Case: 17-50282 Document: 00514818735 Page: 1 Date Filed: 02/01/2019

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

MOTION TO STAY THE DISTRICT COURT'S INJUNCTION PENDING EN BANC CONSIDERATION

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Case: 17-50282 Document: 00514818735 Page: 2 Date Filed: 02/01/2019

TABLE OF CONTENTS

Case: 17-50282 Document: 00514818735 Page: 3 Date Filed: 02/01/2019

TABLE OF AUTHORITIES

Page(s)

Cases

Case: 17-50282 Document: 00514818735 Page: 4 Date Filed: 02/01/2019

Statutes

Other Authorities

Case: 17-50282 Document: 00514818735 Page: 5 Date Filed: 02/01/2019

INTRODUCTION

The district court entered a preliminary injunction to prevent a Texas agency from terminating the Medicaid provider agreements of Texas Planned Parenthood affiliates. This Court has now held, in a unanimous judgment, that the district court's preliminary injunction is unlawful. *See* App. 29. The Court explained that the district court applied the wrong legal standard, and that its "procedure was incompatible with the proper standard." *See* App. 22-29. Further, the district court improperly considered materials outside the record. *See* App. 22, 23, 27, 29. For these reasons, the Court held that "the basis for [the] preliminary injunction cannot be sustained." App. 29.

The State has now sought en banc review of an antecedent question: Whether the qualified-provider provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(23), allows private individuals to bring an action to challenge a state agency's determination that a service provider is not "qualified" under that statute. The State has asked the en banc Court to overrule *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017).

Whether and how the en banc Court chooses to resolve that threshold question cannot rehabilitate the district court's manifestly unlawful injunction. The State therefore moves the Court to stay that injunction pending resolution of the pending petition for rehearing en banc and any related proceedings that might follow. *See* Fed. R. App. P. 8(a)(2). In light of the panel's decision unequivocally declaring the injunction unlawful, a stay is easily warranted. *See Nken v. Holder*, 556 U.S. 418 (2009).

Case: 17-50282 Document: 00514818735 Page: 6 Date Filed: 02/01/2019

BACKGROUND

In early 2015, over eight hours of undercover video was filmed at Planned Parenthood Gulf Coast's facility in Houston, Texas. ROA.5846-6208 (video transcript); ROA at DX-2 (video footage). This video footage demonstrated violations of accepted medical and ethical standards in numerous ways, and the Texas Health and Human Services Commission Office of Inspector General (OIG) determined that Texas Planned Parenthood affiliates could no longer could serve as qualified providers in the Texas Medicaid program. *See* ROA.1210-11. As a result, OIG terminated their provider agreements. ROA.1209-14.

The Texas Planned Parenthood affiliates ("Provider Plaintiffs") and several individual plaintiffs brought suit to challenge that termination. Following a hearing, ROA.22-23, the district court below determined that the plaintiffs had satisfied the criteria necessary to obtain a preliminary injunction blocking the termination, ROA.3776-3819. The State appealed, raising two main issues: first, that the plaintiffs lack a private right of action; and second, that the district court's injunction was unlawful. *See* App. 12.

The panel determined that under *Gee*, 862 F.3d at 459-60, the individual plaintiffs have a private right of action under 42 U.S.C. § 1396a(a)(23), and that it was "constrained" by *Gee*'s conclusion, App. 2. But the panel vacated the injunction, holding that the district court abused its discretion by reviewing OIG's termination decision de novo, rather than under arbitrary-and-ca-

Case: 17-50282 Document: 00514818735 Page: 7 Date Filed: 02/01/2019

pricious review, and by considering evidence outside of the administrative record. App. 17, 29. The court remanded the case to the district court for application of the correct standard to the evidence in the administrative record alone. App. 29. Judge Jones wrote a separate concurrence to outline the reasons that *Gee*'s holding was incorrect, and requested rehearing en banc to "reconsider whether Section 1396a(a)(23) creates a private right of action on behalf of Medicaid patients to challenge the termination of their providers' contracts by the States." App. 36 (Jones, J., concurring). The State has requested en banc review for the same issue.

Under the district court's injunctive relief, which was issued in January 2017, the State has been forced to retain the Provider Plaintiffs as qualified Medicaid providers and allow them to provide medical services to Texas Medicaid recipients. ROA.3776-3819. Under the injunction, the State has already been forced to pay the Provider Plaintiffs millions of dollars in Medicaid service reimbursement funds. *See* ROA.4315 (in 2016, Texas paid approximately $3.4 million to the Provider Plaintiffs in Medicaid reimbursements).

ARGUMENT

The Court should stay the district court's injunction pending the resolution of the en banc petition and any subsequent related proceedings. "An appellate court's power to hold an order in abeyance while it assesses the legality of the order has been described as 'inherent.'" *Nken*, 556 U.S. at 426 (citation omitted). The Supreme Court has set out a four-part test for assessing whether to stay a district court order pending appeal. *See id.*; *Veasey v. Abbott*,

Case: 17-50282 Document: 00514818735 Page: 8 Date Filed: 02/01/2019

870 F.3d 387, 391 (5th Cir. 2017) (per curiam). The first consideration is "whether the stay applicant has made a strong showing that he is likely to succeed on the merits." *Nken*, 556 U.S. at 426. The second is "whether the applicant will be irreparably injured absent a stay." These first two factors "are the most critical." *Id.* at 434. Less "critical," but still relevant, are "whether issuance of the stay will substantially injure the other parties interested in the proceeding," and "where the public interest lies." *Id.* at 426; *see also City of El Cenizo v. Texas*, No. 17-50762, 2017 WL 4250186, at *1-2 (5th Cir. Sept. 25, 2017) (per curiam) (adopting *Nken* four-part test).

In light of the panel decision declaring the district court's preliminary injunction unlawful, the injunction should be stayed while further appellate proceedings unfold. In particular, the panel's decision declaring the injunction invalid establishes that the State—not plaintiffs—are likely to prevail on the merits. Plaintiffs face no irreparable harm if the district court's unlawful order is stayed. No other parties face irreparable injury. And the public interest squarely lies with allowing Texas to immediately remove an unethical and unqualified provider from its Medicaid program.[1]

[1] Fed. R. App. P. 8(a)(2) allows the State to seek a stay in this Court where moving in the district court "would be impracticable." *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410-11 (5th Cir. 2013). That standard is met here because this Court already has exercised its appellate jurisdiction and determined that the district court's injunction is unlawful. In addition, the Court is currently considering the State's pending petition to rehear a portion of this case en banc. Under these circumstances, this Court is best positioned to determine whether to stay the district court's unlawful injunction pending the remainder of any appellate proceedings. *See id.* (staying district court's injunction pending appeal despite no request for stay in the district court).

Case: 17-50282 Document: 00514818735 Page: 9 Date Filed: 02/01/2019

I. In Declaring the Injunction Unlawful, This Court Has Already Decided That the State Will Succeed on the Merits of its Appeal.

The panel decision already held the district court's injunction is unlawful. The district court strayed from the record, applied the wrong legal standard, and failed to follow proper procedures. *See* App. 22-29. This Court has thus already established not just that the State is *likely* to succeed on the merits of its appeal, but rather, that the State *has succeeded* and *will continue to succeed* in establishing that the injunction cannot stand. *See Nken*, 556 U.S. at 426. As this "most critical" factor is now conclusively resolved, the Court should not permit a clearly unlawful injunction to persist any longer. *See id.*[2]

II. The Plaintiffs Will Not Be Irreparably Harmed Absent a Stay.

The district court's injunction was issued on behalf of the individual plaintiffs only. ROA.3796, 3932. 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." *Abbott*, 734 F.3d at 419.

But there is no evidence in the record that the individual plaintiffs will be unable to receive medical care at the facility of their choice if the State ceases to provide Medicaid payments to the Provider Plaintiffs—especially when these providers have not stated that they will refuse to serve these individuals

[2] Even if the district court had applied the correct legal standard, the plaintiffs still could not prevail. The only probative evidence in the administrative record is the undercover videos, and that evidence leaves no doubt that the State's termination decision was proper. *See* App. 7-10.

Case: 17-50282 Document: 00514818735 Page: 10 Date Filed: 02/01/2019

or individuals similarly situated if they do not receive Medicaid reimbursement. Thus, the individual plaintiffs cannot establish irreparable harm. *See Nken*, 556 U.S. at 426.

At the preliminary-injunction hearing, Planned Parenthood Greater Texas (PPGT) CEO Ken Lambrecht testified that their doors will stay open even if they do not get Medicaid funds from Texas. ROA.4124. Planned Parenthood South Texas (PPST) CEO Jeffrey Hons was asked directly whether PPST will provide care to Medicaid patients even if Medicaid funds are withheld, and he refused to give a yes or no answer:

> Q. So you will be able to provide care for some of the individuals if Medicaid funds are withheld?
>
> A. We'll just have to wait and see, won't we?

ROA.4297. The Provider Plaintiff CEOs have, at most, testified that they might have to make changes to their operations if their Medicaid provider agreements are terminated. ROA.4114, 4133-34, 4302. That is not enough to establish that the individual plaintiffs will actually suffer irreparable harm should Provider Plaintiffs' termination from Texas Medicaid become effective.

Because this Court has already declared that the State succeeds on the merits of its appeal, and because no individual plaintiff will suffer irreparable harm from a stay of the injunction, the two "most critical" *Nken* factors conclusively favor the State. 556 U.S. at 426; *see also ODonnell v. Goodhart*, 900

Case: 17-50282 Document: 00514818735 Page: 11 Date Filed: 02/01/2019

F.3d 220, 223 (5th Cir. 2018) ("The first two factors are the most critical." (citing *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016)).

III. No Other Parties Will Be Irreparably Harmed.

Nor is there any evidence in the record to demonstrate that Provider Plaintiffs will suffer irreparable harm if the district court's improper preliminary injunction is stayed pending en banc resolution. If the Provider Plaintiffs are terminated from the Texas Medicaid program, they may experience lower revenue, but this Court has squarely held that such "monetary injury" does not support injunctive relief. *See Deerfield Med. Ctr. v. City of Deerfield Beach,* 661 F.2d 328, 338 (5th Cir. 1981) ("An injury is 'irreparable' only if it cannot be undone through monetary remedies."); *City of Meridian v. Algernon Blair, Inc.*, 721 F.2d 525, 529 (5th Cir. 1983) (same). The fact that an economic injury may be rectified weighs "heavily against a claim of irreparable harm." *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012).

That is especially so where, as here, Medicaid plays an insignificant role in the Provider Plaintiffs' finances. In 2013, PPGT had total revenue of $33,922,566 and net assets of $41,839,154. ROA.8688. PPGT received $950,000 in reimbursements from Texas Medicaid in 2016. ROA.4123-24. In 2013, PPST had total revenue of $4,252,525 and net assets of $3,749,103. ROA.8295. PPST received $350,000 in reimbursements from Texas Medicaid in 2016. ROA.4289. In 2013, PPGC had total revenue of $19,667,024 and net assets of $43,548,729. ROA.7966. In 2016, the total revenue for PPGC's

Case: 17-50282 Document: 00514818735 Page: 12 Date Filed: 02/01/2019

research department alone was $2.5 million dollars—more than the $2.2 million that they received that year in reimbursements from Texas Medicaid. ROA.4236, 4135.

Nothing in the record suggests that the loss of this revenue would leave Provider Plaintiffs wholly unable to continue their operations. In fact, Provider Plaintiffs have insisted in sworn testimony that the opposite is true. *See* ROA.4114, 4133-34, 4302 (testimony of Provider Plaintiff CEOs that at most, they might change their operations if their Medicaid provider agreements are terminated); ROA.4124 (testimony that Planned Parenthood Greater Texas will remain in operation even without Texas Medicaid funds).

Nor will Medicaid patients be left without available providers for the services they seek. In Texas, there are 141,000 providers enrolled in the Medicaid program, including 29,000 primary-care physicians and over 3,300 obstetrician/gynecologists. ROA.4511, 4515. These other providers together perform 99.7% of all Medicaid services in the State. ROA.4518.

There are also other health programs funded by the State that Medicaid recipients may participate in. Texas spends an additional $210 million annually on women's-health programs that cover family-planning services for individuals between the ages of 15 and 64, depending on the program. ROA.4442, 4446. In 2016, Texas women's-health programs served approximately 363,000 women. ROA.4446. The providers in these programs offer the same services as Planned Parenthood clinics, including pelvic exams, contracep-

Case: 17-50282 Document: 00514818735 Page: 13 Date Filed: 02/01/2019

tives, sexually-transmitted-infection screenings, and breast- and cervical-cancer screenings and diagnostic tests. ROA.4443-44. These programs also provide additional services to care for conditions found to affect reproductive health and not provided by Planned Parenthood, such as the screening, diagnosis, and treatment of hypertension, cholesterol, and diabetes. ROA.4444. Provider Plaintiffs are thus not necessary to providing services to Medicaid recipients, and in fact, nearly all Medicaid recipients are already receiving services elsewhere, *see* ROA.4518. No irreparable harm will result from termination of Provider Plaintiffs' Medicaid provider agreements.

IV. The State Will Be Irreparably Harmed Absent a Stay, and the Public Interest Favors Texas's Ability to Terminate Provider Agreements with an Organization That No Longer Is Qualified Under the Texas Medicaid Program.

By contrast, both the State and Medicaid recipients will suffer irreparable harm if the State is forced to continue complying with an unlawful injunction. And keeping the invalid injunction in place is contrary to the public's interest. "Because the State is the appealing party, its interest and harm merge with that of the public." *Veasey*, 870 F.3d at 391 (citing *Nken*, 556 U.S. at 435).

Unless the preliminary injunction is stayed, the State will be forced to keep the Provider Plaintiffs as Medicaid providers, despite the State's determination that they violated medical and ethical standards, *see* ROA.1209-14, which is likely to be upheld, *see* p.7 n.2 *supra*. When a State is enjoined from enforcing the law, "the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Veasey*, 870 F.3d at 391

Case: 17-50282 Document: 00514818735 Page: 14 Date Filed: 02/01/2019

(citing *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers)); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). Medical providers hold a special position of trust in our society and therefore must adhere to the highest standards of accountability. A medical provider that is willing to transgress medical and ethical standards should not continue to receive the benefit of state or federal monies, and staying the preliminary injunction will allow the State to fulfill its obligation under federal law and protect the integrity of the Medicaid program, which is in the public's interest. *See* 42 U.S.C.A. § 1396a(a)(9)(A), (B); *see also Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) ("There can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession.'" (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)); *Barsky v. Bd. of Regents of Univ. of N.Y.*, 347 U.S. 442, 451 (1954) (the State has "legitimate concern for maintaining high standards of professional conduct" in the practice of medicine).

In addition to the irreparable harm of being unable to protect the integrity of the Medicaid program, and potential harm to Medicaid recipients who may receive services from an unqualified, unethical provider, the State will also be forced continue to pay the Provider Plaintiffs for Medicaid services provided until the petition for rehearing en banc is resolved. Based on the current rate of requests for reimbursement, that could total an additional 1.7 million dollars for every six months the Provider Plaintiffs remain forcibly qualified Medicaid

Case: 17-50282 Document: 00514818735 Page: 15 Date Filed: 02/01/2019

providers. *See, e.g.*, ROA.4315 (in 2016, Texas paid approximately $3.4 million to the Provider Plaintiffs in Medicaid reimbursements).

There is no justification for continuing to prevent the State from terminating these providers when this Court has already determined that the district court's preliminary-injunction order was improper. *See* App. 29. The State's petition for rehearing en banc, just like Judge Jones's request for rehearing in her concurrence, *see* App. 36, asks the Court to review the issue of whether there is a private right of action under the qualified-provider provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(23). Whether and how the Court might resolve that issue cannot rehabilitate the district court's manifestly unlawful injunction, and thus, the injunction should be stayed to prevent continuing harm to the State, Medicaid recipients, and the public's interest.

Case: 17-50282 Document: 00514818735 Page: 16 Date Filed: 02/01/2019

Conclusion

This Court should grant the State's motion and stay the district court's preliminary injunction pending resolution of the petition for en banc review and any subsequent related proceedings.

Respectfully submitted.

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Case: 17-50282 Document: 00514818735 Page: 17 Date Filed: 02/01/2019

Certificate of Conference

Prior to filing, my office conferred with Jennifer Sandman and Thomas Watkins, counsel for Appellees. Ms. Sandman stated that Appellees oppose this motion and will be filing a written opposition.

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Certificate of Service

On February 1, 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

Case: 17-50282 Document: 00514818735 Page: 18 Date Filed: 02/01/2019

Certificate of Compliance

This Motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2729 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
Kyle D. Hawkins

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
January 17, 2019

Lyle W. Cayce
Clerk

No. 17-50282

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.

CHARLES SMITH, in his official capacity as Executive Commissioner of HHSC; SYLVIA HERNANDEZ KAUFFMAN, in her official capacity as Acting Inspector General of HHSC,

Defendants - Appellants

Appeal from the United States District Court
for the Western District of Texas

Before JOLLY, JONES, and HAYNES[1], Circuit Judges.

EDITH H. JONES, Circuit Judge:

The Texas Health and Human Services Commission's Office of Inspector General ("OIG") sought to terminate the Medicaid provider agreements of Planned Parenthood affiliates throughout the state. The agency based this

[1] Judge Haynes concurs in the judgment only.

decision largely on undercover video footage of graphic discussions with Planned Parenthood personnel concerning the prospective sale of liver, thymus, and neural tissue from fetuses aborted during the second trimester of pregnancy. The videos justified terminating the affiliates' provider agreements, the agency contended, because they indicated noncompliance with accepted medical and ethical standards. Three Planned Parenthood affiliates ("Provider Plaintiffs") and several Medicaid beneficiaries ("Individual Plaintiffs") sought a preliminary injunction against the termination decision. The district court held that the Individual Plaintiffs possessed a private right of action under the "qualified-provider" provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(23), and issued a preliminary injunction preventing Texas from terminating Medicaid funding to the Planned Parenthood facilities statewide. The state agency has appealed.

We are constrained to affirm the district court's conclusion that the plaintiffs possess a private right of action, as held by this court in *Planned Parenthood Gulf Coast v. Gee*, 862 F.3d 445 (5th Cir. 2017) (hereafter, "*Gee*") (*cert denied*, 139 S. Ct. 408). But Judge Jones, in a separate concurrence, urges rehearing en banc on that issue, which has divided the appellate courts. We vacate the preliminary injunction and remand for the district court to limit its review to the agency record under an arbitrary-and-capricious standard.

I. BACKGROUND

A. Planned Parenthood Affiliates

The Provider Plaintiffs operate health centers and provide family planning services to about 12,500 Medicaid patients and the general public. Planned Parenthood Gulf Coast ("PPGC") runs seven health centers in the Houston area. Planned Parenthood Greater Texas ("PPGT") and Planned

Parenthood South Texas ("PPST")[2] operate an additional 23 health centers. As affiliates of Planned Parenthood Federation of America ("PPFA"), they must adhere to various organizational standards to use the Planned Parenthood name and trademark.

Among the Provider Plaintiffs, only PPGC has sold fetal tissue for use in outside research.[3] Melissa Farrell has served as PPGC's Research Director since 2006. In this role, she provides information about PPGC's services to outside researchers, develops budgets and contracts, and facilitates Institutional Review Board ("IRB") submissions. Ms. Farrell has been involved in several outside studies involving fetal tissue research. In 2006, PPGC participated in a first-trimester fetal tissue study. A second study, conducted in conjunction with the University of Texas Medical Branch in Galveston ("UTMB"), ran from 2010 to 2011 and concerned first-trimester placental tissue.

To facilitate these studies, Ms. Farrell stated that she would modify certain clinical procedures and require consent from the abortion patients whose procedures yielded fetal tissue. Both studies required that fetal tissue be processed and packaged following the abortions. The UTMB study additionally required PPGC to use a sterile process to collect the placental

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[2] PPST is technically an umbrella organization comprising three other named plaintiffs: Planned Parenthood Cameron County, Planned Parenthood San Antonio, and Planned Parenthood South Texas Surgical Center.

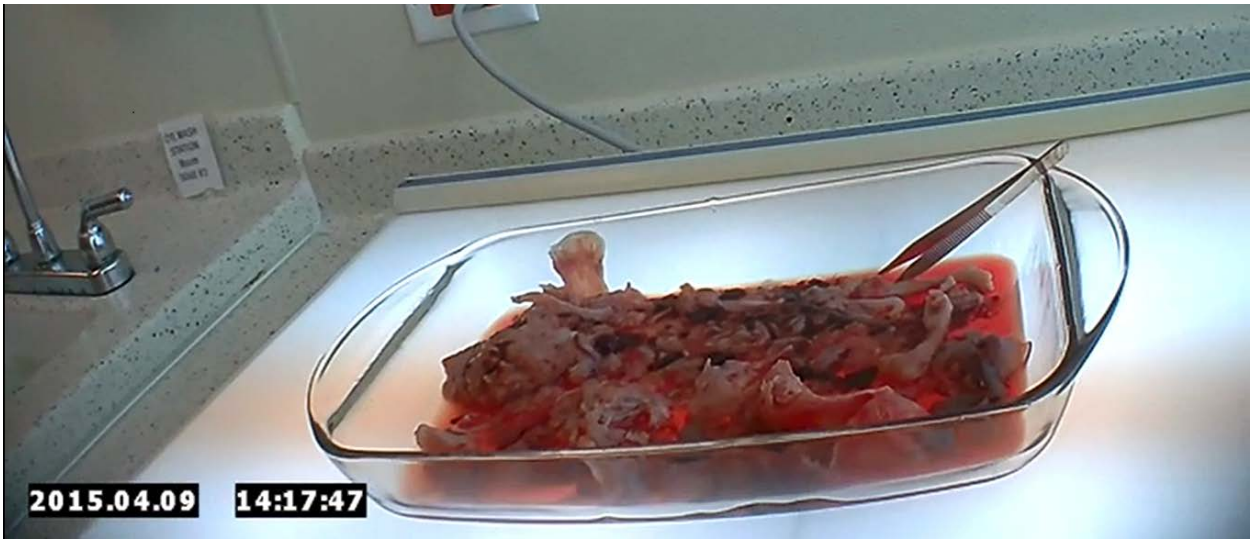
[3] PPGC itself does not technically provide abortions. But an affiliated entity—located in the same building as PPGC's headquarters and called Planned Parenthood Center For Choice ("PPCFC")—does provide abortions. PPGC's own research department handles all of PPCFC's research agreements because PPCFC has no separate research department or personnel of its own. The district court pretermitted the question whether PPGC and PPCFC were effectively a single organization.

tissue after the abortion. Dr. Regan Theiler, a researcher involved in the UTMB project, also performed abortions at PPGC's facility.

Ms. Farrell communicated with Baylor College of Medicine regarding another fetal tissue donation project from 2013 through 2015. They discussed IRB approval, next steps, and draft contract terms, but no contract or budget was finalized.

B. Undercover Videos and Ensuing Investigations

In 2015, the Center for Medical Progress ("CMP"), a pro-life organization, released more than eight hours of undercover videos disclosing conversations held at the PPGC headquarters. In the CMP videos, two individuals posed as representatives from a fetal tissue procurement company. They claimed to be interested in purchasing liver, thymus, and neural tissue from fetuses aborted during the second trimester of pregnancy. Ms. Farrell features prominently in the video, as she discusses the possibility of a research partnership, provides a tour of PPGC's surgical facilities, and displays tissue samples from recently aborted fetuses.



Dr. Tram Nguyen, the director of PPGC's abortion facility, confirmed many of Ms. Farrell's statements.

The release of these graphic videos prompted federal and state investigations into numerous Planned Parenthood affiliates. The Harris County District Attorney, the Texas Rangers, and the Houston Police Department investigated but brought no charges. Likewise, the Texas Attorney General's Office, the Texas Department of State Health Services, and the Texas Health and Human Services Commission conducted investigations.

Additionally, the U.S. House of Representatives formed a Select Investigative Panel ("Select Panel") to investigate abortion providers' medical practices involving fetal tissue procurement. Representative Marsha Blackburn of Tennessee, a Republican, was named Chair of the bipartisan Select Panel. In December 2016, Blackburn emailed the Texas Attorney General Ken Paxton evidence the Select Panel had gathered about PPGC and asked Texas to investigate possible violations of Tex. Penal Code § 48.02, which prohibits the purchase and sale of human organs, and Tex. Penal Code § 37.08, which prohibits making a false report to a law enforcement officer.

C. Termination of Medicaid Provider Agreements

As participants in the Texas Medicaid program,[4] the Provider Plaintiffs and each of their related health centers signed Medicaid provider agreements and agreed to comply with all Texas Medicaid policies and applicable state and federal regulations. The Provider Plaintiffs received $3.4 million from Texas Medicaid funds.[5] Texas Health and Human Services Commission Office of Inspector General ("OIG" or "the agency") oversees compliance with state

[4] Texas Medicaid only pays for abortions under narrow circumstances—specifically, when a woman's life is in danger or for victims of rape and incest.

[5] This amount is a smidgen of the three affiliates' combined revenues of approximately $57 million in 2013.

Medicaid policies and may conduct investigations and terminate Medicaid provider agreements for noncompliance.

OIG may terminate a Medicaid provider agreement when "prima facie evidence" establishes that a provider has committed a "program violation" or is "affiliated with a person who commits a program violation." 1 Tex. Admin. Code § 371.1703(c), (c)(6)-(8). A "program violation" includes any violation of federal law, state law, or the Texas Medicaid program policies. For instance, as explained in the Texas Medicaid Provider Procedures Manual, a provider violates Texas Medicaid rules if it fails to offer health services in accordance with "accepted medical community standards." *See* 1 Tex. Admin. Code § 371.1659(2).

In October 2015, OIG sent each Provider Plaintiff a Notice of Termination, stating that each was "no longer capable of performing medical services in a professionally competent, safe, and legal manner." The Notice listed the bases for termination and stated that, unless the Provider Plaintiffs responded within 30 days, a Final Notice of Termination would issue.

Instead of responding to the Notice and pursuing administrative and state judicial avenues of relief, the Provider Plaintiffs sued in federal court to block the termination. The Individual Plaintiffs—Texas Medicaid beneficiaries who have received services from the Provider Plaintiffs—joined in this challenge. On the state agency's motion, the district court stayed the proceedings for almost a year pending a Final Notice of Termination. OIG sent the Final Notice on December 20, 2016.

The Final Notice states that the Inspector General had determined that the Provider Plaintiffs were "not qualified to provide medical services in a professionally competent, safe, legal and ethical manner under the relevant provisions of state and federal law pertaining to Medicaid providers." The

Final Notice bases this conclusion on the CMP videos and evidence provided by the Select Panel. The Final Notice states that the Inspector General consulted with the Chief Medical Officer, who reviewed the evidence and concluded that PPGC had violated "generally accepted medical standards, and thus [was] not qualified to provide medical services."

The Final Notice then specifies the "numerous violations of generally accepted standards of medical practice" established by the CMP video, including "a history of deviating from accepted standards to procure samples that meet researcher[s'] needs" and "a history of permitting staff physicians to alter procedures to obtain targeted tissue samples needed for their specific outside research." The Final Notice also states that evidence establishes that PPGC engaged in misrepresentations regarding fetal tissue procurement. The Final Notice concludes that under OIG's regulations, affiliates of a terminated entity are also subject to termination. *See* 1 Tex. Admin. Code § 371.1703(c)(7).

D. Court Proceedings

After reviewing the Final Notice, the plaintiffs filed an amended complaint and a new motion for a preliminary injunction. The district court conducted a three-day evidentiary hearing, during which it reviewed the CMP videos and heard testimony from medical and ethics experts on both sides. The plaintiffs offered testimony of the Provider Plaintiffs' CEOs, Ms. Farrell, and PPGC's Medical Director. The agency offered testimony of the Inspector General, OIG's Chief Medical Officer, an expert in obstetrics and gynecology, and a bioethics expert.

Much of the evidentiary hearing consisted of review and analysis of clips from the CMP videos. The agency focused on evidence that PPGC had violated federal regulations relating to fetal tissue research by altering abortion procedures for research purposes or allowing the researchers themselves to be

involved in performing abortions to harvest their preferred tissue samples. *See* 42 U.S.C. § 289g-1(c)(4) (requiring researchers to certify that they "had no part in any decisions as to the timing, method, or procedures used to terminate the pregnancy made solely for the purposes of the research"); 45 C.F.R. § 46.204(i) (for research involving pregnant women or fetuses, requiring that "[i]ndividuals engaged in the research will have no part in any decisions as to the timing, method, or procedures used to terminate a pregnancy"); 42 U.S.C. § 289g-1(b)(2)(A)(ii) (requiring researchers to certify that "no alteration of the timing, method, or procedures used to terminate the pregnancy was made solely for the purposes of obtaining the tissue"). The plain purposes of the regulations are to prevent conflicts of interest between the researcher and patients and to eliminate any temptation to place research studies above the patients' medical needs. In addition to federal regulations, state regulations authorize sanctions for providers who fail to adhere to "accepted medical community standards." *See* 1 Tex. Admin. Code § 371.1659(2).

Various of Ms. Farrell's statements were offered as evidence that PPGC had violated or is willing to violate these standards. For example, at one point in the video, Ms. Farrell responds to questions about whether PPGC has "physicians who would be able to change the procedure a bit" for research purposes, and Ms. Farrell says, "Yep." She then adds:

> Yes. And it will depend. Obviously the change in the procedure will have to be where it's not going to put the patient at more risk . . . prolong the procedure putting her at more risk, and altering the procedure where we leave content in the patient, which obviously we're trying to get . . . and that's something we'll have to discuss, you know, with the docs . . . and see how they can do it. Because some of our[] doctors in the past have projects, and they're collecting the specimens so they do it in a way that they get the best specimen. So I know it can happen.

Later in the video, Ms. Farrell identifies Dr. Theiler, a participant in the UTMB study, as someone who would be a good reference. She explains:

> Yeah. So she knows what's involved in modifying what we need to do to get you the specimens that are intact because she's done it. . . . And she was doing those here.

Dr. Nguyen confirmed that the PPGC abortion facility can obtain intact liver and thymus. The doctor stated, sarcastically, that while federal law (prohibiting partial birth abortions) restricts a facility from intentionally retrieving an intact fetus, PPGC can make it happen by signing a form that they did not so "intend." Nguyen also stated that obtaining intact specimens of liver, thymus, and neural tissue depends upon the amount of cervical dilation of the patient and the patient's pain tolerance. The doctor noted risks associated with fetal tissue procurement that PPGC is willing to take because "it is for a good cause." The doctor acknowledged that two particular PPGC doctors can alter the abortion procedure to meet a researcher's request. Relying on these statements, others like them, and their expert testimony, OIG sought to justify its termination decision.

The plaintiffs' live witnesses, on the other hand, denied that PPGC ever altered abortion procedures for research purposes. Ms. Farrell herself testified that, in the videos, she was actually discussing changes to clinical operations and not changes to the abortion procedures themselves.

Following the hearing, the district court issued a memorandum and order granting the plaintiffs' motion for a preliminary injunction. The district court held that the Individual Plaintiffs possessed a private right of action to challenge OIG's termination decision. Analyzing OIG's evidence of PPGC's program violations, the district court credited the plaintiffs' self-justifying explanations. The court found that even in the light most favorable to the agency, the videotaped discussions were ambiguous and open to interpretation.

The district court stated, inaccurately, that the CMP video had not been authenticated and suggested that it may have been edited.[6] The district court also noted that neither the Inspector General nor the Medical director had expert knowledge concerning abortion procedures. And the court discounted Ms. Farrell's videotaped statements because she claimed on the witness stand that she really had no personal knowledge of the medical aspects of abortion procedures and had never even been in the room when an abortion was performed.

While the court felt free to credit all of the trial testimony from the Provider Plaintiffs—none of which had been offered during the state administrative procedures—the court bound the IG solely to the administrative record and expressly refused to consider any support for termination "not included in the Final Notice and not part of the Inspector General's termination decision." Having thus narrowed the evidence, the court concluded that OIG "did not have prima facie . . . evidence, or even a scintilla of evidence, to conclude the bases of termination set forth in the Final Notice merited finding the Plaintiff Providers were not qualified." The agency timely appealed.

II. STANDARD OF REVIEW

"A preliminary injunction is an 'extraordinary remedy.'" *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 536 (5th Cir. 2013) (quoting *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009)). "To be entitled to a

[6] In fact, the record reflects that OIG had submitted a report from a forensic firm concluding that the video was authentic and not deceptively edited. And the plaintiffs did not identify any particular omission or addition in the video footage. Moreover, the district court also suggested that there was no evidence that any of PPGC's research was federally funded, so the regulations relied on by OIG might be inapplicable. But the record actually establishes that the UTMB study was funded by the National Institute of Health.

preliminary injunction, the applicants must show (1) a substantial likelihood that they will prevail on the merits, (2) a substantial threat that they will suffer irreparable injury if the injunction is not granted, (3) their substantial injury outweighs the threatened harm to the party whom they seek to enjoin, and (4) granting the preliminary injunction will not disserve the public interest." *Tex. Med. Providers Performing Abortion Servs. v. Lakey,* 667 F.3d 570, 574 (5th Cir. 2012) (brackets and citations omitted). The party seeking preliminary injunctive relief must clearly carry the burden of persuasion on all four elements. *Id.* This court "review[s] a preliminary injunction for abuse of discretion, reviewing findings of fact for clear error and conclusions of law *de novo*." *Texans for Free Enter.*, 732 F.3d at 537. When a court applies incorrect legal principles, it abuses its discretion. *See Atchafalaya Basinkeeper v. United States Army Corps of Engineers*, 894 F.3d 692, 696 (5th Cir. 2018).

III. DISCUSSION

The following discussion demonstrates that the district court erred in evaluating the evidence *de novo*, in its peculiarly asymmetrical way, rather than under the arbitrary and capricious standard, and in applying *Gee*'s reasoning to its determination of a "qualified" provider in this context. For those reasons, the court erred legally and Appellees are unable to show a likelihood of success on the merits of their claim. Accordingly, it is unnecessary for us to address the other elements of preliminary injunctive relief.

The Medicaid program exemplifies cooperative federalism—a partnership between federal and state agencies to provide medical services to needy individuals. The federal government shares the costs of funding the program with participating states. *Atkins v. Rivera*, 477 U.S. 154, 156–57, 106 S. Ct. 456, 2458–59 (1986). In exchange for federal funds, the states must

"agree[] to spend them in accordance with congressionally imposed conditions." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S Ct. 1378, 1382 (2015).

Under the Medicaid Act's "qualified-provider" provision, "[a] State plan for medical assistance must . . . provide that [ ] any individual eligible for medical assistance . . . may obtain such assistance from any institution . . . qualified to perform the service or services required . . . who undertakes to provide him such services." 42 U.S.C. § 1396a(a)(23). The Supreme Court has held that this provision "gives recipients the right to choose among a range of qualified providers, without government interference." *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785, 100 S. Ct. 2467, 2475 (1980).

Relying on this court's decision in *Gee*, the district court concluded that the "qualified-provider" provision grants the Individual Plaintiffs a right of action to challenge OIG's termination of the Provider Plaintiffs' Medicaid agreements. 862 F.3d 445 (5th Cir. 2017). The district court then issued a preliminary injunction against the agency after holding that the plaintiffs met the criteria for extraordinary relief.

On appeal, OIG raises two principal arguments: the plaintiffs lack a private right of action because *Gee* does not control this case; and the district court abused its discretion in concluding that the plaintiffs were likely to succeed on the merits of their challenge because, *inter alia*, the court erroneously applied *de novo* review in evaluating OIG's termination decision instead of limiting its review to the agency record under the deferential arbitrary-and-capricious standard.

A. Private Right of Action

In *Gee*, a divided panel of this court held that, under some circumstances, 42 U.S.C. § 1396a(a)(23) can afford Medicaid beneficiaries a private right of action to challenge a state's erroneous termination of Medicaid provider

agreements. This "free choice of provider" provision mandates that "any individual eligible for medical assistance…may obtain such assistance from any institution…or person, qualified to perform the service or services required…." *Gee* involved a decision by the Louisiana Department of Health and Hospitals ("LDHH") to terminate the Medicaid provider agreements of two PPGC-affiliated clinics operating in Louisiana. 862 F.3d at 450–52. Although the OIG, as will be seen, attempts to distinguish *Gee,* we are constrained to follow that decision as the law of this circuit.

In *Gee,* LDHH advanced three reasons for terminating the provider agreements: (1) PPGC's settlement of several qui tam False Claims Act lawsuits, in which PPGC disclaimed all liability; (2) unspecified misrepresentations by PPGC in its letters to LDHH; and (3) a pending investigation of PPGC by LDHH and the Louisiana Office of Inspector General. *See id*. at 453. As in this case, PPGC and several Medicaid beneficiaries bypassed state administrative procedures and sued LDHH under 42 U.S.C. § 1983, arguing that PPGC's clinics were, in fact, "qualified" and that LDHH had failed to identify any valid ground under federal or state law for terminating the two clinics. The *Gee* majority agreed.

The court held, joining the Sixth, Seventh, and Ninth Circuits, that Section 1396a(a)(23) can provide Medicaid beneficiaries with a right of action to challenge a state's termination decision that is unrelated to a provider's qualifications. *See id*. at 462.[7] The court relied on the definition of "qualified"

[7] *See Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012); *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006). After *Gee* was issued, the Eighth Circuit held that Section 1396a(a)(23) does *not* afford a private right of action. *See Planned Parenthood of Ark. & E. Okla. v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017). Then the Tenth Circuit joined the circuit majority in affirming a private right of action. *Planned Parenthood of Kansas and Mid-Missouri v. Andersen*, 882 F.3d 1205 (10th Cir. 2018).

cited by other circuits: "[t]o be 'qualified' in the relevant sense is to be capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner." *See id.* at 462 (quoting *Planned Parenthood of Ind.*, 699 F.3d at 978). The court then determined that none of LDHH's asserted justifications for terminating the Medicaid provider agreements implicated whether the health clinics were "qualified" under this definition. *See id.* at 470.

OIG argues that *Gee* is distinguishable. Specifically, the agency suggests that *Gee* must be narrowly construed to prevent conflict with the Supreme Court's decision in *O'Bannon v. Town Court Nursing Center,* 447 U.S. 773, 100 S. Ct. 2467 (1980). In *O'Bannon*, the Supreme Court held that patients lacked a private right of action under Section 1396a(a)(23) to challenge the state agency's termination of a nursing home's Medicaid provider agreements for failure to meet statutory and regulatory standards. The Court asserted that the Medicaid Act "clearly does not confer a right on a recipient to enter an unqualified home and demand a hearing to certify it, nor does it confer a right on a recipient to continue to receive benefits for care in a home that has been decertified." *Id.* at 785, 100 S. Ct at 2475. Consequently, under Section 1396a(a)(23), a patient "has no enforceable expectation of continued benefits to pay for care in an institution that has been determined to be unqualified." *Id.* at 786, 100 S. Ct at 2476.

Over a cogent dissent by Judge Owen, s*ee* 862 F.3d at 475 (Owen, J., dissenting), the *Gee* majority distinguished *O'Bannon* for two reasons. First, the majority stated that *O'Bannon* involved a due process challenge whereas the *Gee* plaintiffs "assert[ed] the violation of a substantive right." *Id.* at 460. Second, the majority asserted that, in *O'Bannon*, the state had "decertified" the nursing center, whereas in *Gee,* "there was no decertification decision." *Id.*

at 461. "When, as here, a state terminates only a Medicaid provider agreement, independent of any action to enforce statutory and regulatory standards, *O'Bannon* is inapposite." *Id.*

OIG focuses on the majority's second reason for distinguishing *O'Bannon*—the absence of a "decertification decision" by LDHH. OIG emphasizes that LDHH had "conceded that [the clinics were] competent to provide the relevant medical services" and had not sought to decertify the health centers beyond ejecting them from the Medicaid program. *Id.* at 466. Thus, LDHH admitted that its termination of the clinics' Medicaid provider agreements was "independent of any action to enforce statutory or regulatory standards." 862 F.3d at 461. Texas, however, has not conceded that the Provider Plaintiffs are "qualified" in any way. Moreover, unlike LDHH, the OIG's termination action is predicated on specific findings that federal and state statutory and regulatory standards have been violated. In other words, the plaintiffs in this case are doing precisely what *O'Bannon* disallowed—challenging the merits of a state agency's decertification decision.

The *Gee* majority indeed indicated several times that the plaintiffs were not contesting the "the merits of [LDHH's] decertification decision." 862 F.3d at 461. But we are unpersuaded by the distinction urged by the state. The *Gee* majority states that "it bears repeating that LDHH has *conceded* that PPGC is competent to provide the relevant medical services to any and all *non-Medicaid patients*." 862 F.3d at 466 (emphasis added). Although the *Gee* majority acknowledged that LDHH's justifications for termination "might well relate to a provider's qualifications," the state had "taken *no action* to revoke PPGC's

license and has not called into question any qualification that enables PPGC to offer medical care generally." 862 F.3d at 469 (emphasis in original).[8]

Here, there is far stronger evidence in support of OIG's termination decision than the justifications offered by LDHH, but there is also no evidence that the state of Texas questions the competence of the Provider Plaintiffs or that it has taken steps to prevent the Provider Plaintiffs from offering medical care to non-Medicaid patients. In the end, the plaintiffs' claim here is roughly the same as it was in *Gee*: the state agency violated the "qualified provider" provision by excluding them from the Medicaid program for reasons allegedly unrelated to whether they are "capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner." OIG's attempt to distinguish *Gee* regarding an implied individual claim is unavailing.

This does not mean, of course, that the agency's *O'Bannon*-based arguments are frivolous. Seven judges on this circuit joined a dissent from the denial of rehearing en banc focused on the conflict with *O'Bannon*. *See Planned Parenthood of Gulf Coast, Inc. v. Gee*, 876 F.3d 699, 700 (5th Cir. 2017) (Elrod, J., dissenting from denial of rehearing en banc) (explaining that *Gee* "is directly at odds with the Supreme Court's holding in *O'Bannon*"). But this panel lacks authority to contradict the current law of the circuit.

B. Likelihood of Success on the Merits

Gee controls this appeal as to the plaintiffs' right of action but the plaintiffs, and to an extent the district court, suggest that this case is merely *Gee* redux. That is incorrect. In *Gee*, the state agency's purported justifications

[8] *See also* 862 F.3d at 476–77 (Owen, J., dissenting) (characterizing the majority opinion as holding, "whenever a State terminates a provider's Medicaid agreement, regardless of the grounds for termination, a patient may sue to contest the termination, unless the State also precludes the provider from providing services or care to all patients, not just Medicaid recipients.").

for termination were tantamount to contending that a provider can be excluded "simply because state law says so," 862 F.3d at 466, or that a state can "simply label[ ] any exclusionary rule as a 'qualification'" to circumvent Section 1396a(a)(23)'s requirements. *Id*. at 466 (quoting *Planned Parenthood of Ind.*, 699 F.3d at 980). OIG, however, based its termination decision on, *inter alia*, a record of incriminating admissions by PPGC's own personnel that show, the agency contends, a failure to comply with federal regulations or, at the very least, a failure to comply with the ethical standards that Texas requires of Medicaid providers.

It is true that the district court purported to find "not . . . even a scintilla of evidence" impugning PPGC's qualifications. But this occurred only after the district court credited the plaintiffs' witnesses' self-serving testimony about their videotaped statements, while asymmetrically refusing to consider OIG's post-termination evidence. None of the plaintiffs' evidence, moreover, was ever presented to the agency through the standard administrative procedures or judicial review required by the Medicaid statutes.

OIG challenges the district court's procedures as facially inequitable. But the agency's principal argument on appeal is that the district court abused its discretion by reviewing the agency's decision *de novo* instead of under the deferential arbitrary-and-capricious standard required by this court's decision in *Abbeville General Hospital v. Ramsey*, 3 F.3d 797 (5th Cir. 1993). We agree that *Abbeville*'s analysis applies here: a state agency's decision terminating a Medicaid provider agreement—and the agency's determination that the provider is not "qualified"—should be reviewed like any other administrative case—on the record that was made before the agency and under the arbitrary-and-capricious standard.

However, before explaining the appropriate standard of review, it is first necessary to clarify how *Gee*'s analysis of the "qualified-provider" requirement applies to state agencies like OIG. We then explain why the district court had to review the agency's decision under the more deferential standards.

1. The meaning of "qualified"

The Medicaid Act itself does not define what it means for a provider to be "qualified to perform the service or services required." 42 U.S.C. § 1396a(a)(23). But "Medicaid regulations allow states to set reasonable standards relating to the qualifications." *Gee*, 862 F.3d at 462 (quoting 42 C.F.R. § 431.51(c)(2)). And *Gee* emphasized that "states retain broad authority to define provider qualifications and exclude providers on that basis." *Id*. at 465; *see also Detgen ex rel. Detgen v. Janek*, 752 F.3d 627, 631 (5th Cir. 2014) (explaining that states possess "broad discretion to implement the Medicaid Act"). Nevertheless, *Gee* held that a state's discretion is "circumscribed by the meaning of 'qualified' in this context." 862 F.3d at 465.

Rather than offer a comprehensive definition of what it means for a provider to be "'qualified' in this context," *Gee* instead relied on a general definition used by several other circuits. *See id*. at 462. This definition of "qualified," which LDHH never challenged, is "capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner." *See id*. at 462 (quoting *Planned Parenthood of Ind.*, 699 F.3d at 978). Absent further explanation, this broad statement could unduly circumscribe an agency's ability to "define provider qualifications and exclude providers on that basis," *Gee*, 862 F.3d at 465, and it conflicts with other Medicaid statutory provisions and with the interpretation of federal funding statutes.

First, the word "capable" must be construed with reference to the limiting terms "competence," "safety," "legality," and "ethics." Being "capable

of" providing health services is not the same as being "qualified" to do so. Being "capable of" denotes merely the ability to perform a function.[9] In contrast, being "qualified" means "[h]aving qualities or possessing accomplishments which fit one for a certain . . . function" and, often, it means that this *fitness* is "officially recognized."[10] If being merely "capable" of providing health services—say, safely—were the standard for being a "qualified" provider, a Medicaid provider could challenge its termination by showing that it *could* have acted safely—even if it seriously or frequently failed to do so. A state agency should not have to show that a provider is *incapable* of operating appropriately to hold a provider accountable under the "qualified-provider" provision. None of the cases that have relied on the general definition of "qualified" have indicated otherwise.

Similarly, courts may not interpret *Gee* to hold that a Medicaid provider must be considered "qualified" until the state has totally barred that provider from serving the public. A literal understanding of "capable of performing the needed medical services" could lead to that interpretation, as could several of the *Gee* majority's statements in dicta. *See, e.g.*, *id.* at 465 ("While as a general rule a state may terminate a provider's Medicaid agreements for reasons bearing on that provider's general qualification to provide medical services, we are not aware of any case that holds a state may do so while continuing to license a provider's authorization to offer those same services to non-Medicaid patients."). But any such requirement would hamstring state agencies like

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[9] *See* The Oxford English Dictionary (online ed. 2018), available at http://www.oed.com/view/Entry/27354?redirectedFrom=capable#eid.

[10] *See* The Oxford English Dictionary (online ed. 2017), available at http://www.oed.com/view/Entry/155867?rskey=k2PgDU&result=1&isAdvanced=false#eid.

OIG that have no authority to decertify health care providers generally. The Provider Plaintiffs' Texas medical licenses are regulated by the Texas Medical Board, which is a separate agency operating under separate statutory authority. *See* Tex. Occ. Code §§ 151.003(2), 152.001(a). And to the extent the Provider Plaintiffs or their affiliated health clinics are abortion providers, they are separately licensed by the Texas Department of State Health Services. *See* 25 Tex. Admin. Code § 139.1(a). Moreover, if Louisiana's failure to revoke the health clinics' licenses were dispositive, the *Gee* majority would not have needed to review LDHH's justifications for termination at all. In sum, a state's decision to revoke a health care provider's license may be sufficient, but it is not necessary in order for a state to exclude a provider from the Medicaid program.

Second, requiring a state to decertify a provider entirely before jettisoning it from the Medicaid program would also conflict with the Medicaid Act's provision of numerous grounds on which the Secretary of the Department of Health and Human Services ("HHS") or a state can or must exclude a Medicaid provider from the program. *See* 42 U.S.C. §§ 1396a(p)(1) – (3), 1320a-7. Indeed, the general exclusionary provision in Section 1396a(p)(1) authorizes a state to disqualify a provider for many reasons unrelated to violations that would require the provider to cease operating entirely. Suspension from another state health care program, for example, is one of many statutory bases upon which the Medicaid Act allows a state to exclude a provider. *See id.* § 1320a-7. The applicable regulations amplify that "a State may exclude an individual or entity . . . for any reason for which the Secretary could exclude that individual or entity from participation in Federal health care programs" and "[n]othing contained in this part should be construed to limit a State's own authority to exclude an individual or entity from Medicaid for any reason or

period authorized by State law." 42 C.F.R. § 1002.3(a)-(b). *Gee* also recognized that "[s]tates undoubtedly must be able to terminate provider agreements in cases of criminal activity, fraud and abuse, and other instances of malfeasance." 862 F.3d at 469. The Medicaid Act's comprehensive regulatory framework nowhere suggests that a provider may only be disqualified once it is deemed unfit to provide care for the general public.

Third, because the Medicaid program transfers funds to states on conditions, a "clear statement" of any mandatory condition is required by *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981), and OIG's interpretation and implementation of the regulations is valid unless "plainly prohibited" by the statute. *Detgen ex rel. Detgen v. Janek,* 752 F.3d at 631. As noted above, states have definitional latitude, and there is no federal definition of "qualified provider."

In light of this analysis, *Gee*'s holding that a state may not exclude a Medicaid provider for "reasons *unrelated* to that provider's qualifications." 862 F.3d at 462 (emphasis in original), is best read to mean that a state agency's justifications for terminating a provider must actually implicate whether the provider operates in a "safe, legal, and ethical manner" under state and federal law. A state cannot exclude a provider "for no reason at all." *Id.* at 468. Nor can a state "simply label[] any exclusionary rule a 'qualification'" and then contend a provider is unqualified on that basis. *Id*. at 469 (quoting *Planned Parenthood of Ind.*, 699 F.3d at 978). Thus, the Seventh and Ninth Circuits found violations of the "qualified-provider" requirement where states excluded providers merely because they provided abortions. As *Gee* explained, "a state may not exclude a provider simply based on the scope of the services it provides." 862 F.3d at 469.

To comply with *Gee,* a state agency undertaking to decide that a Medicaid provider is not "qualified" should identify regulations concerning the "safe, legal, and ethical manner" of furnishing healthcare services and point to evidence of the provider's violations. As reflected in the *Gee* majority's analysis, this should be an easy standard for the state to meet in most cases. *See id*. at 468 ("[W]e reiterate for emphasis the unique circumstances of the instant case.").

2. Arbitrary and Capricious Review

With the governing legal standard in mind, we turn to the proper standard of judicial review. OIG contends that the district court erred procedurally by applying *de novo* review and allowing the plaintiffs to offer evidence outside the administrative record, because this court held in *Abbeville* that the "substantive adequacy and reasonableness" of a state agency's findings in administering the Medicaid Act should be reviewed by courts "using the arbitrary and capricious standard of review." 3 F.3d at 803–04. Although the district court did not specify the standard of judicial review, the court clearly did not defer to OIG's findings. Instead, the court distinguished the state's findings at every opportunity. And by considering and crediting the plaintiffs' post-termination evidence, while expressly discrediting the state's witnesses, the court did not limit its review to the agency record. This procedure violates *Abbeville*'s requirements.

In *Abbeville*, this court held that the deferential arbitrary-and-capricious standard applies to a state agency's rate-setting action under the Medicaid Act's Boren Amendment. *Abbeville*, 3 F.3d at 802. Federal courts are accustomed to applying the "deferential" standard to the actions of federal agencies under the Administrative Procedure Act. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658, 127 S. Ct. 2518, 2529 (2007);

5 U.S.C. § 706(2)(A). Under this deferential standard, an agency's finding may only be overturned if it fails to satisfy "minimum standards of rationality." *La. Envt'l Action Network v. U.S. E.P.A.*, 382 F.3d 575, 582 (5th Cir. 2004). Courts accordingly may consider only "whether the agency action 'bears a rational relationship to the statutory purposes' and [whether] there [is] 'substantial evidence in the record to support it." *Id*. at 582 (quoting *Tex. Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 934 (5th Cir. 1998) (quoting *Mercy Hosp. of Laredo v. Heckler*, 777 F.2d 1028, 1031 (5th Cir.1985))). Arbitrary and capricious review is conducted on the basis of the agency record alone. *Luminant Generation Co. v. U.S. EPA*, 675 F.3d 917, 925 (5th Cir. 2012) (internal citation omitted).

Abbeville's application of this deferential standard to a *state* agency was not novel; indeed, the court referred to the applicability of this standard as an "indisputable proposition" supported by a "litany of cases." *See Abbeville*, 3 F.3d at 802 & n.6 (citing cases); *see also Miss. Hosp. Ass'n, Inc. v. Heckler*, 701 F.2d 511, 517 (5th Cir. 1983) (reviewing state agency's Medicaid reimbursement plan under the arbitrary-and-capricious standard). *Abbeville* clarified that whether a state had complied with the Medicaid Act's procedural requirements was subject to *de novo* review. *Id*. at 802.[11] However, once a state agency complies with any required Medicaid procedures, "a presumption of regularity and [a] deferential standard attaches" to the agency's decision. *Id*. at 804.

[11] In *Abbeville*, itself, the state agency "admit[ted] . . . that it conducted no studies and made no efforts to" make the required findings. *Id*. at 806. For this reason, the court reversed the agency's reimbursement plan for procedural noncompliance without applying arbitrary and capricious review. *Id*. at 810.

The plaintiffs argue that *Abbeville* is inapposite because the instant case does not actually involve the appeal of an agency decision; rather, it is "a statutory claim under the Medicaid Act giving rise to a right of action in federal court under §[ ]1983." The plaintiffs contend that there is "no case law imposing arbitrary-and-capricious review on such a claim." The plaintiffs are mistaken. *Abbeville* itself involved a Section 1983 action seeking to enforce *statutory* rights. *See Abbeville*, 3 F.3d at 801 ("The Hospitals filed a § 1983 action against the Secretary of LDHH and other agency officials, claiming their actions deprived them of rights secured under the Boren Amendment.").[12] Other courts have likewise concluded that the review of state Medicaid decisions as applied to individual plaintiffs in Section 1983 cases is governed by the arbitrary and capricious standard. *See Smith v. Rasmussen*, 249 F.3d 755, 760 (8th Cir. 2001); *Brown v. Day*, 434 F.Supp.2d 1035, 1041 (D. Kan. 2006).

Contrary to the plaintiffs' assertion, moreover, this case plainly involves judicial review of an agency action. Here, OIG, the state agency empowered to investigate violations of the Medicaid program and terminate providers for noncompliance, decided to exclude the Provider Plaintiffs after finding evidence that they had violated various medical and ethical standards. The plaintiffs have sought judicial review of that termination decision. The plaintiffs' challenge is functionally equivalent to any other appeal of an agency decision. To hold that the plaintiffs' challenge could receive review in federal court without the deference due in a case brought by the Provider Plaintiffs directly would be to elevate patients' rights beyond the complex federal-state cooperative and enforcement structure of the Medicaid statute itself. Put

[12] Similarly, *Miss. Hosp. Ass'n.* does not cite Section 1983 but must also have been brought to enforce federal law under that provision.

otherwise, had the Secretary of HHS excluded the Provider Plaintiffs, there is no question that its decision would be subject to arbitrary and capricious review.[13] And put otherwise again, the result the Individual Plaintiffs obtained goes far beyond their personal claims to be treated by the Provider Plaintiffs, as it prevents the state from denying millions in state funds to those entities; this result cannot be proportional to the litigation of an individual claim, but must arise from wholesale review of agency action toward the Providers.

The plaintiffs next contend that *Gee* precludes the application of arbitrary-and-capricious review in this context because *Gee* reviewed LDHH's termination decision *de novo*. Had *Gee* addressed this question and applied *de novo* review, we might be bound to do likewise. But *Gee* never addressed nor was it required to or even asked to address the applicable standard of review. LDHH's grounds for terminating the health clinics amounted to no more than unsupported suspicions of misconduct. Unlike in this case, LDHH had done no factfinding and conceded that the providers were "qualified." Thus, although *Gee* did not address *Abbeville*, it is consistent with the prior decision's requirements: as in *Abbeville,* the lack of findings rendered the LDHH decision subject to de novo review. This stands in stark contrast to the present case in which OIG made findings.

Further, not one of the circuits that have recognized a private right of action under Section 1396a(a)(23) has intimated that an arbitrary-and-capricious standard would be inappropriate. In *Planned Parenthood of Indiana* and *Betlach*, the Seventh and Ninth Circuits had no need to address

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[13] *See* 5 U.S.C. § 706(2)(A); *see also Nursing Ctr. v. U.S. Dep't of Health & Human Servs.*, 606 F. App'x 164, 167 (5th Cir. 2015) (reviewing whether Secretary's decision imposing sanctions on Medicaid provider was arbitrary and capricious).

this question because they dealt only with state laws, not agency decisions, that blocked Medicaid funding for abortion providers. *See* 699 F.3d at 967; 727 F.3d at 962. Likewise, the underlying issue in the Sixth Circuit's *Olszewski* decision was whether HHS reasonably construed the Medicaid Act's phrase "medical devices" to include "incontinence products." 442 F.3d at 465.[14] The state agency's determination was not properly at issue. Additionally, the Tenth Circuit's decision in *Andersen* largely parrots *Gee* in its rejection of a state agency's termination decision and likewise does not discuss the standard of review. 882 F.3d at 1236.

The plaintiffs next argue that the deferential standard is inappropriate because the Individual Plaintiffs, as Medicaid beneficiaries, have no administrative remedy and thus cannot develop the administrative record.[15] The plaintiffs also point out that *Gee* held that the plaintiffs "are not subject to . . . any administrative exhaustion requirement." *Gee*, 862 F.3d at 455. That is true. But the absence of an exhaustion requirement does not mean there can be no consequences for the provider's decision to ignore the prescribed administrative process. The absence of an exhaustion requirement does not entitle plaintiffs to *de novo* review of OIG's factual findings and conclusions.

Indeed, it is a feature—not a bug—of the arbitrary-and-capricious standard that it incentivizes providers to use the state administrative appeal process required by the Medicaid Act itself. *See* 42 U.S.C. § 1396a(a)(4);

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[14] The court applied *Chevron* deference to HHS's construction of the act and found it reasonable. *Id.* at 470.

[15] The Individual Plaintiffs, of course, serve here as the Providers' litigation proxies, and the Providers had ample opportunity to develop the administrative record. If this deficiency ultimately operates to the detriment of the Individual Plaintiffs, *O'Bannon* recognized that Medicaid beneficiaries might well have a cause of action against their Providers for becoming decertified. 447 U.S. at 787, 100 S. Ct. at 2476.

42 C.F.R. § 1002.213 ("Before imposing an exclusion under § 1002.210, the State agency must give the individual or entity the opportunity to submit documents and written argument against the exclusion."). It is highly doubtful that Congress intended a loophole whereby providers could use patients as litigation proxies to avoid the state's remedial procedures and develop separate, potentially conflicting judicial standards of compliance. Requiring arbitrary and capricious review that is limited to the administrative record encourages Medicaid providers to pursue a state's administrative-hearing procedures in order to develop the administrative record in their favor.[16]

In an effort to apply rather than distinguish *Abbeville*, the plaintiffs alternatively contend that the district court did no more than the federal court in that case and simply disregarded OIG findings that were not "*bona fide*" or "supported by some minimum quantum of evidence." *Abbeville*, 3 F.3d at 804, 805. As explained above, however, *Abbeville* was reviewing LDHH's procedural compliance with Medicaid standards, not its substantive compliance.

In any event, there is no question that the OIG here made factual findings after viewing the videos and related evidence. On the basis of the administrative record—not the *post hoc* justifications offered by plaintiffs' witnesses in the district court—the OIG determined that video discussions "centered on clinic processes and tissue packaging rather than the abortion procedure itself; the video featured repeated discussion about the position of

[16] In this way, requiring the deferential standard of review could ameliorate what some members of this court saw as negative consequences of the *Gee* decision. *See Gee*, 876 F.3d at 702 (Elrod, J., dissenting from denial of rehearing en banc) ("Disqualified providers can now circumvent state law because the panel majority opinion deems it unnecessary to have a final administrative determination so long as there are patients to join a lawsuit filed in federal court.").

the fetus in the uterus, the risk to the patient, and the patient's pain tolerance." The OIG further concluded, based on the videos, that the Provider Plaintiffs at a minimum violated federal standards regarding fetal tissue research and standards of medical ethics by allowing doctors to alter abortion procedures to retrieve tissue for research purposes or allowing the researchers themselves to perform the procedures. The 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.

The plaintiffs finally insinuate that arbitrary and capricious review should not apply because OIG has insufficient expertise to determine the qualifications of abortion providers. On this point, the district court was also dismissive, suggesting that the Inspector General and OIG's Chief Medical Officer were insufficiently informed regarding how to perform abortions. We reject this argument. OIG is the agency that the state of Texas has empowered to investigate and penalize Medicaid program violations. The agency is in the business of saying when providers are qualified and when they are not. That the Chief Medical Officer is a surgeon—and not himself an abortion provider—does not mean that he deserves no deference when deciding whether a provider has failed to meet the medical and ethical standards the state requires.[17] It is even odder to claim that federal judges, who have no experience in the

[17] Here, it seems necessary to consider the appropriate deference owed to OIG outside the abortion context. It is certainly inappropriate "to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Thomas, J., dissenting) (quoting *Stenberg v. Carhart,* 530 U.S. 914, 954, 120 S. Ct. 2597, 2621 (2000) (Scalia, J., dissenting)). To bend the rules here would be particularly imprudent. Had OIG terminated the Medicaid provider agreements of any other type of health care provider, the incongruity of allowing that provider to use patient litigation proxies to avoid administrative review and receive *de novo* review in federal court would be obvious and unacceptable.

regulations and ethics applicable to Medicaid or medical practice, much less in regard to harvesting fetal organs for research, should claim superior expertise.

In sum, the district court erred by giving no deference to OIG's factual findings and by accepting evidence beyond the agency record. The arbitrary and capricious standard applies to review of the record alone. [18]

CONCLUSION

For these reasons, we must affirm that the Individual Plaintiffs possess a private right of action. However, because the district court apparently conducted *de novo* review of the OIG's decision, and its procedure was incompatible with the proper standard, the basis for its preliminary injunction cannot be sustained. Whether plaintiffs might establish a likelihood of success on the merits depends on application of the arbitrary and capricious standard to the administrative record alone.

We **VACATE** the preliminary injunction and **REMAND** for the district court to limit its review to the agency record under an arbitrary-and-capricious standard.

[18] A separate issue raised by Planned Parenthood is whether OIG could terminate Medicaid funding for all of the Provider Plaintiffs where only one, PPGC, has engaged in or contemplated fetal tissue research. State regulations authorizing action against "affiliates" of a provider are at issue. This issue becomes relevant and must be reconsidered by the district court if, on remand, it upholds the OIG's termination decision against PPGC.

EDITH H. JONES, Circuit Judge, concurring:

The panel agrees that the *Gee* decision is binding law for our circuit at present, but I urge reconsideration en banc. *Gee* is inconsistent with *O'Bannon,* and it makes no practical sense to hold that a Medicare provider charged with misfeasance by state regulating authorities may simply bypass state procedures, which are required by the Medicaid statute, and use patients as stalking horses for federal court review of its status. That the arbitrary and capricious standard of review governs such review in federal court is a second-best solution to the legal necessity of aligning our precedent with the Supreme Court's holding. Finally, despite being litigated with the trappings of the abortion debate, this is fundamentally a statutory construction case, not an abortion case. *Gee v. Planned Parenthood of Gulf Coast, Inc.,* 139 S. Ct. 408, 409 (2018) (dissenting from denial of certioriari).

Prudential and practical objections may be made to this recommendation. From a prudential standpoint, the Supreme Court denied certiorari in *Gee* in the past month, and this court rejected en banc reconsideration of the decision in 2017. Therefore, it would follow, the states of this circuit should be bound by judicial inertia to a plainly incorrect statutory interpretation. Pragmatically, there is no harm, no foul, because the nature of arbitrary and capricious review ought ordinarily shield the decisions of state authorities who claim evidentiary and legal support when attempting to sanction or terminate provider status. In my view, none of these rationales suffices.

Start with this evenly divided court's denial of en banc reconsideration. *See Planned Parenthood of Gulf Coast v. Gee,* 876 F.3d 699 (5th Cir. 2017) (Elrod, J., dissenting). At the time of that denial, the *Gee* decision claimed support from three other circuits, but the Eighth Circuit had rejected the

creation of a patient's implied private right of action under Section 1396a(a)(23). *Compare Planned Parenthood of Ariz., Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012); *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006) (all finding a private right of action), *with Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017) (rejecting a private right of action). Importantly, however, this court's even split indicated our recognition that the statutory interpretation issue posed in *Gee* is seriously debatable. A refusal to vote a case en banc under such circumstances is a victory of sorts for the panel decision, but it reflects no endorsement by the majority of active judges. Reconsidering the en banc decision, especially in light of the Supreme Court's recent action, would secure a clear majority decision on this surely recurring issue.

In December 2018, the Supreme Court declined certiorari in *Gee* and the Tenth Circuit's *Andersen* decision, both of which implied a patient's private right of action to challenge Medicaid providers' regulatory terminations. *See Planned Parenthood of Kansas v. Andersen,* 882 F.3d 1205 (2018). A conflict exists with the Eighth Circuit's contrary holding, yet the Supreme Court left in place the circuit conflict. It is a fair bet that the Court's avoidance indicates considerable uncertainty about the statutory issue. To restore the uniformity of federal law, the conflict must eventually be addressed. Until that happens, three different courses of action are afforded to Medicaid providers in different states. In states where no circuit court decision has approved private plaintiffs' ability to challenge the providers' sanctions, the providers must repair to Medicaid-required state administrative and judicial procedures. In the Tenth Circuit, providers may use private plaintiffs' federal court suits, level of federal review undetermined, as an alternative to undergoing state-crafted

procedures. And in this circuit, providers have alternative recourse to private plaintiffs' suits under the arbitrary and capricious standard of review. Tens of thousands of provider entities are subject to the Medicaid program's detailed scheme of integrated federal and state regulation.

That Planned Parenthood providers achieved recognition of implied private plaintiffs' actions should not detract from the program-wide uncertainty spawned by this circuit conflict. Equally to the point, the lower courts remain obliged to undertake careful statutory review while the issue is undecided, especially if the statute, properly construed, offers providers no alternative federal court remedy. The Court's denial of certiorari, in other words, strengthens the propriety of this court's reconsidering *Gee* en banc.

The pragmatic argument for denying en banc relief would seem to include two parts. This court's adoption of the deferential arbitrary and capricious standard means that state authorities will ordinarily be able to defend their program termination decisions successfully in federal court, reducing the friction between federal courts and state Medicaid administrators. Thus, it would be argued, the cost of reconsidering *Gee*, especially if *Gee* was correctly decided, is higher than the cost of federal litigation pending a definitive Supreme Court decision. But there is a second wrinkle here in that whether to apply an arbitrary and capricious standard is a *res nova* decision by this panel made necessary by *Gee*. The parties strenuously disputed the standard of review. As long as a circuit split persists, other courts weighing in on the standard of review may disagree with this panel's decision. Following the *Gee* case thus entails ongoing legal uncertainty.

Another pragmatic consideration, however, favors en banc reconsideration: the complexity and cost to state agencies that administer and regulate Medicaid. The program is already one of the most expensive

components of state budgets. Regulating providers comprises comprehensive federal and state medical, and ethical dictates as well as parameters for facilities that provide patient care. Authorizing lawsuits by patients to challenge their providers' terminations burdens state agencies with redundant and intrusive oversight while the high cost of federal litigation displaces more efficient uses of state resources. As Justice Thomas also noted in his dissent from denial of cert., "the looming potential for complex litigation inevitably will dissuade state officials from making decisions that they believe to be in the public interest." 139 S. Ct. at 409. State courts, moreover, are well suited to handle these cases based on their more intimate familiarity with the agencies, the regulation of the practice of medicine, and state administrative law—as was contemplated in the Medicaid statutes' prescription of coordinate state responsibilities for the program. If *Gee* is incorrect, these practical costs will be avoided.

Having explained why there should be no impediment to our rehearing this case en banc in order to reconsider *Gee,* I repeat briefly the arguments that others have fulsomely developed. *Gee* is inconsistent with the Supreme Court's decision in *O'Bannon* and in tension with numerous other provisions of the Medicaid statute.

Judge Owen, dissenting in *Gee*, argued that *O'Bannon* precluded the individual plaintiffs' assertion of a private right of action to challenge LDHH's termination decision. *See* 862 F.3d at 475 (Owen, J., dissenting). The majority opinion asserted that in *O'Bannon,* "the patient-plaintiffs' injuries were alleged to stem from a deprivation of due process rights," and "[i]n contrast, the Individual [*Gee*] Plaintiffs here assert the violation of a substantive right." *Id.* at 460(citations omitted). Judge Owen pointed out the fundamental logical flaw with this reasoning: the majority "fail[s] to appreciate that there is no

right to due process unless there is a substantive right that may be vindicated if adequate process is accorded." 862 F.3d at 475. The majority completely missed the dissent's primary point that *O'Bannon* rejected the notion that Section 1396a(a)(23) creates any substantive liberty or property right. *Id.* at 476.

Judge Owen criticized the majority's broad assertion that only a total termination of a Medicaid provider from all medical services would render the provider "unqualified" for purposes of Section 1396a(a)(23). She cited, *inter alia,* Section 1396a(p)(1), a provision that authorizes a state to "exclude any…entity [from Medicaid] for any reason for which the Secretary could exclude the…entity from participation in [several federal programs listed]." And she referenced multiple other reasons justifying state termination decisions under the Medicaid statute itself. *Id.* at 477.

Judge Owen also rebutted the majority's claim that in *O'Bannon*, the state had "*totally"* decertified the nursing center, whereas in *Gee,* "there was no decertification decision." *Id.* at 472. The majority concluded, "[w]hen, as here, a state terminates only a Medicaid provider agreement, independent of any action to enforce statutory and regulatory standards, *O'Bannon* is inapposite." *Id.* The majority's error was a "shaky" basis for distinguishing the Supreme Court precedent, according to Judge Owen, because the Court never specified that the nursing home had been totally decertified by the state. 862 F.3d at 483.

Six other judges on this circuit found Judge Owen's dissent sufficiently persuasive to join a dissent from the denial of rehearing en banc. *See Planned Parenthood of Gulf Coast, Inc. v. Gee*, 876 F.3d 699, 700 (5th Cir. 2017) (Elrod, J., dissenting from denial of rehearing en banc) (explaining that *Gee* "is directly at odds with the Supreme Court's holding in *O'Bannon*"). And Judge

Elrod's dissent added that "the panel majority opinion's reasoning is not only at odds with *O'Bannon* but also with the entirety of the statutory framework in 42 U.S.C. Section 1396a." 876 F.3d at 701.

There are other reasons for rejecting *Gee*. The Eighth Circuit held in even more detail, albeit in a split decision, that Section 1396a(a)(23) confers no private right of action on patients concerning the termination of a Medicaid provider's state agreement, because to do so would place that provision in conflict with related Medicaid provisions. *See Does v. Gillespie,* 867 F.3d 1034, 1041–1043 (8th Cir. 2017) (referring to the lack of an *individual* entitlement conferred by the provision itself and 82 related provisions governing State duties to the federal program; the availability of other means to enforce the State's obligations under the Medicaid Act and the resulting likelihood of conflict between the implied individual remedy and a provider's administrative and state judicial remedies; and the "aggregate" or "substantial compliance" nature of the federal government's oversight duties). All of these structural indications, Judge Colloton explained, conflict with the requirement set out in *Gonzaga v. Doe,* that a plaintiff relying on federal law to underpin a Section 1983 case must show that "Congress clearly intended to create an enforceable federal right." *Does,* 867 F.3d at 1039 (citing *Gonzaga Univ. v. Doe,* 536 U.S. 273, 283, 122 S. Ct. 2268 (2002)).[1]

In *Andersen*, Judge Bacharach dissented on the basis that Section 1396a(a)(23) does not "unambiguously" provide an implied private right of action, contrary to *Gonzaga*, because any "right" conferred on patients in that provision conflicts with the state's broad rights under Medicaid "to

[1] Judge Shepherd, concurring in the Eighth Circuit decision, echoed Judge Owen's sentiments about *O'Bannon* as an independent ground for rejecting plaintiffs' implied private right of action.

exclude an individual or entity from Medicaid for any reason or period authorized by State law." 42 C.F.R. § 1002.3(b), interpreting 42 U.S.C. § 1396a(p)(1). *Andersen,* 882 F.3d 1205, 1243–45 (10th Cir. 2018). Judge Bacharach would accordingly distinguish between situations where a state attempted to prohibit all Medicaid funding to abortion providers (contrary to law) and situations like that in *Andersen,* and in this case, where neutral regulations were violated by the providers.

Finally, Justice Thomas and two colleagues noted the "significant implications" of the question "whether Medicaid recipients have a private right of action to challenge a State's determination of 'qualified' Medicaid providers" under Section 1396a(a)(23) and Section 1983. *Gee*, 139 S. Ct. at 408. Justice Thomas noted the threats to state administration of Medicaid programs, not only from the financial burdens of litigation and deterrence of sound management decisions, but also because private patients' suits "give Medicaid providers 'an end run around the administrative exhaustion requirements in [the] state's statutory scheme.'" *Id*. at 409, (quoting 876 F.3d at 702 (Elrod, J., dissenting)).

Given the still-unsettled state of the law and the absence of precedential or pragmatic disincentives to rehearing en banc, these persuasive arguments deserve the attention of our full court. I respectfully request rehearing en banc to reconsider whether Section 1396a(a)(23) creates a private right of action on behalf of Medicaid patients to challenge the termination of their providers' contracts by the States.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

PLANNED PARENTHOOD OF GREATER TEXAS FAMILY PLANNING AND PREVENTATIVE HEALTH SERVICES, INC., PLANNED PARENTHOOD SAN ANTONIO, PLANNED PARENTHOOD CAMERON COUNTY, PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER, PLANNED PARENTHOOD GULF COAST, INC., and JANE DOES ##1, 2, 4, 7, 9–11 on Their Behalf and on Behalf of All Others Similarly Situated,
Plaintiffs,

-vs-

Case No. A-15-CA-1058-SS

CHARLES SMITH, Executive Commissioner, Texas Health and Human Services Commission, and STUART W. BOWEN, JR., Inspector General, Texas Health and Human Services Commission, Office of Inspector General,
Defendants.

ORDER

BE IT REMEMBERED on the 17th, 18th, and 19th days of January 2017, the Court held a hearing in the above-styled cause, and the parties appeared in person or through counsel. This case concerns a § 1983 suit brought by five Texas Planned Parenthood health care providers (Provider Plaintiffs) and seven known but anonymized Jane Does (Individual Plaintiffs) (collectively, Plaintiffs). Plaintiffs sue Defendants Charles Smith and Stuart Bowen, Jr. in their official capacities as Executive Commissioner and Inspector General of the Texas Health and Human Services

Commission (HHSC), challenging HHSC's decision to terminate its Medicaid provider agreements with Provider Plaintiffs.

Before the Court are Plaintiffs' Motion for a Preliminary Injunction [#58], HHSC's Response [#70] in opposition, Plaintiffs' Letter Brief [#91] in support, HHSC's Letter Brief [#92] in opposition, Plaintiffs' Proposed Findings of Fact and Conclusions of Law [#93] in support, and HHSC's Proposed Findings of Fact and Conclusions of Law [#94] in opposition.[1] Having reviewed the documents, the evidence presented at the hearing, the arguments of counsel, the relevant law, and the file as a whole, the Court now enters the following opinion and orders.

Introduction

A secretly recorded video, fake names, a grand jury indictment, congressional investigations—these are the building blocks of a best-selling novel rather than a case concerning the interplay of federal and state authority through the Medicaid program. Yet, rather than a villain plotting to take over the world, the subject of this case is the State of Texas's efforts to expel a group of health care providers from a social health care program for families and individuals with limited resources.

Stalling for nearly a year after issuing an initial notice of termination, HHSC reinitiated its efforts to terminate Planned Parenthood health care providers from the Texas Medicaid program. Following extensive investigations, the Inspector General's reasons for termination constituted unsubstantiated and indeterminate allegations, including a "policy of agreeing to" and a

[1] There are also three other pending motions in this case. First, Plaintiffs filed a motion to certify class, but a ruling on this motion is postponed until it is fully briefed. *See* Mot. Certify Class [#9]. Because the motion does not specify whether it is opposed or unopposed and this case was stayed, the Court will allow HHSC seven days to respond to the motion to certify. Second, HHSC filed a motion to seal [#71], which the Court GRANTS. Third, HHSC filed a motion to dismiss, which only became ripe three days ago and the Court has yet to fully examine. *See* Mot. Dismiss [#95].

"willingness" to violate medical and ethical standards. Without any evidence indicating an actual program violation warranting termination, the Inspector General nevertheless acted to terminate one of the Provider Plaintiffs from the Texas Medicaid program and sought to terminate the other Provider Plaintiffs by extension. After reviewing the evidence currently in the record, the Court finds the Inspector General, and thus HHSC, likely acted to disenroll qualified health care providers from Medicaid without cause. Such action would deprive Medicaid patients of their statutory right to obtain health care from their chosen qualified provider. The deprivation of that right is an irreparable injury in and of itself but could also disrupt the care of the 12,500 Texas Medicaid patients receiving services from Planned Parenthood.

In sum, the Individual Plaintiffs have established entitlement to a preliminary injunction by proving a substantial likelihood of success on the merits, an irreparable injury, and both the balance of harms and public interest favor granting the injunction. The Court therefore grants Plaintiffs' motion for a preliminary injunction to preserve its ability to render a meaningful decision on the merits.

Background

I. Parties

A. Provider Plaintiffs

The five Provider Plaintiffs in this suit are all nonprofit organizations domiciled in Texas providing services both through the Medicaid Program and to the general public.

Planned Parenthood Gulf Coast (PPGC), the Provider Plaintiff central to this case, is headquartered in Houston and operates seven health centers throughout the Houston area. Pls.' Hr'g Ex. 65 (Linton Decl.) ¶ 3. Another Provider Plaintiff, Planned Parenthood Greater Texas, Inc.

(PPGT), is headquartered in Dallas and operates seventeen health centers in Addison, Arlington, Austin, Bedford, Cedar Hill, Dallas, Denton, Fort Worth, Plano, Lewisville, Mesquite, Paris, Tyler, and Waco. Pls.' Hr'g Ex. 40 (Lambrecht Decl.) ¶ 3. The final three Provider Plaintiffs, Planned Parenthood Cameron County, Planned Parenthood San Antonio, and Planned Parenthood South Texas Surgical Center, are all entities under the umbrella of Planned Parenthood South Texas (PPST). Pls.' Proposed Findings [#93] ¶ 3. PPST operates six health centers offering services to Medicaid patients. *Id.*

In total, PPGC, PPGT, and PPST provide Medicaid services at thirty health centers across Texas. *Id.* ¶ 4. Approximately 12,500 Texas Medicaid patients receive services from Planned Parenthood. Hr'g Tr. Vol. 3 at 14:5–10. Specializing in reproductive and sexual health, these clinics offer Medicaid patients contraception and contraceptive counseling, breast cancer screening, cervical cancer screening and treatment, sexually transmitted disease (STD) testing and treatment, pregnancy testing and counseling, as well as other services. Mot. Prelim. Inj. [#58] at 5. In the Texas Medicaid program, only the Provider Plaintiffs are labeled as family planning specialists. Hr'g Tr. Vol. 3 at 17:10–17.

In addition to reproductive health care, the Provider Plaintiffs offer other limited primary care services because their patients may not see other doctors. Hr'g Tr. Vol. 1 at 209:1–210:6. The Provider Plaintiffs strive to accommodate low-income patients who may face additional barriers to health care access, such as child care or inflexible work schedules, by offering evening and weekend hours, walk-in appointments, short wait times, bilingual staff or translation services, and same-day contraceptive services. *Id.* at 19:23–20:19; Mot. Prelim. Inj. [#58] at 5–6.

While PPGC, PPGT, and PPST are separate organizations, they are all affiliates, of the Planned Parenthood Federation of America (PPFA). Mot. Prelim. Inj. [#58] at 4. PPFA is a membership organization that develops medical and organizational standards to which its affiliates must adhere in order to operate under the Planned Parenthood name and use the Planned Parenthood mark. *Id.* There are approximately fifty-six affiliates across the county. *Id.*

The facts of this case primarily focus on PPGC, the only Provider Plaintiff to participate in fetal tissue research. While PPGC itself does not perform abortions, its related entity, Planned Parenthood Center For Choice (PPCFC) does perform abortions. *Id.* at 16. PPGC's headquarters and a health care clinic are located in the same building in Houston as PPCFC. Hr'g Tr. Vol. 1 at 120:20–121:9. While PPGC and PPCFC were originally one entity, the entities separated in 2005 as a condition of PPGC receiving funding it no longer receives. Hr'g Tr. Vol. 1 at 38:8–13. Most significantly here, PPGC's research department handles any research requests or agreements that involve PPCFC because PPCFC has no research department or separate personnel of its own.[2] *Id.* at 64:12–65:13.

B. Individual Plaintiffs

The Individual Plaintiffs are all Texas residents insured through Medicaid. A brief introduction to each Jane Doe plaintiff, anonymized to protect their identities, provides context for this suit.

[2] At this stage of the lawsuit, the Court declines to determine whether PPCG and PPCFC are separate entities or are effectively one organization. Instead, the Court assumes, without deciding, the actions of PPCFC can be considered the actions of PPGC. Rather than attempt to distinguish between the actions of PPGC and PPCFC for purposes of this motion for a preliminary injunction, the Court will only refer to PPGC for the remainder of this order.

Doe # 1 lives in San Antonio and has been a patient at a variety of the health centers under PPST's umbrella since she was seventeen. Pls.' Hr'g Ex. 94 (Doe # 1 Decl.) ¶ 2. Now thirty-three, she has obtained a spectrum of services from PPST health centers including annual exams, STD screening, birth control, pregnancy tests, and general reproductive care. *Id.* ¶ 5. Doe # 1 wishes to continue receiving health care from PPST because she would not know where to go if she could not get care from Planned Parenthood, cannot afford to pay out of pocket, and fears she will end up at a health center where it is difficult to schedule appointments or where she will not like how she is treated. *Id.* ¶ 7.

Doe # 2 is an eighteen-year-old patient of a Planned Parenthood health center under PPST. Pls.' Hr'g Ex. 96 (Doe # 2 Decl.) ¶¶ 1–2. She is a full-time student in a pre-medical program and has a two-year-old son. *Id.* ¶ 3. She relies on her Planned Parenthood health center for STD screening, pregnancy testing, and birth control. *Id.* ¶ 4. She does not know if she could obtain the same services from another provider or if she would be comfortable with another provider. *Id.* ¶ 6.

Doe # 4 has thrombocytopenia, a shortage of blood platelets. Pls.' Hr'g Ex. 97 (Doe # 4 Decl.) ¶ 2. As a result of her condition, she is prone to excessive bleeding. *Id.* When her prior OB/GYN provider prescribed a drug that had to be injected to treat her condition but could not do the injections himself, she turned to PPGC. *Id.* ¶ 5. Doe # 4 now visits PPGC every three months for her injections as well as for other treatments. *Id.* ¶ 6. She wishes to continue her care with PPGC in light of her positive experience, especially considering the long waits she faced with other providers. *Id.*

Twenty-six-year-old Doe # 7 is a single mother who tries to get all her health care from a Planned Parenthood health center under PPST. Pls.' Hr'g Ex. 99 (Doe # 7 Decl.) ¶¶ 1–2, 8. She

sometimes visits her Planned Parenthood health center as a walk-in patient, but if she calls for an appointment her Planned Parenthood center is usually able to fit her in the same day. *Id.* ¶ 6. She feels less comfortable talking to other doctors about women's reproductive issues and wishes to continue to get the services she needs through PPST. *Id.* ¶¶ 7, 9.

Doe # 9 has a four-year-old son, is a part-time student, and works part-time. Pls.' Hr'g Ex. 100 (Doe # 9 Decl.) ¶ 2. She visits a PPGC health center for well-woman exams, STD testing, and birth control. *Id.* ¶ 3. She appreciates that PPGC treats Medicaid patients the same as patients with private insurance. *Id.* ¶ 4. She previously saw another provider who accepted Medicaid, but the wait times for that provider ranged up to two hours. *Id.* ¶ 5. Doe # 9 has found it difficult to find a good provider who will take Medicaid patients and worries she will be unable to find another provider in light of her commitments to her son, school, and work. *Id.* ¶ 7. She would prefer to remain with PPGC which has her medical history and has earned her trust. *Id.* ¶ 8.

Doe # 10 is an Austin resident who grew up in the foster care system. Pls.' Hr'g Ex. 102 (Doe # 10 Decl.) ¶¶ 1, 3. Doe # 10 was raped and had a negative experience with the doctor who examined her afterward. *Id.* ¶ 5. As a result, she is very nervous in a health center. *Id.* She wishes to continue her care with PPGT because she is comfortable with the doctors there and PPGT is flexible with scheduling. *Id.* ¶¶ 7–8. She and her younger sister do not know where they would go for health care if PPGT was not an option. *Id.* ¶¶ 9–10.

Doe # 11, now twenty-four, has been a patient of a PPST health center since she was fifteen. Pls.' Hr'g Ex. 104 (Doe # 11 Decl.) ¶¶ 1–2. While she briefly went to another provider when her Planned Parenthood health center was closed, she returned to her Planned Parenthood health center

when it reopened because it had all her medical records and she was more comfortable there. *Id.* ¶ 5. She also appreciates the reproductive health education Planned Parenthood provided her. *Id.* ¶ 7.

C. HHSC

Defendant Charles Smith is the Executive Commissioner of HHSC and Defendant Stuart Bowen is the Inspector General of HHSC (Inspector General). The Inspector General consulted with his organization's Chief Medical Officer in deciding to terminate the Provider Plaintiffs from the Texas Medicaid Program, but the ultimate decision to terminate was made by the Inspector General individually. Hr'g Tr. Vol 2 at 18:24–20:15, 88:8–13.

II. The Texas Medicaid Program

In Texas, there are approximately 4.3 million people enrolled in Medicaid. Hr'g Tr. Vol. 3 at 6:15–17. In order for a health care provider to serve these patients through the Medicaid program, it must execute a HHSC Medicaid Provider Agreement (Provider Agreement), which lays out the responsibilities and obligations of a Texas Medicaid provider. Hr'g Tr. Vol. 2 at 11:3–10. By signing a Provider Agreement, a provider agrees to comply with all the requirements of the Provider Manual, a document describing Texas Medicaid program policies, as well as state and federal law. Defs.' Hr'g Ex. 21 (Provider Agreement) at 1. A provider also agrees to ensure all its employees and agents comply with such requirements. *Id.* All of the Provider Plaintiffs involved in this lawsuit executed a Provider Agreement. Hr'g Tr. Vol. 2 at 11:24–12:2.

Section 6 of a Provider Agreement indicates the circumstances under which a Provider Agreement may be terminated:

> [E]xclusion from participation in Medicare, Medicaid, or any other publically funded health-care program; loss or suspension of professional license or certification; any circumstance resulting in ineligibility to participate in Texas Medicaid; and failure

> to comply with the provisions of this Agreement or any applicable law, rule or policy of the Medicaid program; and any circumstances indicating that the health or safety of clients is or may be at risk.

Provider Agreement at 13. The Provider Manual supplies additional guidance on the rules governing Texas Medicaid providers. For instance,"[i]t is a violation of Texas Medicaid rules when a provider fails to provide health care services or items to Medicaid clients in accordance with accepted medical community standards . . . ." Defs.' Hr'g Ex. 20 (Provider Manual) at 13. Simply put, any violation of federal law, state law, or the Texas Medicaid program policies is a basis for termination, commonly referred to as a program violation. *See* Hr'g Tr. Vol. 2 11:3–23.

Under Texas law, the Inspector General is charged with enforcing the rules of the Mediciaid program. 1 TEX. ADMIN. CODE § 371.1603. Such enforcement authority includes the ability to expel a provider from enrollment in the Texas Medicaid program. *Id.* Specifically, the Inspector General may terminate a provider's participation in the Texas Medicaid program when the Inspector General establishes by prima facie evidence the provider committed a program violation, is affiliated with a provider that commits a program violation, or commits an act for which sanctions, damages, penalties, or liability could be assessed by the Inspector General. *Id.* § 371.1703©.

In terms of substantive coverage, Texas does not pay for abortions for women insured by Medicaid except in extremely narrow circumstances. Lambrecht Decl. ¶ 6.

In addition to Medicaid, Texas oversees other state health programs such as the Healthy Texas Women Program, the Family Planning Program, and the Breast and Cervical Cancer Screening Program. Hr'g Tr. Vol. 2 at 135:10–15.

III. Research Activities of the Provider Plaintiffs

PPGC has an internal department devoted to research, headed by Research Director Melissa Farrell (Ms. Farrell). Pls.' Hr'g Ex. 225 (Farrell Decl.) ¶ 2. Ms. Farrell worked as a nurse for two years in labor and delivery and pre-natal care before becoming the research coordinator at Baylor College of Medicine. *Id.* ¶ 1. In 2006, she became the research director at PPGC. *Id.* She has never witnessed an abortion or even been in the room when an abortion was performed. Hr'g Tr. Vol. 1 at 64:2–11.

The PPGC research department is involved in approximately twenty projects a year, responsible for coordinating and managing research-related activities between PPGC and third-parties. *Id.* The majority of research projects facilitated by PPCG's research department concern family planning services. *Id.* Such projects have included developing new forms of STD screening and treatment, advances in emergency contraception, and an HPV vaccine. *Id.*

When PPGC receives a request for a research partnership, Ms. Farrell works with the researchers to gather information and learn whether PPGC could participate. Pls.' Hr'g Ex. 108 (Fine Decl.) ¶ 23. Ms. Farrell's role includes providing researchers with information about PPGC's services and facilities, developing a budget, negotiating a contract, facilitating Institutional Review Board (IRB) submissions and approval, and guiding internal approval processes. Farrell Decl. ¶¶ 4–5. As part of this process, she consults with other staff members from PPGC to evaluate whether the research request is feasible and what operational changes and additional training would be required. Fine Decl. ¶ 23. Before any research project can begin, it must be approved by PPGC's medical director, the CEO, and PPFA. *Id.* If a project is approved, Ms. Farrell coordinates staff training and clinical logistics. Hr'g Tr. Vol. 1 at 78:21–79:14.

While PPGC is not currently involved with any fetal tissue studies or fetal tissue donation, it has facilitated fetal tissue donation in the past. Fine Decl. ¶ 10. Since 2006, PPGC has been involved in two research projects relating to fetal tissue. Farrell Decl. ¶¶ 9–10; Hr'g Tr. Vol. 1 at 74:23–75:12. The first study, in progress when Ms. Farrell arrived at PPGC in 2006, concerned first-trimester fetal tissue. Hr'g Tr. Vol. 1 at 75:2–3. The second study, running from 2010 to 2011, concerned first-trimester placental tissue. Farrell Decl. ¶ 9. During Ms. Farrell's tenure as research director PPGC has not engaged in research on or the donation of fetal tissue obtained from second-trimester abortions. Farrell Decl. ¶ 10.

When the prior studies relating to fetal tissue received all the required approvals, Ms. Farrell integrated each study into the clinical procedures of an abortion. In a typical procedure modified for research, a patient would receive a consultation and ultrasound and would be walked through the abortion consent process. Hr'g Tr. Vol. 1 at 76:16–77:1. The doctor would then determine the abortion method entirely based on the gestational age of the embryo or fetus without considering whether the patient was interested in donating fetal tissue. Fine Decl. ¶ 17.

Donation of fetal tissue was not discussed until after the woman completed all consents necessary for the abortion. Hr'g Tr. Vol. 1 at 77:4–13. A separate research consent process would then be undertaken. *Id.* at 76:22–77:3. If a patient consented to donate fetal tissue, a separate file and chart with the patient's research profile was created. *Id.* The doctor was not involved in obtaining a patient's consent to participate in fetal tissue donation and was not informed whether a particular patient agreed to donate tissue. *Id.* at 77:21–78:13, 177:1–6; Fine Decl. ¶ 22. The separate research file was delivered to a laboratory where all fetal tissue would be evaluated after a procedure. Hr'g Tr. Vol. 1at 78:3–13.

After an abortion, the doctor would then be asked to sign off on a form indicating no change was made to the timing, method, or procedure of the abortion for fetal tissue tagged for research. *Id.* at 78:9–13. After the doctor's signature was obtained, the fetal tissue would be processed and packaged according to research needs.

The most recent study concluded in 2011 and was conducted in conjunction with the University of Texas Medical Branch in Galveston (UTMB). Farrell Decl. ¶ 10. It concerned the collection of first-trimester placental tissue from women who consented and required PPGC to use a sterile process to collect the placental tissue after the abortion. *Id.*; Hr'g Tr. Vol. 1 at 79:15–81:17.

As part of the contract between UTMB and PPGC, UTMB agreed to reimburse PPGC twenty-five dollars "for staff time expense involved in obtaining consent" for up to 500 patients and $1,500 for expenses related to a specific training necessary for the research. Pls.' Hr'g Ex. 239 (Tissue Supply Agreement and Amendment) at 1. Once the study began, the agreement was amended, however, to account for costs related to the length of time required to obtain consent, the sterile procedures, the collection of a maternal blood draw, and an administrative fee. *Id.* at 3–4; Hr'g Tr. Vol. 1at 84:7–85:22. Under the amended agreement, UTMB reimbursed PPGC $50 per patient consent and $100 per consent for the combination of the sterile process and maternal blood draw; UTMB also reimbursed a one-time $2,000 fee for surgical services, research management, oversight, and storage. Hr'g Tr. Vol. 1at 85:21–86:22. In total, UTMB reimbursed PPGC slightly less than $10,000. *Id.* at 87:3–6. Ms. Farrell testified that amount did not fully reimburse PPGC for all of its expenses in light of administrative and staff time devoted to the research partnership. *Id.* at 87:7–23.

One of PPGC's physicians who performed abortions was also an investigator on the research side for the UTMB project. *Id.* at 77:14–16.

Neither PPGT, its related entity that performs abortions, nor PPST participates or previously participated in fetal tissue research or a donation program. Lambrecht Decl. ¶ 6; Pls.' Hr'g Ex. 92 (Hons Decl.) ¶ 7.

IV. Center for Medical Progress Videos

On April 9, 2015, Ms. Farrell conducted a site visit with two individuals purporting to be representatives of a tissue procurement company. Farrell Decl. ¶¶ 6–7. The two individuals, however, were not tissue procurement representatives but were affiliated with the Center for Medical Progress (CMP), an anti-abortion organization. *Id.* Using fake names, the two anti-abortion activists attended PPFA conferences and portrayed themselves as starting a company interested in connecting Planned Parenthood health centers with research studies. *Id.* In response to an email from these activists, Ms. Farrell arranged the site visit to PPGC's headquarters. *Id.*

During the site visit, one of the activists secretly videotaped conversations with Ms. Farrell and the tour of the PPGC facility she provided. *See* Defs.' Hr'g Ex. 2 (CMP Video). Ms. Farrell also arranged for the anti-abortion activists to meet with the Ambulatory Surgical Center (ASC) Director and to take a tour of the surgical facilities. *Id.* While touring the surgical facilities, the activists asked to see an example of fetal tissue and the hosts obliged. *Id.* All of these interactions were covertly recorded, netting over eight hours of undercover video. *Id.*

A few months later, CMP released a series of undercover videos, including the one filmed at PPGC's headquarters, purportedly showing Planned Parenthood and its affiliates were contracting to sell aborted human fetal tissue and body parts. Mot. Prelim. Inj. [#58] at 7. The release of the videos prompted a number of federal and state investigations concerning Planned Parenthood organizations.

In Texas, the Harris County District Attorney, together with the Texas Rangers and the Houston Police Department, investigated PPGC. Mot. Prelim. Inj. [#58-1] Ex. 2C (Harris County District Attorney Press Release). The investigation found no wrongdoing by PPGC, but the grand jury indicted the two anti-abortion activists who created the videos. *Id.* These charges were eventually dismissed. Linton Decl. ¶ 25 n.1. During the same period, the Texas Attorney General's Office, Texas Department of State Health Services, and HHSC all conducted their own investigations. *Id.* ¶¶ 27–30. Aside from HHSC's allegations with respect to the Texas Medicaid program, the record includes no additional findings of wrongdoing from the investigations and no efforts to revoke any license or qualification of the Plaintiff Providers.

V. Proposed Research Project with Baylor College of Medicine

Starting in 2013, a researcher from Baylor College of Medicine (Baylor) approached PPGC to explore a new fetal tissue donation project. Farrell Decl. ¶ 36. Ms. Farrell, the Baylor researcher, and a research coordinator from Baylor corresponded for nearly a year concerning the potential project. *Id.*

In mid-November of 2014, the research coordinator from Baylor emailed Ms. Farrell. Pls.' Hr'g Ex. 198 (Nov. 17, 2014) at 2. The title of the email included the phrase "IRB Approval Obtained" and indicated "[Baylor] heard back from the IRB today and like we discussed, the study does not constitute human subject[] research." *Id.* Ms. Farrell responded to the email "Thank you!" *Id.* at 1. The next email in the chain, from the Baylor researcher, asked about next steps "[n]ow that we have approval for these studies . . . ." *Id.*

Following the November 2014 email chain, both Baylor and PPGC continued to discuss the project, exchanging a draft contract. *See* Pls.' Hr'g Exs. 205 (May 21, 2015 Emails), 206 (Jun. 22,

2015 Emails). On July 7, 2015, Ms. Farrell asked the Baylor team to "insert any language that is pertinent to the project" into the contract and emphasized "that if this study involves DNA, isolation of cell lines, etc…[sic] the IRB approval and ICF need to specify this. I don't have a recollection that DNA research was your projected plan." Pls.' Hr'g Ex. 207 (July 7, 2015 Emails) at 1.

No site visit concerning the potential project was ever conducted. Farrell Decl. ¶¶ 38–39. No contract or budget was ever finalized or approved by PPGC or PPFA. *Id.*

After the release of the CMP videos, the Baylor researcher emailed Ms. Farrell to ask if "[i]n light of recent events," they needed to make other changes to the contract. Pls.' Hr'g Ex. 214 (Oct. 13, 2015 Email to PPGC). Nearly a month later, Ms. Farrell responded, clarifying that there was no valid contract and "PPGC will not commit to engage in any fetal tissue research endeavors at this time." Pls.' Notice Filing [#81-12] Ex. K (Nov. 4, 2015 Email to Baylor) at 2.

VI. Congressional Investigation

In the wake of several Congressional committee investigations following the release of videos by CMP, the Select Investigative Panel (Select Panel) was formed by the House of Representatives and tasked with investigating fetal tissue donation practices. Defs.' Hr'g Ex. 61 (Select Panel Report) at 2–3. Representative Marsha Blackburn of Tennessee, a Republican, was named Chair of the Select Panel. *Id.* In addition to the Chair, seven Republicans and six Democrats were selected to serve on the Select Panel. *Id.* at 3.

On December 1, 2016, Representative Blackburn emailed Ken Paxton, the Attorney General of Texas, a letter describing evidence the Select Panel had gathered concerning PPGC. Defs.' Hr'g Ex. 68 (Referral Letter). Representative Blackburn claimed PPGC had violated two specific laws:

Texas Penal Code § 48.02, prohibiting the purchase and sale of human organs, and Texas Penal Code § 37.08, prohibiting a false report to a law enforcement officer. *Id.* at 1, 10.

Representative Blackburn concluded her letter, "Based on the facts outlined above and the supporting documentation, I urge your office to conduct a thorough investigation into whether PPGC violated these statutes, and, if you agree that such violations occurred, to take all appropriate action." *Id.* at 11. Representative Blackburn signed the letter with her name and title as Chairman of the Select Panel. *Id.* No other Select Panel member signed the letter. *See id.*

On December 30, 2016, the Select Panel issued a final report. *See* Select Panel Report. Only Representative Blackburn's name and the seven Republican panel members' names appear in the author block of the final report. *Id.*

VII. Procedural History of this Suit

A. October 2015 Termination Letter

On October 19, 2015, HHSC issued a "Notice of Termination" to each of the Provider Plaintiffs. *E.g.*, Mot. Prelim. Inj. [#58-1] Ex.1A (Initial Notice). The Initial Notice "effect[ed] a process to end [the Provider Plaintiffs'] enrollment in the Texas Medicaid program." *Id.* (citing 1 TEX. ADMIN. CODE § 371.1703(e)).[3] Plaintiffs filed suit, seeking a temporary restraining order or, alternatively, a preliminary injunction. Compl. [#1] at 19.

Although the Initial Notice warned the Provider Plaintiffs their Provider Agreements would be terminated fifteen days following receipt of a Final Notice of Termination, HHSC claimed the

[3] The Initial Notice alleged four bases for termination: video evidence indicating (1) a policy of agreeing to procure fetal tissue "even if it means altering the timing or method of an abortion"; (2) failure to prevent conditions allowing the spread of infectious diseases; and (3) inadequate training for infection control and barrier precaution in handling fetal blood and tissue; as well as (4) prior *qui tam* litigation. *See* Initial Notice.

lawsuit was premature as it had not yet actually decided termination was in order. Defs.' Ltr. Br. [#38] (citing Initial Notice). In light of HHSC's representation, the Court stayed the case pending the issuance of a final termination notice. Ord. of Jan. 27, 2016 [#42]. The case remained dormant for nearly a year. *See* Mot. Prelim. Inj. [#58] at 14.

B. December 2016 Termination Letter

On December 20, 2016, more than a year after the Initial Notice had been issued, HHSC sent a Final Notice of Termination (Final Notice) to each of the Provider Plaintiffs. Pls.' Hr'g Ex. 1 (Final Notice) at 1. The Final Notice informed the Provider Plaintiffs that the Inspector General "finds you are not qualified to provide medical services in a professionally competent, safe, legal and ethical manner under . . . state and federal law pertaining to Medicaid providers." *Id.* at 1–2.

The Final Notice cites three sources of evidence for the Inspector General's conclusions: the video footage obtained by CMP (CMP Video), discussions with PPGC staff, and evidence uncovered by the Select Panel. *Id.* at 2. According to the Final Notice, "the unedited video footage indicates that Planned Parenthood 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." *Id.* The Final Notice also states the Inspector General consulted with his agency's Chief Medical Officer, who reviewed the video and concluded the Plaintiff Providers' "willingness to engage in these practices violates generally accepted medical standards . . . ." *Id.*

Summarizing the evidence from the CMP Video, the Final Notice enumerates alleged violations of generally accepted standards of medical practice:

1. a history of deviating from accepted standards to procure samples that meet researcher's needs;

2. a history of permitting staff physicians to alter procedures to obtain targeted tissue samples needed for their specific outside research;

3. a willingness to convert normal pregnancies to the breech position to ensure researchers receive intact specimens;

4. an admission that "we get what we need to do to alter the standard of care where we are still maintaining patient safety, still maintaining efficiency in clinic operations, but we integrate research into it";

5. an admission that Planned Parenthood gets requests for "information from our study sponsor on what data they need that is not our standard of care," and that [Planned Parenthood] provides what is needed by creating a separate research protocol or template that can include medically unnecessary testing; and

6. a willingness to charge more than the costs incurred for procuring fetal tissue.

Id.

In addition to alleging violations of medical and ethical standards, the Final Notice indicates the Inspector General relied on evidence from the Select Panel that Planned Parenthood "engaged in misrepresentations about [its] activity related to fetal tissue procurements . . . ." *Id.* at 3. While the Final Notice primarily outlines bases for termination pertaining to PPGC, it also notes "if you are affiliated with a provider that commits a program violation subjecting it to enrollment termination, then the affiliate is also subject to enrollment termination." *Id.* The Final Notice then outlines indicia of affiliation. *Id.*

With the Provider Plaintiffs' termination from Medicaid set to take place thirty days after the receipt of the Final Notice, Plaintiffs filed an amended complaint and a new motion for a preliminary injunction to prevent termination. Am. Compl. [#76]; Mot. Prelim. Inj. [#58]. Starting January 17, 2017, this Court held a three-day evidentiary hearing on Plaintiffs' motion for injunctive relief. At the conclusion of the evidentiary hearing, the Court entered an order prohibiting the termination of

the Plaintiff Providers' enrollment in Medicaid until February 21, 2017. Ord. of Jan. 19, 2017 [#84] at 2. The Court also requested letter briefs and authorized the parties to file findings of fact and conclusions of law. *Id.* Both parties have done so.

Analysis

I. Legal Standard for Injunctive Relief

A preliminary injunction is an "extraordinary equitable remedy." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 452 (5th Cir. 2014). In essence, "[t]he purpose of a preliminary injunction is to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *Miss. Power & Light Co. v. United Gas Pipe Line Co.,* 760 F.2d 618, 627 (5th Cir. 1985) (citation omitted).

The Court may issue such relief only if the movant establishes "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Jackson Women's Health Org.,* 760 F.3d at 452 (citation and internal quotation omitted). Because preliminary injunctions are extraordinary remedies, the movant must "clearly carr[y] the burden of persuasion on all four requirements." *PCI Transp. Inc. v. Fort Worth & W.R.R. Co.,* 418 F.3d 535, 545 (5th Cir. 2005) (citation and internal quotation omitted).

II. Application

A. Substantial Likelihood of Success on the Merits

Plaintiffs bring this suit based on rights secured by the federal Medicaid statute and the United States Constitution. Am. Compl. [#76] ¶¶ 86–89. Yet, Plaintiffs seek a preliminary injunction

solely via their federal Medicaid statutory claim, not the constitutional claim. See Mot. Prelim. Inj. [#58] at 22–32. Specifically, Plaintiffs allege a violation of 42 U.S.C. § 1396a(a)(23)(A), which states, "[A]ny individual eligible for medical assistance may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . and who undertakes to provide him such services . . . ." Plaintiffs allege HHSC violated this provision, referred to as the free-choice-of-provider requirement, because the Provider Plaintiffs are qualified and willing to undertake family planning services.

The Court briefly addresses the issue of standing before examining the merits of Plaintiffs' Medicaid Act claim.

I. Standing

The Fifth Circuit's recent opinion in *Planned Parenthood of Gulf Coast v. Gee* provides the guidance for a § 1983 action alleging a violation of Medicaid's free-choice-of-provider requirement. 837 F.3d 477 (5th Cir. 2016). In *Gee*, the Fifth Circuit affirmed the district court's holding that the Medicaid's free-choice-of-provider requirement creates a private right enforceable under § 1983 and the individual plaintiffs met their burden to show entitlement to a preliminary injunction. *Id.* at 487, 502. Thus, this Court looks both to the Fifth Circuit's *Gee* opinion as well as to the district court's opinion in the same case, *Planned Parenthood Gulf Coast, Inc. v. Kliebert,* 141 F. Supp. 3d 604 (M.D. La. 2015).

HHSC raises the issue of standing, emphasizing the Fifth Circuit is still considering whether to grant en banc review of the *Gee* opinion. Defs.' Proposed Findings [#94] at 45 n. 6. HHSC refuses to concede § 1396a(a)(23) provides a private right of action for individuals and also argues providers do not have a right of action under the same provision. *Id.*

Although the Fifth Circuit may grant en banc review, the *Gee* opinion currently stands as the authority in the Fifth Circuit. In *Gee*, the Fifth Circuit "join[ed] every other circuit to have addressed this issue to conclude that § 1396a(a)(23) affords the Individual Plaintiffs a private right of action under § 1983." 837 F.3d at 489. Thus, this Court, heeding the Fifth Circuit's unqualified statement from *Gee*, finds the Individual Plaintiffs in this case have a right of action under § 1396a(a)(23).

Moreover, just as the district court in *Kliebert* concluded, this Court finds if either the Individual Plaintiffs or the Provider Plaintiffs prevail on the merits, "the same remedy—a permanent injunction—would be due and any potential action by [HHSC] would be similarly affected." 141 F. Supp. 3d at 636. The Court need not conclude all Plaintiffs have a substantial likelihood of prevailing on the Medicaid Act claim for a preliminary injunction to issue at this time. *Id.* at 636. If Plaintiffs satisfy the elements needed to show a substantial likelihood of success on the Individual Plaintiffs' § 1396a(a)(23) claim only, so long as the other factors are met, a preliminary injunction is appropriate. *See id.* Accordingly, because this Court finds the Individual Plaintiffs have a right of action, it need not decide whether the Provider Plaintiffs also have such a right, either on their own behalf or on the behalf of their patients. *See id.*

ii. Medicaid Act Claim

"Medicaid is a cooperative program between the federal government and the states in which the federal government gives financial assistance to states to provide medical services to Medicaid-eligible individuals." *Gee,* 837 F.3d at 489. Through Medicaid, the federal government and participating states share health care costs. *Id.* at 489 (citing *Atkins v. Rivera,* 477 U.S. 154, 156–57 (1986)). The federal government provides the states with federal funding, and "[i]n return participating States are to comply with the requirements imposed by the [Medicaid] Act and by the

Secretary of Health and Human Services." *Id.* (internal quotation marks omitted). In other words, "Medicaid offers the States a bargain: Congress provided federal funds in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions." *Id.* (quoting *Armstrong v. Exceptional Child Ctr., Inc.,* 135 S.Ct. 1378, 1382 (2015) (Scalia, J.) (plurality opinion) (internal quotation marks omitted)).

This case concerns the contours of Medicaid's mandated free-choice-of-provider requirement. As the Supreme Court explained, the free-choice-of-provider requirement "gives recipients the right to choose among a range of qualified providers, without government interference." *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980). While the Medicaid statute does not define the term "qualified," the Fifth Circuit interpreted qualified in the Medicaid context to mean "to be capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner." *Gee,* 837 F. 3d at 495 (internal quotation marks omitted) (quoting *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health,* 699 F.3d 962, 978 (7th Cir. 2012)).

Within the federal Medicaid scheme, states may exclude providers on the grounds provided under § 1396a(p)(1) of the Medicaid Act and on analogous state grounds relating to provider qualification. *Id.* at 495. Therefore, while a state retains broad authority to define provider qualifications and to exclude providers who are not qualified, that authority is limited by the meaning of qualified as it relates to the ability to perform medical services. *Id.*

Previously, the Fifth Circuit rejected Louisiana's asserted bases for terminating PPGC—two *qui tam* claims, unspecified misrepresentations, and a pending investigation—because they did not relate to PPGC's qualifications. *Id.* at 495–96. In particular, Louisiana failed to show how its

grounds for termination even related to PPGC's qualifications. *Id.* The Fifth Circuit implied that in order to survive a § 1396a(a)(23) challenge, a state's basis for denying a Medicaid beneficiary their chosen provider requires "factual support or linkage" between the grounds for termination and the provider's qualifications. *Id.* at 499.

Under Texas law, the Inspector General may terminate a provider's enrollment in Medicaid if the Inspector General establishes by prima facie evidence the provider committed a program violation, is affiliated with a provider that commits a program violation, or commits an act for which sanctions, damages, penalties, or liability could be assessed by the Inspector General. 1 TEX. ADMIN. CODE § 371.1703©. Prima facie evidence in this context is defined as evidence "sufficient to establish a fact or raise a presumption unless disproved."*Id.* § 371.1(62). Thus, in order for the Inspector General to terminate a provider, he must have evidence sufficient to establish the provider or its affiliate committed a program violation, i.e. a violation of state law, federal law, or Texas Medicaid policies. *See id.* § 371.1703©.

Additionally, both federal and Texas law require a provider be given notice of termination, which must describe the reasons for termination. *See, e.g.*, 42 U.S.C. § 1320a-7 (requiring "reasonable notice" before termination); 42 U.S.C. § 405(b) (mandating the notice include a "discussion of the evidence" and the "reason or reasons upon which [termination] is based"); 1 TEX. ADMIN. CODE § 371.1703(f) (requiring a provider be given notice of termination as part of due process); *Id.* 371.1703(e) (mandating notice of termination include "the basis for termination").

Consequently, the Court will not consider bases for termination not included in the notice of termination.[4]

It is undisputed the Inspector General individually made the decision to terminate the Plaintiff Providers' enrollment in Medicaid and the Final Notice sets forth the bases for that decision. Hr'g Tr. Vol. 2 at 88:2–16, 18:8–14. Thus, the Court looks to see whether the Inspector General had prima facie evidence sufficient to conclude the bases of termination set forth in the Final Notice merited finding the Plaintiff Providers were not qualified.

The Inspector General had three overarching bases for termination: (1) video evidence indicating PPGC violated medical and ethical standards; (2) evidence PPGC misrepresented activity related to fetal tissue procurement; and (3) evidence the other Provider Plaintiffs were affiliated with PPGC. *See* Final Notice; Hr'g Tr. Vol. 2 at18:11–22:7, 31:6–35:9, 37:16–41:4.[5]

In short, the Court finds the Inspector General did not have any factual support to conclude the bases of termination set forth in the Final Notice merited finding the Plaintiff Providers were not qualified. Rather, in light of the current record, it appears the termination decision had nothing to do with the Provider Plaintiffs' qualifications. As a result, the Court finds the Individual Plaintiffs met their burden of proof showing a substantial likelihood of success on the merits of their claim under § 1396a(a)(23).

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[4] In its pleadings and at the evidentiary hearing, HHSC alleged bases for termination such as the Provider Plaintiffs' failure to obtain informed consent, but, as discussed above, the Court will not consider reasons for termination not included in the Final Notice and not part of the Inspector General's termination decision. *See, e.g.*, Defs.' Resp. [#70] at 13–14; Hr'g Tr. Vol. 1 at 129:17–132:6.

[5] Notwithstanding the Inspector General's sworn testimony he reviewed the Select Panel's report in making the decision to terminate the Provider Plaintiffs from Texas Medicaid, Hr'g Tr. Vol. 2 at 35:12–36:21, the Court notes the Select Panel's report was published on December 30, 2016, ten days after the Inspector General sent the Final Notice to the Provider Plaintiffs. *See* Select Panel Report. Additionally, the validity of the Select Panel Report remains in question as six out of the thirteen committee members declined to endorse the report. *see id.*

a. Video evidence indicating PPGC violated medical and ethical standards

In essence, the Inspector General alleges the CMP Video demonstrates PPGC violated medical and ethical standards in three ways. First, the Inspector General concluded, based on consultation with HHSC's Chief Medical Officer, the CMP Video shows PPGC has "a history of" altering and "a willingness" to alter abortion procedures for research purposes. *See* Final Notice at 2; Hr'g Tr. Vol. 2 at 28:22–31:24. Second, the Inspector General determined the CMP Video demonstrates researchers at PPGC performed and possibly altered abortions to procure fetal tissue for their own research. *See* Final Notice at 2; Hr'g Tr. Vol. 2 at 31:25–33:1. And third, the Inspector General found PPGC had "a willingness" to profit from procuring fetal tissue. *See* Final Notice at 3; Hr'g Tr. Vol. 2 at 28:22–32:21. After reviewing the CMP Video in its entirety and considering the Inspector General's testimony, the Court finds there is no evidence in the record PPGC violated any medical or ethical standard.

As a threshold matter, the CMP Video is the only evidence the Inspector General relied upon to conclude PPGC violated medical and ethical standards. *See* Hr'g Tr. Vol. 2 at 28:22–32:21 (reviewing the video clips the Inspector General relied upon to conclude PPGC violated ethical and medical standards). While the Chief Medical Officer did provide the Inspector General with his opinion, that opinion was only offered as an analysis of what the CMP Video showed, not whether a violation occurred. *Id.* at 18:24–20:8.

Ultimately, the quality and strength of the evidence the CMP Video provides is suspect. While the record shows the Inspector General knew there were multiple versions of the video available on the internet, Hr'g Tr. Vol. 2 at 24:7–5, HHSC offered no evidence the Inspector General

took steps to authenticate the CMP Video he relied upon or verify it had not been altered.[6] Indeed, HHSC offered no evidence to authenticate the CMP Video at all.

Despite concerns about the authenticity of the video, the Court nevertheless examines the CMP Video to evaluate whether it provided the Inspector General with prima face evidence to conclude PPGC violated medical and ethical standards. To summarize the CMP Video for those not blessed with eight free hours to watch it, the vast majority of the footage concerns conversations between Ms. Farrell and the two anti-abortion activists during the April 9, 2015 site visit. CMP Video at 7:41:15–13:57:03, 14:30:03–14:49:50.[7] A thirty-minute section of the CMP Video features a tour of the Ambulatory Surgical Center (ASC), which includes conversations with the ASC Director and Ms. Farrell and a visit to a laboratory. *Id.* at 13:57:03–14:28:30.

Turning now to the first allegation—PPGC has both a history of altering and a willingness to alter abortion procedures for research purposes—the Court finds the Inspector General had no evidence to support this allegation. In particular, the Inspector General had no evidence any PPGC doctor altered an abortion procedure and the video he relied upon, the CMP Video, features unclear and ambiguous dialogue, statements by Ms. Farrell who had no personal knowledge of abortion procedures, and conversations exploring theoretical possibilities.

Most significantly, the Inspector General admitted he had no evidence any PPGC doctor altered the medical procedure of an abortion, for research purposes or for any other reason, when he

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[6] HHSC only offers evidence that other versions of the CMP Video posted on YouTube were verified as authentic by independent digital forensic professionals. Resp. [#70] at 21. As the Inspector General testified he did not rely on videos available via YouTube, the authentication of such videos is not relevant here. *See* Hr'g Tr. Vol. 2 at 24:7–25:25.

[7] The Court uses the time stamps from the CMP Video to reference sections of footage.

issued the Final Notice (nor did he have such evidence at the hearing). Hr'g Tr. Vol. 2 at 50:14–21, 69:17–70:13.

Rather, in support of his determination, the Inspector General pointed to CMP Video clips he claims show Ms. Farrell admitted PPGC doctors previously altered abortion procedures. Hr'g Tr. Vol. 2 at 29:1–31:24 (citing CMP Video at 7:59:00–8:00:43, 8:00:54–8:01:50); see also Defs.' Ltr. Br. [#92] at 2–5 (citing CMP Video at 8:04:08–8:05:35, 8:11:25–8:11:53, 11:59:30–12:01:40). After reviewing these clips in the context of the full video, the Court notes the conversations in the CMP ideo shift quickly between discussing changes to clinical processes necessary to incorporate research into a health center's operations and discussing changes to the medical procedures of abortion. Even viewing these conversations in the light most favorable to the Inspector General, the Court sees nothing more than confused and ambiguous dialogue, open to interpretation. *Compare* Pls.' Ltr. Br.[#91] *with* Defs.' Ltr. Br. [#93] (citing the same or adjacent clips of the CMP Video for opposite propositions).

In addition to Ms. Farrell's statements captured in the CMP Video, the Inspector General indicated he relied on the section of the CMP Video depicting the tour of the ASC. Hr'g Tr. 2 29:1–31:24 (citing CMP Video at 13:56:54–13:59:10, 14:03:11–14:03:50, 14:17:03–14:17:55, 14:20:10–14:20:56, 14:24:57–14:25:26). HHSC argues this section of the CMP Video demonstrates PPCG doctors altered abortion procedures to remove intact fetuses, or would be willing to do so, for research. Plaintiffs, however, offer the uncontradicted testimony of Dr. Fine, an experienced OB/GYN who has performed numerous abortions, that it is always clinically desirable to remove the fetus as intact as possible to minimize entries into the uterus. Hr'g Tr. Vol. 1 at 156:17–157:3.

By comparison, the Inspector General, a lawyer with no medical training, testified he relied on the Chief Medical Officer, to determine if the CMP Video included any medically unethical conduct. Hr'g Tr. Vol. 2 at 6:19–7:19, 19:3–20:15, 58:16–25. Yet, the Chief Medical Officer, an orthopedic surgeon who practices sports medicine, admitted he would have to defer to an OB/GYN to evaluate abortion procedures. *Id.* at 91:18–93:2. He also admitted that he and the Inspector General would have a similar understanding of the abortion terms and procedures discussed in the CMP Video, the understanding of a lay person. *Id.*

Furthermore, the Court discounts the secretly recorded statements by Ms. Farrell, especially as the CMP Video repeatedly shows Ms. Farrell had no personal knowledge of the medical aspects of abortion procedures or PPGC's abortion procedures. For example, Ms. Farrell simply shrugged when asked if PPGC's doctors could convert a fetus to breech position and later indicated she would have to ask why converting to breech would be medically necessary. CMP Video at 8:05:23–8:06:00, 11:53:53–11:54:45. Similarly, when confronted with questions from the anti-abortion activists concerning potential changes to abortion procedures, Ms. Farrell admitted she was unsure how the gestational age for a fetus is determined or how second-trimester procedures differ. *E.g.*, CMP Video at 11:50:39–11:54:35. While Ms. Farrell previously worked as a nurse, she has never seen an abortion performed or even been in the room when an abortion was performed. Hr'g Tr. Vol. 1 at 64:2–11.

Rather, Ms. Farrell's day-to-day role involves managing clinical operations and is unrelated to the medical procedures of abortion. Farrell Decl. ¶¶ 4–5. Statements from the CMP Video demonstrate how Ms. Farrell indicated she would have to discuss changes to medical procedures with the doctors. *See, e.g.*, CMP Video at 8:01:25–8:01:34; 8:05:16–8:05:42. Plaintiffs also

emphasize that the site visit featured in the video is only a preliminary step in a research partnership; more approval, from senior clinical staff and PPFA, would be required before any research project could be undertaken. Hr'g Tr. Vol. 1 at 161:7–12; Fine Decl. ¶ 23. After evaluating the CMP Video, PPGC's prior research partnerships, and Ms. Farrell's experience, it appears more likely Ms. Farrell believed she was discussing changes to clinical operations rather than changes to the medical procedures of abortion. *See, e.g.*, Hr'g Tr. Vol. 1 91:5–92:14, 97:4–15.

The theoretical nature of the conversations recorded in the CMP Video further undermines the support for the Inspector General's allegation. The last study even relating to fetal tissue ended in 2011. Farrell Decl. ¶ 9. During that study, PPGC abortion doctors were unaware of whether a patient consented to donate fetal tissue. PPGC clinical staff maintained separate files for a patient's clinical information and any research involvement. Hr'g Tr. Vol. 1 at 76:22–77:3. Doctors were not involved in obtaining a patient's consent for donation. Hr'g Tr. Vol. 1 at 77:21–78:13, 177:1–6; Fine Decl. ¶ 22.

Overall, the context of the CMP Video eliminates the plausibility of interpreting it to show PPGC had a history of and willingness to alter the medical aspects of abortion procedures. Viewing the evidence holistically, the Court concludes the Inspector General had no evidence indicating PPGC ever altered an abortion procedure or would be willing to do so.

Evaluating the Inspector General's second allegation—the CMP Video demonstrates researchers at PPGC performed abortions to procure fetal tissue, possibly altering procedures, for their own research—the Court finds this allegation similarly unsupported by evidence. As discussed above, the Inspector General had no evidence any PPGC doctor ever altered an abortion procedure, for research or for any other purpose. And, again, there is no evidence any PPGC doctor ever knew

if a patient consented to donate to research. Consequently, there is no evidence a PPGC doctor could have altered an abortion procedure for research purposes.

But the Court also notes the Inspector General had no evidence a researcher who performs abortions and collects the fetal tissue after the procedure for her own research purposes violates medical or ethical standards. HHSC cites three sections of federal law as evidence PPGC violated medical and ethical standards, but there is no indication these sections apply to the studies in which PPGC participated. HHSC cites no other source for the medical or ethical standards PPCG allegedly violated. *See* Defs.' Proposed Findings [#94] at ¶¶ 24–28.

Specifically, HHSC cites 45 C.F.R. § 46.204 as prohibiting researchers from performing abortions and collecting fetal tissue for their own research. Resp. [#70] at 11; Defs.' Proposed Findings [#94] at ¶ 24. This regulation, however, imposes a condition on federal funding for research on fetuses in utero, not research performed on tissue collected after an abortion. *See* § 46.204; Consolidated Appropriations Act, Pub. L. No. 111-117, § 509(a)(2), 123 Stat. 3034, 3280–81 (2010) ("None of the funds made available in this Act may be used for— . . . research in which a human a human embryo . . . [is] knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero under 45 C.F.R. § 46.204(b) . . . ."); *see also* Hr'g Tr. Vol. 3 at 39:25–40:18. Furthermore, HHSC does not contend the Inspector General had any evidence the studies with which PPGC partnered received federal funding.

HHSC also cites 42 U.S.C. § 289g-1(c)(4) and (b)(2)(C)(I) as evidence a researcher cannot play a role in the decision to terminate a pregnancy and must disclose if she has an interest in research conducted with the tissue. Defs.' Proposed Findings [#94] at ¶¶ 25–26. Yet, again, these two sections pertain to conditions on federal research funding. *See* 42 U.S.C. § 289g-1(a)(1).

Relatedly, the two prior studies PPGC engaged in received IRB approval, which means an IRB panel validated the studies' plans for managing legal and ethical issues. Hr'g Tr. Vol. 1 at 75:13–76:15. The Inspector General presented no evidence suggesting the IRB review and approval was insufficient. In conclusion, the Court finds 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.

Finally, the Court examines the Inspector General's third allegation for how PPGC violated medical and ethical standards—PPGC had "a willingness" to profit from procuring fetal tissue. As an initial matter, the Court is unconvinced mere willingness, without any evidence of attempt, is enough to deprive a Medicaid beneficiary of the right to her otherwise qualified provider. *See Gee*, 837 F.3d at 495, 499 (warning that a state cannot simply label an exclusionary rule as a qualification). The Inspector General offered no evidence indicating PPGC ever made a profit from procuring fetal tissue for research. Specifically, the Inspector General could not point to a single payment PPGC ever received that exceeded its expenses incurred. Instead, the Inspector General again relied on the conversations between Ms. Farrell and the two anti-abortion activists from the CMP Video. The Inspector General testified Ms. Farrell's use of the term "financially beneficial" led him to conclude PPGC was willing to procure fetal tissue for valuable consideration. Hr'g Tr. Vol. 2 at 34:2–12. Yet, it is undisputed that it is a financial benefit to receive reimbursement for actual, reasonable expenses. Hr'g Tr. Vol. 2 at 75:1–75:10. And no PPGC employee, in the CMP Video or otherwise, represented that PPGC sought to make a profit on fetal tissue research. *Id.* at 74:15–25.

Therefore, to summarize, the Inspector General relied on an unauthenticated video and the advice of an orthopedic surgeon to conclude PPGC violated medical and ethical standards related to abortion procedures. The video in question offers, at most, theoretical conversations concerning what might be possible in a research partnership between a health care provider and a tissue procurement company. The Inspector General had no evidence any PPGC doctor ever altered an abortion procedure, for research or for any other purpose. The Inspector General also possessed no evidence any researcher ever knowingly performed or altered an abortion to procure fetal tissue for his or her own research. And even if a doctor did collect fetal tissue for her own research after performing an abortion, the Inspector General had no evidence such activity violates medical or ethical standards. Lastly, the Inspector General possessed no evidence PPGC ever profited, or even sought to profit, from procuring fetal tissue. Thus, the Court finds there is no factual support in the record for the conclusion PPGC violated medical and ethical standards or would be willing to do so.

b. Evidence PPGC misrepresented activity related to fetal tissue procurements

The Final Notice stated the Inspector General had evidence the Provider Plaintiffs "engaged in misrepresentations about your activity related to fetal tissue procurements, as revealed by evidence provided by the [Select Panel]." Final Notice at 3. At the evidentiary hearing, the Inspector General testified he only considered evidence of one alleged misrepresentation in making his termination decision: evidence a Texas Ranger was told the IRB had not yet approved a proposed research project between Baylor and PPGC. Hr'g Tr. Vol. 2 at 36:12–21, 51:6–14.

Under Texas law, "[a] person commits an offense if, with intent to deceive, he knowingly makes a false statement that is material to a criminal investigation and makes the statement to: . . . [a law enforcement employee] conducting the investigation . . . ." TEX. PENAL CODE § 37.08(a).

Such an offense is a program violation. *See* Provider Agreement at 13 (indicating the failure to follow any applicable law is grounds for termination from Texas Medicaid).

In determining PPGC made a misrepresentation, the Inspector General relied on the letter Representative Blackburn emailed the Attorney General of Texas. Hr'g Tr. Vol. 2 at 34:18–35:7 (discussing the Referral Letter). That letter called the Inspector General's attention to an email chain between Ms. Farrell and the Baylor researchers where the subject line included "IRB approval obtained." *Id.* The Referral Letter cited the email chain and a subsequent report by a Texas Ranger issued as part of the investigations into PPCG. Referral Letter at 7–9 (discussing Defs.' Hr'g Ex. 79 (Email Chain) and Defs.' Hr'g Ex. 81 (Texas Ranger Report)). The Texas Ranger Report states, "The Institutional Review Board had not yet given approval for the Baylor [study]." Texas Ranger Report at 4.

While the Inspector General reviewed the Referral Letter and the documents it cites, specifically the Email Chain and the Texas Ranger Report, the Inspector General conducted no additional interviews or investigations of the alleged misrepresentation. Hr'g Tr. Vol. 2 at 52:2–10. Yet, the Inspector General acknowledged he did not know whether the statement indicating the Baylor study had not yet obtained IRB approval was a mistake or misrepresentation. Hr'g Tr. Vol. 2 at 52:1–23. Admittedly, he had no evidence on whether the statement's speaker had the required intent to deceive.[8] *Id.*

At the same time, evidence in the record suggests IRB approval for the Baylor study, in truth, may not have been obtained or it was at least reasonable to believe IRB approval had not been

[8] The Court is also unconvinced the Inspector General had any evidence showing the statement concerning IRB approval for the Baylor study was material to a criminal investigation. *See* TEX. PENAL CODE § 37.08(a); Hr'g Tr. Vol. 2 at 53:5–54:6.

secured. Pls.' Hr'g Ex. 207 (July 7, 2015 Emails) at 1 (indicating IRB approval would have to specify if the study involved DNA). Given the lag in negotiations following the initial IRB approval in November 2014, the fact a contract had not yet been confirmed in July 2015, and the lack of clarity on the study's details, an additional IRB approval process could have been necessary. *See* Farrell Decl. ¶ 38 (noting the IRB process is an ongoing process requiring annual re-submission and additional approvals when project modifications are made).

Without any evidence that a single allegedly incorrect statement was a misrepresentation rather than a mistake, the Court finds it likely the Inspector General did not have sufficient evidence to conclude PPGC made a misrepresentation.

c. Evidence the other Provider Plaintiffs were affiliated with PPGC

Most importantly, to find the Provider Plaintiffs, other than PPGC, should be terminated from Texas's Medicaid program because of their affiliation with PPGC, the Inspector General needed prima facie evidence PPGC committed a violation. *See* 1 TEX. ADMIN. CODE § 371.1703(c). Yet, as discussed above, the Inspector General had no evidence PPGC violated any medical or ethical standards and no evidence PPGC engaged in misrepresentations. Thus, the Inspector General had no evidence the other Provider Plaintiffs could be terminated on the basis of affiliation. However, even if the Inspector General could establish prima facie evidence PPGC committed a violation, the Inspector General would likely be unable terminate the other Provider Plaintiffs' enrollment in Medicaid on the basis of affiliation alone.

To reiterate, the Fifth Circuit confirmed states retain board authority to define provider qualifications and to exclude providers on that basis, but that authority is limited by the meaning of qualified. *Gee,* 837 F.3d at 495. The Fifth Circuit has expressly defined qualified in the Medicaid

context as meaning "capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner." *Id.*

The Final Notice relies on indicia of affiliation such as "common identifying information," "individual providers working across affiliates,"[9] and the Provider Plaintiffs' relationship with PPFA to find all the Provider Plaintiffs are affiliates. Thus, applying this line of logic, the Inspector General concluded if one Planned Parenthood provider could be terminated from Medicaid, all Planned Parenthood providers could be terminated as affiliates. Hr'g Tr. Vol. 2 at 38:23–41:3.

Yet, indicia of affiliation are likely unconnected to a provider's qualifications to provide medical services. *See id.* at 492–95 (discussing the scope of a state's ability to set reasonable standards related to a provider's qualifications). Excluding a provider from Medicaid as not qualified, if the provider is otherwise legally qualified to provide the required medical services within the state, violates Medicaid patients' statutory right to obtain medical care from the qualified provider of their choice. *Id.* at 493 (citing *Planned Parenthood of Ind.,* 699 F.3d at 968 (7th Cir. 2012) and *Planned Parenthood of Ariz. Inc. v. Beadlike,* 727 F.3d 960, 970 (9th Cir. 2013)). HHSC's expansion of a state's power to exclude qualified providers because of organizational associations would likely eviscerate the free-choice-of-provider requirement as an exclusionary rule unrelated to qualification. *See id.* at 494 (restating the principle that allowing a state to define qualified for its own purposes would destroy a Medicaid patient's right to choose his or her own qualified provider).

Generally, Medicaid's statutory scheme suggests the "individual or entity" a state may exclude must be the same individual or entity the state determines is not qualified to provide medical

[9] HHSC identified one doctor who worked at two different Provider Plaintiffs but there is no evidence this doctor ever worked at more than one provider at the same time. Hr'g Tr. Vol 2 at 80:7–81:17.

services. 42 U.S.C. § 1396a ("[A] State may exclude any individual or entity for purposes of participating under the State plan under this subchapter for any reason for which the Secretary could exclude *the* individual or entity from participation in a program . . . .") (emphasis added); *see also Planned Parenthood Se., Inc. v. Bentley,* 141 F. Supp. 3d 1207, 1223 (M.D. Ala. 2015) (similarly holding the entity a state may exclude from Medicaid must be the same entity the state determines is unqualified and not an affiliate).

In contrast, HHSC argues federal law permits the termination of entities based on their affiliation, citing 42 C.F.R. § 1001.1001(a)(i)©. Defs.' Proposed Findings [#94] at ¶ 47. In relevant part, § 1001.1001(a) provides the following:

> (1) The [Office of the Inspector General] may exclude an entity if:
>
> (i) A person with a relationship with such entity—
>
> . . .
>
> © Has been excluded from participation in Medicaid or any of the State health care programs, *and*
>
> (ii) Such person—
>
> (A)(1) Has a direct or indirect ownership interest (or any combination thereof) of 5 percent or more in the entity;
>
> (2) Is the owner of a whole or part interest in any mortgage, deed of trust, note or other obligation secured (in whole or in part) by the entity or any of the property assets thereof, in which whole or part interest is equal to or exceeds 5 percent of the total property and assets of the entity;
>
> (3) Is an officer or director of the entity, if the entity is organized as a corporation;
>
> (4) Is partner in the entity, if the entity is organized as a partnership;
>
> (5) Is an agent of the entity; or

> (6) Is a managing employee, that is, an individual (including a general manager, business manager, administrator or director) who exercises operational or managerial control over the entity or part thereof, or directly or indirectly conducts the day-to-day operations of the entity or part thereof, or
>
> (B) Was formerly described in paragraph (a)(1)(ii)(A) of this section, but is no longer so described because of a transfer of ownership or control interest to an immediate family member or a member of the person's household . . . .

(emphasis added).[10]

The Court disagrees with HHSC's interpretation. Section 1001.1001(a)(i)© allows discretionary exclusion of an entity in a narrow circumstance, when a sanctioned person has an ownership or control interest in the entity or is an officer, director, agent, or managing employee of the entity. In such a situation the individual is an alter ego of the entity. Here, the Provider Plaintiffs are separate entities, with no evidence of an ownership or control interest. Consequently, the Court holds the Inspector General would likely be unable to terminate the other Provider Plaintiffs' enrollment in Medicaid on the basis of affiliation alone.

d. HHSC's Course of Conduct

Plaintiffs offer evidence HHSC seeks to terminate the Provider Plaintiffs for reasons other than their qualifications.

Most significantly, Plaintiffs emphasize how HHSC began its effort to terminate the Provider Plaintiffs from the state's Medicaid system in the fall of 2015 with the Initial Notice. *See* Initial Notice [#58-1]. The Inspector General even admitted he had not reviewed the CMP Video before the Initial Notice was issued. Hr'g Tr. Vol. 2 49:2–15. Only after Plaintiff filed this suit to challenge termination did HHSC concede it was not ready to move forward with termination. Mot. Prelim. Inj.

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[10] HHSC misquotes 42 C.F.R. § 1001.1001(a)(1)(i)©, neglecting the "and" emphasized above and failing to explore how the other requirements of the section apply. *See* Defs.' Proposed Findings [#94] at ¶ 47.

[#58] at 2. Despite being unwilling to proceed with termination, HHSC did not rescind the Initial Notice, causing this case to languish on this Court's docket for over a year. *Id.*

When HHSC ultimately decided to issue the Final Notice, it did so five days before Christmas, forcing Plaintiffs to renew their efforts to challenge termination in the middle of the holiday season.[11] *Id.* Without explanation, the Final Notice abandons the majority of the bases for termination alleged in the Initial Notice and asserts new grounds for termination. *Compare* Initial Notice *with* Final Notice.

In addition, the general lack of evidence supporting the Inspector General's termination decision, discussed above, implies HHSC seeks to terminate the Provider Plaintiffs for reasons other than their qualifications.[12] Moreover, there is no evidence in the record of any effort to revoke the license or any other qualification needed to render medical services of any Provider Plaintiff. *See Gee,* 837 F.3d at 499 (considering the fact Louisiana made no effort to revoke the license of PPGC or limit its entitlement to render medical services to the general population as evidence the termination decision had nothing to do with PPGC's qualifications).

The Individual Plaintiffs have met their burden to establish a likelihood of success on the merits. The Inspector General did not have prima facie of evidence, or even a scintilla of evidence, to conclude the bases of termination set forth in the Final Notice merited finding the Plaintiff

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[11] Almost simultaneously with HHSC's issuance of the Final Notice, the Texas Department of State Health Services adopted new rules restricting disposal methods for fetal tissue; the new rules were published on December 9, 2016, and intended to take effect on December 18th. *See* Mot. Prelim. Inj., *Whole Woman's Health et al. v. Hellerstedt*, No. 1:16-cv-01300 (W.D. Tex. Dec. 12, 2016), ECF No. 6. The Court notes the coincidental timing of the Final Notice and the intended effective date of fetal tissue disposal rules.

[12] It appears the letter to the Texas Attorney General recommending further investigation of Planned Parenthood was sent by Representative Blackburn in her individual capacity, *see* Referral Letter at 11, and only half of the Select Panel is recognized in the author block of the Report. *See* Select Panel Report.

Providers were not qualified. The Inspector General relied on an unauthenticated video and the advice of an orthopedic surgeon to conclude PPGC violated medical and ethical standards related to abortion procedures. Likewise, the Inspector General concluded PPGC made a misrepresentation following the identification of a single allegedly incorrect statement, without any evidence the statement was a misrepresentation rather than a mistake. Simply put, the Inspector General did not have any basis to conclude PPGC warranted termination from the Medicaid program as unqualified.

Even if the Inspector General could establish by prima facie evidence PPGC was unqualified, the Inspector General would likely be unable terminate the other Provider Plaintiffs' enrollment in Medicaid because organizational affiliation is unrelated to fitness to provide medical services. Finally, the evidence currently in the record implies HHSC was motivated by reasons other than qualifications to terminate the Provider Plaintiffs from Medicaid. For all these reasons, the Court holds the Individual Plaintiffs are substantially likely to succeed in showing HHSC violated their rights under § 1396a(a)(23).

B. Threat of Irreparable Injury

HHSC argues the Individual Plaintiffs will not be harmed because they can seek medical care through other Medicaid providers and through Texas's other health care programs such as Texas Healthy Women. Defs.' Proposed Findings [#94] at ¶¶ 14–18, 58–59. HHSC's argument fails to appreciate that § 1396a(a)(23) provides Medicaid beneficiaries the right to their chosen qualified provider, not just access to any qualified provider.

In *Gee*, the Fifth Circuit concluded the district court did not err in finding the individual plaintiffs would be irreparably harmed if they were unable to receive medical care from the qualified Medicaid provider of their choice. 837 F.3d at 500–01.The same reasoning applies here. Each of the Individual Plaintiffs submitted a declaration stating her preference for continuing to receive health care

from her chosen Planned Parenthood provider. The declarations collectively show the Individual Plaintiffs do not know where they would get the same kind and quality of care, each citing the nonjudgmental service the Provider Plaintiffs offer, the flexible hours, and the short wait times.

Consequently, because the Individual Plaintiffs in this case would be deprived of their legal right to the qualified health care provider of their choice, the Court finds the Individual Plaintiffs would suffer an irreparable injury if not granted a preliminary injunction.

C. Threatened Injury Outweighs Alleged Harms to Texas

On one side of the harm scale, HHSC claims denying the injunction is necessary to protect patients, and granting the injunction would allow an unqualified provider to continue "engag[ing] in behavior that violates medical and ethical standards." Resp. [#70] at 40. However, as discussed above, the current record does not include sufficient evidence to support Texas's claim PPGC violated any ethical and medical standards. There is also no claim the other Provider Plaintiffs violated any standards.

On the other side of the scale, as previously stated, the Individual Plaintiffs have proven a substantial likelihood of success on their claim terminating the Provider Plaintiffs from Medicaid violates their right to their chosen provider and would cause irreparable harm. If the termination were allowed to proceed, the Individual Plaintiffs would, at minimum, see their health care disrupted.

This Court is not convinced all of the Provider Plaintiffs' patients would be able to quickly and easily find new providers if they were prevented from seeing their chosen provider, a harm in and of itself. Terminating the Provider Plaintiffs would eliminate thirty health centers across Texas from the Medicaid program. These centers are the only family planning specialists in the state and provide a wide variety of services in a manner specifically designed to be convenient for vulnerable populations.

For these reasons, the Court holds injuries suffered by the Individual Plaintiffs outweigh any harm to HHSC.

D. Public Interest Favors Injunction

Finally, like the district court in *Kliebert*, this Court finds an injunction in this case serves the public interest by ensuring Medicaid recipients in Texas will continue to have access to medical care at their chosen providers. 141 F. Supp. 3d at 651. Because HHSC's termination of the Provider Plaintiffs' provider agreements likely violates federal law, there is no legitimate public interest in allowing Texas to complete its planned terminations based on the current facts. *See Gee,* 837 F.3d at 502. Instead, the public interest favors enforcing the Individual Plaintiffs' rights and avoiding disrupting the health care of some of Texas's most vulnerable individuals.

E. No Bond Required

Federal Rule of Civil Procedure 65 allows a court to "issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." A court may waive this requirement, however, at its discretion. *See, e.g.*, *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996).

Here, HHSC requested a bond, arguing if it were enjoined from terminating the Provider Plaintiffs' enrollment in Medicaid then it would have to continue to reimburse Planned Parenthood. Resp. [#70] at 41–42. HHSC contends forcing the continuation of payment would be a violation of Texas's authority over the Medicaid program within its borders. *Id.*

Regardless of whether this Court enjoined the termination of the Provider Plaintiffs, Texas would still have an obligation to reimburse some providers for the services the Individual Plaintiffs and other Medicaid beneficiaries require. The Court therefore finds the injunction will not harm

Texas's budget. Furthermore, as noted above, Texas does not have an interest in administering the state's Medicaid program in a manner that violates federal law. As a result, the Court finds no reason to require Plaintiffs to provide security for the preliminary injunction.

Conclusion

Because the Individual Plaintiffs have met their burden on the elements for a preliminary injunction, the Court GRANTS Plaintiffs' Motion for a Preliminary Injunction. With this injunction, the Court preserves its ability to render a meaningful decision on the merits.

Accordingly,

IT IS ORDERED that Plaintiffs' Motion for a Preliminary Injunction [#58] is GRANTED;

IT IS FURTHER ORDERED that Defendants, their employees, agents, and successors, and all others acting in concert or participating with them are PRELIMINARILY ENJOINED from terminating the Provider Plaintiffs' Medicaid Provider Agreements. No bond is required. The preliminary injunction will remain in force until further ordered; and

IT IS FINALLY ORDERED that the parties confer and submit a proposed scheduling order specifying the time period requested for necessary discovery for the Court's consideration within THIRTY (30) DAYS from the entry of this order. The Court will then schedule a trial date. A form scheduling order is available at http://www.txwd.uscourts.gov/USDC%20Rules/StandingOrders/Austin/sched-ss.pdf.

SIGNED this the 21st day of February 2017.

Sam Sparks

SAM SPARKS
UNITED STATES DISTRICT JUDGE