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.; PLANNED PARENTHOOD SAN ANTONIO; PLANNED PARENTHOOD CAMERON COUNTY; PLANNED PARENTHOOD GULF COAST, INC.; PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER; JANE DOE #1; JANE DOE #2; JANE DOE #4; JANE DOE #7; JANE DOE #9; JANE DOE #10; JANE DOE #11,

Plaintiffs-Appellees

v.

COURTNEY PHILLIPS, in her official capacity as Executive Commissioner of HHSC; and SYLVIA HERNANDEZ KAUFFMAN, in her official capacity as Acting Inspector General of HHSC,

Defendants-Appellants

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
No. 1:15-cv-1058

PLAINTIFFS-APPELLEES' EN BANC BRIEF

JENNIFER SANDMAN
Planned Parenthood Federation of America, Inc.
123 William Street
New York, NY 10038
(212) 541-7800
jennifer.sandman@ppfa.org

Attorney for Plaintiffs-Appellees

CERTIFICATE OF INTERESTED PERSONS

No. 17-50282

Planned Parenthood of Greater Texas Family Planning and Preventative Health Services, Inc., et al. v. Courtney Phillips, et al.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

- Planned Parenthood of Greater Texas Family Planning and Preventative Health Services, Inc. – Plaintiff-Appellee;
- Planned Parenthood San Antonio – Plaintiff-Appellee;
- Planned Parenthood Cameron County – Plaintiff-Appellee;
- Planned Parenthood South Texas Surgical Center – Plaintiff-Appellee;
- Planned Parenthood Gulf Coast, Inc. – Plaintiff-Appellee;
- Jane Doe #1 – Plaintiff-Appellee;
- Jane Doe #2 – Plaintiff-Appellee;
- Jane Doe #4 – Plaintiff-Appellee;
- Jane Doe #7 – Plaintiff-Appellee;
- Jane Doe #9 – Plaintiff-Appellee;
- Jane Doe #10 – Plaintiff-Appellee;
- Jane Doe #11 – Plaintiff-Appellee;
- Jennifer Sandman, Maithreyi Ratakonda, Roger Evans, Alice Clapman, Richard Muniz, Helene Krasnoff, Planned Parenthood Federation of America – counsel for Plaintiffs-Appellees;
- Thomas H. Watkins, Husch Blackwell LLP – counsel for Plaintiffs-Appellees;
- Courtney Phillips, in her official capacity as Executive Commissioner of HHSC – Defendant-Appellant;

- Sylvia Hernandez Kauffman, in her official capacity as Inspector General of HHSC – Defendant-Appellant;
- Heather Gebelin Hacker, Kyle Douglas Hawkins, Scott A. Keller, Andrew Bowman Stephens, Office of the Attorney General of Texas – counsel for Defendants-Appellants;
- Adam Arthur Biggs, Amanda J. Cochran-McCall, Andrew Bowman Stephens, Marc Edward Rietvelt, Patrick K. Sweeten, Shawn E. Cowles, Shelley Dahlberg, Heather Gebelin Hacker, Office of the Attorney General of Texas – counsel for Defendants-Appellants in the District Court;
- Ken Paxton, Jeffrey C. Mateer, James E. Davis, Beth Klusmann, Angela V. Colmenero – former counsel for Defendants-Appellants;
- All Texas Medicaid beneficiaries who obtain, or who seek to obtain, covered health care services from Planned Parenthood Gulf Coast, Inc., Planned Parenthood of Greater Texas Family Planning and Preventative Services, Inc., Planned Parenthood San Antonio, Planned Parenthood Cameron County, or Planned Parenthood South Texas Surgical Center.

/s/ Jennifer Sandman
Jennifer Sandman
Attorney for Plaintiffs-Appellees

STATEMENT REGARDING ORAL ARGUMENT

The Court directed the Clerk to set this matter for oral argument in its order granting rehearing en banc. Oral argument is set for Tuesday, May 14, 2019.

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INTRODUCTION

For decades, the Texas Planned Parenthood Providers and their predecessor organizations have provided a broad range of essential healthcare services to low-income Texans through the state Medicaid program. They provide preventive care such as regular wellness exams, breast cancer screenings, and family planning services at thirty health centers across the state. And they serve some of the State's poorest residents, who often have nowhere else to go for this crucial healthcare.

In 2015, Defendants terminated Provider Plaintiffs from the Medicaid program without cause. They have attempted to justify this termination by pointing to videos made by a radical anti-abortion group with ties to violent extremists. These videos have been widely debunked. And they have nothing to do with two of the three Provider Plaintiffs.

This is not the first attempt by a state in this Circuit to terminate one of the Provider Plaintiffs from the Medicaid program. This Court previously affirmed a preliminary injunction rejecting Louisiana's attempt to terminate Planned Parenthood Gulf Coast from that state's Medicaid program based on the same video. *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017), *reh'g en banc denied*, 876 F.3d 699 (5th Cir 2017), *cert. denied*, 139 S. Ct. 408 (Mem.) (2018). In so doing this Court established that patients may bring an action pursuant to §1983 to enforce the Free-Choice-of-Provider requirement, which gives Medicaid

patients the right to receive care from any qualified healthcare provider of their choosing.[1]

The district court correctly held that the Plaintiffs here too are likely to succeed and enjoined the Texas terminations. Indeed, after a three-day evidentiary hearing the district court found that there was not "even a scintilla of evidence" to support Defendants' claim that Provider Plaintiffs are not qualified Medicaid providers, ROA.3813, and supported that conclusion with detailed factual findings (which Defendants ask this Court to disregard entirely). The district court's decision ensures that thousands of Medicaid patients, including the Doe Plaintiffs, can continue to obtain critically needed high-quality health services from Provider Plaintiffs while Plaintiffs' challenge to the meritless termination proceeds.

Defendants ask this en banc Court to reverse *Gee*'s holding that Medicaid beneficiaries have a private right of action to enforce their rights under the Free-

[1] The panel opinion was initially unanimous, *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 837 F.3d 477 (5th Cir. 2017), but ten months later, that opinion was withdrawn and superseded after Judge Owen changed her position. Judge Owen continued to agree that the Free-Choice-of-Provider requirement gives rise to a private right of action; her disagreement was as to the scope of that right. *Id*. at 474 ("I agree that §1396a(a)(23) . . . provides a right upon which a Medicaid patient may base a suit under §1983."). In its petition for en banc review from *Gee*, Louisiana similarly agreed that §1396a(a)(23) is privately enforceable under §1983, objecting only as to the scope of that right. Def.'s-Appellant's Pet. for Reh'g En Banc, *Planned Parenthood Gulf Coast v. Gee*, No. 15-3097 (5th Cir. July 13, 2017). Louisiana has now reversed its position in its brief as *amicus curiae* on behalf of Defendants. Br. of the [sic] Louisiana and Mississippi as *Amici Curiae* in Supp. of Appellants, March 19, 2019.

Choice-of-Provider requirement. But *Gee* was rightly decided. Four of the other five courts of appeal to consider the question have reached the same conclusion, and three of those decisions involved similar efforts to terminate Planned Parenthood providers from state Medicaid plans. *Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 638 (Mem.) (2018); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013), *cert. denied*, 571 U.S. 1198 (2014); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012), *cert. denied*, 569 U.S. 1004 (2013); *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006); *but see Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017). And the Supreme Court denied review of two of these decisions during its current term.

The *Gee* Court's conclusion follows directly from Supreme Court precedent. In *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) and *Blessing v. Freestone*, 520 U.S. 329 (1997), the Supreme Court established a three-part test for determining whether a statute provides a private right of action, and as the *Gee* panel explained, the Medicaid provision at issue easily meets all three factors. Defendants are asking this Court to disregard this clear and binding precedent and to upend its own well-established Medicaid jurisprudence. For this reason and the reasons set out below, the en banc Court should affirm its prior ruling in *Gee* and affirm the district court's conclusion that preliminary injunctive relief is warranted here.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Should the Court overrule *Planned Parenthood of Gulf Coast, Inc. v. Gee* and hold that 42 U.S.C. §1396a(a)(23) does not give Medicaid-insured patients a private right of action to challenge state actions depriving them of their choice of qualified provider?

2. Did the district court abuse its discretion in finding that right was likely violated by the Texas terminations and granting a preliminary injunction on that basis?

STATEMENT OF THE CASE

Defendants are Texas officials and agencies that have terminated the Medicaid provider agreements of three Planned Parenthood affiliates operating in Texas—Plaintiffs Planned Parenthood Greater Texas, Inc. ("PPGT"), Planned Parenthood Gulf Coast, Inc. ("PPGC"), and Planned Parenthood South Texas and its subsidiaries (together, "PPST"). These Provider Plaintiffs joined with individual patients (the Doe Plaintiffs) to challenge the terminations. They have explained that Defendants' decision was not based on any legitimate concerns about Provider Plaintiffs' qualifications, but rather based on false and facially-unsupported claims against one of the three Provider Plaintiffs, PPGC. The district court's order ensures that the Doe Plaintiffs and the thousands of other Medicaid patients who rely on the Provider Plaintiffs can continue to obtain critically needed family planning and other

preventive health services from their provider of choice while Plaintiffs' challenge proceeds.

I. Provider Plaintiffs' Participation in the Texas Medicaid Program and Role in Providing Needed Services

Provider Plaintiffs provide services across the state of Texas to Medicaid patients at thirty health centers. They have done so for decades. ROA.3779, 3589–90. In 2015, they served nearly 11,000 Medicaid patients. Plaintiffs offer a range of essential health services, including wellness exams, contraception, cancer screening and treatment, and sexually transmitted infection ("STI") testing and treatment. ROA.3779. Medicaid does not pay for abortions except in extremely narrow circumstances, when the patient was a victim of rape or incest or when her life is in danger. ROA.3784, 4914.[2]

Texas has some of the most stringent Medicaid requirements in the country. To even be eligible, an individual must not only be low-income, but also meet certain criteria, such as having dependent children or a disability. For example, a single woman with a dependent qualifies for Medicaid only if her monthly income falls below $153. ROA.4523–24. Texas Medicaid patients therefore constitute an

[2] While PPGC does not provide abortions, the related entity Planned Parenthood Center for Choice, Inc. does. The district court referred to both entities as PPGC. ROA.3780. To avoid confusion, Plaintiffs will do the same.

especially vulnerable population who already face severe obstacles to receiving healthcare.

Provider Plaintiffs are the only family planning specialists in the Texas Medicaid program. ROA.3779. As the district court found, Provider Plaintiffs have designed their services to meet the real-life needs of low-income patients, who often struggle to find time to care for their own health while navigating inflexible and unpredictable work schedules, childcare obligations, and limited transportation options. ROA.3779, 4915, 4963, 4991, 4996, 5017. To that end, Provider Plaintiffs operate health centers in medically-underserved areas and offer evening and weekend hours; short wait-times; next-day or walk-in appointments; and same-day access to the most effective forms of contraception, ROA.3779, 4915, 4926–27, 4962–63, 4991–93, as well as bilingual services, ROA.4915, 4963, 4991. Like many patients, Doe Plaintiffs have chosen Provider Plaintiffs for their non-judgmental, high-quality, and accessible care. ROA.3781–83, 3815, 4914, 4962–63, 4993, 5017, 5025–26. Patients may forgo family planning care altogether if they do not find a provider that makes them comfortable. ROA.4914, 5009, 5017.

As the district court found and the uncontroverted evidence shows, Provider Plaintiffs are wholly separate organizations, each with its own board, CEO, and management structure and control of its own finances, operations, and policies, and without overlap in ownership or control. ROA.3780, 4112, 4921–22, 4952, 4988–

90. The only legal relationship they have in common is that each is a member of Planned Parenthood Federation of America ("PPFA"), a membership organization that promulgates medical and other standards that members (known as "affiliates") must follow in order to operate under the name "Planned Parenthood." ROA.3780, 4920–21, 4952, 4989. Provider Plaintiffs are not affiliates, subsidiaries, parents, employees, contractors, vendors, or agents of one another. ROA.4920–21, 4989. Nor are their operations controlled by PPFA. ROA.4113.

And as the district court found and the uncontroverted evidence shows, neither PPGT and PPST nor their related entities have ever participated in fetal tissue donation. ROA.3788; *see also* ROA.4111, 4914, 4985. No PPGT or PPST staff members appear in the video on which the Final Notice of Termination is based. ROA.4919–20, 4988. Accordingly, the videos have absolutely nothing to do with PPGT and PPST.

II. Efforts to Defund Planned Parenthood Organizations, in Texas and Nationally

Despite Provider Plaintiffs' high-quality care, Texas has long sought to terminate them from publicly-funded health programs, regardless of the effect on patients and on the state budget. Starting in 2003, the Texas legislature enacted restrictions aimed at preventing providers associated with abortion from participating in publicly-funded family planning programs. ROA.4915. In 2012 then-Attorney General Greg Abbott excluded all Planned Parenthood organizations from

the Women's Health Program, a then-federal program that at one point enrolled over 150,000 Texas women, 45% of whom were served by Planned Parenthood. ROA.4915–16. Texas was so determined to defund Planned Parenthood Plaintiffs that it did so in violation of federal law, causing the state to forgo over $30 million yearly in federal family planning funds since 2013, and requiring the state-funded program to end entirely if Planned Parenthood was permitted to participate. ROA.4916. Instead of viewing the massive loss of federal funds as a public health crisis, Governor Abbott celebrated the state's role in "ensuring that Planned Parenthood is closing down clinics across the state of Texas." ROA.4916–17.

By 2015, Medicaid was the only state-wide public health program from which Texas had not excluded Planned Parenthood Providers. But it saw an opportunity to do so when a radical anti-abortion group, the Center for Medical Progress ("CMP"), released a series of videos, including one taken at PPGC headquarters during a meeting with PPGC's research director. CMP, which opposes abortion and has ties to violent extremists, obtained this footage under false pretenses by masquerading as a biotechnology company. ROA.3788, 4949, 5526. CMP repeatedly baited Planned Parenthood staff and spliced together heavily-edited footage to try to suggest that PPGC had done something wrong in facilitating tissue donation for research purposes. ROA.4949, 5528–29.

The district court considered extensive record evidence and concluded that

CMP's videos do not show any violations of law or other applicable standards by any Planned Parenthood organization. *See* ROA.3800, 3807; *see also* Pls.-Appellees' Br. ("Panel Br.") at 21–27, 37-43 (Oct. 6, 2017). And leading medical organizations, including the American College of Obstetricians and Gynecologists (ACOG), the American Public Health Association, and the New England Journal of Medicine, have recognized that the videos are misleading and baseless attacks—and continue to strongly support Planned Parenthood organizations as providing high-quality, essential health services to millions of underserved patients annually.[3] Indeed, although officials in twelve other states investigated Planned Parenthood affiliates based on these videos, all of those investigations fully vindicated Planned Parenthood.[4] And when state officials opposed to abortion nonetheless took the videos as an excuse to exclude Planned Parenthood affiliates from their state

[3] *See* George P. Topulous, M.D. et al., *Editorial, Planned Parenthood at Risk*, 373 N. Eng. J. Med. 963 (Sept. 3, 2015); Letter from Am. C. Nurse-Midwives to Hon. Mitch McConnell, Majority Leader, and Hon. John Boehner, Speaker, (Aug. 3, 2015), http://www.midwife.org/acnm/files/ccLibraryFiles/Filename/000000005551/ProviderLetteronPlannedParenthood.pdf. *See also* Brief of Amici Curiae ACOG, et al. in Supp. of Appellees for Affirmance, *Planned Parenthood S. Atlantic v. Baker,* No. 18-2133 (4th Cir. Feb. 6, 2019). This Court may take judicial notice of these and facts from similar sources elsewhere in the brief. *United States v. Herrera-Ochoa*, 245 F.3d 495, 501 (5th Cir. 2001); Fed. R. Evid. 201(d).

[4] *See* Laura Bassett, *A Year After "Baby Parts" Videos, Planned Parenthood is Taking its Victory Lap*, Huffington Post (July 18, 2016), http://www.huffingtonpost.com/entry/planned-parenthood-baby-parts-legacy_us_5787a724e4b03fc3ee4f7fed.

Medicaid programs, courts have almost uniformly rejected their efforts, and as detailed below, with the exception of Arkansas each has been enjoined.

A. HHSC's Attempts to Terminate Provider Plaintiffs from the Medicaid Program

1. First Notice of Termination

In October 2015, Defendants notified the Provider Plaintiffs that they were being terminated from the Medicaid program. The Notices of Termination made false allegations against PPGC; PPST and PPGT were accused only of being "affiliates" of PPGC.[5] The accusations against PPGC were based almost exclusively on the CMP videos, which the state Inspector General admitted he had not even seen before issuing the Notices. ROA.1202–07, 1239–43, 1310–14, 3812.

Plaintiffs filed this litigation, and Defendants reversed course. They claimed that the Notices of Termination actually did not reflect a final termination decision. The district court stayed the case for nearly a year, pending the State's "final" decision. ROA.3791–92, 3812–13, 8943–44 (sealed). Defendants did not, however, rescind the Notices, but instead promised to undertake further investigations to try to find a way to terminate Provider Plaintiffs from Medicaid.[6]

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[5] For ease of reference, because each notice is identical in substance they will be cited in only one location hereinafter.

[6] *See LIFE Initiative*, Abbott–Governor, https://www.gregabbott.com/life-initiative/ (Dec. 29, 2016) ("As Planned Parenthood is investigated, Governor Greg Abbott has announced the 'LIFE Initiative' to protect the unborn and prevent the sale of baby

2. The "Investigations" of PPGC

The day after the CMP video involving PPGC came out, the Lieutenant Governor directed the Harris County District Attorney to initiate a criminal investigation. *Governor Dan Patrick Asks Harris County D.A. to Immediately Open Criminal Investigation of Planned Parenthood in Texas,* Lieutenant Governor of Texas—Dan Patrick (Aug. 5, 2015), http://ow.ly/KwWY307y8tt. After an extensive joint investigation, which included hours of interviews with PPGC staff, a two-hour tour of the facility shown in the video, and review of over 800 pages of documents and what PPGC believes is the unedited version of the CMP video, a grand jury "cleared PPGC of breaking the law," and instead indicted the anti-abortion extremists who created the videos. ROA.1266, 4955.[7]

The State did not stop there. The Attorney General's office, the Texas Department of State Health Services ("DSHS"), and the Texas Health and Human Services Commission ("HHSC") all conducted separate, overlapping investigations. Provider Plaintiffs cooperated fully, making employees available to investigators and producing thousands of pages of documents. ROA.4917–4918, 4956–58, 4986–

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body parts . . . Funding for Planned Parenthood [will be] COMPLETELY ELIMINATED." (emphasis in original)); Statement by Att'y Gen. Paxton (Jan. 25, 2016), http://ow.ly/X1op307y8jJ.

[7] While those charges were eventually dismissed on technical legal grounds, the two extremists subsequently were indicted again and face fifteen felony charges in California. Panel Br. at 11 n.6.

87. As the district court correctly found, despite these "extensive investigations," ROA.3777, "the record includes no additional findings of wrongdoing from the investigations and no efforts to revoke any license or qualification of the [Provider Plaintiffs]" (except the assertions in the final termination notices). ROA.3789.

Four congressional committees also launched broad investigations. PPFA and Planned Parenthood affiliates voluntarily produced over 25,000 pages of documents and made staff from across the country available for interviews and testimony. Panel Br. at 12–14. After review of these extensive submissions, Jason Chaffetz, the chair of the House Oversight and Government Reform Committee, concluded that he "didn't find" any wrongdoing. *Id*. In fact, none of these committees found wrongdoing by any Provider Plaintiff.[8]

And even though the House formed yet another committee to investigate Planned Parenthood organizations, the chair of which asked the Texas Attorney General to further investigate PPGC, ROA.9022–9032, the committee did not find any wrongdoing, and merely raised issues already investigated by the Harris County District Attorney. ROA.9022–32, 4988–89. As the district court found, the Texas Inspector General did not conduct any investigation based on this letter. ROA.3808.

[8] While Representative Charles Grassley, the chair of the Senate Judiciary Committee, wrote a letter suggesting further investigation of four Planned Parenthood affiliates, the Provider Plaintiffs were not among them. ROA.4958.

3. Final Notice of Termination

Fourteen months after its initial Notice, HHSC issued each Provider Plaintiff a Final Notice of Termination. ROA.4714–19. These Final Notices abandoned most of the prior asserted bases for termination, *see* Panel Br. at 14 & n.10, and instead asserted that the CMP video shows that PPGC violated accepted ethical standards because it "follows a policy of agreeing to procure fetal tissue, potentially for valuable consideration, even if it means altering the timing or method of an abortion." ROA.4715. The Final Notices contained no independent allegations against PPGT and PPST but merely stated that they are "affiliated" with PPGC. ROA.4715–16.

III. Impact of Defendants' Actions on Providers and Patients

If Defendants' termination efforts are successful, thousands of low-income Texans, including Doe Plaintiffs, will have their care disrupted and lose access to their preferred health care providers. ROA.3779, 4922–23, 4961, 4990. As noted above, patients choose Planned Parenthood Providers because they trust them to provide high-quality, respectful care and because of their flexible hours and appointments, short wait-times, and accessibility. Patients insured through Medicaid will face difficulties finding other providers, especially for urgent conditions. This is especially true for patients in medically-underserved areas, where many of Provider Plaintiffs' thirty health centers are located. ROA.4926–27, 4962, 4992–93.

Texas already has a shortage of willing Medicaid providers. ROA.4923. Many are already stretched thin; some only accept new Medicaid patients who are pregnant, and others have long wait-times (even for patients with urgent symptoms). ROA.4926, 4961–62, 4991–92. Many do not offer same-day services, the most effective forms of birth control, or lifesaving cancer screening, instead referring Medicaid patients to Provider Plaintiffs for these services. ROA.4301, 4926.

If low-income Texans cannot receive covered care from Provider Plaintiffs, this situation will worsen. People who cannot obtain timely family planning care face devastating consequences, including unintended pregnancies, STIs, and undiagnosed cancers. ROA.4927, 4963, 4992–93. Provider Plaintiffs will be forced to reduce services and hours and potentially close clinics, and will be prevented from fulfilling their mission to provide care for underserved patients. ROA.4114, 4133–34, 4302, 4927, 4964, 4993–94.

IV. District Court Proceedings

After Defendants issued the Final Notices, Plaintiffs moved for preliminary injunctive relief. The district court conducted a three-day evidentiary hearing, during which it viewed extensive footage from the CMP videos taken at PPGC[9] and heard testimony from witnesses including the then-Inspector General of OIG, who made

[9] The district court also reviewed the video footage in its entirety in chambers. ROA.3801.

the termination decision; PPGC's director of research, who was featured in the video; medical and ethics experts, including PPGC's Medical Director and the State's Chief Medical Officer; each Provider Plaintiff's CEO; and the Doe Plaintiffs. The district court then issued a detailed forty-two-page order granting the preliminary injunction.

The court followed this Court holdings from *Gee* that Medicaid beneficiaries have a private right of action to enforce the Free-Choice-of-Provider requirement. ROA.3796. It explained that under *Gee* a provider is "qualified" if "capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner." ROA.3797 (quoting *Gee*, 862 F.3d at 457) (internal quotation marks and citations omitted).[10] It concluded that Provider Plaintiffs easily meet that standard, concluding that Defendants "did not have any factual support to conclude the bases of termination set forth in the Final Notice merited finding the Provider Plaintiffs were not qualified" and the termination decision was made "[w]ithout any evidence indicating an actual program violation warranting termination." ROA.3778, 3799; *see also*, *e.g.*, ROA.3800 ("no evidence"); 3809 (no prima facie evidence); 3813 ("[not] even a scintilla of evidence").[11]

[10] The court cited to the prior version of the *Gee* opinion, which was withdrawn and replaced on June 29, 2017. *Gee*, 862 F.3d at 449. Citations here are to the latter version.

[11] While Defendants falsely assert the district court refused to consider its post-termination evidence or testimony, Defendants' En Banc Br. ("Def. Suppl. Br.") at

A. Findings Concerning the CMP Videos

The district court focused first on the CMP video,[12] which the state Inspector General claimed demonstrated PPGC violated medical and ethical standards by showing "a history of" altering and "a willingness to" perform and alter abortions for research purposes. ROA.3800, 4714–15. "After reviewing the CMP video in its entirety and considering the Inspector General's testimony," the district court held there was "*no* evidence in the record PPGC violated any medical or ethical standard." ROA.3800 (emphasis added).[13]

1. Findings of No Alteration of Abortion Procedures for Research Purposes

The Inspector General claimed the CMP video showed PPGC's research director admitting PPGC doctors had altered abortion procedures or were willing to

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14 (March 7, 2019), the district court considered Defendants' testimonial and other evidence and gave detailed findings for why it failed to support termination. *See infra* at 14-19; Panel Br. at 21-27. What the court properly declined to consider was Defendants' post-hoc efforts to come up with entirely *new* bases for termination, included in neither the Final Notice nor the IG's decision-making, because doing so would be in violation of state and federal notice requirements. ROA 3798–99; *see* Panel Br. at 20 n.14.

[12] Multiple versions of the video were circulated; the version referenced herein ("CMP video") is that admitted at the hearing. Panel Br. at 21 n.15. The district court noted there was no evidence HHSC took any steps to authenticate the CMP video and concluded that as evidence its "quality and strength" is "suspect," but considered it to evaluate whether it supported the terminations. ROA.3800–01.

[13] The district court's findings, which also addressed additional unsupported claims of unethical conduct, are addressed more fully at Panel Br. at 21–27.

do so. ROA.3802. But even viewing the video in the light most favorable to HHSC, ROA.3801–02, the court concluded it showed no such thing.

Rather, the court found that the research director (whose role related primarily to family planning research) was not knowledgeable about abortion procedures, and stated repeatedly on the video that if there was any request for a change to *medical* procedures, she would have to discuss it with the doctors. ROA.3801, 3803. In the two studies using pregnancy tissue since the research director assumed that position (the more recent of which ended five years before the video), her role focused on the ways in which *clinic operations*, such as patient flow, could be modified to accommodate research needs. ROA.3786, 3803. And in both, the abortion-providing physician did not know whether patients had chosen to donate tissue, ROA.3786, 3804–05, and so could not possibly have altered the procedure to obtain usable tissue.[14] Thus, the court concluded, in the video the research director was discussing changes to clinical operations rather than changes to the medical procedures of abortion. ROA.3804.

[14] Defendants make the sensational accusation that a University of Texas Medical Branch ("UTMB") researcher took tissue "home" in her cooler. Def. Suppl. Br. at 1, 7, 8. The uncontroverted evidence shows the researcher used a cooler to transport tissue samples to her UTMB laboratory. ROA.4190–91. Defendants' attempt to suggest this physician hand-picked patients and asked staff to try to enroll them, *see* Def. Suppl. Br. at 7, is a similarly blatant distortion of the uncontroverted evidence showing the researcher told staff only which gestational age ranges were eligible for study participation. ROA.4191–92.

The Inspector General relied on HHSC's Chief Medical Officer "to determine if the CMP Video included any medically unethical conduct." ROA.3803. But the Chief Medical Officer—an orthopedic surgeon—candidly admitted he "would have to defer to an OB/GYN to evaluate abortion procedures," because he had only "the understanding of a lay person" with respect to the procedures discussed in the video. ROA.3803, 4398–4400.

For all of these reasons, the district court properly concluded "the Inspector General had *no* evidence indicating PPGC ever altered an abortion procedure or would be willing to do so." ROA.3804 (emphasis added).

2. Findings of No Ethical Violation Connected to Procuring Tissue for Physician's Own Research

The court also rejected Defendants' second asserted basis for termination, that "the CMP Video demonstrates researchers at PPGC performed abortions to procure fetal tissue, possibly altering procedures, for their own research." The court explained that this assertion was "similarly unsupported by evidence." ROA.3804. The court found no evidence that any PPGC doctor ever altered an abortion procedure or even knew whether an abortion patient had chosen to donate tissue. ROA.3804–05. The court also found no evidence of any medical or ethical violations in having an abortion provider involved in research using pregnancy tissue. ROA.3805; *see also* ROA.3631–32; Panel Br. at 25–26. And finally, the court found that the two studies PPGC participated in (years before the termination) were both

approved by Institutional Review Boards ("IRBs") whose role was to "validate[] the studies' plans for managing legal and ethical issues," and there is no evidence this IRB approval was insufficient. ROA.3806. Accordingly, the court concluded that "the Inspector General had little to no evidence a doctor who performed abortion procedures and subsequently conducted research on the tissue collected violated medical or ethical standards." *Id*.

Because the court concluded that the video provided no basis to terminate PPGC from Medicaid, it held that the termination likely would violate Doe Plaintiffs' Free-Choice-of-Provider rights.

B. Claimed Evidence of "Affiliation"

The court then rejected Defendants' only claimed basis for terminating PPST and PPGT—that they are "affiliated" with PPGC. The court held that Provider Plaintiffs "are separate entities, with no evidence of an ownership or control interest." ROA.3812. Termination on this basis therefore would likely violate the Doe Plaintiffs' Free-Choice-of-Provider rights. ROA.3810.[15] This appeal followed.

V. The Panel Decision

The panel decision correctly held that the Doe Plaintiffs have a private right of action to enforce their rights under the Free-Choice-of-Provider requirement.

[15] Based on the evidence of harm outlined above, the district court found that Plaintiffs satisfied the remaining preliminary injunction factors. ROA.3814–16.

Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc. v. Smith, 913 F.3d 551 at 560–62 (5th Cir. 2019) (relying on *Gee*). Rather than reviewing Plaintiffs' federal-law argument *de novo*, the panel decided the district court should have applied deferential arbitrary-and-capricious review. The panel then vacated the preliminary injunction and remanded. *Id.* at 569.

In a concurring opinion, Judge Jones urged the Court to reconsider *Gee*. *Id.* at 569–73 (Jones, J., concurring). This Court *sua sponte* granted *en banc* rehearing. *Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc. v. Smith*, 914 F.3d 994 (Mem.), 996 (5th Cir. 2019).

SUMMARY OF ARGUMENT

As the near-unanimous case law recognizes, including from the Sixth, Seventh, Ninth, and Tenth Circuits, the Medicaid Act's Free-Choice-of-Provider requirement is privately enforceable by patients under §1983. *Andersen*, 882 F.3d 1205; *Betlach*, 727 F.3d 960; *Comm'r of Ind.*, 699 F.3d 962; *Harris*, 442 F.3d 456; *but see Gillespie*, 867 F.3d 1034. This Court recognized as much in *Gee*, and it should reaffirm that holding.

The Supreme Court has established standards for determining when a federal statute is privately enforceable. The Medicaid Act's Free-Choice-of-Provider requirement meets those standards, because it is has individual rights-granting language, judicially-enforceable standards, and is couched in mandatory terms. *See*

generally Gonzaga, 536 U.S. 273; *Blessing*, 520 U.S. 329. The Supreme Court recently had two opportunities to address this issue and accept Defendants' view that the Free-Choice-of-Provider requirement is not privately enforceable, and declined to do so. *Andersen*, 139 S. Ct. 638 (Mem.) (2018); *Gee*, 139 S. Ct. 408 (Mem.) (2018).

The Supreme Court precedents cited by Defendants are not to the contrary. *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), addressed whether the Supremacy Clause (not §1983) provides a private right of action, and it concerned a provision of the Medicaid Act that is materially different from the Free-Choice-of-Provider requirement. Defendants are wrong to suggest that *Armstrong* represents a sea change in the Supreme Court's private-right-of-action jurisprudence; after *Armstrong*, courts (including this one) have continued to apply the Supreme Court's established three-factor test and have not hesitated to find a private right of action where those factors are met. Thus, as the panel correctly held, *Armstrong* provides no basis for this Court to upend its Medicaid Act precedents. Nor does *Gonzaga*; to the contrary, the Free-Choice-of-Provider requirement contains exactly the individual rights-granting language the Supreme Court clarified in *Gonzaga* must be present to give rise to a private right of action.

Defendants alternately suggest that even if there is a private right of action, the Doe Plaintiffs may not challenge the termination of a provider the state has

deemed unqualified, no matter how baseless that determination. Def. Suppl. Br. at 37-43. The *Gee* panel rightly rejected this argument, and Defendants can point to *no* court that has adopted it. To the contrary, every court that has found a private right of action has concluded that similar state efforts to exclude Planned Parenthood affiliates from the Medicaid program violate or likely violate the Medicaid Act's Free-Choice-of-Provider requirement, and granted injunctive relief on that basis. *See Andersen*, 882 F.3d 1205; *Betlach*, 727 F.3d 960; *Comm'r of Ind.*, 699 F.3d 962; *Planned Parenthood Se., Inc. v. Bentley*, 141 F. Supp. 3d 1207 (M.D. Ala. 2015); *Planned Parenthood Se., Inc. v. Dzielak*, No. 3:16cv454-DPJ-FKB, 2016 WL 6127980 (S.D. Miss. Oct. 20, 2016), *appeal docketed sub nom.*, *Planned Parenthood Se., Inc. v. Snyder*, No. 16-60773 (5th Cir. Nov. 21, 2016); *Planned Parenthood S. Atlantic v. Baker*, 326 F. Supp. 3d 39 (D.S.C. 2018) (order granting temporary restraining order and preliminary injunction), *appeal docketed*, No. 18-2133 (4th Cir. Sept. 28, 2018); *see also Planned Parenthood Ark. & E. Okla. v. Gillespie*, No. 4:15-cv-00566, 2016 WL 8928315 (E.D. Ark. Sept. 29, 2016), *rev'd on other grounds sub nom. Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017).

Finally, for the reasons herein and in Plaintiffs' panel-stage briefing, the district court did not abuse its discretion when it issued a preliminary injunction. The record amply supports the court's conclusion that Plaintiffs have established a likelihood of success on the merits and the remaining preliminary injunction factors,

including because the balance of harms plainly favors allowing patients to continue receiving medical care during the pendency of this lawsuit, and the preliminary injunction should be affirmed.[16]

ARGUMENT

Medicaid is a program through which the federal government provides financial aid to states in order to provide 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 (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 (1998).

Texas (like Louisiana) participates in the Medicaid program and is therefore bound by its requirements. This includes the Free-Choice-of-Provider requirement, which requires that state Medicaid plans "must provide" that "any individual eligible

[16] Defendants request dismissal of the Doe Plaintiffs' claims if this Court overrules *Gee* and holds there is no private right of action to enforce the Free-Choice-of-Provider requirement. But that would be inappropriate, because the private-right-of-action issue has no bearing on Doe Plaintiffs' separate constitutional claims. *See* ROA.33, 48.

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).

I. The Free-Choice-of-Provider Requirement Gives Rise to a Private Right of Action

A. The Free-Choice-of-Provider Requirement Satisfies the Supreme Court's Established Test

The panel in *Gee*—like the Sixth, Seventh, Ninth, and Tenth Circuits—correctly recognized that Medicaid recipients can sue to enforce the Free-Choice-of-Provider requirement under §1983. *See Gee*, 862 F.3d at 457; *Andersen*, 882 F.3d at 1224; *Betlach*, 727 F.3d at 966–68; *Comm'r of Ind.*, 699 F.3d at 974–75; *Harris*, 442 F.3d at 461–62. *But see Gillespie*, 867 F.3d 1034 (divided panel holding no private right of action). This is because the Free-Choice-of-Provider requirement easily satisfies the Supreme Court's three-factor test for identifying a privately enforceable right. *See generally Gonzaga*, 536 U.S. 273; *Blessing*, 520 U.S. 329. "To determine whether a particular statute gives rise to a federal right, the Court has enunciated three factors: (1) 'Congress must have intended that the provision in question benefit the plaintiff';[17] (2) 'the plaintiff must demonstrate that the right

[17] In order to meet the first factor, "the particular statute must provide 'an unambiguously conferred right' with an "*unmistakable* focus on the benefited class.'" *Legacy*, 881 F.3d at 371 (quoting *Gonzaga*, 536 U.S. at 283–84).

assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence"; and (3) 'the statute must unambiguously impose a binding obligation on the States." *Legacy Cmty. Health Servs., Inc. v. Smith*, 881 F.3d 358, 371 (quoting *Blessing*, 520 U.S. at 340–41), *cert. denied*, 139 S. Ct. 211 (Mem.) (2018).

First, the requirement's plain text unambiguously shows Congress's intent to give individual Medicaid beneficiaries a specific right. *Gee*, 862 F.3d at 459. It identifies the intended beneficiaries—"any *individual* eligible for medical assistance" under Medicaid—and grants them the right to "obtain such assistance" from any qualified and willing provider. 42 U.S.C. §1396a(a)(23)(A) (emphasis added). The statute is "phrased in terms of the persons benefited" and has an "unmistakable focus" on those persons, showing Congress's intent to "create not just a private right but also a private remedy." *Gonzaga*, 536 U.S. at 284 (internal quotation marks omitted). There is no question who Congress intended to benefit in this statute, or what benefit Congress intended to give them. *See Comm'r of Ind.*, 699 F.3d at 974 ("[Language] that *any* Medicaid-eligible person may obtain medical assistance from *any* institution, agency, or person qualified to perform that service . . . does not simply set an aggregate plan requirement, but instead establishes a personal right to which all Medicaid patients are entitled."); *Andersen*, 882 F.3d at 1226; *Betlach*, 727 F.3d at 966–67; *Harris*, 442 F.3d at 461.

Defendants suggest that the Free-Choice-of-Provider requirement does not contain individual rights-granting language because it depends upon "contingent events," namely, the state's participation in Medicaid, its determination that a provider is qualified; and the provider's willingness to provide services. *See* Def. Suppl. Br. at 23–24. But these are not arguments about why there is no private right of action; they are factual questions relevant to establishing a violation of the Medicaid Act. And as the district court found, Plaintiffs have established a likelihood of success on that score. It is unsurprising Defendants cite no relevant authority for this argument, as finding these "contingent events" to be incompatible with a private right of action would be wholly inconsistent with this Court's Medicaid Act precedent. *See infra* at 40 & n. 26.

Second, Congress defined this individual right using administrable terms. *Gee*, 862 F.3d at 459. Here, the statute "specifies that any individual Medicaid recipient is free to choose any provider so long as two criteria are met: (1) the provider is 'qualified to perform the service or services required,' and (2) the provider 'undertakes to provide [the recipient] such services.' 42 U.S.C. §1396a(23)(A)." *Betlach*, 727 F.3d at 967 (alteration in original); *see also Andersen*, 882 F.3d at 1226–27; *Harris*, 442 F.3d at 462. "These are objective criteria, well within judicial competence to apply." *Betlach*, 727 F.3d at 967. Courts routinely make such determinations; this inquiry "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. *See Gee*, 862 F.3d at 459 (whether a provider is "qualified" to perform the required medical services is a "simple factual question . . . courts decide every day").

And third, the Free-Choice-of-Provider requirement is "couched in mandatory" terms. *Gee*, 862 F.3d at 459–60. This analysis is straightforward, because the statute specifies that states "must" allow Medicaid recipients their free choice of qualified provider. 42 U.S.C. §1396a(a). *See Andersen,* 882 F.3d at 1227–28; *Betlach*, 727 F.3d at 967; *Comm'r of Ind.*, 699 F.3d at 974; *Harris*, 442 F.3d at 462.

Once those factors are met, there is a presumption that the right is enforceable under §1983; that presumption may be rebutted by a showing that Congress "specifically foreclosed a remedy under §1983," such as by providing for "a comprehensive enforcement scheme that is incompatible with individual enforcement under §1983." *Legacy*, 881 F.3d at 371 n.12 (quoting *Gonzaga*, 536 U.S. at 284 n.4). But as discussed below, *see* 36-37, *infra*, there is no such indication here.

Faced with this overwhelming and well-reasoned authority, Defendants barely engage with the *Gonzaga/Blessing* factors[18] and instead fall back on two main arguments, neither of which is correct.

B. *Armstrong* and *Gonzaga* Do Not Require a Different Result

Defendants contend that *Gee* is inconsistent with the Supreme Court's approach to determining when Spending Clause legislation is privately enforceable. To support that argument, they rely on *Armstrong*, 135 S. Ct. 1378, as well as *Gonzaga*, 536 U.S. 273. Def. Suppl. Br. at 19–23, 25–28. But these cases involved materially different statutes and do not impose the type of sea change Defendants suggest, and the *Gee* panel was right to reject these arguments.

As an initial matter, Defendants ignore that *Armstrong* did not concern whether plaintiffs could sue under §1983—which expressly provides a right of action in federal court. Rather, the issue in *Armstrong* was whether the plaintiff could imply a right of action under the Supremacy Clause, which (as *Armstrong* discussed at length) creates a rule of decision as to how conflicts between federal and state law

[18] To the degree Defendants suggest *Gonzaga* "supplanted" the *Blessing* analysis, and this Court should no longer apply the three factors above, *see* Def. Suppl. Br. at 20, 28, 34, they are wrong. *Gonzaga* clarified that the first *Blessing* factor is met only if the federal provision a plaintiff seeks to enforce contains an unambiguously-conferred individual right, not merely by falling within its general zone of interest, *Gonzaga*, 536 U.S. at 283; it did not alter application of its remaining two factors. As detailed at 38-43, *supra*, following *Gonzaga*, this Court has consistently applied the *Gonzaga/Blessing* factors to determine whether a provision gives rise to a private right of action, and has faithfully found one where the factors are met.

are to be resolved but does *not* create a cause of action to enforce a right. 135 S. Ct. at 1383. This is an important difference, because the whole purpose of §1983 is to create a cause of action to redress deprivation of a federal right. As a result, "[o]nce a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by §1983." *Gonzaga*, 536 U.S. at 284; *Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697 (5th Cir. 2007) (citing *Gonzaga*, 536 U.S. at 284). Indeed, this Court has recognized that *Armstrong* is not applicable when determining whether a private right of action arises under §1983. *Legacy*, 881 F.3d at 371 n.12 (declining to consider *Armstrong* because it "involved an implied right of action—a situation lacking the presumption that §1983 itself provides the private right of action"); *see also Andersen*, 882 F.3d at 1226; *Fishman v. Paolucci*, 628 F. App'x 797, 801 n.1 (2d Cir. 2015).[19]

Further, as the *Gee* panel correctly recognized, the provision at issue in *Armstrong* is very different from the provision at issue here. *Armstrong* concerned a

[19] Defendants contend this distinction is unimportant because "*Gonzaga* held that implied-right-of-action reasoning applies in the section 1983 context." Def. Suppl. Br. at 36. But they ignore that *Gonzaga* expressly recognized that plaintiffs suing under §1983 (in contrast to plaintiffs suing under an implied right of action) "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." 536 U.S. at 284. Thus, while the "initial inquiry—determining whether a statute confers any right at all—is no different from the initial inquiry in an implied right of action case," in the §1983 context, "[o]nce a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by §1983." *Id*. at 284–85.

rates-setting provision, §1396a(a)30(A), that lacks both individual rights-granting language and an administrable standard. *Gee*, 862 F.3d at 461–62; *Armstrong*, 135 S. Ct. at 1385, 1387. That provision contains no reference to individual Medicaid beneficiaries—in sharp contrast to §1396a(a)(23), which mandates that "any individual eligible for medical assistance" may receive assistance from any qualified provider. This is a crucial difference, as a critical deficiency with the *Armstrong* plaintiffs' claim was that they could not meet *Gonzaga*'s requirement that a statute "unambiguously confer[] [a] right." *Armstrong*, 135 S. Ct. at 1386 n.* (Scalia, J., concurring and noting plaintiffs do not assert a §1983 action because they could not meet this standard) (quoting *Gonzaga*, 536 U.S. at 283); *see also Equal Access*, 509 F.3d at 703 (discussing 30(A)'s lack of individual rights-granting language); *Andersen*, 882 F.3d at 1226 (same).

The two provisions also could not be more different with regard to enforceability. Section 30(A) is a rate-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) (alteration in original); *see Gee*, 862 F.3d at 461–62; *see also Westside Mothers v. Olszewski*, 454 F.3d 532, 543

(6th Cir. 2006); *Sanchez v. Johnson*, 416 F.3d 1051, 1059–60 (9th Cir. 2005); *Long Term Care Pharmacy All. v. Ferguson*, 362 F.3d 50, 58 (1st Cir. 2004).[20] Here, in contrast, the statute asks whether the provider is qualified—a judicially-manageable standard.

Thus, *Armstrong*'s conclusion that §1396a(a)(30)(A) is too vague and judgment-laden to be judicially administrable does not dictate the same result for the provision at issue here. *See Suter v. Artist M.*, 503 U.S. 347, 358 n.8 (1992) (every federal statute "must be interpreted by its own terms"); *see also Ball v. Rodgers*, 492 F.3d 1094, 1115 (9th Cir. 2007) ("Although §1396a(a)(30)(A) would require a court to account for numerous, largely unquantifiable variables . . . the [free choice provisions] are far more straightforward.").

For these reasons Defendant's assertion that "[t]here is nothing about the language of [§1396a(a)(23)] which would distinguish it from [§30(A)] and justify a different conclusion as to a right of action," Def. Suppl. Br. at 22, is simply false, and the panel was right to conclude that reliance on *Armstrong* is "misplaced." *Gee*, 862 F.3d at 461. Indeed, in the four years since *Armstrong*, numerous courts including this one have continued to analyze whether a provision of the Medicaid

[20] Indeed, Justice Breyer joined only portions of Justice Scalia's opinion in *Armstrong*, and he wrote separately to make clear that the fact §30(A) is a rate-setting statute was critical to his determinative vote. 135 S. Ct. at 1388 ("Reading §30A underscores the complexity and nonjudicial nature of the rate-setting task." (Breyer, J., concurring)).

Act is enforceable under §1983 pursuant to the familiar *Gonzaga/Blessing* standards, and have not hesitated to find a private right of action where those standards are met.[21]

Defendants' reliance on *Gonzaga*, Def. Suppl. Br. at 26–28, is similarly unavailing. In *Gonzaga*, the Supreme Court considered whether a federal statute that prohibited funding educational institutions with a "policy or practice of permitting the release of educational records" is privately enforceable under §1983. 536 U.S. at 288. Unlike the Free-Choice-of-Provider requirement, that statute did not even mention the "individual[s]"—students and parents—who sought to enforce it, and did not speak to "individual instances of disclosure;" it "sp[oke] only to the Secretary of Education," and whether there was an improper "policy or practice." *Id*. at 287–88. And a separate provision of federal law granted students and parents aggrieved

[21] *See*, *e.g.*, *Legacy*, 881 F.3d at 372 (holding that §1396a(bb) satisfies the *Blessing/Gonzaga* test); *Andersen*, 882 F.3d at 1226 ("*Armstrong* does nothing to undermine the Patients' claim that Congress intended to confer on them an enforceable right of action with the free-choice-of-provider provision."); *BT Bourbonnais Care, LLC v. Norwood*, 866 F.3d 815, 820–22 (7th Cir. 2017) (*Armstrong* does not alter analysis that §1396a(a)(13)(A) is enforceable under §1983); *Health Sci. Funding, LLC v. N.J. Dep't of Health & Human Servs.*, 658 Fed. App'x 139, 140–41 (3d Cir. 2016) (same as to §1396a(a)(54)); *Davis v. Shah*, 821 F.3d 231 (2d Cir. 2016) (same as to §1396a(a)(10)(B)); *Backer ex rel. Freedman v. Shah*, 788 F.3d 341, 344 (2d Cir. 2015) (same as to §1396a(a)(19)); *Fishman*, 628 Fed. App'x at 801 n.1(same as to §1396a(a)(3)); *Gillespie*, 867 F.3d at 1052 (8th Cir. 2017) (Melloy, J., dissenting) ("I do not read *Armstrong* to overrule or even undermine the reasoning of the other circuits that have addressed whether §23(A) creates a private right of action under §1983."). *But see Gillespie*, 867 F.3d 1034.

by an improper disclosure a "federal review mechanism" required to hear and act on any timely complaints. *Id*. Those factors, the Supreme Court concluded, "squarely distinguished" the case from laws that are privately enforceable. (citing *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 501–02 (1990)). And those factors distinguish *Gonzaga* from this case, because the individual rights-granting language that was missing in *Gonzaga* is present in the Free-Choice-of-Provider requirement, §1396a(a)(23) (giving right to "any *individual* eligible for medical assistance" (emphasis added)), and as discussed below, no enforcement scheme is available to patients. In short, *Gonzaga* identifies the relevant principles for determining whether statutory rights are enforceable under §1983. In *Gonzaga*, those factors were not satisfied. But here, they are.[22]

[22] *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1 (1981), which preceded *Wilder*, *Blessing,* and *Gonzaga*, also is not to the contrary. As set forth above, the Free-Choice-of-Provider requirement reflects precisely the kind of "'unambiguous' intent to confer individual rights," spoken in Congress's "clear voice," that gives rise to individual rights enforceable under §1983. *Gonzaga*, 536 U.S. at 280 (quoting *Pennhurst*, 451 U.S. at 17, 28 & n.21). In *Pennhurst* the Court emphasized that the "clear voice" requirement exists to ensure that States make "informed choice[s]" as to whether to participate in federally-funded programs. *Pennhurst*, 451 U.S. at 25. *Pennhurst* addressed the lack of such unambiguous intent in an Act that was not part of the Social Security Act, and indeed cited a provision of the Social Security Act as an example of how "where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly." *Pennhurst*, 451 U.S. at 17–18 (citing *King v. Smith*, 392 U.S. 309, 332 (1968), which found a private right of action to enforce the "reasonable promptness" provision).

C. The Federal Government's Ability to Withhold Funds Is Not to the Contrary

Defendants urge this Court to disregard the Free-Choice-of-Provider requirement's individual rights-granting language, enforceable standards, and mandatory nature simply because the U.S. Department of Health and Human Services ("HHS") also can enforce the requirement by withholding federal funds. Def. Suppl. Br. at 26–28. But the Supreme Court long ago rejected the view that the possibility of federal enforcement forecloses a private remedy under the Medicaid Act. *See Wilder*, 496 U.S. at 521–22. And since *Wilder*, the Supreme Court has reaffirmed that the possibility of federal enforcement does not "close the door on §1983 liability" under the Medicaid Act. *Blessing*, 520 U.S. at 348. *See also Harris*, 442 F.3d at 463 ("That the Federal Government may withhold federal funds to non-complying States is not inconsistent with private enforcement.").

Defendants contend *Wilder* has been repudiated by *Armstrong* and *Gonzaga*, Def. Suppl. Br. at 30, but this is simply wrong. *Gonzaga* clarified that *Wilder* cannot be understood to mean an enforceable right is created solely because the plaintiff comes within the general zone of interest the statute intended to protect, and thus clarified the application of the first *Gonzaga/Blessing* factor: the determination of whether a provision contains individual rights-granting language. *Gonzaga*, 536 U.S. at 283; *see also Armstrong*, 135 S. Ct. at 1386 n.* (recognizing *Gonzaga* rejected the notion that "anything short of an unambiguously conferred right" is

enforceable under §1983). But these cases did not call into question *Wilder*'s ongoing validity where, as here, individual rights-granting language creates an unambiguously conferred right. Thus, *Wilder*'s holding that the possibility of federal enforcement does not preclude a §1983 remedy remains good—and binding—law. The Supreme Court has continued to cite *Wilder* with approval. *See City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 122 (2005); *Blessing*, 520 U.S. at 347–48. This Court has also recognized *Wilder*'s vitality. *See Legacy,* 881 F.3d at 372 (state argument would "likely overrule" *Wilder* and "thus . . . goes too far").

And all but one of the courts considering §1396a(a)(23)(A) claims since *Gonzaga* and *Armstrong* have, like the *Gee* panel, applied *Wilder* to find an enforceable right.[23] They have recognized that, as in *Wilder*, the federal government's ability to withhold *all* Medicaid funding is not a feasible or adequate "remedy" for individuals deprived of their free choice of providers. *See Andersen*, 882 F.3d at 1229 ("[The Medicaid Act's] administrative scheme cannot be considered sufficiently comprehensive to demonstrate a congressional intent to

[23] *See Andersen,* 882 F.3d at 1229 n.16 ("We rely on *Wilder* . . . for its conclusion that the Medicaid Act's administrative scheme isn't sufficiently comprehensive that it demonstrates Congress's intent to preclude enforcement under §1983. *Armstrong* neither discussed nor 'plainly repudiate[d]' this portion of *Wilder.*") (citation omitted)); *Comm'r of Ind.*, 699 F.3d at 975–76 (relying on *Wilder* to find §1396a(a)(23) enforceable under §1983); *Harris*, 442 F.3d at 463 (same); *cf. Betlach*, 727 F.3d at 965–68 (without citing *Wilder*, finding §1396a(a)(23)(A) enforceable under *Gonzaga*); *Gillespie,* 867 F.3d at 1052–53 (Melloy, J., dissenting). *But see Gillespie*, 867 F.3d at 1040.

withdraw the private remedy of §1983 . . . '[G]eneralized powers' . . . to audit and cut off federal funds [are] insufficient to foreclose reliance on §1983 to vindicate federal rights." (alterations in original) (quoting *Wilder*, 496 U.S. at 522)); *Comm'r of Ind.*, 699 F.3d at 974–75 ("[P]rivate enforcement of [Free-Choice-of-Provider requirement] in suits under §1983 in no way interferes with the Secretary's prerogative to enforce compliance using her administrative authority."); *Harris*, 442 F.3d at 463 ("[T]hat the Federal Government may withhold federal funds to non-complying States is not inconsistent with private enforcement."). And federal withholding of funds would be cold comfort to the many low-income individuals who will be denied necessary medical care if states are allowed to terminate providers' contracts without judicial oversight. *See Andersen,* 882 F.3d at 1229 ("federal Secretary's withholding Medicaid funds would not redress [the patients'] injuries at all.").

To be sure, Congress could foreclose a §1983 remedy by creating a separate, "comprehensive enforcement scheme" that includes a "private remedy" for the party whose rights are violated. *Abrams*, 544 U.S. at 121. But it has not done so here. And the key question is whether Congress has provided a "more restrictive *private* remedy," *id*. (emphasis added), not whether it has authorized *federal* enforcement, *see, e.g., Suter*, 503 U.S. at 358; *Gonzaga*, 536 US at 2278–79 (finding no private right of action where statute created comprehensive enforcement scheme with

review board required to review any timely complaint from aggrieved individual, investigate, and describe steps required to correct violation); *see also Armstrong*, 135 S. Ct. at 1385 ("provision for the Secretary's enforcement by withholding funds" did not "*by itself,* preclude the availability of equitable relief").[24]

Indeed, the federal government itself has taken the position that federal enforcement does not preclude a federal right of action here, filing an amicus brief in *Gee* agreeing that the Free-Choice-of-Provider requirement is enforceable under §1983. *See* Br. for United States as Amicus Curiae, *Gee*, 862 F.3d 445 (5th Cir. 2017) (No. 15-30987), 2016 WL 691347, at *7–9.

Finally, if there were any doubt whether Congress intended to foreclose a §1983 remedy by providing for HHS enforcement of state Medicaid plans, Congress removed it by enacting 42 U.S.C. §1320a-2, which provides that "[i]n 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." (emphasis added). The legislative history accompanying this provision confirms that it was intended "to assure that individuals who have been injured by a State's failure to comply with the

[24] Moreover, Defendants' attempt to rely on the fact that *Provider* Plaintiffs could have gone through an administrative appeal process, Def. Suppl. Br. at 44–45, is misplaced, since it is the *Doe* Plaintiffs whose rights are being asserted here, and Defendants do not suggest any such remedy was available to the Does.

Federal mandates of the State plan titles of the Social Security Act *are able to seek redress in the federal courts*." H.R. Conf. Rep. No. 103-761 (1994), reprinted in 1994 U.S.C.C.A.N. 2901, 3257 (emphasis added). This provision therefore reinforces that the mere possibility of HHS withholding federal funds for noncompliance does not override rights-granting language in the Medicaid Act.[25]

Significantly, Defendants appear to concede that §1320a-2 "means that Congress intended for provisions in the Social Security Act to not be deemed unenforceable solely because they are part of a statute outlining the requirements for state plans." Def. Suppl. Br. at 32.

For all of these reasons, Defendants are wrong to treat the Free-Choice-of-Provider requirement as merely a "direction to the Secretary in approving State Medicaid plans" that is not privately enforceable. *Id*. at 21.

[25] *See., e.g., S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 603 (5th Cir. 2004) ("[I]n light of [§1320a-2] it is clear that the mere fact that an obligation is couched in a requirement that the State file a plan is not itself sufficient grounds for finding the obligation unenforceable under §1983." (alteration in original) (citing *Harris v. James*, 127 F.3d 993, 1003 (11th Cir. 1997))); *Comm'r of Ind.*, 699 F.3d at 976 n.9 (rejecting argument "that federal statutes specifying the requirements of state Medicaid plans cannot impose legal obligations on state officials" because "Congress specifically foreclosed this argument when it enacted . . . §1320a-2"); *Betlach*, 899 F. Supp. 2d at 878; *Rio Grande Cmty. Health Ctr. Inc. v. Rullan*, 397 F.3d 56, 74 (1st Cir. 2005); *Rabin v. Wilson-Coker*, 362 F.3d 190, 201–02 (2d Cir. 2004); *L.J. v. Wilbon*, 633 F.3d 297, 309 (4th Cir. 2011); *Ball*, 492 F.3d at 1112.

D. *Gee* Follows Directly From This Court's Precedents

Consistent with this binding authority, this Court for years has faithfully applied the *Gonzaga/Blessing* factors to determine whether a particular Medicaid Act provision is privately enforceable under §1983. *See, e.g., Legacy*, 881 F.3d at 371–72 (enumerating factors and finding them met by Medicaid Act §1396a(bb)); *Romano v. Greenstein*, 721 F.3d 373, 378 (5th Cir. 2013) (same for §1396a(a)(8)); *Hood*, 391 F.3d at 603–05 (same for §1396a(a)(10)(A)); *see also Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 625 (5th Cir. 2017) ("We have held that §1396a(a)(10) creates a private right of action that is enforceable through §1983.")

Defendants' attempts to distinguish these cases amount to nothing more than a thinly-veiled request that this Court ignore settled Supreme Court law and upend its own well-established Medicaid Act jurisprudence. As the Seventh Circuit has explained, the Supreme Court has not taken the drastic step Defendants suggest: If the Supreme Court had intended to hold that "plaintiffs are now flatly forbidden in section 1983 actions to rely on a statute passed pursuant to Congress's Spending Clause powers," they would not have "sen[t] lower courts off on a search for 'unambiguously conferred rights,'" because "[a] simple 'no' would have sufficed." *BT Bourbonnais*, 866 F.3d at 820–21.

This Court's decisions recognize as much. For example, this Court recently held that Federally Qualified Health Centers ("FQHCs") may sue under §1983 to enforce §1396a(bb) of the Medicaid Act. It reasoned that the requirement that states ensure FQHCs be fully paid for covered services contained the "rights-creating language" required by *Gonzaga*; provides for judicially-administrable reimbursement standards; and imposes a binding obligation on the states using the language "the State plan shall provide." *Legacy*, 881 F.3d at 371–72. In so holding, this Court rejected Defendant's suggestion that *Armstrong* changed this analysis, and also noted that accepting Defendant's argument would "go too far" by improperly overruling *Wilder*. *Id*.

Citing no relevant authority, Defendants contend *Legacy*'s analysis is inapplicable here because the Doe Plaintiffs' rights under the Free-Choice-of-Provider requirement are "narrowed" by "intervening factors controlled by others"—namely, whether the State participates in Medicaid, the State's determination that a particular Medicaid provider is qualified, and the provider's willingness to provide services. Def. Suppl. Br. at 30, 23–24. But these supposed "intervening factors" are common to the provisions this Court (like others) has found enforceable under §1983.[26] And indeed, it makes no sense to say that whether a State

[26] For example, this Court's determination in *Legacy* that FQHCs may enforce §1396a(bb)'s reimbursement requirement depended on the state participating in Medicaid and deeming FQHCs to be qualified providers, and on the FQHCs being

participates in Medicaid is an "intervening factor" making Doe Plaintiffs' rights unenforceable; this (and the other supposed factors Defendants identify) are just factual questions about whether the Medicaid Act applies and whether it has been violated.[27]

Defendants similarly ask this Court to disregard *Romano*, 721 F.3d at 378. In that case, the Court concluded that §1396a(a)(8), which requires that a state plan must provide that medical assistance be furnished "with reasonable promptness" to "all eligible individuals," satisfied the *Gonzaga/Blessing* test because its focus on "all eligible individuals" was "precisely the sort of 'rights-creating' language identified in *Gonzaga* as critical to demonstrating a congressional intent to establish a new right;" the right to reasonably prompt assistance is not "vague and

willing to provide services. *Legacy,* 881 F.3d at 372. This Court's determination in *Romano* that patients may enforce §1396a(a)(8)'s "reasonable promptness" requirement depended on the state participating in Medicaid, and on providers the state deems qualified being willing to provide services. *Romano*, 721 F.3d at 378. And this Court's determination in *Hood* that patients may enforce §1396a(a)(10)(A)'s requirement that the state make certain medically-necessary services available to eligible individuals depended on the state's participation in Medicaid, and on a determination the disputed services are medically necessary. *Hood*, 391 F.3d 581; *Jefferson*, 849 F.3d at 625.

[27] At any rate, Texas and Louisiana *do* participate in Medicaid, and are bound by the Free-Choice-of-Provider requirement. Nor is there any question as to Provider Plaintiffs' willingness to provide services. As to whether they are qualified, far from this being an "intervening factor," the heart of Plaintiffs' Free-Choice-of-Provider claim is that Texas has terminated the Provider Plaintiffs for reasons having no bearing on their qualification to provide services through the Medicaid program.

amorphous;" and its mandatory language imposed a binding obligation on the States. *See id*. at 378–79 (alterations in original) (quoting *Hood*, 391 F.3d at 601–07).

Defendants contend *Romano* is "out-of-step with *Armstrong*" because it "focused on the individual subsections at issue and ignored their context in the overarching statute." Def. Suppl. Br. at 30. But *Armstrong* itself focused on the specific language of §30(A). *Armstrong* 135 S. Ct. at 1387 ("*Section 30(A)* lacks the sort of rights-creating language needed to imply a private right of action.") (emphasis added); *see also Blessing*, 520 U.S. at 342 ("We [do] not ask whether the federal . . . legislation generally [gives] rise to rights; rather, we focus[] our analysis on a specific statutory provision . . . ."); *Golden State Transit Corp. v. City of L.A*., 492 U.S. 103, 106 (1989) (asking whether "provision in question" was designed to benefit plaintiff). This approach is embedded in this Circuit's precedent analyzing each Medicaid Act provision to determine whether it is enforceable under §1983. *See supra* at 38-43.[28]

Finally, Defendants ask this Court to disregard *Hood,* 391 F.3d at 603–05. In that decision, the Court held that §1396a(a)(10)(A)'s requirement that a state plan make certain medically necessary services available to "all individuals" who meet

[28] If Defendants' reference to the "context of the statute" is meant to suggest this Court should disregard a Medicaid Act provision's individual rights-granting language because the provision is included as a state plan requirement enforceable by HHS, this argument is foreclosed by *Wilder* and §1320a-2. *See* 34-38, *supra*.

eligibility criteria satisfied the *Gonzaga/Blessing* test because it contains "prototypical rights-creating language," merely asks courts to "ascertain whether [it] require[d] [a state] to provide [the plaintiff] with a specific benefit," and uses mandatory language. *Hood*, 391 F.3d at 603, 605; *see also Jefferson*, 849 F.3d at 625. But Defendants provide no reason to disregard this decision, and their citation to §1320a-2 underscores that provisions of the Medicaid Act—like the Free-Choice-of-Provider requirement—that contain individual rights-granting language and otherwise fulfill the *Blessing*/*Gonzaga* factors are enforceable under §1983.

II. Defendants' Action Violates the Free-Choice-of-Provider Requirement

Defendants argue that even if the Free-Choice-of-Provider requirement is privately enforceable under §1983, the right does not extend to a situation where a state has deemed patients' chosen Medicaid providers to be unqualified. Def. Suppl. Br. at 37–43. The *Gee* panel correctly rejected this argument, explaining that the Free-Choice-of-Provider requirement guarantees Medicaid beneficiaries such as the Doe Plaintiffs the right to choose "any qualified" provider "without government interference." *Gee,* 862 F.3d at 461 (quoting *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 at 785 (1980)). The statute permits states to exclude a willing provider from Medicaid only "for reasons bearing on that provider's general qualification to provide medical services," *id*. at 465, meaning its ability to "perform[] the needed medical services in a professionally competent, safe, legal, and ethical manner," *id*.

at 462. *Every* court to reach the issue has agreed. *Andersen*, 882 F.3d at 1230 (state has authority "to set qualifications only for professional competency and patient care"); *Betlach*, 727 F.3d at 972 (state is not authorized to terminate provider agreements "on grounds unrelated to medical competency *or* legal and ethical propriety"); *Comm'r of Ind.*, 699 F.3d at 978; *Baker*, 326 F. Supp. 3d at 47; *Smith*, 236 F. Supp. 3d at 996; *Bentley*, 141 F. Supp. 3d at 1221; *Planned Parenthood Ark & E. Okla. v. Selig*, 4:15-cv-00566-KGB E.D. Ark. 2015) 2015 WL 13307030 at *9.[29]

[29] Defendants take issue with the *Gee* panel's discussion of how Louisiana made no attempt to prevent PPGC from providing medical services to anyone other than Medicaid patients, and suggest this undermines the panel's analysis because the Medicaid Act contemplates that a provider can be terminated for reasons other than license revocation. Def. Suppl. Br. at 40–41. But the panel's analysis expressly recognized that "the general grounds for termination invoked by [Louisiana]—fraud, misrepresentations, and investigations—might well relate to a provider's qualifications." *Gee*, 862 F.3d at 469. However, it correctly concluded the accusations of such conduct by PPGC were baseless, and the fact the state did not attempt to impose any sanction other than Medicaid termination should be understood as a factor supporting this conclusion. *Id*. at 466. Defendants' reliance on §1320a–7(b), which permits exclusion of providers who have defaulted on public loans, is accordingly misplaced, as it (like fraud) relates to responsibility in the handling of government funds. As the *Gee* panel recognized, "[s]tates undoubtedly must be able to terminate provider agreements in cases of criminal activity, fraud and abuse, and other instances of malfeasance." *Id.; see also Comm'r of Ind*., 699 F.3d at 979 ("[§1320a–7(b)] merely stipulates a particular ground for excluding a Medicaid provider; it does not imply that the states may establish any rule of exclusion and declare it a provider 'qualification' for purposes of §1396a(a)(23).").

As the *Gee* court explained, "[i]f it were otherwise, states could terminate Medicaid providers with impunity and avoid §1396a(a)(23)'s mandate altogether." 862 F.3d at 470. And indeed, if states were free to set their own criteria for providers to participate in Medicaid, no matter how untethered from their ability to provide Medicaid services, the Doe Plaintiffs' Free-Choice-of-Provider rights "would be hollow." *Id.* at 463; *see also Andersen*, 882 F.3d at 1236; *Comm'r of Ind.*, 699 F.3d at 978; *Betlach*, 727 F.3d at 970.[30] This argument is particularly compelling here, where Defendants not only attempt to terminate PPGC based on claims the district court found to be wholly unsupported, but also to terminate PPST and PPGT—separate entities who do not appear on the CMP video at all, and whose only claimed "misconduct" is affiliation with other, totally separate Planned Parenthood entities.

[30] Defendants rely on a small number of provisions elsewhere in the Medicaid Act that assign the state a role in determining whether a provider is "qualified" to determine that a patient can receive covered services during a period of "presumptive eligibility" based on the provider's determination that they are eligible for Medicaid but not yet enrolled. Def. Suppl. Br. at 42; 42 U.S.C. §§1396r-1(b)(2); 1396r-1c(2)(a); 1396r-1a(b)(3); 1396r-1b(b)(2). But these provisions, unlike the Free-Choice-of-Provider requirement, expressly define "qualified" with reference to the State's role. *See id*. Moreover, some of these provisions on their face appear to limit the bases on which a State may determine a provider not to be "qualified." *See, e.g.*, 42 U.S.C. §1396r-1c(2)(a) (defining "qualified entity" to mean any entity "determined by the State agency to be capable of making [eligibility determinations]" and noting that "Nothing in this paragraph shall be construed as preventing a State from limiting the classes of entities that may become qualified entities *in order to prevent fraud and abuse*") (emphasis added). For these reasons, these provisions do nothing to support Defendants' arguments.

Defendants read the Supreme Court's decision in *O'Bannon* to mean that patients may not bring a Free-Choice-of-Provider challenge to a state's determination that a provider is unqualified, regardless of the basis for the termination, and thus to require *Gee*'s reversal. But that case is inapposite for multiple reasons, and Defendants can point to *no* court that has interpreted it as they suggest. In *O'Bannon*, the Supreme Court considered whether §1396a(a)(23) conferred upon nursing home 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. 447 U.S. at 776 n.3, 784. First, in *O'Bannon* there was no claim that state authorities had closed the nursing home on an invalid ground not permitted by the Medicaid Act. Rather, as the panel correctly recognized, *Gee*, 862 F.3d at 460–61, the Court took it as a given that the facility was unqualified, and determined that its residents had no right to a hearing on whether an unqualified facility should be closed. *O'Bannon,* 447 U.S. at 785–88; *see Andersen*, 882 F.3d at 1231 ("[*O*]*'Bannon* addressed a different situation—one where no one contested that the nursing home was unqualified to perform the services."). Second, the question in *O'Bannon* was whether residents of a nursing home had a procedural due process right to a hearing in front of *state* authorities before those authorities closed the home, *O'Bannon*, 447 U.S. at 775—not whether they could bring a §1983 action in federal court. *O'Bannon* simply did

not consider whether the Medicaid Act supports a substantive statutory right. *See Gee*, 862 F.3d at 460; *Andersen*, 882 F.3d at 1231; *Comm'r of Ind.*, 699 F.3d at 977. *O'Bannon* therefore casts no doubt on the Doe Plaintiffs' Free-Choice-of-Provider challenge.

Defendants attempt to avoid the plain and absolute terms of §1396a(a)(23)(A) by relying on §1396a(p)(1), which authorizes states to terminate providers based on specific categories of misconduct such as crimes committed in the delivery of services, submission of false claims, or failure to comply with Medicaid regulations, and includes a savings clause that these grounds are "in addition to any other authority." Defendants suggests this savings clause is a wholesale authorization to disqualify providers for any reason established by state law. Def. Suppl. Br. at 40, 48.

But as the *Gee* Panel correctly recognized, this argument reads the savings clause "for more than it's worth." 862 F.3d at 464 (quoting *Comm'r of Ind.*, 699 F.3d at 979). "'[I]n addition to any other authority' signals only that what follows is a non-exclusive list of specific grounds . . . . It does not imply that the states have an unlimited authority to exclude providers for any reason whatsoever." *Id*. For this reason, courts have universally rejected Defendants' reading of §1396a(p)(1).[31]

[31] *Guzman v. Shewry*, 552 F.3d 941 (9th Cir. 2009), is not to the contrary. In that case the provider *was* terminated based on fraud and abuse allegations, specifically that he was importing "large quantities" of foreign, non-approved intrauterine devices,

Gee, 862 F.3d at 466; *Andersen*, 882 F.3d at 1230–31; *Betlach*, 727 F.3d at 971–72; *Comm'r of Ind.*, 699 F.3d at 979; *Bentley*, 141 F. Supp. 3d at 1220–21.

Finally, Defendants urge this Court to bar the Doe Plaintiffs from challenging the disqualification of their chosen providers because "other factors" show that Congress did not intend this outcome. Def. Suppl. Br. at 46–47. But none of these "factors" withstand scrutiny. Defendants express concern about "parallel tracks of adjudication" (state administrative remedies and a patient's federal-court challenge), *id*. at 47, but there are already parallel tracks of adjudication built into the Act, because HHS may initiate action against the state and the state may then seek judicial review in the federal courts. 42 U.S.C. §§1316(a)(2)–(5), (b); 1396c; 42 C.F.R. §§430.18, 430.35, 430.38, 430.60.

And Defendants' suggestion that allowing the Does' challenge would risk "burden[ing] the States with complex litigation" whenever it excludes a Medicaid provider, Def. Suppl. Br. at 47, has been disproven by the experience in the many circuits that have permitted individuals to bring those claims. Since the first appellate decision permitting enforcement of the Free-Choice-of-Provider requirement under §1983 (the Sixth Circuit's decision in *Harris* in March 2006), Plaintiffs are aware of only ten district court decisions involving lawsuits challenging the termination of

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implanting them in patients, and fraudulently billing them to Medicaid as approved devices. *See Betlach*, 727 F.3d at 973.

Medicaid providers through the Free-Choice-of-Provider requirement and §1983,[32] plus a handful of cases challenging other state policies using those statutes.[33] And it would be wrong to assume that Medicaid recipients—some of the poorest members of our society—are enthusiastic about the prospect of bringing lawsuits against states under §1983. *See* Def. Suppl. Br. at 46 (noting Medicaid participants are by definition low-income and lack resources to hire attorneys or experts). They would much prefer that states just follow the rules and allow them to obtain health care from qualified and willing providers.

[32] *Smith*, 236 F. Supp. 3d at 978; *Dzielak*, 2016 WL 6127980, at *1; *Planned Parenthood of Kan. & Mid-Mo. v. Mosier*, No. 2:16-cv-2284, 2016 WL 3597457, at *15 (D. Kan. July 5, 2016), *aff'd in part, vacated in part sub nom. Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205 (10th Cir. 2018); *Bader v. Wernert*, 178 F. Supp. 3d 703, 718–20 (N.D. Ind. 2016); *Bentley*, 141 F. Supp. 3d at 1217; *Selig*, 2015 WL 13710046, at *6; *Betlach*, 922 F. Supp. 2d at 864 (D. Ariz. 2013); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 794 F. Supp. 2d 892, 902 (S.D. Ind. 2011), *aff'd in part, rev'd in part*, 699 F.3d 962 (7th Cir. 2012); *G. ex rel. K. v. Hawai'i Dep't of Human Servs.*, No. 08-cv-551, 2009 WL 1322354, at *12 (D. Haw. May 11, 2009); *Baker*, 326 F. Supp. 3d 39 (D.S.C. 2018) (order granting temporary restraining order and preliminary injunction).

[33] *Women's Hosp. Found. v. Townsend*, No. 07-cv-711, 2008 WL 2743284, at *8 (M.D. La. July 10, 2008); *Kapable Kids Learning Ctr., Inc. v. Ark. Dep't of Human Servs.*, 420 F. Supp. 2d 956, 962 (E.D. Ark. 2005); *L.F. v. Olszewski*, No. 04-cv-73248, 2004 WL 5570462, at *7 (E.D. Mich. Nov. 1, 2004), *rev'd on other grounds and remanded sub nom. Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006); *Martin v. Taft*, 222 F. Supp. 2d 940, 979 (S.D. Ohio 2002).

III. Plaintiffs Prevail for the Additional Reasons Set Out in Their Panel-Stage Briefing

For these reasons *Gee* was rightly decided; the Free-Choice-of-Provider requirement is privately enforceable under §1983; and that right encompasses the Doe Plaintiffs' challenge to Defendants' termination of their chosen providers from the Medicaid program.

And for these reasons and the additional reasons set forth in Plaintiffs' briefing before the panel, *Gee* was correctly applied by the district court, and the preliminary injunction should be affirmed.

First, the allegations against PPGC (both in the Final Notice of Termination and in Defendants' improper post-hoc efforts to justify the termination) are baseless, as the district court properly found following a three-day evidentiary hearing. Panel Br. at 19–27, 37–43.

Second, even if true, these allegations would not provide a valid basis to terminate PPGT and PPST, which were terminated solely on the basis of their "affiliation" with PPGC. Panel Br. at 28, 43–46.

Third, arbitrary-and-capricious review does not apply to Doe Plaintiffs' federal statutory challenge, and if it does apply, is met. Panel Br. at 46–51.

And finally, the district court did not clearly err in finding the other preliminary injunction factors met, or in granting injunctive relief that extended to all of Plaintiffs' patients. Panel Br. at 52–55.

For these reasons, the preliminary injunction should be affirmed.

Respectfully submitted,

/s/ Jennifer Sandman

Jennifer Sandman
Planned Parenthood Federation of America, Inc.
123 William Street
New York, NY 10038
(212) 541-7800
(212) 247-6811 (telefacsimile)
jennifer.sandman@ppfa.org

Attorney for Plaintiffs-Appellees

April 8, 2019

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of April, 2019, I electronically filed the foregoing Supplemental Brief of Plaintiffs-Appellees with the clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to counsel for Defendants-Appellants and Amici Curiae.

/s/ Jennifer Sandman
Jennifer Sandman
Attorney for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) I hereby certify that:

1. The Supplemental Brief of Plaintiffs-Appellees complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,532 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f)
2. This Supplemental Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Microsoft Word Office 365 with Times New Roman, 14-point font.

Dated: April 8, 2019

/s/ Jennifer Sandman
Jennifer Sandman
Attorney for Plaintiffs-Appellees