No. 17-50282

In the United States Court of Appeals for the Fifth Circuit

PLANNED PARENTHOOD OF GREATER TEXAS FAMILY PLANNING AND PREVENTATIVE HEALTH SERVICES, INC., ET AL.;

Plaintiffs-Appellees,

v.

CHARLES SMITH, IN HIS OFFICIAL CAPACITY AS EXECUTIVE COMMISSIONER OF HHSC, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division,
No. 1:15-cv-01058

REPLY IN SUPPORT OF MOTION TO STAY THE DISTRICT COURT'S INJUNCTION PENDING EN BANC CONSIDERATION

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INTRODUCTION

The Court's decision to rehear this case en banc makes a stay of the district court's preliminary injunction even *more* warranted. The preliminary injunction is unlawful on the merits, as the panel unanimously concluded. The district court furthermore lacked jurisdiction because the Medicaid Act creates no private right of action. For both of those reasons, the State should not be required to operate under the injunction's yoke any longer. Neither plaintiffs nor any other party can show irreparable harm if the injunction is stayed. And the public interest favors a stay, as the State should not be forced to continue to include in its Medicaid program an unethical and unqualified provider. The State should be permitted to terminate Planned Parenthood's provider agreements and protect Medicaid patients immediately without having to wait many months for en banc proceedings to conclude.

The State has easily satisfied *Nken*'s factors. Plaintiffs cannot seriously argue otherwise, so they instead advance a rule that does not exist: a stay is unwarranted because it "would disrupt orderly proceedings." Resp. 6. No case supports that rule. The actual test the Supreme Court adopted in *Nken v. Holder* is whether the State "has made a strong showing that [it] is likely to succeed on the merits." 556 U.S. 418, 426 (2009). The persuasive panel decision leaves no doubt that the answer is "yes."

The Court should grant the State's motion to stay the district court's preliminary injunction for the duration of en banc proceedings.

ARGUMENT

I. The State Is Entitled to a Stay Because It Has Demonstrated All Four *Nken* Factors.

A. The State has made a strong showing that it is likely to succeed on the merits of this appeal.

1. The Court has jurisdiction over this interlocutory appeal under 28 U.S.C. § 1292(a)(1), and the issue on appeal is the validity of the district court's preliminary injunction. The question, for purposes of *Nken*, is whether the State has made a strong showing that it is likely to succeed in establishing that the preliminary injunction is unlawful. 556 U.S. at 426. A panel of this Court has held that it is. That opinion confirms that the State easily satisfies the first *Nken* factor.

Appellees argue that the well-reasoned panel decision is a complete "nullity." Resp. 6-7. But that overlooks the posture in which the Court granted en banc review—on its own motion, after Judge Jones, the author of the opinion, expressly requested it on a particular issue: whether the individual plaintiffs have a cause of action under the Medicaid Act. *See* App. 36; Amended Order Granting En Banc Review 1-2. While the panel decision is technically vacated, it still contains sound and persuasive reasons why the district court's injunction was manifestly improper. And neither Judge Jones nor any party has suggested that the en banc Court revisit that particular determination. App. 30-36; Appellants' Pet. Reh'g En Banc 1, 16. Plaintiffs did not request rehearing.

Even if the Court were to treat that panel decision as a complete "nullity," as plaintiffs urge, the same reasons that compelled the panel to vacate

the district court's injunction should lead this Court to determine that the State is likely to succeed in getting the injunction vacated, regardless of whether the Court finds that the individual plaintiffs have a cause of action. *See* App. 16-29. The State has thus made a strong showing on the first element of the *Nken* test.

2. Plaintiffs confuse the likelihood of success on the underlying merits with the likelihood of success in *this appeal* under section 1292(a)(1). But even if the Court considers likelihood of success on the merits of the underlying case, the State is still likely to succeed. While the panel did not reach the merits of whether a preliminary injunction should issue based on the administrative record and with application of the proper legal standard, it clearly suggested that Planned Parenthood Gulf Coast's (PPGC) statements in the video supported the grounds outlined in the Final Notice of Termination. App. 7-10; *see also* App. 16 ("Here, there is far stronger evidence in support of OIG's termination decision than the justifications offered by [Louisiana]."). The video is the only evidence in the administrative record, and plaintiffs cannot add any on remand.[1]

[1] The administrative record is closed because Provider Plaintiffs deliberately chose to forego any of their opportunities to add any evidence, and because they failed to request a hearing within 15 days of receipt of the Final Notice, making their terminations unappealable under state law prior to the issuance of injunctive relief. *See* 1 Tex. Admin. Code § 371.1703(f)(2); ROA.1213; *see also* ROA.3551-52 (temporary restraining order dated January 19, 2017); ROA.3818-19 (preliminary injunction order dated February 21, 2017).

The Court reviewed the grounds for termination discussed in the Final Notice, which included violation of federal regulations designed to limit conflicts of interest on behalf of doctors harvesting fetal tissue from abortions and state law requiring providers to adhere to medical and ethical standards, and compared those with statements in the video affirming that PPGC would violate them in the future and admitting that doctors had done so in the past. App. 7-9. The Court described plaintiffs' hearing evidence, which was not in the administrative record, as "self-serving," App. 17, and "self-justifying explanations," App. 9. And the Court also noted that "[t]he plaintiffs' briefing with regard to the substance of the discussions contained in the videos (as opposed to their trial witnesses' post hoc justifications) is curiously silent." App. 28. Thus, with faithful application of the arbitrary-and-capricious standard of review, App. 29, the grounds for termination outlined in the Final Notice and supported by the video evidence could not "fail[] to satisfy 'minimum standards of rationality,'" App. 23 (quoting *La. Envtl. Action Network v. U.S. E.P.A.*, 382 F.3d 575, 582 (5th Cir. 2004)).

While the panel noted that the district court should consider the issue of whether affiliates of PPGC that do not engage in fetal tissue procurement may be terminated on remand, App. 29 n.18, there is a state regulation that expressly provides for that, *see* 1 Tex. Admin. Code § 371.1703(c)(7), and the other Texas Planned Parenthood affiliates clearly meet the definition of "affiliate," *see id.* § 371.1(3)(I) (defining "affiliate" as someone who "shares any

identifying information with another person, including. . . . corporate or franchise names"). The validity of those regulations has not been challenged in this litigation. *See* ROA.3227-48. It could not be arbitrary and capricious for the Inspector General to terminate PPGC's affiliates when valid state law *expressly allows him* to do so. Thus, the State, not plaintiffs, are likely to succeed on the merits.

Even if the en banc Court rejected the panel's reasoning, the evidence in the video clearly shows violations of legal and ethical standards, including violations in addition to what was outlined in the termination notice. *See* Appellants' Br. 33-54; Reply Br. 12-21. And on appeal, plaintiffs had no explanation for those statements, relying only on their post-hoc explanations that made no sense in light of what was being discussed. *See* App. 8-9; Appellants' Br. 50-51; Reply Br. 12. As the panel rightly points out, key portions of the district court's opinion are flatly contradicted by the record. *See* App. 10 & n.6. And as the panel noted, under *Gee,* to terminate a provider, a state agency must "identify regulations concerning the 'safe, legal, and ethical manner' of furnishing healthcare services and point to evidence of the provider's violations. . . . [t]his should be *an easy standard* for the state to meet in most cases." App. 22 (emphasis added). The bases for termination and the evidence pointed to by the State satisfies that "easy" standard.[2]

[2] To bolster their claims for likelihood of success on the merits, plaintiffs cite to a string of cases, claiming they held that "C[enter for] M[edical] P[rogress] videos [did not] provide a basis to terminate a Planned Parenthood organization from the Medicaid program." Resp. 8 n.1. But this assertion is false. In South Carolina, Mississippi, and Alabama, the

B. Plaintiffs will not be irreparably harmed by a stay.

The State has already explained in detail how the record demonstrates that no irreparable harm will befall any plaintiff or other third party should a stay issue, given the availability of thousands of other Medicaid providers, which currently provide 99.7% of all Medicaid services in Texas, including family planning services, and the availability of other state programs to provide family planning services. Mot. to Stay 7-9. Plaintiffs point to speculative statements that suggest the individual plaintiffs would "at minimum, see their health care disrupted." Resp. 11. But claims of irreparable harm must be more than speculative. *Cf. Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992,

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termination was not based on videos. *Planned Parenthood S. Atl. v. Baker*, 326 F. Supp. 3d 39, 48 (D.S.C. 2018) (termination based on the provision of abortion); *Planned Parenthood Se., Inc. v. Dzielak*, 3:16cv454-DPJ-FKB, 2016 WL 6127980, at *1 (S.D. Miss. Oct. 20, 2016) (termination based on state law disqualifying abortion providers); *Planned Parenthood Se., Inc., v. Bentley*, 141 F. Supp. 3d 1207, 1220 (M.D. Ala. 2015) (termination was at-will).

The few cited cases that did involve videos are far different than this one. They did not involve a video filmed in that state, or admitted into evidence, and Kansas and Arkansas did not point to a state law basis for terminating affiliates, as here. *See Planned Parenthood of Kan. & Mid-Mo. v. Mosier*, No. 16-2284-JAK-GLR, 2016 WL 3597457, *4, 18-19, 21 n.121 (D. Kan. July 5, 2016) (mem. op), *aff'd in part, vacated in part sub nom. Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205 (10th Cir. 2018); *Planned Parenthood Ark. & E. Okla. v. Selig*, No. 4:15-cv-00566-KGB, 2015 WL 13710006, *13, *14 (E.D. Ark. Oct. 5, 2015); *vacated sub nom. Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017); *see also Planned Parenthood of Gulf Coast, Inc., v. Gee*, 862 F.3d 445, 453, 465-68 (5th Cir. 2017) (assessing termination based on settlements in qui tam False Claims Act cases involving Planned Parenthood, and unspecified "misrepresentations," some of which involved statements PPGC made to state officials which differed from statements made in video filmed in Texas).

997 (5th Cir. 1985) ("Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant [for equitable relief].").

Plaintiffs claim that "[e]ach Provider Plaintiff's CEO has testified that, should they terminated from Medicaid, they would be forced to turn patients away," Resp. 12, but include no record citations to support that claim other than citations to the Planned Parenthood South Texas CEO's testimony, which is unclear at best, *compare* ROA.4296-97 ("I don't have [3 million dollars from a capital campaign used to build their facility] to pay for anyone's healthcare next year if we're kicked out of Medicaid.") (cited by Resp. 12) *with* ROA.4297 ("[w]e'll just have to wait and see [whether PPST will continue to provide Medicaid services], won't we?"). This cannot provide a non-speculative basis for finding irreparable harm. Even if plaintiffs could make a "strong showing that their interests would be harmed by staying the injunction, given the State's likely success on the merits, this is not enough, standing alone, to outweigh the other factors." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013).

C. The State will be irreparably harmed absent a stay.

Plaintiffs fail to acknowledge the irreparable harm being suffered by the State in not being able to enforce its laws. *See Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017). The idea that the State might pay the same amount of money to other Medicaid providers if Provider Plaintiffs are terminated, Resp. 10, is speculative and does not lessen this irreparable harm, nor does it mean that Provider Plaintiffs should be entitled to a windfall due to the continued

viability of an improper injunction due to the Court's grant of en banc review. Plaintiffs also suggest that the State has unclean hands because it did not request a stay at the outset of the appeal. But this overlooks the unique posture here: where the State prevailed substantively in their appeal but the Court sua sponte granted en banc review, which will delay the State from obtaining the benefits of that victory. Moreover, the fact that the State chose to forego burdening this Court with motions until it prevailed did not prejudice plaintiffs—rather, it benefitted them because they continued to receive reimbursements. There is no justification for continuing to prevent the State from terminating these providers when the panel already determined that the district court's preliminary-injunction order was improper, *see* App. 29, and the State is suffering irreparable harm while the Court resolves the case en banc.

II. Plaintiffs Misunderstand the Court's Authority to Stay Lower Court Orders Pending Appellate Review.

Plaintiffs misunderstand this Court's authority in two distinct ways. First, plaintiffs argue that a stay would "lift the preliminary injunction based on a now-vacated panel decision, and do so without providing any guidance to the parties or the district court as to what standard would apply to a renewed preliminary injunction motion." Resp. 6. But the stay would not "lift" anything. It would simply render the preliminary injunction unenforceable while this appeal is pending. Further, a stay would not vest the district court with jurisdiction to hear a renewed motion, as plaintiffs argue, because no mandate has

issued. *See United States v. Bolton*, 908 F.3d 75, 101 (5th Cir. 2018) ("The Supreme Court has held and this court has recently recognized that an appeal divests the district court of its jurisdiction over those aspects of the case involved in the appeal." (cleaned up)). So long as this Court retains jurisdiction over this appeal, the district court lacks jurisdiction to enter new orders. *See id.*

Second, plaintiffs argue that "[i]t would be improper to presuppose the outcome of the en banc Court's analysis, as would be required to grant a stay in this posture." Resp. 7. But that is precisely what *Nken* requires courts to do when considering whether to grant a stay pending appeal—courts assess the likelihood of success before success has been determined. *See Nken*, 556 U.S. at 421 ("[i]t 'has always been held, . . . that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment *pending the outcome of an appeal*.'" (quoting *Scripps–Howard Radio v. FCC*, 316 U.S. 4, 9-10 (1942) (emphasis added) (footnote omitted)).

III. This Motion is not Moot, and the Court's Decision to Rehear This Case En Banc Makes a Stay Even More Warranted.

The Court directed the State to explain whether this motion is moot or otherwise affected by the Court's order granting en banc review. The Court's sua sponte grant of en banc review only underscores the need for the stay, as the State will now be forced to continue complying with what the panel determined was an unlawful injunction for many months while the en banc Court receives briefing, hears argument, and decides the case. The Court should not

require the State to bear the district court's unlawful preliminary injunction any longer. The injunction should be stayed so that the State may protect its Medicaid patients during the en banc process.

CONCLUSION

This Court should stay the district court's preliminary injunction.

Respectfully submitted.

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Certificate of Service

On February 7, 2019, this motion was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Certificate of Compliance

This Motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 2575 words, excluding the parts of the brief exempted by Rule 27(a)(2)(B); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Kyle D. Hawkins
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