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 CAPACIITY AS EXECUTIVE COMMISIONER OF HHSC, ET AL.,

Defendants-Appellants

Appeal from the United States District Court, Western District of Texas, Austin Division

No. 1:15-cv-1058

PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO MOTION TO STAY THE DISTRICT COURT'S INJUNCTION PENDING EN BANC CONSIDERATION

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INTRODUCTION

At issue in this motion is a preliminary injunction preventing Defendants from terminating three Planned Parenthood providers ("Provider Plaintiffs") from the Medicaid program based on false accusations against one of the three. Although the Court recently vacated that preliminary injunction and remanded the case to the trial court, *Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc. v. Smith*, No. 17-50282, 2019 WL 244829 (5th Cir. Jan. 17, 2019), the mandate has not issued, initially because last Thursday, on the day it was set to issue, Defendants filed a petition for rehearing en banc. This afternoon, this Court *sua sponte* granted en banc review of the panel decision, thus vacating the panel's decision, and set a rapid schedule by which en banc rehearing will be fully briefed and argued in just over three months. Order, Doc No. 00514822104 (Feb. 4, 2019) ("Order Granting Rehearing En Banc").

The day after Defendants filed their petition for en banc review, Defendants filed an application seeking the extraordinary remedy—for which they cite to no precedent, in this Court or any other—of a stay of the preliminary injunction pending determination of their petition for en banc review, and any ensuing en banc consideration. Even before this Court granted en banc review, such a stay would have been deeply problematic because it risked forcing the district court to decide a renewed preliminary injunction motion without appropriate guidance—all in order

to deprive thousands of Texans insured through Medicaid of access to their chosen provider of family planning and other preventive care, and jeopardize their ability to access that care at all.

Now that this Court has granted en banc review and vacated the panel decision, it is even more clear that Defendants' stay application cannot be granted without wreaking havoc on the orderly proceedings contemplated by this Court's rules and the Federal Rules of Appellate Procedure. The now-vacated panel opinion directed the district court, on remand, to apply arbitrary-and-capricious review to the determination of whether Plaintiffs are likely to succeed on their challenge to the terminations, and clearly contemplated that Plaintiffs could seek a renewed preliminary injunction under this more deferential standard. Now that the panel decision has been vacated, however, it would be wholly unclear what standard the district court should apply to such a motion—a legal vacuum that leaves both the parties and the district court without appropriate guidance. Such a lawless result is not contemplated by the Federal Rules or by this Court's rules, which provide that when en banc review is sought (much less granted) the mandate is stayed. 5th Cir. R. 41.3. Accordingly this Court should deny Defendants' motion, follow the procedures laid out in the rules, and maintain the status quo pending the outcome of its en banc review.

BACKGROUND

Provider Plaintiffs provide high-quality and accessible family planning services, cancer screening and treatment, and other preventive care to thousands of patients insured through Medicaid at thirty health centers across the state of Texas, and have done so for decades. Despite this high-quality care, Texas has long sought to terminate them from publicly-funded health programs, and until recently, Medicaid was the only public health program from which Texas had not excluded the Provider Plaintiffs. Then starting in July 2015 a radical anti-abortion group, the Center for Medical Progress ("CMP"), released a series of videos on YouTube, including one ("CMP Video" or "Video") taken at Plaintiff Planned Parenthood Gulf Coast ("PPGC") at a meeting with PPGC's Research Director. CMP, which opposes abortion, obtained this footage by masquerading as a biotechnology company and repeatedly baiting PPGC staff. ROA.3788, 1222, 5526, 5528–29. As correctly found by the district court, CMP's videos do not show any violations of law or other applicable standards by Planned Parenthood organizations; indeed, multiple investigations across the country, including in Texas, have cleared Planned Parenthood of wrongdoing. ROA 3599.

Claiming that the CMP Video reflected ethical violations related to fetal tissue donation, Defendants terminated Provider Plaintiffs from the Medicaid program; Plaintiffs challenged that termination. Following a three-day evidentiary hearing and

review of the entire eight-hour Video, the district court determined that it contained "no evidence," ROA.3801–02, to support PPGC's termination from Medicaid—much less to terminate the other two, wholly independent Provider Plaintiffs, Planned Parenthood of Greater Texas Family Planning and Preventative Health Services, Inc. ("PPGT") and Planned Parenthood San Antonio, Planned Parenthood Cameron County, and Planned Parenthood South Texas Surgical Center (collectively, "PPST"), who did not appear on the video and have never facilitated fetal tissue donation. ROA.3788. The district court further held that because the terminations were unrelated to provider qualification, they likely violated the Medicaid beneficiary plaintiffs ("Doe Plaintiffs")' rights under § 1396a(a)(23) of the Medicaid Act, the "Free Choice of Provider" requirement.

On appeal, the panel recognized as a threshold matter that it was bound by this Court's prior holding in *Planned Parenthood of Gulf Coast, Inc. v. Gee,* 862 F.3d 445 (5th Cir. 2017), *en banc reh'g denied,* 876 F.3d 699 (5th Cir. 2017), *cert. denied,* 139 S. Ct. 408 (2018), that the Doe Plaintiffs had a private right of action to enforce their Free Choice of Provider rights and that this right of action encompasses their challenge to Provider Plaintiffs' termination from Medicaid. App. to Mot. to Stay the District Court's Inj. Pending En Banc Consideration ("App.") 11–16 (Feb. 1, 2019). However, it determined that the district court applied an inadequately deferential legal standard in determining Plaintiffs were likely to succeed on their

challenge to the Medicaid terminations, as required for grant of their preliminary injunction motion. And as is appropriate to the respective roles of the appellate and district courts, the panel remanded for the district court's determination of whether that challenge was likely to succeed under the arbitrary and capricious standard the panel held applied. App. 29. Judge Jones wrote a separate concurrence requesting rehearing en banc to reconsider the holding in *Gee*. App. 30–36.

Late on January 31, 2019, Defendants filed a petition for en banc review, thereby staying this Court's mandate pending consideration of that petition. The next morning they filed a petition for a stay of the district court's preliminary injunction. And today, as Plaintiffs were finalizing their opposition to the stay application, the Court sua sponte granted en banc review.

ARGUMENT

Stay pending appeal—let alone stay pending rehearing en banc—is an extraordinary remedy. *Belcher v. Birmingham Tr. Nat'l Bank*, 395 F.2d 685, 685 (5th Cir. 1968); *see also Greene v. Fair,* 314 F.2d 200, 202 (5th Cir. 1963) (denying motion for stay because it should be granted "in exceptional cases"). "A stay is not a matter of right" but rather "an exercise of judicial discretion" and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418 (2009) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658 (1926)). "A stay is an 'intrusion into the ordinary processes of administration

and judicial review,' and accordingly 'is not a matter of right.'" *Id.* at 427 (citations omitted).

To prevail on their motion, Defendants must show: (1) a likelihood of prevailing on the merits on appeal; (2) that they are likely to suffer irreparable injury absent a stay; (3) that Plaintiffs will not be substantially harmed by a stay; and (4) that granting the stay will serve the public interest. *Id.* at 425–434; *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013); *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5th Cir. 1992). "The party requesting a stay bears the burden of showing that the circumstances justify [its entry]." *Nken*, 556 U.S. at 433–34; *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982). Defendants cannot meet that burden here.

I. A Stay Would Disrupt Orderly Proceedings

Far from this case being in a posture that necessitates this extraordinary remedy, granting Defendants' request would be an unprecedented departure from the orderly process contemplated by the Federal Rules and the procedures of this Court. That is because a stay would lift the preliminary injunction based on a now-vacated panel opinion, and do so without providing any guidance to the parties or the district court as to what standard would apply to a renewed preliminary injunction motion.

First, Defendants' application turns on the argument that a stay is warranted because the panel already ruled in their favor. But that panel decision is now a

nullity, and the en banc court has not yet even received briefing on the issues at bar—much less issued a decision. It would be improper to presuppose the outcome of the en banc Court's analysis, as would be required to grant a stay in this posture.

Moreover, contrary to Defendants' claim, the now-vacated Panel opinion did not "already establish[] 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." Mot. to Stay the District Court's Inj. Pending En Banc Consideration ("Stay Pet.") 5, Doc No. 00514818735 (Feb. 1, 2019). Rather, the panel determined that in analyzing Plaintiffs' likelihood of success on the merits the district court had applied an inadequately deferential standard and failed to limit its consideration to the appropriate record. App. 22. And the panel did not prejudge the result of this fresh analysis, but rather was clear that question is for the district court: "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 . . . REMAND for the district court to limit its review to the agency record under an arbitrary-and-capricious standard." App. 29 (emphasis in original). The now-vacated panel opinion also expressly declined to reach the issue of whether, if the CMP Video did provide a basis to terminate PPGC from Medicaid, Defendants could also lawfully terminate the wholly separate entities PPST and PPGT—who do not appear on the video, and have never facilitated

fetal tissue research. App. 29 n.18 ("This issue becomes relevant and must be reconsidered by the district court if, on remand, it upholds the OIG's termination decision against PPGC").

Therefore, the next step—clearly contemplated by the panel—was for Plaintiffs to return to the district court and file a motion seeking a preliminary injunction on their Free Choice of Provider challenge under the arbitrary-and-capricious standard. In fact, they were preparing to do just that, but then Defendants filed their petition for en banc review, thus staying issuance of the mandate.[1] 5th Cir.

[1] Plaintiffs would likely have prevailed on such a motion because, even limiting review to the contents of the Video, such review reflects "no evidence," ROA.3801–02, to support a finding of the wrongdoing of which PPGC is accused—much less "substantial evidence," App. 23 (quoting *La. Envtl. Action Network v. U.S. E.P.A.*, 382 F.3d 575, 582 (5th Cir. 2004), which must be "evidence . . . a reasonable mind might accept as adequate to support a conclusion," *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 229 (1938); *Elgin Nursing & Rehab. Ctr. v. U.S. Dep't of Health & Human Servs.*, 718 F.3d 488, 495 (5th Cir. 2013), as would be required for the terminations to withstand challenge under arbitrary-and-capricious review. And indeed, every court in the nation to reach the issue of whether accusations related to the CMP videos provide a basis to terminate a Planned Parenthood organization from the Medicaid program has concluded they do not. *See Gee*, 862 F.3d 445; *Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205 (10th Cir. 2018), *cert. denied*, 2018 WL 1456394 (U.S. Dec. 10, 2018) (No. 17-1340); *Planned Parenthood Se., Inc. v. Bentley*, 141 F. Supp. 3d 1207 (M.D. Ala. 2015); *Planned Parenthood Ark. & E. Okla. v. Gillespie*, No. 4:15-cv-00566-KGB, 2016 WL 8928315 (E.D. Ark. Sept. 29, 2016), *rev'd on other grounds sub nom. Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017); *see also Planned Parenthood S. Atlantic v. Baker*, 326 F. Supp. 3d 39 (D.S.C. 2018) (rejecting terminations in wake of the CMP videos), *appeal docketed*, No. 18-2133 (4th Cir. Sept. 28, 2018); *Planned Parenthood Se. v. Dzielak*, No. 3:16-cv-454-DPJ-FKB, 2016 WL 6127980 (S.D. Miss. Oct. 20, 2016) (same), *appeal docketed*, No. 16-60773 (5th Cir. Nov. 22, 2016). Moreover, as to PPST and PPGT, Plaintiffs would likely to succeed on a renewed application for preliminary

R. 41.3. But now that this Court has granted en banc review and nullified the panel opinion, *see* Order Granting Rehearing En Banc; Letter, Doc No. 0051482122 (Feb. 4, 2019), granting a stay would lift the preliminary injunction previously granted by the district court without providing any clarity what standard that court should apply to a renewed preliminary injunction application.

Granting a stay in such a legal vacuum would be profoundly unfair not only to PPGC and its patients, but also to the wholly separate entities PPGT and PPST—who did not appear on the Video and have never facilitated fetal tissue research—and their patients. The extraordinary remedy of a stay should not be used in this way to undermine the orderly progression of this case and the procedures contemplated by this Court's rules, and leave Plaintiffs without appropriate guidance as to the standard applicable to vindicate their rights under the Medicaid Act.

II. Defendants Will Not Be Harmed By Planned Parenthood Providers Remaining In Medicaid

Defendants claim they will be harmed in the absence of a stay because they will be required to continue reimbursing Provider Plaintiffs for services rendered to their Medicaid patients. *See* Stay Pet. 10. But as the district court correctly found,

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injunction for the additional reason that the district court already determined that, as a matter of law, Defendants may not terminate them from Medicaid based on claimed misconduct by the wholly separate entity PPGC (an issue the panel opinion did not reach, App. 29 n.18). *See* ROA.3812.

"[r]egardless 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" and thus Provider Plaintiffs' continued participation in the Medicaid program in which they have provided high-quality services for decades "will not harm Texas's budget." ROA.3816–17; *see also New Orleans Home for Incurables, Inc. v. Greenstein*, 911 F. Supp. 2d 386, 413 (E.D. La. 2012) ("DHH would have to pay the same amount for benefits of these patients regardless of who their Medicaid provider happens to be.").

Moreover, Defendants' claim that they will suffer irreparable harm unless they are immediately able to terminate Provider Plaintiffs from the Texas Medicaid program is contradicted by their own conduct during the litigation. Defendants issued a Notice of Termination in October 2015, stating Provider Plaintiffs were not qualified Medicaid providers based on the CMP Video and initiating the termination process. ROA.1202–06, 1239–43, 1310–14. After Plaintiffs challenged these terminations and sought a preliminary injunction, however, Defendants changed course, claiming litigation was premature because they "had not yet actually decided termination was in order." ROA.3791–92. Not until fourteen months later did Defendants issue the Final Notice of Termination. *See* ROA.1209–14, 1291–96, 1316–21. Given Defendants' own conduct, it cannot be said that denying them the

extraordinary remedy of a writ pending decision on their petition for en banc review would cause them irreparable injury. And this is especially so given the rapid schedule already set for en banc review, with the case to be fully briefed and completed on May 13.

In fact, Defendants will not suffer any substantial injury whatsoever from keeping the injunction in place pending the outcome of en banc review as it would simply maintain the status quo, requiring Defendants "to maintain the funding they have provided to Plaintiffs for years." *Marlo M. ex rel. Parris v. Cansler*, 679 F. Supp. 2d 635, 638 (E.D.N.C. 2010).

III. Remaining Factors Favor Denying the Stay

Contrary to Defendants' assertions, the Doe Plaintiffs and Provider Plaintiffs' thousands of other Medicaid patients will be irreparably injured if a stay is granted. As the district court correctly found (and the panel opinion does nothing to disturb), absent an injunction the Doe Plaintiffs would be denied access to their chosen family planning provider, would "at minimum, see their health care disrupted," and would be at risk of being unable to find adequate alternative providers. ROA.3815. This is especially true because Provider Plaintiffs are Texas's only family planning specialists, and provide medical services at thirty health centers across the state. ROA.3815–16. Moreover, Texas suffers from a shortage of Medicaid providers, especially ones who provide the high-quality and accessible services Provider

Plaintiffs are known for, including cancer screening and treatment and same-day long-acting reversible contraceptives, the most effective form of birth control. ROA.3639–40.

It is simply false that (as Defendants claim, Stay Pet. 8) the Doe Plaintiffs and Provider Plaintiffs' other patients will be able to continue obtaining Medicaid services from Provider Plaintiffs even if their Medicaid terminations are allowed to take effect for months. To the contrary, the record is clear that being terminated from the Medicaid program "will prevent [Provider Plaintiffs] from providing critical health services to the thousands of Medicaid patients who come to [them] each year." ROA.1304; ROA.1233. Each Provider Plaintiff's CEO has testified that, should they be terminated from Medicaid, they would be forced to turn patients away, with one explaining that the provider lacked funds to care for Medicaid patients without reimbursement and thus that those patients "would have to be charged like our other clients," which Medicaid beneficiaries simply cannot afford. ROA.4298–99 ("I don't have that money to pay for anyone's healthcare next year if we're kicked out of Medicaid"); *see also*, ROA.4296–97 (about 1,700 PPST patients will be denied care); ROA.1298–99, 1304 (same); ROA.4113–14 (after exclusion, Medicaid patients "wouldn't know where to turn"); ROA.1185–86, 1195 (PPGT patients will be turned away and see a disruption in care).

Additionally, there is ample evidence in the record that being terminated from Medicaid will force Provider Plaintiffs to make drastic reductions in their provision of healthcare, to the detriment of all of their patients. *See, e.g.*, ROA.4133–34 (PPGC's CEO testifying that when PPGC "lost funding in the past, we were forced, unfortunately, to close some health centers," and may have to do the same if terminated from Medicaid); ROA.1234 (PPGC "will have to reduce health center hours and staffing at its health centers"); ROA.4114 (PPGT's CEO testifying that his affiliate would have to reduce staff positions and reduce hours in health centers if terminated); ROA.4301–02 (PPST's CEO testifying termination can result in "one less address, fewer hours, fewer staff, not as wide an array of methods—birth control methods at every site, at all the times").

Finally, Defendants' argument that "monetary injury" is insufficient to show irreparable injury because it may be remedied at the close of litigation through monetary damages, Stay Pet. 7, ignores that Plaintiffs are foreclosed by Eleventh Amendment sovereign immunity from seeking monetary damages from the State for the harm they would suffer absent a stay. *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Allied Mktg. Grp., Inc. v. CDL Mktg., Inc.*, 878 F.2d 806, 810 n.1 (5th Cir. 1989) (where financial losses cannot be compensated by money damages, irreparable

injury is present).[2] There is, therefore, no question that the balance of harms tips strongly in Plaintiffs' favor and the public interest is served by denying Defendants' request for a stay and allowing Provider Plaintiffs to continue providing crucial health services to underserved and low-income Texans. ROA.3816; *New Orleans Home for Incurables*, 911 F. Supp. 2d at 412 (injunction serves the public interest where termination of provider agreement would result in significant risk of negative health effects to the provider's patients); *Gee,* 862 F.3d at 472 ("[T]he public interest weighs in favor of . . . allowing some of the state's neediest citizens to continue receiving medical care from a medically qualified provider. We emphasize that there is a legitimate public interest in safeguarding access to health care for those eligible for Medicaid.") (internal quotations and citations omitted). Not only does the public have a strong interest in protecting access to health care, but that interest is particularly acute with respect to the neediest of its members who depend on publicly-funded programs. *See Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 659 (9th Cir. 2009), *vacated and remanded on other grounds*, 565 U.S. 606 (2012).

[2] Moreover, Defendants' claim that Medicaid revenues play an "insignificant role" in Provider Plaintiffs' finances, Stay Pet. 7, disregards the uncontroverted record evidence that in 2015, Medicaid accounted for as much as twenty-nine percent of Provider Plaintiffs' Texas healthcare revenues. *See* ROA.1234 (PPGC revenue figures).

CONCLUSION

For all the foregoing reason, Plaintiffs respectfully submit that this Court should deny Defendants' stay application. However, if this Court grants the stay application, Plaintiffs respectfully request that it defer the stay's effective date by at least seven days (the normal time period in which a mandate would take effect), in order to allow Plaintiffs to return to the district court and seek a temporary restraining order and/or preliminary injunction. This modest delay is appropriate given that the allegations that are at issue in this case date back to 2015 and Defendants have never before, including in filing this motion, claimed an emergency need to alter the status quo.

Respectfully submitted,

/s/ *Jennifer Sandman*

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CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that counsel for the Defendants-Appellants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Jennifer Sandman*
Jennifer Sandman

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 3,653 words, excluding the items exempted by Fed. R. App. P. 32(f). This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: February 4, 2019

/s/ *Jennifer Sandman*
Jennifer Sandman