s/ Colin R. Jorgensen