No. 15-3271
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PLANNED PARENTHOOD ARKANSAS & EASTERN OKLAHOMA, d/b/a Planned Parenthood of the Heartland; JANE DOE #1; JANE DOE #2; and JANE DOE #3,

APPELLEES,

v.

JOHN M. SELIG, Director, Arkansas Department of Human Services, in his official capacity,

APPELLANT.

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

No. 4:15-CV-566 KGB

THE HONORABLE KRISTINE G. BAKER

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SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

The District Court properly granted a preliminary injunction to permit the Doe Plaintiffs to continue receiving family planning services from their chosen Medicaid provider, Planned Parenthood of Arkansas & Eastern Oklahoma ("PPH"), despite Defendant's political attempt to terminate PPH based on false allegations in deceptively-edited YouTube videos. PPH does not even appear in the videos, which make claims about the conduct of a small number of *other* Planned Parenthood affiliates in other states.

The Free Choice of Provider requirement guarantees Medicaid beneficiaries the right to receive Medicaid services from any qualified provider they choose. The District Court properly found that right likely violated by Defendant's attempt to terminate PPH from the Medicaid program. The termination be cannot justified under 42 U.S.C. §1396a(p)(1), because Defendant does not claim that *PPH*—as opposed to other Planned Parenthood affiliates—has provided inadequate services. This baseless termination of the Doe Plaintiffs' chosen Medicaid provider strikes at the heart of the right granted by the Free Choice of Provider requirement, and the District Court's preliminary injunction should be affirmed.

Plaintiffs agree that thirty minutes for argument are necessary because of the complexity of the issues.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 8th Circuit Local Rule 26.lA, Appellee Planned Parenthood Arkansas & Eastern Oklahoma, d/b/a Planned Parenthood of the Heartland, by and through its undersigned counsel, discloses that it is a wholly owned subsidiary of Planned Parenthood of the Heartland, Inc., and that Planned Parenthood of the Heartland, Inc. is a private non-governmental party and has no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

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   Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378 (2015); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013); 42 U.S.C. §1396a(a)(23)**;** 42 U.S.C. §1983.

2. **Whether the District Court was correct in holding §1396a(a)(23) entitles the Doe Plaintiffs to federal review of Defendant's termination decision.**

   Comm'r of Ind., 699 F.3d 962; *Betlach*, 727 F.3d 960; *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, No. 3:15-cv-00565-JWD-SCR, 2015 WL 6551836 (M.D. La. Oct. 29, 2015); *Planned Parenthood Se., Inc. v. Bentley*, No. 2:15-cv-00620-MHT-TFM, 2015 WL 6517875 (M.D. Ala. Oct. 28, 2015); 42 U.S.C. § 1396a(a)(23); 42 U.S.C. §1396a(p)(1).

3. **Whether the District Court was correct in holding the Doe Plaintiffs' §1396a(a)(23) challenge is likely to succeed.**

   See above.

4. **Whether the District Court abused its discretion in finding PPH's termination would irreparably harm the Doe Plaintiffs.**

   See above.

STATEMENT OF THE CASE

This case challenges the abrupt and unwarranted termination of Planned Parenthood Arkansas & Eastern Oklahoma ("PPH"), doing business as Planned Parenthood of the Heartland, from the Arkansas Medicaid program. Through Medicaid, PPH provides critical family planning and other preventive services to hundreds of patients at its health centers in Little Rock and Fayetteville, including Plaintiffs Jane Doe #1, #2, and #3 ("Doe Plaintiffs"), each of whom is enrolled in Medicaid and has chosen PPH as her provider. As the District Court properly held was likely the case, this termination violated these patients' rights under 42 U.S.C. §1396a(a)(23), ("the Free Choice of Provider" requirement), which protects a Medicaid patient's right to receive care from any qualified provider.

I. Plaintiffs and their Participation in the Medicaid Program

The Doe Plaintiffs receive family planning and other preventive services through the Arkansas Medicaid program and have chosen PPH as their provider. APX 23–29; 931 ¶8–933 ¶25. The District Court held each gave credible and detailed testimony about the prompt, high-quality services at PPH and the reasons they choose PPH, including that "it is convenient, they are able to obtain appointments quickly, they obtain test results quickly and reliably, they like the atmosphere and staff, they like that they receive the information they need, and they like the services they can receive as a walk-in patient, especially given their

time commitments to children, inflexible work schedules, and other responsibilities that make it difficult to schedule appointments at a set time." APX 933 ¶24; 948. As the District Court further noted, each Doe Plaintiff wants to continue receiving services through Medicaid at PPH. APX 931 ¶12; 932 ¶16; 933 ¶23.

In Arkansas, PPH operates health centers in Little Rock and Fayetteville providing preventive services, including contraception and contraceptive counseling, physical exams, screening for breast cancer, and screening and treatment for cervical cancer and certain sexually transmitted infections ("STIs"), among others. APX 930 ¶¶1–2; 15 ¶6. PPH also operates a pharmacy through which patients, including those insured through Medicaid, have their birth control prescriptions automatically refilled and delivered every month. APX 930 ¶5; 15 ¶7. While PPH offers early medication abortion in Arkansas, these services are covered by Medicaid only in extremely narrow circumstances not at issue here. APX 930 ¶¶3–4.

PPH and its predecessor organizations have provided care in Arkansas for over thirty years and participated in the Medicaid program in Arkansas for over a decade. APX 930 ¶1; 15 ¶8. In fiscal year 2015, PPH provided nearly 1,000 health care visits and filled more than 1,100 prescriptions for over 500 Medicaid patients in Little Rock and Fayetteville. APX 931 ¶6; 15 ¶9.

The need for publicly supported family planning services is great in Arkansas, which regularly ranks among the worst states for reproductive care. In 2010, 55% of pregnancies in Arkansas were unintended.[1] The state is tied for the third highest rate of teen pregnancy among the 50 states.[2] 72% of Arkansas's unplanned births are publicly funded.[3] Moreover, Arkansas has high STI rates, ranking second in congenital syphilis, eighth in chlamydia, and tenth in syphilis.[4]

Planned Parenthood of the Heartland is an affiliate of Planned Parenthood Federation of America ("PPFA"), a membership organization that promulgates medical and other standards to which members (known as "affiliates") must adhere in order to operate under the name "Planned Parenthood" and otherwise use the Planned Parenthood mark. APX 540-41 ¶¶2, 4. PPFA is not a parent to any affiliate, including Planned Parenthood of the Heartland, and the affiliates are not subsidiaries of PPFA. APX 540-41 ¶¶2–3. Rather, like all Planned Parenthood affiliates, Planned Parenthood of the Heartland is an independent corporation with its own board, finances, operations, and decision-making. PPH is a wholly-owned

[1] Guttmacher Inst., State Facts About Unintended Pregnancy: Arkansas (2014), https://www.guttmacher.org/statecenter/unintended-pregnancy/pdf/AR.pdf (hereafter "State Facts: Arkansas" (APX 34).

[2] Kathryn Kost & Stanley Henshaw, Guttmacher Inst., U.S. Teenage Pregnancies, Births and Abortions, 2010: National and State Trends by Age, Race and Ethnicity 4 (2014), http://www.guttmacher.org/pubs/USTPtrends10.pdf (APX 34).

[3] State Facts: Arkansas (APX 34).

[4] Ctrs. for Disease Control and Prevention, Sexually Transmitted Disease Surveillance 2013 79, 91, 105, 122 (2014), http://www.cdc.gov/std/stats13/surv2013-print.pdf (APX 34).

subsidiary of Planned Parenthood of the Heartland. APX 540-41 ¶¶1; 3. PPFA does not provide medical services or operate health centers. APX 541 ¶4. PPFA has no power or authority to manage the day-to-day operations of PPH or any other affiliate. APX 540-41 ¶3, 527.

II. Defendant's Attempts to Terminate PPH from the Medicaid Program

On August 14, 2015, without expressing previous concerns about PPH's participation in Medicaid, Defendant John Selig, Director of the Arkansas Department of Human Services ("DHS"), notified PPH that DHS was terminating PPH's Medicaid provider agreements. APX 22. While the notice gave no reason, Arkansas Governor Asa Hutchinson issued a press release stating he had directed DHS to terminate the agreements because "[i]t is apparent that after the recent revelations on the actions of Planned Parenthood, that this organization does not represent the values of the people of our state and Arkansas is better served by terminating any and all existing contracts with them." Press Release, Ark. Governor Asa Hutchinson, Governor Asa Hutchinson Directs DHS to End Contract with Planned Parenthood (Aug. 14, 2015), http://governor.arkansas.gov/press-releases/detail/governor-asa-hutchinson-directs-dhs-to-end-contract-with-planned-parenthood. The reference to "recent revelations" appears to relate to deceptively-edited videos opponents of Planned Parenthood released, making claims about the practices of a small number of

Planned Parenthood affiliates that allow patients to donate fetal tissue in order to advance medical research. Nothing in the press release, or Defendant's letter, states PPH is not a qualified provider of Medicaid services.

On September 1, 2015, Defendant sent a second letter, stating PPH was being terminated "for cause" and that:

> The 'for cause' termination is based in part upon the troubling circumstances and activities that have recently come to light regarding the national Planned Parenthood organization, Planned Parenthood of the Heartland, and other affiliated Planned Parenthood entities, all of which are affiliated with [PPH].

APX 73.[5] The letter further stated "there is evidence that [PPH] and/or its affiliates are acting in an unethical manner and engaging in what appears to be wrongful conduct." *Id*. No other cause or explanation for the termination was given. The letter attached questions about fetal tissue disposal and donation at PPH and related entities, stating that answers may be helpful if PPH appeals the termination. These questions included such basic inquiries as whether PPH participates in fetal tissue donation. APX 75. Although PPH did not pursue an administrative appeal, APX 936 ¶44, PPH provided the requested information; however, Defendant did not rescind the termination.

[5] Due to an internal mail-processing error PPH was not initially aware of this second letter, and accordingly Plaintiffs' initial filing addressed only the first letter. APX 66.

Neither letter, nor Governor Hutchinson's release, gave a reason for terminating PPH relating to the quality of Medicaid services PPH provides, in Arkansas or elsewhere. As the District Court correctly found and the uncontroverted evidence shows, PPH has never participated in fetal tissue donation, in Arkansas or elsewhere, and does not appear in any of the videos. APX 935 ¶¶34–36; APX 953–954; APX 17 ¶13. The District Court further found "no evidence that PPH has been cited, reprimanded, or cautioned by [Defendant] in the past about its qualifications as a provider of the services it offers." APX 955. Rather, the asserted bases for termination relate to accusations about the conduct of other Planned Parenthood entities in other states. *Id*.

Further, the videos' allegations that *any* Planned Parenthood entity has engaged in illegal activity or violated standards regarding the use of fetal tissues in scientific research are false, and no governmental investigation related to the videos has identified wrongful conduct by any Planned Parenthood entity; rather, as the District Court correctly found, completed governmental investigations in Georgia, South Dakota, Indiana, Pennsylvania, and Massachusetts have fully vindicated Planned Parenthood. APX 936 ¶42.[6] More recently, a Texas grand jury

[6] Since briefing below concluded, public sources indicate completed investigations in Nevada, Kansas, Florida, Ohio, Washington, Missouri, and Michigan also found no wrongdoing; at least eight other states have declared the evidence insufficient to waste resources on an investigation. Molly Hennessy-Fiske, *Texas Grand Jury Indicts Antiabortion Activists Who Made Undercover Videos of Planned*

cleared a Planned Parenthood affiliate in Texas of any wrongdoing, instead indicting personnel from the extremist anti-abortion organization behind the misleading videos, the so-called "Center for Medical Progress" ("CMP"). Manny Fernandez, *2 Abortion Foes Behind Planned Parenthood Videos are Indicted*, N.Y. Times (Jan. 25, 2016), http://www.nytimes.com/2016/01/26/us/2-abortion-foes-behind-planned-parenthood-videos-are-indicted.html?_r=0. Leading medical organizations, including the American Congress of Obstetricians and Gynecologists, American Public Health Association, and New England Journal of Medicine, have called the CMP videos what they are—baseless attacks—and continue to strongly support Planned Parenthood. *See* George P. Topulos, M.D. et al., Editorial, *Planned Parenthood at Risk*, 373 N. Eng. J. Med. 963 (Sept. 3, 2015); Letter from Am. Coll. Nurse-Midwives et al. to Hon. Mitch McConnell (Aug. 3, 2015), http://www.midwife.org/acnm/files/ccLibraryFiles/Filename/000000005551/ProviderLetteronPlannedParenthood.pdf.

Parenthood, L.A. Times, Jan. 25, 2016, http://www.latimes.com/nation/la-na-grand-jury-planned-parenthood-20160125-story.html; *Nevada AG Closes Inquiry into Planned Parenthood*, KOLO 8, Dec. 2, 2015, http://www.kolotv.com/home/headlines/Nevada-AG-Closes-Inquiry-Into-Planned-Parenthood-360186111.html. This Court may take judicial notice of these developments. *Havens Steel Co. v. Randolph Eng'g Co.*, 813 F.2d 186, 188 (8th Cir. 1987); Fed. R. Evid. 201(d).

III. Impact of Defendant's Action on the Doe Plaintiffs

If Defendant's termination were allowed to take effect, and the Doe Plaintiffs could not continue receiving Medicaid services at PPH, they would be deprived of access to services at their chosen healthcare provider, with whom, as the District Court found, they have an established relationship worthy of protection. APX 947–948. As the District Court found, record evidence demonstrates the Doe Plaintiffs would be unable to afford services at PPH if they could no longer receive them through Medicaid. APX 948. The District Court also credited their detailed testimony that "because of various family and occupational responsibilities, it is difficult for all three… to plan health care visits weeks in advance. Thus, they prefer going to PPH, where they can walk in for an appointment, obtain an appointment quickly, and the wait times are less than those at private physician's offices or public health clinics." APX 948. The Court further found the State's "own documents reflect that long wait times and [scheduling] delays…are commonplace among county health clinics that offer family planning services and other preventive care." APX 934 ¶ 26.

The record reflects additional reasons the Doe Plaintiffs would be unable to obtain equivalent services at other Medicaid providers, including that the pool of participating family planning providers is limited; that locating a private ob/gyn who will take a non-pregnant Medicaid patient is virtually impossible; that many

clinics have significant waits and scheduling delays; and that many individuals receiving health care through other Medicaid providers choose a separate provider such as PPH for reproductive health care because they are concerned about privacy or being judged. APX 18–20 ¶¶16–21.

IV. Other States' Attempts to Exclude Planned Parenthood Providers From State Medicaid Programs

Arkansas is not the first state to try to exclude a Planned Parenthood affiliate from the Medicaid program. In the past few years both Indiana and Arizona tried, but those efforts were rejected, with both the Seventh and Ninth Circuits holding that preventing Medicaid enrollees from obtaining care from the qualified provider of their choice violates federal Medicaid law. *See 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. 2736 (2013); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1283 (2014).

More recently, Alabama and Louisiana tried to terminate Planned Parenthood affiliates from their Medicaid programs, based largely on the same YouTube videos at issue here. These efforts were rejected, and injunctions granted to allow Planned Parenthood health centers to continue providing Medicaid services. *See Planned Parenthood Se., Inc. v. Bentley*, No. 2:15-cv-00620-MHT-TFM, 2015 WL 6517875 (M.D. Ala. Oct. 28, 2015); *Bentley* (M.D. La. Nov. 30, 2015) (permanently enjoining termination of Planned Parenthood affiliate due to

CMP's allegations); *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, No. 3:15-cv-00565-JWD-SCR, 2015 WL 6551836 (M.D. La. Oct. 29, 2015). Texas initially did the same; that attempt has also been challenged, and no termination has taken effect. *Planned Parenthood of Greater Tex. Surg. Health Servs. v. Traylor*, No. 1:15-CV-01058 (W.D. Tex. filed Nov. 23, 2015).

V. Proceedings in the District Court

Following extensive briefing, evidentiary submissions, and argument, the District Court granted a preliminary injunction allowing the Doe Plaintiffs to continue receiving Medicaid services at PPH. The District Court properly found the Doe Plaintiffs likely to prevail on the merits of their Free Choice of Provider claim. As the District Court properly found, under clear precedent from this Circuit and others, §1396a(a)(23)(A) provides a right of action enforceable under 42 U.S.C. §1983 ("§1983") because its language demonstrates Congress's intent to confer an individual right. APX 940-942. Furthermore, the District Court correctly held that §1396a(a)(23)(A) prohibits states from interfering with patients' choice of Medicaid provider for reasons unrelated to the provider's ability to provide high-quality services, APX 949–950, and concluded, after examining Defendant's explanation of his bases for termination, that the Doe Plaintiffs are likely to prevail on their claim that Defendant's actions violated this provision. APX 949–950. This is so because Defendant seeks to terminate PPH from

Medicaid based on misleadingly-edited You-Tube videos containing unsubstantiated claims of misconduct at *other* Planned Parenthood organizations in *other* states, and no conduct by PPH—which has never participated in fetal tissue donation—is even at issue in this case. Finally, the District Court properly found the other factors for preliminary injunctive relief are satisfied, including that the Doe Plaintiffs would be irreparably injured if they were prevented from obtaining Medicaid services at PPH. APX 945–949; 957.

Proceedings are continuing in the District Court, which recently granted Plaintiffs' Motion to certify a class of patients who seek or desire to obtain Medicaid services in Arkansas at PPH. *Planned Parenthood Ark. & E. Okla. v. Selig*, No. 4:15-cv-00566-KGB (Jan. 25, 2016).

SUMMARY OF ARGUMENT

On appeal, Defendant tries to draw focus from his paper-thin justifications for terminating PPH through a number of arguments that federal courts are not permitted to reach the issue of whether this termination was authorized under federal Medicaid law. These arguments fail, and indeed, would render meaningless the Free Choice of Provider requirement's protections. As the District Court correctly held, the Doe Plaintiffs are likely to prevail on their challenge to Defendant's baseless and politically-driven attempt to terminate PPH from Medicaid.

First, Defendant contends that under the logic of *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015), §1396a(a)(23)(A) does not grant a §1983 private right of action. Appellant Br. 16, 21–27. However, *Armstrong* (a Supremacy Clause case) did nothing to alter longstanding §1983 analysis in this Circuit and others, and construed a statutory provision with significantly different language than §1396a(a)(23)(A). Next, Defendant contends the District Court misconstrued the scope of protection afforded by §1396a(a)(23)(A), which (he suggests) only protects Medicaid beneficiaries' right to choose among providers the state has deemed qualified—regardless of how baseless a disqualification may have been. Appellant Br. 16–17, 28–32. He also argues the Doe Plaintiffs are foreclosed from challenging the termination of their chosen provider because PPH elected not to pursue its administrative remedies for challenging that determination (despite that no such remedy was available to the Doe Plaintiffs, and it is well established that §1983 does not impose an exhaustion requirement). Appellant Br. 17–18, 38–40. The District Court properly rejected Defendant's arguments, which ignore both the plain language of §1396a(a)(23)(A) and the well-reasoned and persuasive analysis of the courts that have considered it, including the Seventh and Ninth Circuits.

Finally, Defendant quibbles over the Doe Plaintiffs' ability to obtain services from other providers (ignoring clear evidence that they may be unable to obtain

prompt and adequate services), in contending that Plaintiffs did not demonstrate irreparable injury. Appellant Br. 50–53. This argument misses the point. Even if they could find another provider offering the services they need, the Doe Plaintiffs would be irreparably injured if denied access to their chosen and trusted provider, PPH. At any rate, Defendant's assertions do not come close to a showing the District Court clearly erred in its findings.

In short, the District Court did not abuse its discretion in entering the preliminary injunction, and it should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

On appeal of preliminary injunctive relief, review is limited to whether the district court abused its discretion. *See United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 739 (8th Cir. 2002). As this Court has stated, "We will affirm a grant of injunctive relief unless the district court "clearly erred in its characterization of the facts, made a mistake of law, or abused its discretion in considering the equities.'" *Id*. at 739 (quoting *Shen v. Leo A. Daly Co.*, 222 F.3d 472, 477 (8th Cir. 2000)). The clear error standard of review is deferential. "'A factual finding supported by substantial evidence on the record is not clearly erroneous,' even where [the court of appeals] 'would have viewed the evidence

differently had [it] been sitting as the trier of fact.'" *Kennedy Bldg. Assocs. v. CBS Corp.*, 576 F.3d 872, 876–77 (8th Cir. 2009).

In ruling on a motion for a preliminary injunction, the district court must consider: (1) the threat of irreparable harm to the movant; (2) the balance between this harm and the harm to the other party if the injunction is granted; (3) the probability that the movant will prevail on the merits; and (4) the public interest. *Dataphase Sys. Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). Here, the District Court properly found that each factor favored the Doe Plaintiffs.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING PLAINTIFFS DEMONSTRATED LIKELIHOOD OF SUCCESS ON THE MERITS

A. The Free Choice of Provider Requirement Creates Rights Enforceable Through Section 1983

Medicaid is a cooperative federal-state program through which the federal government provides financial aid to states furnishing medical assistance to eligible low-income individuals. *See* 42 U.S.C. §1396a *et seq.*; *Atkins v. Rivera*, 477 U.S. 154, 156–57 (1986). "State participation is voluntary; but once a State elects to join the program, it must administer a state plan that meets federal requirements." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 433 (2004). Although "states are given considerable latitude in formulating the terms of their own medical assistance plans," that latitude is "qualified by the requirement that a participating state fully comply with the federal statutes and regulations governing

the program." *Addis v. Whitburn*, 153 F.3d 836, 840 (7th Cir. 1998) (citations omitted), *cert. denied*, 153 F.3d 836. Arkansas participates in the Medicaid program and is therefore bound by all of its requirements.

One such requirement is that the state plan "must 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." 42 U.S.C. §1396a(a)(23)(A); 42 C.F.R. §431.51(a)(1) (recipients "may obtain services from any qualified Medicaid provider that undertakes to provide the services to them").

Defendant argues the Doe Plaintiffs lack standing to bring this §1983 action, but as the District Court correctly recognized, the overwhelming weight of authority, including from the Sixth, Seventh, and Ninth Circuits, as well as numerous district courts, recognizes that patients have a private right of action to enforce the Free Choice of Provider requirement under §1983. *See Comm'r of Ind.*, 699 F.3d at 974–75; *Betlach*, 727 F.3d at 966–68; *Harris v. Olszewski*, 442 F.3d 456, 461–62 (6th Cir. 2006), *reh'g and reh'g en banc denied*; *Kliebert*, 2015 WL 6551836, at *24; *Bentley*, 2015 WL 6517875, at *4–5; *Kapable Kids Learning Ctr v. Ark Dep't of Human Servs.*, 420 F. Supp. 2d 956, 960–61 (E.D. Ark. 2005); *G. ex rel. K. v. Haw. Dep't of Human Servs.*, Nos. 08–00551 ACK–BMK, 09–

00044 ACK–BMK, 2009 WL 1322354, at *12 (D. Haw. May 11, 2009); *Martin v. Taft*, 222 F. Supp. 2d 940, 979 (S.D. Ohio 2002); *Women's Hosp. Found. v. Townsend*, No. 07-711-JJB-DLD, 2008 WL 2743284, at *8 (M.D. La. July 10, 2008).[7] Notably, much of this authority is from contexts essentially identical to this one: patient challenges to state attempts to exclude abortion providers from the Medicaid program.

As these opinions set forth and as the District Court correctly held, this is so because the Free Choice of Provider requirement satisfies the three-part test of *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) and *Blessing v. Freestone*, 520 U.S. 329 (1997). APX 940–942.

First, the requirement that the state provide "any *individual* eligible for medical assistance" with assistance from any qualified provider, 42 U.S.C. §1396a(a)(23)(A) (emphasis added), "'confer[s] rights on a particular class of persons.'" *Gonzaga*, 536 U.S. at 285 (citation omitted). It thus contains sufficient "rights-creating language" to support an individual cause of action under §1983. *Id*. at 290. As the Seventh Circuit explained, this focus on the individual is significant:

> Medicaid patients are the obvious intended beneficiaries of the statute; it states that *any* Medicaid-eligible person may obtain medical

[7] The only case to the contrary is *M.A.C. v. Betit*, 284 F. Supp. 2d 1298 (D. Utah 2003), and as the Sixth Circuit has observed, that opinion offers virtually no analysis of the issue. *Harris*, 442 F.3d at 463.

> assistance from *any* institution, agency, or person qualified to perform that service. . . . This language does not simply set an aggregate plan requirement, but instead establishes a personal right to which all Medicaid patients are entitled.

Comm'r of Ind., 699 F.3d at 974. *See also Betlach*, 727 F.3d at 966–67 (same); *Harris*, 442 F.3d at 461 (same) .

Second, the requirement "is not so 'vague and amorphous' that its enforcement would strain judicial competence." *Blessing*, 520 U.S. at 340–41 (citation omitted). Determining whether a provider is "qualified to perform the service or services required," 42 U.S.C. 1396(a)(23), "falls comfortably within the judiciary's core interpretive competence . . . [and] is a legal question fully capable of judicial resolution." *Comm'r of Ind.*, 699 F.3d at 974; *Betlach*, 727 F.3d 960 at 967–68; *Kliebert*, 2015 WL 6551836, at *24; *Bentley*, 2015 WL 6517875, at *4; *Harris*, 442 F.3d at 462.

And *third*, the requirement is "couched in mandatory, rather than precatory, terms." *Blessing*, 520 U.S. at 341 (citation omitted). Its plain language *requires* a state plan to give Medicaid recipients a free choice of providers: "A State plan for medical assistance *must*....provide…." 42 U.S.C. §1396a(a) (emphasis added); *see also Comm'r of Ind.*, 699 F.3d at 974; *Harris*, 442 F.3d at 462; *Betlach*, 727 F.3d at 967.

Faced with this overwhelming and well-reasoned authority, Defendant relies almost entirely on *Armstrong*, which analyzed an unrelated Medicaid Act provision

with significantly different language and in which the Plaintiffs did not even bring a §1983 claim. But as the District Court correctly held, *Armstrong* "does not overrule, or even significantly undermine, the precedent that informed the… Sixth, Seventh, and Ninth Circuits in recognizing a private right of action under 42 U.S.C. §1396a(a)(23)." APX 939 (citing *Planned Parenthood Ariz. v. Betlach*, 899 F. Supp. 2d 868 (D. Ariz. 2012), *appeal dismissed as moot*, 727 F.3d at 962 (2013), *cert. denied*, 134 S. Ct. 1283 (2014); *Comm'r of Ind.*, 699 F.3d 962; *Harris*, 422 F.3d 456).

The logic of *Armstrong* cannot be stretched to the Free Choice of Provider requirement because the rates-setting provision at issue in *Armstrong*, §1396a(a)30(A), lacks both the individual rights-granting language and the administrability of §1396a(a)(23). In contrast to §1396a(a)(23)'s mandate that "any *individual* eligible for medical assistance" may receive assistance from any qualified provider, §1396a(a)30(A) omits any reference to individual Medicaid beneficiaries. Indeed, the *Armstrong* Court notes that case's plaintiffs likely did not bring a §1983 action because they could not meet *Gonzaga*'s requirement that a statute "'unambiguously confer[] [a] right.'" *Armstrong*, 135 S. Ct. at 1388 n.* (plurality opinion) (citing *Gonzaga*, 536 U.S. at 283). *See also Bentley*, 2015 WL 6517875, at *6 (Section 30(A) "lacks the sort of rights-creating language needed to imply a private right of action—that is, just the sort of language that the free-

choice-of-provider provision *does* contain") (internal quotation marks and citation omitted); *Kliebert*, 2015 WL 6551836, at *26 (distinguishing §30(A) and §1396a(a)(23) on same basis); APX 939.

Similarly, the two provisions could not be more different with regard to enforceability. Section 30(A) is a rates-setting provision that expressly requires balancing competing policy interests. As the *Armstrong* Court emphasized, "[i]t is difficult to imagine a requirement broader and less specific than §30(A)'s mandate that states 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.'" 135 S. Ct. at 1385 (citation omitted); *see also Westside Mothers v. Olszewski*, 454 F.3d 532, 543 (6th Cir. 2006) (§30(A) requires "interpretation and balancing of. . .general objectives [that] 'would involve making policy decisions for which this court has little expertise and even less authority'") (citation and internal quotation marks omitted); *Sanchez v. Johnson*, 416 F.3d 1051, 1059–60 (9th Cir. 2005) (§30(A) expresses "competing interests" such as "efficiency, economy, and quality of care," that required balancing from a policy perspective; "[t]he tension between these statutory objectives supports the conclusion that §30(A) is concerned with overall methodology rather than conferring individually enforceable rights on individual Medicaid recipients"); *Long Term Pharmacy All. v. Ferguson*, 362 F.3d 50, 58 (1st Cir. 2004) (§30(A)'s

"criteria (avoiding overuse, efficiency, quality of care, geographic equality) are highly general and potentially in tension" and because of that "generality" it was unenforceable).[8]

In contrast, whether a provider is "qualified to perform the service or services required" pursuant to §1396a(a)(23) "falls comfortably within the judiciary's core interpretive competence … [and] is a legal question fully capable of judicial resolution." *Comm'r of Ind.*, 699 F.3d at 974; *Betlach*, 727 F.3d at 967 ("[t]hese are objective criteria, well within judicial competence to apply"); *Kliebert*, 2015 WL 6551836, at *24 ("with its terms so comprehensive and clear, court after court forced to peruse this provision has reached the same conclusion"); *Bentley*, 2015 WL 6517875, at *7 ("determining that a provider is qualified to perform a service. . . and undertakes to provide such service is well within a court's competence") (internal quotation marks and alterations omitted); *see also Ball v. Rodgers*, 492 F.3d 1094, 1115 (9th Cir. 2007) ("Although [§(30)(A)] would require a court to account for numerous, largely unquantifiable variables—

[8] Furthermore, while Justice Breyer joined Parts I-III of Justice Scalia's opinion in *Armstrong*, making those three parts the majority opinion, he also wrote separately to underscore how narrowly the Court's ruling should be read. This concurrence makes clear that the fact that §30(A) is a rate-setting statute was critical to his determinative vote. 135 S. Ct. at 1388 ("[r]eading § 30A underscores the complexity and nonjudicial nature of the rate-setting task.") (Breyer, J., concurring).

'efficiency, economy, and quality of care'—the [free choice provisions] are far more straightforward.")

Thus, while Defendant focuses on *Armstrong*'s analysis that §1396a(a)(30)(A) is too vague and judgment-laden to be judicially administrable, and asks this Court to reach the same conclusion as to the very different language of the Free Choice of Provider requirement, Appellant's Br. 22–24, *Armstrong*'s analysis of the administrability of §30(A) is irrelevant to §1396a(a)(23)'s far more straight-forward mandate. *See, e.g.*, *Suter v. Artist M.*, 503 U.S. 347, 358 n.8 (1992) (every federal statute "must be interpreted by its own terms"); *Armstrong*, 135 S. Ct. at 1388 ("[There is no] simple fixed, legal formula separating federal statutes that may underlie this kind of injunctive action from those that may not. . . . Rather . . . several characteristics of the federal statute before us, when taken together, make clear that Congress intended to foreclose respondents from bringing *this particular action* for injunctive relief." (Breyer, J., concurring) (emphasis added).

In addition to ignoring these critical differences in the two provisions, Defendant asks this Court to disregard that *Armstrong* was a Supremacy Clause case, not a §1983 case. Appellant Br. 25. But Defendant is wrong in suggesting this makes no difference. In *Armstrong*, the Court discussed at length that Supremacy Clause creates a rule of decision as to how conflicts between federal

and state rule are to be resolved but does not create a cause of action to enforce a right: "It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so." 135 S. Ct. at 1383. In contrast, the very nature and purpose of §1983 is to create a cause of action to redress "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." Thus, "Plaintiffs suing under §1983 do not have the burden of showing an intent to create a private remedy because §1983 generally supplies a remedy for the vindication of rights secured by federal statutes…Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by §1983." *Gonzaga*, 536 U.S. at 274.

Thus, the *Armstrong* Court's analysis regarding whether plaintiffs could sue under the Supremacy Clause or in equity does not affect the validity of the Court's longstanding §1983 jurisprudence, and certainly did not implicitly overrule *Gonzaga* or *Blessing*. Indeed, Defendant appears to acknowledge as much. Appellant Br. 20-21 (citing *Blessing* and *Gonzaga*). Defendant nevertheless asks this Court to disregard that precedent and extend *Armstrong* to foreclose the creation of private rights of action by provisions of the Medicaid Act *even where they contain rights-creating language*, as this one does, because of the Medicaid Act's grant of authority to the U.S. Department of Health and Human Services ("HHS") to withhold funds for violation of the Medicaid Act's requirements.

Appellant Br. 25. Tellingly, Defendant cannot identify any court that has done as he suggests. Rather, in the wake of *Armstrong*, courts have continued to analyze whether a provision of the Medicaid Act creates a private right of action under §1983 pursuant to the familiar *Blessing* and *Gonzaga* standards, and have not hesitated to find a private of action where those standards are met. *See*, *e.g.*, *Fishman v. Paolucci*, No. 14-3715, 2015 WL 5999318, at *4 n.1 (2d Cir. Oct. 15, 2015) (*Armstrong* does not alter analysis that §1396a(a)(3), requiring opportunity for fair hearing "to any individual" whose claim is denied, authorizes private right of action under §1983); *J.E. v. Wong*, CV 14-00399 HG-BMK, 2015 WL 5116774, at *7–8 (D. Haw. Aug. 27, 2015) (same as to §1396a(a)(10) and (43) early and periodic screening, diagnostic and treatment provisions, requiring that certain services be provided to "all individuals" meeting specified requirements); *Unan v. Lyon*, No. 2:14-CV-13470, 2016 WL 107193, at *11 (E.D. Mich. Jan. 11, 2016) (same as to §1396a(a)(8), requiring that "all individuals" wishing to apply for medical assistance have the opportunity to do so, and (10), requiring medical assistance be available to "all individuals"); *see also Providence Pediatric Med. DayCare v. Alaigh*, No. CIV. 10-2799 NLH/KMW, 2015 WL 3970049, at *10 (D.N.J. June 30, 2015) (rejecting Supremacy Clause claims based on *Armstrong*, but finding private right of action under §1983 for claims under §1396a(a)(8), (10), and (43)). Indeed, as the District Court correctly recognized, APX 941,

Defendant's suggestion to the contrary would prevent §1983 enforcement of *any* provision of the Medicaid Act, because HHS may always withhold funds for violation of the Act's requirements.[9] 42 U.S.C. §1396c.

Moreover, in the §1983 context, Defendant's argument that Congress foreclosed a private remedy because HHS can withhold Medicaid funds has been expressly rejected by the Supreme Court. *See Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 521-22 (1990); *Comm'r of Ind.*, 699 F.3d at 974-75; *Harris*, 442 F.3d at 463.[10] And Congress itself has reinforced that Medicaid Act provisions can support a private right of action even when they are part of a state plan and subject to HHS enforcement actions. 42 U.S.C. §1320a-2 ("In an action brought to enforce a provision of this chapter, 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."); *see also Betlach*, 899 F.Supp.2d

[9] Indeed, *Armstrong*'s suggestion that HHS's authority to withhold funds may be read, in conjunction with other aspects of §30A's text, to reflect Congressional intent to foreclose a private right of action, *id*. at 1385,is simply inapplicable in the context of §1396a(a)(23), where Congress used language about the state plan's obligations to "any individual eligible for medical assistance," that *created* a private right of action, and Congressional intent to *foreclose* such a private right of action therefore cannot be inferred from the grant of an additional remedy to HHS.

[10] Although *Armstrong* recognizes that later cases clarified that *Wilder* does not stand for the proposition that mere "benefits" or "interests" can be enforced through §1983 actions, *Armstrong*, 135 S. Ct. at 1386 n.* (citing *Gonzaga*, 536 U.S. at 283), this by no means overrules *Wilder*'s holding that the ability to withhold federal funds does not evidence a Congressional intent to specifically foreclose a remedy under §1983.

at 878 (explaining provision's context and significance).

Finally, the United States agrees that patients can enforce the Free Choice of Provider requirement through §1983, despite HHS's parallel authority. Statement of Interest of the United States 11, *Kliebert* ("Statement of Interest") (APX 527 ("[W]hile [42 U.S.C.] §1396c represents one means of enforcing the Medicaid statute's requirements, it surely is not the only means.").

For all these reasons, Defendant's reliance on *Armstrong* is misplaced, and the District Court was correct in following the overwhelming precedent and concluding that the Free Choice of Provider requirement creates a right of action enforceable under §1983.

B. The Free Choice of Provider Requirement Bars States from Excluding Providers for Reasons Unrelated to Their Competence to Provide Medical Services

Section 1396a(a)(23) provides that a state plan for delivery of Medicaid services "must 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." 42 U.S.C. §1396a(a)(23).

As the District Court correctly recognized, and as the U.S. Supreme Court has explained, the Free Choice of Provider requirement gives beneficiaries an "absolute right" to choose a qualified provider "without governmental

interference." *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980). APX 939.

Moreover, Congress has afforded family planning services additional protections: although HHS is generally permitted to waive §1396a(a)(23)(A) when allowing states to implement a primary care case-management system, *see* 42 U.S.C. §1396n(b)(1), it may not do so for family planning services. 42 U.S.C. §1396a(a)(23)(B).

As the Ninth Circuit explained, "[s]ection 1396a(a)(23)(B) . . . carves out and insulates family planning services from limits that may otherwise apply under approved state Medicaid plans, assuring covered patients an unfettered choice of provider for family planning services." *Betlach*, 727 F.3d at 964; *see also Bentley*, 2015 WL 6517875, at *7 (because family planning providers particularly vary in the options they are *willing* to provide, "Congress saw fit to identify family planning as the area of medical care with respect to which a recipient's free choice of provider was most critical"). Congress also signaled its particular interest in maximizing access to family planning services by providing 90% of the cost of these services, 42 U.S.C. §1396b(a)(5), a higher percentage than many other services.

In administering the Medicaid statute, HHS has repeatedly interpreted the "qualified" language in §1396a(a)(23) to prohibit a state from denying Medicaid

patients access to their provider of choice for reasons unrelated to that provider's ability to perform or properly bill for Medicaid-covered services. HHS has explained that "[t]he purpose of the free choice provision is to allow [Medicaid] recipients the same opportunities to choose among available providers of covered health services as are normally offered to the general population." Ctrs. For Medicare & Medicaid Servs. ("CMS"), CMS Manuals Publication #45, State Medicaid Manual §2100.

Accordingly, HHS has rejected multiple state attempts to exclude providers based on the scope of the medical services offered. (Notably, as here, all have been ideologically-driven attempts targeting abortion providers.) In 2012, for example, CMS, the HHS agency that administers Medicaid, rejected an Indiana plan that barred state agencies from contracting with or making grants to abortion-providing entities, concluding Indiana's plan violated §1396a(a)(23). Letter from Adm'r., CMS, to Dir., Ind. Office of Medicaid Policy & Planning (June 1, 2011), http://www.politico.com/static/PPM169_110601_indiana_letter.html; *see also* Not. of Hr'g: Reconsideration of N.J. State Plan Amendment 02-10, 67 Fed. Reg. 79121-01 (Dec. 27, 2002) (noting disapproval of a state plan amendment that

would limit "beneficiary choice…by imposing standards that are not reasonably related to the qualifications of providers").[11]

And less than six months ago, the federal government took the same position against Louisiana's attempt to terminate a Planned Parenthood affiliate from its Medicaid program in response to the same CMP videos at issue in this case, noting that "terminating [Planned Parenthood] from its Medicaid program without providing any justification related to [its] qualifications to provide medical services would violate Louisiana's obligations under the Medicaid statute's 'free choice of provider' provision." APX 517.

In this case, consistent with the precedent discussed above, HHS warned Arkansas officials that states have an "obligation to ensure beneficiaries have freedom of choice of provider," and that they may not "exclude providers from the program solely on the basis of the range of medical services they provide," including abortion services. *See* Brian Fanney, U.S. Warns State's End of Contract

[11] Even if §1396a(a)(23) were ambiguous, which it is not, HHS's longstanding interpretation of this provision is entitled to *Chevron* deference. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Pharm. Research & Mfrs. America v. Thompson*, 362 F.3d 817, 822 (D.C. Cir. 2004) (by "expressly conferr[ing] on the Secretary authority to review and approve state Medicaid plans as a condition to disbursing federal Medicaid payments," Congress expressed "its intent that the Secretary's determinations, based on interpretation of the relevant statutory provisions, should have the force of law") *see also Iowa Dep't of Human Servs. v. Ctrs. For Medicare & Medicaid Servs.*, 576 F.3d 885, 888 (8th Cir. 2009) ("the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.") (citation and internal quotation marks omitted).

Legally Iffy, Ark. Democrat-Gazette, Aug. 30, 2015, http://www.arkansasonline.com/news/2015/aug/30/us-warns-states-end-contract-legally-iffy/.[12]

Consistent with the government's position, courts facing the issue have unanimously held that states may exclude a provider from Medicaid only upon a valid determination that the provider is not "qualified to perform the service or services required," 42 U.S.C. §1396a(a)(23). Excluding "Planned Parenthood from Medicaid for a reason unrelated to its fitness to provide medical services[] violat[es] its patients' statutory right to obtain medical care from the qualified provider of their choice." *Comm'r of Ind.*, 699 F.3d at 968; *see also Betlach*, 727 F.3d at 969 (§1396a(a)(23) is "subject only to two limitations: (1) the provider 'is qualified to perform the service or services required' and (2) the provider 'undertakes to provide [the patient] such services.'" (quoting 42 U.S.C. §1396a(a)(23)); *Kliebert*, 2015 WL 6551836, at *27; *Bentley*, 2015 WL 6517875, at * 7.

As both the Seventh and Ninth Circuits have recognized, it is clear from §1396a(a)(23) that any determination that a provider is not qualified must "unambiguously relate to a provider's… capability of performing the needed

[12] This history is contrary to Defendant's suggestion that HHS has not taken a position on whether Defendant's termination of PPH from the Medicaid program violates §1396a(a)(23), see Appellant Br. 18. To the contrary, HHS's position is clear.

medical services in a professionally competent, safe, legal, and ethical manner." *Betlach*, 727 F.3d at 969 (alteration omitted) (quoting *Comm'r of Ind.*, 699 F.3d at 978). *See also Bentley*, 2015 WL 6517875, at * 7 ("qualified to perform the service or services required means just what the plain language says: having competency and professional standing as a medical provider generally") (internal quotations omitted); *Kliebert*, 2015 WL 6551836, at * 28 ("If [a provider] 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 follows that if a provider is "qualified" within the meaning of §1396a(a)(23), he or she can be terminated from the Medicaid program without running afoul of the Free Choice of Provider requirement only if the termination is authorized by one of the narrow grounds laid out in the Medicaid Act. *See*, *e.g.*, §1396a(p)(1) (authorizing state to terminate a Medicaid provider based on, *inter alia*, crimes committed in the delivery of services, abuse or neglect of patients, provision of inadequate medical services, submission of false claims or acceptance of kick-backs, or failure to comply with regulations or corrective action requirements); *Betlach*, 727 F.3d at 972-73 (rejecting argument that provider may

be terminated for a reason not authorized by §1396a(p)(1) or another provision of the Medicaid Act); *Comm'r of Ind.*, 699 F.3d at 979 (same); *Bentley*, 2015 WL 6517875, at * 7.

Defendant contends that *Betlach* and *Comm'r of Ind.* are inapplicable because they involved legislatures disqualifying a class of providers, whereas here Defendant has attempted (at the Governor's direction) to terminate a specific provider. Appellant Br. 33-35. As the District Court properly recognized, Defendant overstates this distinction's significance. APX 950. As set forth above, the persuasive and well-reasoned analysis of these cases goes well beyond the fact that a state could not lawfully disqualify a *class* of providers, and specifically rejects the idea that §1396a(a)(23) permits a state to disqualify a Medicaid provider for a reason unrelated to that provider's ability to provide medically appropriate services, absent specific authorization for the termination under federal Medicaid law. In short, the analysis in these cases applies regardless of whether the state attempted to disqualify a disfavored provider through legislative or executive action; the point is that any disqualification must relate to a permissible reason. *See also* Statement of Interest 7 n.3 (APX 523 n.3) (§1396a(a)(23) "is violated whenever a beneficiary is denied her right to receive covered Medicaid services from 'any' qualified provider of her choice willing to provide them; it does not matter whether that provider was excluded from the

Medicaid program on an individualized or class-wide basis."). For that reason, like the District Court here, the two other district courts to consider the termination of Planned Parenthood organizations from state Medicaid programs as a result of CMP's videos found *Betlach* and *Comm'r of Ind*. persuasive, and entered preliminary injunctions protecting the rights of Medicaid patients to continue receiving services at their chosen provider. APX 958; *Kliebert*, 2015 WL 6551836, at *35; *Bentley*, 2015 WL 6517875, at *9.

C. Defendant Lacks Any Legitimate Basis to Terminate PPH from the Medicaid Program

As the District Court correctly held, Plaintiffs are likely to succeed on the merits of their Free Choice of Provider claim because PPH is a qualified provider and Defendant lacks any legitimate basis for its termination.

(1) the "at will" termination

Defendant first attempted to terminate PPH from the Medicaid program based on an at-will provision in the Medicaid Provider Agreement. APX 22. He did so at Governor Hutchinson's directive, apparently without viewing the videos underlying that directive. APX 951; APX 115 ¶¶5, 9. The District Court properly held that the Free Choice of Provider requirement does not allow for such baseless exclusion of a qualified Medicaid provider. APX 951-52. Indeed, for states to have carte blanche to terminate Medicaid provider agreements "at will" would

render illusory the guarantees of the Free Choice of Provider requirement. See, e.g., *Comm'r of Ind.*, 699 F.3d at 978; *Betlach*, 727 F.3d at 970.

Perhaps in recognition of the inadequacy of his first attempt to terminate PPH from Medicaid, Defendant no longer appears to defend his At-Will Termination.

(2) the "For-Cause" termination

Defendant's second, "For-Cause" termination is equally unavailing. It is based on accusations in CMP's deceptively-edited videos, obtained by anti-abortion extremists who spent nearly three years infiltrating Planned Parenthood entities by masquerading as personnel from a biotechnology company, and attempting unsuccessfully to entrap their physicians and staff into wrongdoing related to fetal tissue donation. APX 114, 115; APX 352. Defendant watched these YouTube videos at the Governor's directive, APX 115, and claims they show that "[PPH] and/or its affiliates are acting in an unethical manner and engaging what appears to be wrongful conduct," APX 73, and thus provide a basis for termination pursuant to 42 U.S.C. §1320a-7(b)(6)(B), which (in relevant part) permits states to terminate a provider when it "determines" that an "individual or entity" has "furnished or caused to be furnished items or services to patients . . . of a quality which fails to meet professionally recognized standards of health care." Appellant Br. 37. As additional support for these claims, Defendant relies on

transcripts purporting to reflect longer (though still incomplete) versions of the same interactions. Appellant Br. 42; APX 353.

Defendant has not shown—and cannot show—that termination is authorized under the provision he cites, for at least three independent reasons. First, the videos and transcripts do not even purport to depict conduct by PPH, the Medicaid provider whose agreements were terminated. Second, no "determination" of wrongdoing has been made within the meaning of 42 U.S.C. §1320a-7(b)(6)(B). And third, Defendant's own evidence belies the accusations in the deceptively-edited videos.

(a) the videos do not purport to depict conduct at PPH and cannot be attributed to PPH

First, the videos and transcripts on which Defendant relies are not about PPH or Planned Parenthood of the Heartland at all, but rather make false claims about the practices of *other* Planned Parenthood affiliates in *other* states. As set forth in Section II, *supra*, and as the District Court properly found, neither PPH nor Planned Parenthood of the Heartland has ever participated in fetal tissue donation. APX 954; APX 17 ¶13, APX 541 ¶7. Indeed, PPH does not provide surgical abortions in Arkansas, from which tissue could be obtained for donation. APX 954; APX 541 ¶8; APX 417. And no staff member of PPH or Planned Parenthood of the Heartland appears in any of the videos or transcripts. APX 935 ¶¶34-35;

APX 17 ¶13; APX 542 ¶9. Nor does Defendant claim any issue with the quality of services PPH has provided in Arkansas. APX 957; APX 17 ¶13.

Rather, Defendant's only justifications for termination are his contentions that PPFA and its affiliates function as a "unified whole" and "are part of an overarching enterprise of which PPFA is the central manager," and thus that the acts of any affiliate, or of PPFA, may be attributed to all other affiliates. Appellant Br. 44, 47. As the District Court recognized, APX 955, this contention fails.

Federal Medicaid law does not permit a provider to be excluded from a state Medicaid program due to actions of an entirely separate entity. This is clear from the text of 42 U.S.C. §1320a-7(b)(6)(B), which allows for termination of "*any individual or entity* that the Secretary determines… has furnished or caused to be furnished items or services to patients… of a quality which fails to meet professionally recognized standards of health care" (emphasis added). Similarly, 42 U.S.C. §1396a(p)(1) allows a state to terminate "any individual or entity…for any reason for which the Secretary could exclude *the* individual or entity" (emphasis added). By the plain language of these provisions, the entity being terminated must be the same entity that furnished or caused to be furnished the services that violate professionally recognized standards.

As an Alabama district court held recently in rejecting a similar attempt to

exclude a Planned Parenthood affiliate from Medicaid program based on a CMP video not involving that affiliate, federal law permits no such "guilt by association." Rather, the federal provisions authorizing states to exclude providers based on program violations or other legal violations "make clear that the 'entity' that 'a State may exclude' must be the *same* 'entity that the [State] determines… has furnished… services to patients… of a quality which fails to meet professionally recognized standards of health care.'" *Bentley*, 2015 WL 6517875, at *11 (emphasis and alterations in original) (quoting §1320a-7(b)(6)(B)).

This plain language reading of the federal for-cause provisions is reinforced by the narrow federal provision permitting exclusion of a participant based on its relationship with another Medicaid participant subject to exclusion. 42 U.S.C. §1320a-7(b)(8)(allowing for discretionary exclusion of "[e]ntities controlled by a sanctioned individual" in the sense that that individual "has a direct or indirect ownership or control interest," or "is an officer, director, agent, or managing employee" of the entity). *See Bentley*, 2015 WL 6517875, at *11 (citing narrow parameters of §1320a-7(b)(8) in rejecting same argument Defendant makes here regarding exclusion based on Planned Parenthood's affiliation structure).

Not only is the federal "relationship" provision extremely narrow, applying only to entities that are owned or controlled by sanctioned individuals, but

Congress and HHS were very specific about the types of ownership and control interests that support termination under 42 U.S.C. §1320a-7(b)(8)— none of which could remotely apply here. *See* 42 U.S.C. §1320a-7(b)(8)(A)(i)-(iii); 42 C.F.R. §1001.1001(a). As HHS explained, "[t]he purpose of this provision is to ensure that the programs do not indirectly reimburse excluded individuals," not to punish organizations for their associations, as Defendants attempt to do here. Health Care Programs: Fraud and Abuse; Amendments to OIG Exclusion and CMP Authorities Resulting From Public Law 100-93, 57 Fed. Reg. 3298, 3308-10 (Jan. 29, 1992).

No such ownership or control is present between Planned Parenthood of the Heartland and any other Planned Parenthood affiliate or PPFA. As detailed in Section I, *supra*, Planned Parenthood of the Heartland (like other affiliates) is a separate corporation with its own board, finances, operations, and decision-making. While Planned Parenthood of the Heartland is an affiliate of PPFA, Defendant is wrong in claiming "PPFA directs activities, programs, services and pronouncements of each of its affiliates," Appellant Br. 46. To the contrary, PPFA has no authority to manage the operations of any affiliate, including Planned Parenthood of the Heartland. APX 540-41. Defendant's quotations from an out-of-date version of PPFA's Bylaws suggest nothing to the contrary. *See generally* Appellant Br. 46 (highlighting, *inter alia*, that Planned Parenthood affiliates must provide medical services in conformity with PPFA Medical Standards and

Guidelines, use "Planned Parenthood" in their name, and provide services consistent with the purposes of PPFA); *see also* APX 381-82 (PPFA bylaws reflecting that "[e]ach Affiliate shall be governed by an elected Board of Directors or similar governing body" and "by written bylaws which conform to PPFA policies."). Nor does a letter from PPFA's President "underscore[] the unity of the organization" or reflect that "the affiliates exist as separate entities on paper, but not in reality," as Defendant maintains. Appellant Br. 47-48. Rather, the letter makes clear that "Planned Parenthood uses an affiliate structure" and that PPFA's role is to "establish policies and accreditation standards for our 59 *legally independent* affiliates." APX 349 (emphasis added). [13] Thus, there is no basis under federal Medicaid law for PPH to be terminated based on accusations against other Planned Parenthood affiliates or PPFA. *See also Bentley*, 2015 WL 6517875, at *11–12 (rejecting similar arguments).

Likely because there is no federal Medicaid law or precedent that would permit such a termination, Defendant resorts to inapposite corporate law cases.[14]

[13] Defendant suggests he is entitled to deference on his determination that all Planned Parenthood entities should be treated as a unified whole, Appellant Br. 44, but provides neither legal citation for this surprising proposition, nor an explanation of why such a determination would fall within the agency's expertise.

[14] *See In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 344 F. Supp. 2d 686, 691, 695 (W.D. Wash. 2003) (considering whether the court had personal jurisdiction over a foreign company based on its relationship with a U.S. subsidiary and explaining that if the entities are not really separate or if there is an agency relationship between the two, then the subsidiary's contacts may be imputed to the

Appellant Br. 48-49. The parent/subsidiary, agency, and joint employer relationships found necessary in those cases for some kind of imputed theory of corporate responsibility are a far cry from the relationship between Planned Parenthood of the Heartland and PPFA, much less Planned Parenthood of the Heartland and other Planned Parenthood affiliates.[15]

For these reasons, the District Court was correct to reject Defendant's contention that PPFA and its affiliates "function as a unified whole and thus, the acts of one affiliate may be attributed to all other affiliates." APX 955. Similarly,

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parent); *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004) (considering whether U.S. defendants could be liable for the human-rights abuses of foreign subsidiaries and identifying several theories under which a court could hold a parent liable for its subsidiary's acts, including piercing the corporate veil and agency liability); *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186, 2015 WL 5047768, at *2 (Aug. 27, 2015) (NLRB held that employers are "joint employers . . . if they 'share or codetermine those matters governing the essential terms and conditions of employment'").

[15] Indeed, while Defendant argues that "Planned Parenthood" should be treated as one organization, he does not explain—as he would need to—whether he is arguing that Planned Parenthood of the Heartland is a principal or an agent. Moreover, even if actions taken by PPFA and Planned Parenthood of the Heartland could be attributed to one another by virtue of some kind of agency relationship (which they cannot), there is certainly *no* support for the idea that Planned Parenthood of the Heartland could be held liable for actions taken by affiliates in other states. Defendant's position seems to be that if the conduct of any affiliate in any state entitled that state to disqualify it as a Medicaid provider, that means that *any* state could disqualify *any* of the other fifty-eight affiliates. Such a holding would be far-reaching and unprecedented, as well as contrary to federal law, and Defendant has not attempted to make a serious factual or legal showing to support it.

the acts of PPFA (which provides no medical services and thus cannot engage in fetal tissue donation) cannot be attributed to PPH.

(b) Defendant has made no "determination" of wrongdoing

Defendant's attempt to justify PPH's termination fails for the independent reason that Defendant has not—and could not have—actually "determine[d]" that PPH (or *any* Planned Parenthood entity) violated professional standards of health care delivery, as required by §1320a-7(b)(6)(B).

Defendant has stated that his decision was based on the deceptively-edited YouTube videos obtained under false (and seemingly illegal) pretenses by Planned Parenthood's political opponents, which purport to depict tissue donation practices at a small number of other Planned Parenthood affiliates, without any further inquiry. APX 115 ¶10, 117 ¶15. Defendant does not claim he inquired into the veracity of the videos even though, as set forth below, that the videos were deceptively edited to smear the Planned Parenthood entities depicted is readily apparent even from the longer CMP transcripts Defendant has filed.[16] Indeed, there is no indication he even reviewed these transcripts, or the longer versions of the videos on which they were based, before making the termination

[16] For these reasons, among others, the District Court properly gave the videos "little weight." APX 953.

decision.[17] Further, the For-Cause Termination Letter does not state what PPH is claimed to have done wrong, on what basis, or in violation of what statutory provision or rule, but rather states only "there is evidence that [PPH] and/or its affiliates are acting in an unethical manner and engaging in what appears to be wrongful conduct." APX 73. The letter also invites PPH to submit information about such basic topics as whether it participates in fetal tissue donation. APX 73, 75. This purposefully vague, "terminate first, ask questions later" approach cannot constitute the "determination" required under federal Medicaid law. *See, e.g.*, *Determine*, Merriam-Webster (last visited Sept. 25, 2015), http://www.merriam-webster.com/dictionary/determines ("determines" means "to officially decide, especially because of evidence or facts: to establish exactly or with authority"). It also does not meet the requirements of the state laws on which Defendant relies, Appellant Br. 18, 38. Ark. Code Ann. §20-77-1705

[17] The state's lack of interest in ascertaining whether the videos provide any legitimate basis for terminating PPH from Medicaid is further clarified by Governor Hutchinson's response to the recent announcement that a grand jury vindicated of any wrongdoing the Texas affiliate featured in the CMP videos on which Defendant relies, but issued felony indictments for two CMP personnel for their role in the deceptive videos. In response, the Governor announced "[t]he decision of a Grand Jury in Texas investigating criminal conduct does not impact the policy of the state of Arkansas in regard to Planned Parenthood. The issue is one of respect for life by a Medicaid provider and the decision in Arkansas to not send taxpayer funds to Planned Parenthood is not influenced by a decision in Texas." *Will Arkansans See Affects [sic] of Planned Parenthood Ruling?*, OzarksFirst (Jan. 26, 2016, 9:50 PM), http://www.ozarksfirst.com/news/will-arkansans-see-affects-of-planned-parenthood-ruling.

("[e]ach denial or other deficiency that [DHS] makes against a Medicaid provider… shall specify… the statutory provision or specific rule alleged to have been violated[,] and the facts and grounds that form the basis for the adverse decision"); Ark. Admin. Code §016.06.35-190.006 (same).

(c) The accusations in the videos are false and belied by Defendant's own evidence.

Had Defendant actually tried to make a determination, it would have become apparent that any concern that Planned Parenthood affiliates in other states have altered abortion methods or received improper remuneration for fetal tissue donation is utterly unfounded, as Defendant's own exhibits demonstrate.[18]

In particular, Defendant relies on three CMP videos, Appellant Br. 41-42, that he suggests support two accusations: (1) that Planned Parenthood affiliates profited from the fetal tissue its patients chose to donate, and (2) that Planned Parenthood affiliates altered the abortion procedure to preserve fetal tissue for donation.[19] Depicted in those videos are two non-PPH physicians (one employed by PPFA and the other from an affiliate in California) and staff members at a

[18] Only two of Planned Parenthood's fifty-nine affiliates are currently involved with fetal tissue research. APX 347. The affiliates that have been involved in fetal tissue donation comply with federal law requirements and receive (or have received) reimbursement for only actual expenses. APX 350-51.

[19] Defendant states these are "simply examples" of video evidence justifying PPH's termination from the Medicaid program, Appellant Br. 43. However, arguments based on any additional examples and evidence not set forth in Appellant's Brief must be deemed abandoned.

Texas affiliate. Appellant Br. 40-42; APX 115 ¶10, 117 ¶13.

However, the transcripts Defendant submitted of the longer (though still incomplete) versions of those interactions reflect repeated, clear statements that Planned Parenthood affiliates do not profit from fetal tissue donation, but rather are reimbursed—as is legally and ethically permitted—for expenses. These statements were edited out of the shorter, deceptively-edited videos on which Defendant relied.

For example, the PPFA physician stated repeatedly, "Really [the affiliates'] bottom line is, they want to break even. Every penny they save is just pennies they give to another patient. To provide a service the patient wouldn't get;" "[A]ffiliates are not looking to make money by doing this. They're looking to serve their patients and just make it not impact their bottom line;" and "[N]obody should be 'selling' tissue. That's just not the goal here," among many other similar statements. APX 289, 307, 319; *see also* APX 306, 311, 338. The physician from the California affiliate similarly made clear that "we're not in it for the money," but that "there are costs associated with the use of our space," APX 150, and the Texas staff member discussed how costs are calculated, APX 182. *See also* APX 545 (Letter from PPFA to Energy and Commerce Committee listing additional examples of misleading and deceptive editing).

The accusation that Planned Parenthood affiliates altered the abortion

method to preserve fetal tissue for donation is similarly belied by Defendant's own evidence. As is clear from the transcripts Defendant submitted of the longer version of the interactions, once a physician selects an abortion method in consultation with the patient, even if a physician needs to make adjustments as the surgery proceeds, "[t]hese adjustments are clinical judgments—not a change of method… and are always intended to achieve the woman's desired result as safely as possible." APX 351.

For example, the PPFA physician states, "You should always do the procedure the same, and that's what the providers try to do. They're not gonna treat these patients any differently than they would treat any other patient, just the disposition of the tissue at the end of the case is different." APX 294. Similarly, the Texas staff member explains, "[W]e can't delay an abortion in order to get a later gestation. Of course, that's unethical. . . . So if we're going to be doing a surgical procedure, the surgical procedure is going to be the same. We're not going to say hey, let's experiment with giving you, you know, whatever medication." APX 205. *See also* APX 154 (CMP: "Well, the best for us would be, you know, multi-day induction." Planned Parenthood affiliate physician: "Yea[h]. That's not going to happen.").

Finally, Defendant's citation to the Texas staff member stating they "deviate from [the] standard"—the main "evidence" on this topic highlighted in

his brief—completely misrepresents the transcript. Appellant Br. 42. In context, this statement clearly did not refer to abortion procedures, but to how processing of products of conception *after* an abortion could be changed to allow tissue to be donated. APX 175-76. Of course, discussion of post-procedure processing provides no support for the claim that any Planned Parenthood affiliate alters abortion procedures.

The heavily edited and misleading CMP videos, therefore, do not constitute "cause" to terminate *any* Planned Parenthood provider—much less PPH, who does not appear in the videos and has never participated in fetal tissue donation—from the Medicaid program.

D. The Free Choice of Provider Requirement Entitles the Doe Plaintiffs to Federal Review of Defendant's Termination Decision.

(1) §1396a(a)(23) includes right not to have chosen provider terminated without authorization under Medicaid Act

With nothing but this paper-thin justification for his termination decision, Defendant tries to shift focus with two arguments that Plaintiffs misconstrue the scope of the right afforded by §1396a(a)(23).[20]

[20] Indeed, Defendant devotes only a scant four pages of its fifty-five page brief to discussing the claimed "misconduct" underlying its termination decision. Appellant Br. 40-43.

(a) Defendant's tautological argument that a provider who has been terminated from Medicaid cannot be "qualified" fails.

Defendant first argues that properly understood, §1396a(a)(23) grants a right to choose only among providers that are "qualified" in the sense of being participants in a state's Medicaid program, "not a right to choose which providers are in the pool of qualified Medicaid providers." Appellant Br. 28-29. Thus, according to Defendant, once DHS terminates a provider for whatever reason (or no reason), that provider is no longer "qualified" and the Doe Plaintiffs lack recourse under §1396a(a)(23).

The District Court correctly rejected this argument. APX 946. Indeed, if states had carte blanche to terminate Medicaid provider agreements for any reason, the guarantees of the Free Choice of Provider requirement would be illusory. The two Courts of Appeals to consider this issue have reached the same conclusion. As the Seventh Circuit held, "If the 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" because it "would open a significant loophole for restricting patient choice, contradicting the broad access to medical care that §1396a(a)(23) is meant to preserve." *Comm'r of Ind.*, 699 F.3d at 978. The Ninth Circuit's analysis was similar. *Betlach*, 727 F.3d at 970 ("Read as Arizona suggests, the free-choice-of-provider requirement would be self-eviscerating.").

The text of §1396a(A)(23) itself makes clear that the term "qualified" relates not to whether a provider has been terminated, but to the provider's fitness to perform the medical services the patient requires. As the Ninth Circuit explained:

> [T]he words "to perform the service or services required" modify the adjective "qualified," telling us that Congress meant for that adjective not to refer to a Medicaid Act-specific authorization, but to denote the capability to carry out a particular activity—"perform[ing] the [medical] service" that a given Medicaid recipient requires. The provision thus indexes the relevant "qualifications" not to any Medicaid-specific criteria… but to… the provider's competency and professional standing as a medical provider generally. The verb "perform" here is key: it confirms that the relevant question is not whether the provider is qualified in some sense specific to Medicaid patients, but simply whether the provider is qualified in a general sense to *perform*, i.e., *carry out*, the service in question, whether for Medicaid patients or for any other patients

Betlach, 727 F.3d at 969; *see also Comm'r of Ind.,* 699 F3d at 968; *Kliebert*, 2015 WL 6551836, at *8 (characterizing as "circular" the idea that a provider could be unqualified simply because the defendant disqualified him); *Bentley*, 2015 WL 6517875, at *7.

(b) §1396a(a)(23) includes a right to judicial review of the claimed basis for termination

Second, Defendant argues that even if PPH is an otherwise qualified provider, the factual and legal basis of Defendant's decision is shielded from examination by his claim that the termination is authorized by a provision of the Medicaid Act—specifically §1320a-7(b)(6)(B), which permits exclusion of providers upon a determination they have provided services in violation of

professionally recognized standards of healthcare. Defendant claims this is so because the Free Choice of Provider requirement "does not require states to allow Medicaid patients to use providers who have been excluded from the Medicaid program under other subs-sections of the Medicaid Act or federal or state regulations permitted by the Medicaid Act." Appellant Br. 29.

But this argument would permit exactly the type of baseless terminations from Medicaid that the well-reasoned and persuasive analysis of the Seventh and Ninth Circuits held the Free Choice of Provider requirement does not permit, by "open[ing] a significant loophole for restricting patient choice, contradicting the broad access to medical care that §1396a(a)(23) is meant to preserve," *Comm'r of Ind.*, 699 F.3d at 978, and mean that "the free-choice-of-provider requirement would be self-eviscerating," *Betlach*, 727 F.3d at 970. As set forth in Section IID(1)(a), it is clear from these opinions that a state cannot evade the mandate of the Free Choice of Provider requirement by excluding a provider without a basis for termination that is permissible under the Medicaid Act. And a basis for termination certainly cannot be permissible under the Medicaid Act if the claimed facts are legally insufficient to make out a violation of the provision under which the termination is claimed to be authorized—as is the case here, where, for all the reasons set forth in Section IIC(2), PPH has not even been accused of providing

services in violation of professionally recognized standards, much less "determined" to have done so.

If the right afforded by §1396a(A)(23) is to mean anything, it cannot be sufficient for a state to recite a provision of the Medicaid Act it claims authorizes termination of the Doe Plaintiffs' chosen provider, and thereby evade any examination of whether that provision actually authorized the termination. Thus, as the District Court correctly held, "if this right found in 42 USC §1396a(a)(23) and conferred on Medicaid recipients is to have meaning… [Defendant] 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." APX 946. Similarly, the other courts that have considered attempts to terminate a Medicaid patient's chosen provider have not hesitated to examine the *merits* of the state's claimed basis for termination. As the Alabama district court observed in rejecting an identical argument under §1320a-7(b)(6)(B):

> Doe alleges that her qualified provider of choice… was *wrongfully* removed from the pool of providers among whom she has a right to choose. Indeed, Doe argues not only that there exists no basis in fact for [the] termination, but also that [her provider] was excluded on a basis which, as a matter of law, falls outside the exclusion-provision exception. If a State could defeat a Medicaid recipient's right to select a particular qualified healthcare provider merely by terminating its agreement with that provider on an unlawful basis, the right would be totally eviscerated.

Bentley, 2015 WL 6517875, at *7-8; *see also Kliebert*, 2015 WL 6551836 at *30-31 (rejecting "facial credibility" of state's asserted bases for terminating Planned Parenthood provider for alleged Medicaid fraud and other violations, where facts claimed did not make out the elements of two bases and third was factually unsupported); Statement of Interest 7 n.3 (APX 523 n.3) (§1396a(A)(23) "is violated whenever a beneficiary is denied her right to receive covered Medicaid services from 'any' qualified provider of her choice willing to provide the services; it does not matter whether that provider was excluded from the Medicaid program on an individualized or class-wide basis.").

Defendant relies heavily on *O'Bannon*, which he contends stands for the proposition that §1396a(a)(23) does not permit a Medicaid beneficiary to contest a state's decision to terminate a Medicaid provider so long as the state claims a basis for termination authorized by the Medicaid Act. Appellant Br. 29-31. But this argument vastly overstates *O'Bannon*'s holding. In that case, which concerned only a procedural due process claim under the Fourteenth Amendment, the Court considered whether §1396a(a)(23) conferred upon residents a property right to remain in a given nursing home, such that they would be entitled to a predetermination hearing before the state determined the home unfit to participate in Medicare and Medicaid due to numerous violations found in a certification survey, and concluded it did not. 447 U.S. at 776 n.3, 784. *O'Bannon* did not

construe the scope of §1396a(a)(23)'s protections in the context of a Medicaid beneficiaries' substantive §1983 challenge to the termination of their chosen provider, *see Comm'r of Ind.*, 699 F.3d at 977 (distinguishing *O'Bannon* because "[t]his is not a due process case. Planned Parenthood and its patients are not suing for violation of their *procedural* rights; they are making a substantive claim that Indiana's defunding law violates §1396a(a)(23)")—and indeed, in *O'Bannon*, it does not appear the home's residents contested that it had committed violations of program requirements that would authorize termination. Rather, as the opinions below make clear, the residents' complaint was that they were denied the opportunity to establish at a predetermination hearing that moving to a new facility would be traumatic, as well as to provide their perception of the quality of the home's services, so the state could weigh this information in making its decision.[21] In short, the situation presented in *O'Bannon* could not be more different than that presented here, where the Doe Plaintiffs, seeking vindication of their substantive right under §1396a(a)(23), claim the state had no permissible basis to terminate

[21] *See Town Court Nursing Ctr. v. Beal*, 586 F.2d 280, 292-93 (3d Cir. 1978) *rev'd sub nom. O'Bannon v. Town Court Nursing Ctr.,* 447 U.S. 773 (1980) (Adams, J., concurring) (observing "residents can provide relevant information which cannot be obtained from other sources concerning the daily functioning of the institution as it affects them," and that "it seems reasonable to conclude that where the patient transfer that inevitably accompanies decertification would result in serious hardship or danger to the patients, the administrators probably would be reluctant to decertify the institution and would seek instead to alleviate the nonconforming conditions through alternative sanctions.")

PPH. Thus, as the Alabama district court correctly recognized in rejecting an identical argument that it could not review a state's termination decision under §1320a-7(b)(6)(B):

> *O'Bannon* held that a Medicaid recipient has no due-process right to a hearing before his unqualified nursing home's agreement is terminated…not… that any time a State terminates a Medicaid provider agreement, for any reason or for no reason at all, that decision is insulated from substantive review at the behest of recipients.

Bentley, 2015 WL 6517875, at *8 n.7

(c) that PPH did not pursue an administrative appeal is irrelevant

Finally, Defendant attempts to insulate his termination decision from judicial examination through a variety of arguments stemming from the fact that PPH did not seek an administrative appeal. Appellant Br. 38-40, 43-44. These arguments are equally unavailing.

First, as the District Court noted, it is well settled that, absent a specific exception not present here, administrative remedies need not be exhausted before seeking injunctive relief under §1983. APX 947; *Patsy v. Bd. Of Regents of State of Fla.*, 457 U.S. 496, 516 (1982); *Hopkins v. City of Bloomington*, 774 F.3d 490, 492 (8th Cir, 2014); *see also Romano v. Greenstein*, 721 F.3d 373, 376 (5th Cir. 2013); *Roach v. Morse*, 440 F.3d 53, 58 (2d Cir. 2006); *Houghton ex rel. Houghton v. Reinertson*, 382 F.3d 1162, 1167 n.3 (10th Cir. 2004); *Talbot v. Lucy Corr Nursing Home*, 118 F.3d 215, 220 (4th Cir. 1997); *Alacare, Inc.–N v.*

Baggiano, 785 F.2d 963, 969 (11th Cir. 1986), cert denied, 479 U.S. 829. The purpose of §1983 is "to provide an alternate, supplemental avenue for relief to persons who almost always have an additional available remedy at state law." *Alacare, Inc.*, 785 F.2d at 967. Thus, the Doe Plaintiffs' Free Choice of Provider challenge cannot be subject to an exhaustion requirement.

Defendant appears to concede as much, *see* APX 947, and indeed, the word "exhaustion" never appears in his brief. Rather, he suggests that "*especially in light of the fact that Planned Parenthood did not appeal DHS's decision and termination*, the fact that the evidence in the videos might be open to different interpretation cannot possibly serve as a basis for patients to prevail on a 42 U.S.C. §1396a(a)(23) claim," because the "operative question" is "whether a Medicaid patient was restricted from using a *qualified* provider"—and PPH is no longer a qualified provider (by Defendant's definition) because of Defendant's termination decision. Appellant Brief 43-44 (first emphasis added). But this is nothing more than a back-door attempt to buttress Defendant's argument about the scope of the Free Choice of Provider requirement, discussed in Section IID(1)(a) and (b), *supra*, with an exhaustion requirement the law does not support.

Importantly, that the Doe Plaintiffs had no administrative remedy to elect (let alone exhaust) is undisputed; any administrative appeal was available only to PPH. APX 946, 497. The District Court properly recognized that this supports its

ruling that the Doe Plaintiffs cannot be foreclosed from bringing their Free Choice of Provider challenge in federal court. APX 946-947 ("If the Court gives [the fact that PPH did not invoke the administrative process] the significance [Defendant] seeks, the Court questions why Congress would confer a right on Medicaid beneficiaries when that right seemingly has to be enforced by the provider through the administrative appeals process as [Defendant's] argument suggests.").[22]

But Congress did confer that right on the Doe Plaintiffs, and for all the reasons expressed herein, the District Court's holding that they are likely to succeed on the merits should be affirmed.

[22] Defendant also asserts the "findings and determination (and termination)" in the For-Cause Termination letter are final and binding under Ark. Admin. Code §016.06.35-154.000, because PPH did not pursue an administrative appeal. Appellant Br. 18, 38-39. But this is again an attempt to import an exhaustion requirement the law does not support. Further, for the reasons discussed in Section IIC(2)(b), it is clear the For-Cause Termination letter does not meet the requirements of the provisions on which Defendant relies, *see* Ark. Code Ann. §20-77-1705 ("Each denial or other deficiency that [DHS] makes against a Medicaid provider… shall specify… the statutory provision or specific rule alleged to have been violated[,] and [t]he facts and grounds that form the basis for the adverse decision."); Ark. Admin. Code §016.06.35-190.006 (same). Defendant's letter provided none of the required information. Nor is it clear what "findings" from the letter could be "final and binding," since the letter states only that there is unspecified "evidence that [PPH] *and/or its affiliates* are acting in an unethical manner and engaging in what *appears to be* wrongful conduct." APX 73 (emphasis added).

III. THE DISTRICT COURT'S FINDING OF IRREPARABLE HARM IS NOT CLEARLY ERRONEOUS

The District Court acted well within its discretion in granting an injunction, correctly finding that if unable to receive Medicaid services at PPH, the Doe Plaintiffs would be denied their statutory right to free choice of family planning provider, lose established provider relationships, and face reduced access to high-quality family planning and other services. APX 945–49.

Contrary to Defendant's argument that the District Court merely presumed irreparable harm from his violation of §1396a(a)(23), the District Court expressly concluded that "*based on the Court's findings of fact*…the harms alleged by the Jane Does do constitute irreparable harm sufficient for an injunction." APX 949 (emphasis added). These findings are amply supported by the record.

For example, the District Court credited the Doe Plaintiffs' testimony, and found they would be unable to receive services at PPH, where they have established relationships, if not through Medicaid, APX 947–48; that at PPH they can "walk in for an appointment, obtain an appointment quickly, and [experience] wait times [that] are less than those at private physician's offices or public health clinics," APX 948; that the State's own documents confirmed that "long wait times and [scheduling] delays…are commonplace" at other providers, APX 934 ¶26; and that flexibility and the ability to be seen promptly are important to the Doe Plaintiffs because "various family and occupational responsibilities [make it]

difficult for all three… to plan health care visits weeks in advance," as may be required at other providers, APX 948. The District Court also credited each Plaintiff's testimony about her individual experience, including obstacles encountered trying to obtain healthcare elsewhere (including long wait times, scheduling delays, and inadequate services), fear of losing access to her birth control method of choice because of these obstacles, and close relationships of trust with PPH providers. APX 931–33 ¶¶8–25. Finally, the District Court found the Doe Plaintiffs' relationship with PPH, their chosen provider, is deserving of protection. APX 945 (citing *Baptist Health v. Murphy*, 226 S.W.3d 800 (Ark. 2006); *Roudachevski v. All-Am. Care Ctrs., Inc.*, 648 F.3d 701 (8th Cir. 2011)). The District Court's decision to accept and credit the Doe Plaintiffs' testimony is afforded "even greater deference" on review. *Lesch v. United States*, 612 F.3d 975, 980 (8th Cir. 2010). These facts, as well as other record evidence, *see* Section III, *supra*, more than adequately support the District Court's finding of irreparable harm.

Defendant disregards these findings and instead focuses on two arguments: that the Doe Plaintiffs could obtain care from other providers, and that the District Court's findings about wait times are speculative and insufficient to establish irreparable harm. Appellant Br. 52–54. These arguments are unavailing and were properly rejected by the District Court.

First, there is nothing speculative about the District Court's findings; they were based on the Doe Plaintiffs' credible and specific testimony of their experiences at other providers, as well as the other record evidence, including the State's own documents. APX 933–34 ¶¶25–26. Defendant's argument that delays and other obstacles to accessing care do not rise to the level of irreparable injury miss the mark, and the District Court properly rejected them. APX 948. (finding these harms significant, "especially when family planning and reproductive health care needs are at issue").

Second, the claim that the Doe Plaintiffs could obtain care from a provider who is not their provider of choice is irrelevant. As the District Court properly held, "the right [of §1396a(a)(23)] does not protect the Jane Does' right to a substitute or similar provider." *Id.* *See also Comm'r of Ind.*, 699 F.3d at 981 ("[t]hat 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"); *Betlach*, 727 F.3d at 974–75 (it is "immaterial" that other Medicaid family planning providers remain in the program, because "[t]here is no exception to the free-choice-of-provider requirement for 'incidental' burdens on patient choice"); *Bentley*, 2015 WL 6517875, at * 13 ("Although Doe can seek family-planning

services elsewhere, this does not diminish the injury that will result from her inability to see the provider of her choice").

Indeed, even in the absence of the District Court's detailed findings, irreparable harm would be established by the Doe Plaintiffs' deprivation of access to their chosen provider in violation of §1396a(a)(23). As the District Court properly noted, "[s]hould the Court fail to issue injunctive relief, the Jane Does will be denied their choice of provider for family planning services… [D]enial of that freedom of choice is more likely than not exactly the injury that Congress sought to avoid" in enacting §1396a(a)(23)." APX 949. *See, e.g., Comm'r of Ind.*, 794 F. Supp. 2d at 912 ("denial of freedom of choice has been deemed to be irreparable harm") (internal citation omitted); *Comm'r of Ind.*, 699 F.3d at 980–81 ("[a]bsent a preliminary injunction… Medicaid patients would lose their provider of choice for the duration of the litigation"); *Betlach*, 899 F. Supp. 2d at 886 ("denial of that freedom of choice is exactly the injury that Congress sought to avoid when it enacted §1396a(a)(23)"); *Kliebert*, 2015 WL 6551836, at *32 ("if the Agreements are terminated, [Doe Plaintiffs] will be unable to visit their Medicaid provider of choice); *Bentley*, 2015 WL 6517875, at *13.

Finally, Defendant does not appear to contest the District Court's findings that the balance of harms and the public interest favor the Doe Plaintiffs and support the grant of a preliminary injunction.

CONCLUSION

For the reasons set forth above, this Court should affirm the District Court's preliminary injunction.

Respectfully submitted,

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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)(B). Excluding those portions of the brief exempted from limitations by FRAP 32(a)(7)(B)(iii), the brief contains 13,987 words. The brief was prepared with Microsoft Word 2010 and typed using Times New Roman 14-point font.

I further certify that on this 28th day of January, 2016, I electronically filed the forgoing 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 appellants 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/ Jennifer Sandman