No. _____

IN THE

Supreme Court of the United States

JEFF ANDERSEN, SECRETARY,
KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
IN HIS OFFICIAL CAPACITY,

Petitioner,

v.

PLANNED PARENTHOOD OF KANSAS
AND MID-MISSOURI, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Derek Schmidt
Attorney General of Kansas
Jeffrey A. Chanay
Chief Deputy Attorney General
Toby Crouse
Solicitor General of Kansas
Bryan C. Clark
Assistant Solicitor General
Dwight R. Carswell
Assistant Solicitor General
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215

Counsel for Petitioner

Date: March 21, 2018

Patrick Strawbridge
Counsel of Record
CONSOVOY MCCARTHY PARK PLLC
Ten Post Office Square
8th Floor South, PMG, #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

Michael H. Park
CONSOVOY MCCARTHY PARK PLLC
745 Fifth Avenue, Suite 500
New York, NY 10151

Caroline A. Cook
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201

QUESTION PRESENTED

The Medicaid Act requires participating states to include in their plans the ability of eligible individuals to obtain services from any "qualified" provider, 42 U.S.C. § 1396a(a)(23), but grants states broad authority to exclude providers for violating state or federal requirements, 42 U.S.C. § 1396a(p). Do these provisions indicate that Congress clearly and unambiguously intended to create an implied private right of action to challenge a state's determination that a provider is not "qualified" under the applicable state regulations?

PARTIES TO THE PROCEEDING

Petitioner, who was the defendant-appellant below, is Jeff Andersen, the Secretary of the Kansas Department of Health and Environment, named in his official capacity.

Respondents, who were the plaintiffs-appellees below, are Planned Parenthood of the St. Louis Region and Southwest Missouri; Planned Parenthood of Kansas and Mid-Missouri (now Planned Parenthood Great Plains); and Jane Doe No. 1, Jane Doe No. 2, and Jane Doe No. 3, each a patient of Planned Parenthood of Kansas and Mid-Missouri.

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PETITION FOR WRIT OF CERTIORARI

Jeff Andersen, the Acting Secretary of the Kansas Department of Health and Environment, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 882 F.3d 1205 and reprinted at App. 1a-92a. The District Court's memorandum and order granting Respondents' motion for a preliminary injunction is not reported and is reprinted at App. 93a-168a.

JURISDICTION

The Tenth Circuit issued its opinion on February 21, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves provisions of the Medicaid Act, in particular 42 U.S.C. §§ 1396a(a)(23) and 1396a(p), which are reproduced at App. 191a-93a.

INTRODUCTION

"Like other Spending Clause legislation, Medicaid offers the States a bargain: Congress provides federal funds in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1382 (2015). When a state fails to

comply with the terms of Medicaid, the statute provides one remedy: the U.S. Secretary of Health and Human Services may withhold funds from the state. *See* 42 U.S.C. § 1396c. When statutes include express remedies like this, the Court has been highly skeptical of individuals' attempts to claim an implied private right to bring enforcement actions in federal court. "[U]nless Congress speaks with a clear voice, and manifests an unambiguous intent to confer individual rights, federal funding provisions provide no basis for private enforcement." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (quotation marks and brackets omitted); *see also Alexander v. Sandoval*, 532 U.S. 275, 290 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.").

Notwithstanding that admonition, the Tenth Circuit below held that § 23(A) of the Medicaid Act creates a private right of action enforceable under § 1983. That Medicaid section requires states to provide in their administrative plans the ability of eligible patients to obtain services from "any institution, agency, community pharmacy, or person, qualified to perform the service or services required … who undertakes to provide him such services." 42 U.S.C. § 1396a(a)(23)(A). Although the Medicaid Act elsewhere grants a state substantial leeway in deciding when to exclude individual providers from the Medicaid program, *see id.* § 1396a(p)(1), the Tenth Circuit's decision permits patients to challenge those decisions in federal court—regardless whether the provider has done so or whether the federal government has elected to pursue its own statutory

remedy by withholding funds from the state for noncompliance.

The decision below deepened an acknowledged circuit split on whether § 23(A) allows a private right of action for Medicaid patients to challenge the merits of their providers' terminations. The Tenth Circuit joins four other circuits by holding that it does, but the Eighth Circuit, in an opinion written by Judge Colloton, recently held that § 23(A) "does not give … beneficiaries an enforceable federal right that supports a cause of action under § 1983." *Does v. Gillespie*, 867 F.3d 1034, 1046 (8th Cir. 2017). Moreover, the three courts to decide this question within the last year—all on similar facts—have issued divided panel opinions, and the Fifth Circuit's decision upholding a private right under § 23(A) was the subject of an *en banc* petition that was denied by an equally divided 7-7 court. *See Planned Parenthood of Gulf Coast, Inc. v. Gee*, 876 F.3d 699 (5th Cir. 2017). This sharp and recent division on an important question of federal law warrants this Court's review.

Moreover, the question presented is of exceeding importance. More than 70 million people—one out of every five Americans—are enrolled in Medicaid. The Tenth Circuit's decision permits any one of them to challenge a termination decision of an individual provider in federal court, and it runs roughshod over the existing state processes for administrative and judicial review for providers who wish to challenge their disqualifications. Under the current split, patients of the *same* provider—including the two provider Respondents here—have different rights to pursue a § 1983 action based solely on the state in

which they live. Although this case involved a controversial Medicaid provider, the legal question potentially affects any one of the *thousands* of medical-care providers who are ruled disqualified by state administrators every year.

Finally, the Tenth Circuit's decision cannot be reconciled with this Court's precedent. It does not faithfully apply *Gonzaga*'s requirement of a clear and unambiguous expression of intent by Congress to create an individual right; it discounts this Court's approach to the Medicaid Act in *Armstrong*; and it is directly contrary to this Court's prior holding that § 23(A) does not give Medicaid patients a procedural or substantive right to challenge the merits of a state's decision to exclude their provider of choice from Medicaid.

For all of these reasons, Petitioner respectfully requests that the Court grant this petition for certiorari.

STATEMENT OF THE CASE

A. Statutory Background

"Medicaid is a cooperative federal-state program that provides medical care to needy individuals." *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 610 (2012). Originally enacted in 1965 as Title XIX to the Social Security Act, Medicaid has since been repeatedly expanded (and funded) by the federal government—which has, in turn, imposed an increasingly complex administrative framework on the states. States are required to administer Medicaid through a "plan," which the federal government must

approve. 42 U.S.C. § 1396a(a)-(b). If a state fails to comply with the statutory requirements of a plan, then the Secretary of Health and Human Services may withhold the state's Medicaid funds. *See id.* § 1396c.

Among the requirements for a state Medicaid plan is the provision relevant to this dispute, found at 42 U.S.C. § 1396a(a)(23)(A). Section 23(A) was added to the Medicaid statute in 1967, amid reports that states were limiting Medicaid patients to specific providers and restricting Medicaid reimbursements for certain classes of providers.[1] To ensure broad access to Medicaid services, plans must allow "any individual eligible for medical assistance … [to] obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required … who undertakes to provide him such services." 42 U.S.C. § 1396a(a)(23)(A). The limitation to "qualified" providers thus makes plain that an eligible Medicaid recipient cannot demand services from any provider they wish; rather, the plan must permit them "to choose among a range of *qualified* providers, without government interference." *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980) (emphasis in original).

The Medicaid statute does not define the term "qualified." Other provisions of the Act make clear that states retain broad authority to determine individual providers' qualifications. A state may, for

[1] *See, e.g.*, President's Proposals for Revision in the Social Security System, Hearing on H.R. 5710 before the H. Comm. on Ways and Means, Part 4 (April 6 and April 11, 1967), at 2273, 2301.

example, exclude Medicaid providers "for any reason for which the Secretary [of Health and Human Services] could exclude the individual or entity from participation in a program under" a number of specified statutes. 42 U.S.C. § 1396a(p)(1); *see also id.* § 1320a-7 (specifying grounds for exclusion from Medicaid plan); 42 C.F.R. §§ 1002.2(a)-(b); *id.* § 431.51(c)(2) (providing that § 23(A) "does not prohibit the agency from … [s]etting reasonable standards relating to the qualifications of providers").

In accordance with these provisions, Kansas has issued regulations governing participation in the Kansas Medicaid program, including the power to terminate the contracts of providers for a variety of reasons, including "non-compliance with applicable state laws," Kan. Admin. Reg. § 30-5-60(a)(2); "non-compliance with the terms of a provider agreement," *id.* § 30-5-60(a)(3); "unethical or unprofessional conduct," *id.* § 30-5-60(a)(9); or "other good cause," *id.* § 30-5-60(a)(17). Kansas regulations provide the notice requirements and process for hearing challenges to a termination decision. *See id.* §§ 30-5-60(b), 30-7-64-68. The termination procedure includes a right of appeal to the Kansas Office of Administrative Hearings, Kan. Admin. Regs. § 30-7-67, and ultimately to state court, Kan. Stat. Ann. § 77-601, *et seq*.

B. Factual Background

In 2014, the Center for Medical Progress published videos revealing that Planned Parenthood Federation of America ("PPFA" or the "National Office"), in conjunction with several of its regional affiliates, was

selling body parts from fetuses obtained during abortion procedures. App. 3a, 7a. In one video, Dr. Deborah Nucatola, PPFA's Senior Director of Medical Services, explained that Planned Parenthood manipulates abortions to harvest organs with the highest market demand. *Id.* 7a, 102a. Another video featured a negotiation for the price of fetal tissue between two actors and Dr. Mary Gatter, the President of PPFA's Medical Directors' Council. *Id.*

Although neither of the PPFA affiliates at issue in this case was mentioned in the videos, there are substantial links between the national and regional entities: PPFA refers to its affiliates as local offices; its annual report presents a "combined balance sheet" and aggregated "revenue and expenses" for both the National Office and its affiliates; and it identifies the total values for the entire organization. *Id.* 7a-8a. Further, PPFA's 2014 tax return reported that the National Office transferred more than $50 million in total to its affiliates, including Planned Parenthood Great Plains[2] ("PPGP") and Planned Parenthood of the St. Louis Region and Southwest Missouri ("PPSLR"). *Id.* 7a-8a. PPFA also provides operational and executive support to its local and state offices. *Id.* Given the ties between the national and local offices, the Kansas Department of Health and Environment ("KDHE") viewed the 2014 videos as potential

[2] The PPFA affiliate serving Kansas was known as Planned Parenthood of Kansas and Mid-Missouri ("PPKM") when the termination was initiated, but PPFA has since reorganized its affiliates, and the former PPKM is now part of PPGP. The petition will refer to the entity by its current name.

evidence of illegal activity by two providers, PPGP and PPSLR. *Id.* 8a.

Around the same time, Kansas officials became aware of allegations that Planned Parenthood offices were engaged in questionable billing practices, including in the nearby states of Oklahoma and Texas. *Id.* 182a-90a. In 2015, the Governor of Oklahoma called for the termination of Planned Parenthood providers based on an integrity review that identified a 14 to 20 percent error rate in bills Planned Parenthood providers submitted to Oklahoma's Medicaid program. *Id.* Planned Parenthood's practices prompted numerous lawsuits under the False Claims Act ("FCA"). *See, e.g.*, Press Release, U.S. Dep't of Justice, *Planned Parenthood Pays $4.3 Million To Settle Allegations of Unnecessary Medical Care* (Aug. 16, 2013) (announcing $4.3 million settlement); *U.S. ex rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914, 915-16, 921 (8th Cir. 2014) (holding that *qui tam* relator pled sufficiently particularized facts to support her allegations that Planned Parenthood violated the FCA).

At the request of the Governor of Kansas, the Kansas Board of Healing Arts and KDHE undertook an inspection of Planned Parenthood health centers and investigated whether they engaged in the sale of fetal tissue. App. 8a. In late 2015, the KDHE's Bureau of Waste Management ("Bureau") began an inspection initiative at facilities that produce medical waste. *Id.* On December 16, 2015, as part of this program, two inspectors from the Bureau sought to perform a solid waste inspection at the Comprehensive Health Center

("Center"), an abortion clinic in Overland Park operated by PPGP. *Id.*

Although the inspectors were permitted to begin their inspection, they were stopped by PPGP employees after they had inspected only two exam rooms. *Id.* 8a-9a. The Center's compliance officer objected to the inspectors photographing waste receptacles, as required by Bureau protocols, and told the inspectors that they would have to come back with a warrant to complete their inspection. *Id.* 8a-9a, 105a-06a. The inspectors returned with an administrative warrant, but the attorney for the Center continued to refuse to permit them to take photographs. *Id.* 105a. The Center also refused to turn over waste vendor lists. *Id.* Unable to complete their inspection, the inspectors departed without visiting additional rooms in the facility. *Id.* Inspectors returned for a third time on January 5, 2016. *Id.* 105a-06a. On that visit, the inspectors were permitted to take photographs, but the Center continued to refuse to turn over vendor lists and requested an extension of time to do so. *Id.* After a second extension of time, the Center finally disclosed the list of waste vendors on January 15, 2016, an entire month after the first inspection. *Id.* 106a.

On March 10, 2016, the State issued separate notices to PPGP and PPSLR, informing them of the intent to terminate their participation in the Kansas Medicaid Program. App. 175a-190a. The notices identified a number of violations of state regulations. *Id.* They also identified the facts giving rise to the findings that termination was appropriate: PPGP's and PPSLR's affiliation with PPFA and video evidence

regarding PPFA's sale of body parts from abortions; PPGP Overland Park clinic's refusal to allow KDHE to complete an inspection and to photograph certain portions of its facility; and evidence of fraudulent Medicaid claims by PPFA affiliates in neighboring states. *Id.*

C. Procedural History

The provider Respondents initially availed themselves of state administrative review by challenging KDHE's termination decision. App. 11a. On April 29, 2016, PPGP and PPSLR participated in an informal administrative review process, meeting with personnel from KDHE's Division of Health Care and Finance and explaining why they should remain certified providers. *Id.* 10a-11a.

On May 3, 2016, following a review of information presented at the meeting, KDHE notified PPGP and PPSLR that it intended to terminate their participation effective May 10, 2016. App. 169a-74a. KDHE's termination notices stated that the providers had the right to request a "fair hearing" under the relevant state regulations. *Id.* If they had pursued that hearing, PPGP and PPSLR also would have had a right to judicial review of any final decision. *Id.*

PPGP and PPSLR, however, did not avail themselves of this process. *Id.* 11a. Instead, PPGP, PPSLR, and three anonymous patients of PPGP (Respondents Jane Doe No. 1, Jane Doe No. 2, and Jane Doe No. 3) filed a § 1983 complaint in the U.S. District Court for the District of Kansas alleging violations of the Medicaid Act and Equal Protection Clause. *Id.* 11a-12a. They also sought a temporary

restraining order and a preliminary injunction. *Id.* The district court held a hearing on the preliminary injunction, and on July 5, 2016, the district court granted injunctive relief. *Id.*

As relevant here, the court held that the Jane Does were likely to succeed on the merits of their argument that the State violated § 23(A) of the Medicaid Act. *See* App. 133a-155a. The court held that § 23(A) creates an enforceable right that may be vindicated by the Jane Doe plaintiffs under § 1983.[3] *Id.* 137a. In a single paragraph, the court concluded that § 23(A) "creates unambiguous rights-creating language sufficient to show that Congress intended to benefit Medicaid beneficiaries," "provides courts with sufficiently concrete and objective standards for enforcement," and "is couched in mandatory terms because it says that states 'must provide' in their Medicaid plans that beneficiaries can choose from a provider qualified to perform the medical services required." *Id.*

The district court acknowledged that *Armstrong* post-dated the other cases it was relying on, and that *Armstrong* declined to recognize an implied right of action for a violation of another subsection of § 1396a of the Medicaid Act. *Id.* 138a. It opined, however, that "*Armstrong*'s holding is narrow and applies only to subsection 30(A), which does not contain the type of rights-creating language contained in subsection 23." App. 139a.

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[3] The district court concluded that because the Jane Does had standing, it was unnecessary to address the standing of the providers to bring their own claims. App. 140a.

The district court also concluded that the Jane Does were likely to succeed on the merits of their claims that the terminations of PPGP and PPSLR were not justified. App. 140a-155a. And it held that the Jane Doe Plaintiffs were likely to establish that they would be irreparably harmed by the termination decisions and that the balance of harms and public interests weighed in favor of injunctive relief. *Id.* 161a-164a.

The State appealed to the Tenth Circuit, arguing that § 23(A) does not "clearly and unambiguously" authorize a private right of action, as required by this Court's framework set forth in *Gonzaga.* The Tenth Circuit affirmed the district court in a 2-1 decision.[4]

D. Decision Below

Addressing the "threshold issue" of whether § 23(A) "creates a private right of action," the majority acknowledged a circuit split on the question and sided with the courts that have recognized an individual right enforceable under § 1983. App. 33a-34a. In analyzing the question, the Court applied the framework from *Gonzaga* and *Blessing v. Freestone*, 520 U.S. 329 (1997), which requires a four-step analysis. *Id.* 36a-46a.

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[4] The Tenth Circuit determined that PPSLR had not adequately demonstrated its standing below and remanded that question to the district court. App. 3a-4a, 65a. But because PPKM and the Jane Does had standing, the Tenth Circuit proceeded to the merits of the appeal of the preliminary injunction.

First, the majority held "that Congress unambiguously intended to confer an individual right on Medicaid-eligible patients." App. 37a. It found that the statute's requirement that Medicaid plans include the terms of § 23(A), combined with the specific carve-out from exemptions for family planning services in § 23(B), suggested that Congress "clearly intended to grant a specific class of beneficiaries—Medicaid-eligible patients—an enforceable right to obtain medical services from the qualified provider of their choice." *Id.* 38a. The Court concluded that "*Armstrong* does nothing to undermine the [Jane Does'] claim that Congress intended to confer on them an enforceable right of action" through § 23(A), because "the Medicaid section at issue in *Armstrong* directed states to adopt rate-setting plans in accordance with certain general standards." *Id.* 39a. In the majority's view, § 23(A) differs from the provision in *Armstrong* because it "is phrased in individual terms that are specific and judicially administrable." *Id.*

Second, the Tenth Circuit determined that "the free-choice-of-provider agreement is not so vague and amorphous that its enforcement would strain judicial competence." *Id.* 40a (quotation marks omitted). The court rejected Kansas's argument that adjudicating whether a provider is "qualified"—even though the term is not defined by the statute—weighed against the finding of a private right. Rather, the majority found the requirements of the provision to be "concrete and objective standards for enforcement, which are well within judicial competence to apply." *Id*. (citations and quotation marks omitted). Again, the majority distinguished *Armstrong*, which it said involved a "judgment-laden standard" that was much

harder to apply than "the decision of whether a provider is qualified." *Id.* 41a. In the majority's view, courts "can determine whether providers are qualified by 'drawing on evidence such as descriptions of the service required; state licensing requirements; the provider's credentials, licenses, and experience; and expert testimony regarding the appropriate credentials for providing the service.'" *Id.* 42a (quoting *Planned Parenthood Ariz., Inc. v. Betlach*, 727 F.3d 960, 968 (9th Cir. 2013)).

Third, the majority concluded that "the statute is couched in mandatory, rather than precatory, terms" because § 23(A) "provides that [a] State plan for medical assistance *must*" permit eligible individuals to obtain services from the qualified provider of their choice. App. 42a (emphasis in original) (citation omitted). The majority found that this language does not merely serve as "a directive to the federal agency" but instead "affirmatively requires state plans to allow Medicaid-eligible people to obtain medical services from their willing and qualified provider of choice." *Id.* (citation omitted).

Fourth, and finally, the majority recognized that "even if a plaintiff meets these three threshold requirements, the plaintiff has established "only a rebuttable presumption that the right is enforceable under § 1983." *Id.* 43a (quoting *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005)). The majority rejected the argument that "Congress foreclosed a private right of action under the Medicaid Act simply because it was enacted under the Spending Clause." App. 43a n.15. The majority declined to rely on *Armstrong*, again distinguishing the provision in

that case and finding support in an earlier decision, *Wilder v. Virginia Hospital Ass'n,* 496 U.S. 498, 522 (1990), for its view that the Medicaid Act can provide a private right of action. App. 44a-46a.

The majority recognized that "[a]ll agree that states have considerable discretion in establishing provider qualifications," but it nonetheless held that federal law "entitles Kansas to set qualifications only for professional competency and patient care." App. 47a. Moreover, the majority held that "[i]f a state could terminate providers without any challenge by affected patients, the patients' § 1396a(a)(23) right would lose force and be easily eviscerated." *Id.* 48a. Thus, while the majority agreed that "states have broad powers to terminate Medicaid providers," it nonetheless held that "when Kansas shrinks the pool of qualified providers by terminating them under § 1396a(p)(1)"—even on an isolated and individual basis—"patients must have a § 1396a(a)(23) right to challenge the state's termination decision as improper or wrongful." *Id.*

Although the majority recognized *O'Bannon*'s holding that Medicaid beneficiaries do not have a right to challenge a state's termination of an unqualified provider, it found that case distinguishable: "Here, the Patients are not challenging the right to continue receiving care from an unqualified provider. Instead, they contend Kansas wrongfully terminated the Providers, thereby infringing their choice-of-provider rights. For this reason, we disagree with Kansas that *O'Bannon* controls this case in Kansas's favor." *Id.* 51a.

The majority then considered the grounds under which Kansas terminated PPGP. It first rejected the claim that PPGP's delay in providing full access to its facility during the Bureau's inspections justified termination under the federal provisions permitting termination for failing "to grant immediate access" to the Bureau investigators, 42 U.S.C. § 1320a-7(b)(12)(B), and "for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity," *id.* 53a (citing 42 U.S.C. § 1320a-7(b)(5)(B)). It found that the videos describing the conduct of PPFA did not provide a justifiable basis for termination because "no PPFA affiliate, including PPGP and PPSLR, has been convicted or sanctioned for any wrongdoing," and because the affiliation between PPFA and the local affiliates did not involve "ownership or control," which the majority believed was required to justify termination under 42 U.S.C. §§ 1320a-7(a)(3), (a)(1), and (b)(1)(A)(ii)). App. 57a-59a. Finally, it found that the financial misconduct of other PPFA affiliates—including PPGP, the organization that PPKM merged with during the litigation—was insufficient to warrant termination of the Kansas affiliates because there were no allegations that those affiliates themselves engaged in fraudulent activity. App. 60a-61a.

The majority found that the other factors favoring an injunction—irreparable harm, the balance of harms, and the public interest—all supported the district court's ruling. *Id.* 62a-65a. It therefore affirmed entry of the preliminary injunction. *Id.* 65a.

Judge Bacharach dissented. He noted the circuit split on whether § 23(A) provides a private right of action and then wrote that, even if such a right exists under that provision, "[s]ection 1983 does not provide a mechanism for the Jane Doe plaintiffs to challenge Kansas's application of its laws authorized by § 1396a(p)(1)." App. 76a, 78a.

First, the dissent determined that the language of § 1396a(p)(1) permitted states to terminate providers for violations of "state laws that prohibit acts of 'malfeasance'"—which the dissent interpreted to mean "wrongful conduct affecting Medicaid-related goals." *Id.* 81a-83a. The dissent then found that the Kansas laws providing the basis for PPGP's and PPSLR's terminations were consistent with policing Medicaid-related goals, *id.* 83a, and that even under a narrower construction, the interference with the Bureau's waste inspection was analogous to a violation of a federal law requiring immediate cooperation with inspections, *id.* at 83a-86a (citing 42 U.S.C. § 1320a-7(b)(12)(C)). The dissent thus concluded "that Kansas's action was of a type authorized by a separate Medicaid provision: § 1396a(p)(1)." App. 86a.

The dissent then addressed the district court's fear that "the inability to use § 1983 in these circumstances could allow states to evade judicial review of Medicaid-related decisions, rendering the free-choice-of-provider clause a hollow right." *Id.* 86a-87a. Refuting this fear, the dissent explained that "even with the absence of a private right of action to litigate the application of state laws authorized by § 1396a(p)(1), plaintiffs could still challenge a state

Medicaid program that expressly limited the choice of qualified providers without any separate statutory authority"—for example, by excluding *all* abortion providers. *Id*. 90a (citing *Betlach*, 727 F.3d at 964). The dissent further concluded that "even if the inability to invoke § 1983 would render the free-choice-of-provider clause 'a hollow right,' this problem would be for Congress to fix." App. 90a. "This fear," he explained, "does not permit us to broaden § 1983 to allow a private right of action to challenge administrative action taken under § 1396a(p)(1), for it is not our function as judges to create a cause of action to enforce a statute that does not confer an unambiguous federal right." *Id.* 87a (citing *Gonzaga*, 536 U.S. at 283).

The dissent thus concluded, "[t]hough Congress has arguably created an individual right under the free-choice-of-provider clause, the scope of that right remains ambiguous when the state terminates a provider under § 1396a(p)(1)." *Id.* 91a. Therefore, because "ambiguity prevents an applicable right, … Jane Doe plaintiffs [are prevented] from establishing likelihood of success in their challenge to [PPGP's] termination." *Id*. 92a.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted for three reasons. First, the Tenth Circuit "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. Rule 10(a). The circuits are split 5-1 over whether § 23(A) of the Medicaid Act creates a private right of action that allows Medicaid patients to challenge the merits of a state's determination that a provider is not

"qualified." This split is entrenched and has been expressly recognized by the circuits, including the court below. *See, e.g.*, App. 33a-34a; *Gillespie*, 867 F.3d at 1042.

Second, this "important question of federal law … has not been, but should be, settled by this Court." Sup. Ct. Rule 10(c). Without the Court's intervention, patients of the *same* provider have different remedies to challenge a state's disqualification of that provider, based solely on where they live. Moreover, the decision below gives millions of Medicaid beneficiaries the ability to go directly to federal court to challenge a state's determination that their provider is not "qualified"—bypassing layers of state administrative review. And there are important legal questions beyond the interpretation of § 23(A) itself; for example, the decision below notes disagreement among the circuits as to the effect of no fewer than *three* of this Court's precedents regarding the application of *Gonzaga* to the Medicaid statute and other Spending Clause legislation (*Armstrong, Wilder,* and *O'Bannon*).

Third, the Tenth Circuit's decision misinterprets the Medicaid Act and cannot be reconciled with this Court's precedents. Sup. Ct. Rule 10(c). Viewed as a whole, the Act lacks the necessary language to find a "clear and unambiguous" congressional intent to create a private right enforceable under § 1983, as *Gonzaga* requires. Moreover, the decision below disregards this Court's admonitions in *Armstrong* and cannot be reconciled with the holding of *O'Bannon*, in which this Court made clear that § 23(A) does not entitle Medicaid recipients to challenge a state's

decision about whether certain entities are qualified to be in the pool of providers.

I. The Circuits Are Divided over the Existence and Scope of a Private Right of Action under § 23(A).

"[A] private right of action under federal law is not created by mere implication." *Armstrong*, 135 S. Ct. at 1387-88 (plurality). Rather, "if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms." *Gonzaga*, 536 U.S. at 290. These "clear and unambiguous terms" must show that (1) Congress "intended that the provision in question benefit the plaintiff"; (2) "the right assertedly protected … is not so 'vague and amorphous' that its enforcement would strain judicial competence"; and (3) the alleged right is "couched in mandatory, rather than precatory, terms." *Blessing*, 520 U.S. at 340-41 (citation omitted).

Even if a statutory provision satisfies these conditions, it will not create a private right of action when sufficiently comprehensive alternative methods of enforcement are provided. *See Gonzaga*, 536 U.S. at 284 & n.4; *Armstrong*, 125 S. Ct. at 1385. Thus, when it comes to Spending Clause legislation like the Medicaid Act, "the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981). In fact, this Court recently reaffirmed this principle in holding that § 30(A) of the Medicaid Act did not create a private right of action, in part due to the Secretary's authority

to withhold state funds for noncompliance. *See Armstrong*, 135 S. Ct. at 1387-88 (plurality). Nevertheless, the circuits are sharply divided on whether the same holds true for § 23(A) of the Medicaid Act.

In the decision below, the Tenth Circuit joined the majority of courts to consider this question, squarely holding that § 23(A) gives Medicaid beneficiaries a private right of action to challenge a state's termination of their preferred providers pursuant to state regulations governing provider qualifications. It cited the language of § 23(A) to find that "Congress unambiguously intended to confer an individual right on Medicaid-eligible patients." App. 37a. It held that courts were competent to adjudicate the meaning of "qualified," *id.* 40a, and that the fact that Medicaid is Spending Clause legislation did not weigh against a finding that Congress intended to provide individuals with the right to challenge disqualification of their provider in federal court. *Id.* 43a-44a, n.15. Finally, it distinguished this case from the Court's prior decisions in *Armstrong* and *O'Bannon*, citing minor discrepancies in statutory language and procedural posture. *Id.* 38a-41a, 49a-51a.

The Tenth Circuit's decision follows the reasoning of the Fifth Circuit's majority opinion in *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017). Like Kansas, Louisiana disqualified an individual Planned Parenthood affiliate from Medicaid due to credible allegations of fraud, an ongoing state investigation of the affiliate, and misrepresentations that the affiliate made to state authorities. *Id.* at 451-52, 479-81. The Fifth Circuit held that § 23(A) "creates a private right of action"

that allows Planned Parenthood patients to challenge Louisiana's "provider-qualifications determination." *Id.* at 459. And it rejected arguments that *Armstrong* or *O'Bannon* required a different result. *Id.* at 460-62.

The Tenth and Fifth Circuits joined three earlier decisions—all predating *Armstrong*—holding that § 23(A) created a private right of action. In *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006), the Sixth Circuit considered a § 23(A) challenge brought by Medicaid patients against Michigan's single-supplier contract for incontinence products. *Id.* at 459. The court held that the provision's "individually focused terminology," "readily apparent" standards, and "mandatory" language "creates enforceable rights that a Medicaid beneficiary may vindicate through § 1983." *Id.* at 461-62.

The Seventh and Ninth Circuits have held the same. Arizona and Indiana passed laws defunding abortion providers under Medicaid, and patients brought a § 23(A) challenge under § 1983. *See Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 967 (7th Cir. 2012); *Betlach*, 727 F.3d at 962. Both circuits held that § 23(A)'s text created a private right of action notwithstanding Medicaid's alternative enforcement scheme and states' broad authority to exclude entities from the pool of qualified providers. *See Planned Parenthood of Indiana*, 699 F.3d at 968; *Betlach*, 727 F.3d at 965-72.

The Eighth Circuit, however, recently reached the opposite conclusion. In *Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017), Medicaid patients sued Arkansas to challenge its termination of Planned Parenthood

affiliates' Medicaid agreements. *Id.* at 1038. Judge Colloton, writing for the court, held that "§ 23(A) of the Medicaid Act does not give [patients] an enforceable federal right that supports a cause of action under § 1983." *Id.* at 1046. The Eighth Circuit disagreed with the other circuits' reading of the § 23(A)'s text, noting that the "statute [is] phrased as a directive to a federal agency," and is thus "two steps removed from the interests of the patients who seek services." *Id.* at 1041. Second, the court explained that compliance with § 23(A) could be enforced by "the withholding of federal funds by the Secretary" and through the provider's "opportunity for administrative appeal and judicial review in state courts." *Id.* The court also concluded that *Armstrong* serves as the most compelling example of how to consider alleged private rights under Medicaid. *Id.* at 1042, 1044.

The Eighth Circuit's holding that Medicaid patients have no private right to challenge the disqualification of their preferred provider is consistent with the dissent in this case, App. 66a-92a, and that of the Fifth Circuit, *Gee*, 862 F.3d at 473-77, underscoring the unsettled nature of the question presented in this petition. *See also Gillespie*, 867 F.3d at 1046 (Shepherd, J., concurring) (arguing, in the alternative, that "even if § 23(A) provides a substantive right that the plaintiffs can enforce through a § 1983 suit," *O'Bannon* limits that right "to a range of qualified providers—not the right to a particular provider the State has decertified").

In sum, the split is entrenched, as both the Tenth and Eighth circuits have recognized. *See, e.g.*, App. 37a; *Gillespie*, 867 F.3d at 1042. The sharp division

within the three circuits that have considered the issue in the past year (including the Fifth Circuit, which denied a rehearing petition on an evenly divided vote), underscores the need for this Court's intervention to resolve the split.

II. This Petition Raises Important Questions About the Ability of States to Make Decisions Regarding Medicaid Provider Qualifications.

The split over whether § 23(A) provides a private right of action under § 1983 has serious implications for Medicaid beneficiaries, providers, and administrators. Medicaid patients across the country are now afforded different rights under § 23(A) based solely on where they live, and states have varying degrees of autonomy under federal law depending on which circuit's boundaries they fall within. The question presented is unquestionably "an issue of great importance," with significant practical and legal repercussions. *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*). It warrants this Court's intervention.

To begin, the current split permits some Medicaid-eligible beneficiaries to go to federal court to challenge a state decision terminating their provider of choice, while others have no such right. This anomaly is particularly stark for the patients of providers who operate in more than one locality. Indeed, Respondent PPSLR serves patients in both Missouri and Kansas. *See* App. 96a. The Kansas patients, based on the Tenth Circuit's decision below, have the right to challenge the termination of PPSLR as their Medicaid

provider; meanwhile, PPSLR clients in Missouri, who are subject to the Eighth Circuit's decision in *Gillespie*, have no such right. The same is true of the other provider Respondent, PPGP, which serves patients both in Arkansas and Kansas. *See Gillespie*, 867 F.3d at 1037.

The manner in which many circuits, including the Tenth, have resolved the question also threatens to undermine the existing processes that states have established for providers to challenge disqualification decisions. In Kansas, for example, providers have the option to appeal their decision within KDHE, then to the state's Office of Administrative Hearings, and then (if necessary) to the state courts. *See* App. 6a. The decision below, however, renders that layered administrative process a nullity. "[A] Medicaid provider can now make an end run around the administrative exhaustion requirements in a state's statutory scheme." *Gee*, 876 F.3d at 702 (Elrod, J., dissenting from denial of rehearing *en banc*). Indeed, that is precisely what PPGP and PPSLR did in this case below—they began, but prematurely terminated, the administrative review process and instead ran directly into federal court. App. 11a. In the Tenth Circuit (as in other circuits adopting the majority rule), "[d]isqualified 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." *Gee*, 876 F.3d at 702 (Elrod, J., dissenting from denial of rehearing *en banc*); *see also Gillespie*, 867 F.3d at 1041 (criticizing the majority rule for permitting "a curious system for

review of a State's determination that a Medicaid provider is not 'qualified'").

This is a substantial concern. State Medicaid agencies terminate thousands of providers each year. According to one study by the Office of Inspector General at the Department of Health and Human Services, more than 2,500 unique providers were terminated for cause in 2011 alone.[5] Between 2010 and 2017, Kansas itself terminated 42 providers from its Medicaid program.[6] The approach adopted by the Tenth Circuit would give these providers' patients the right to bring a federal court action under § 1983 to challenge their providers' terminations and bypass—or even overrule—the determinations of the state and its courts that the providers were not qualified to continue offering services under applicable state regulations.

The importance of this case is further heightened by Medicaid's unprecedented rate of growth in recent years. According to the federal government, the number of Medicaid enrollees more than doubled between 2000 and 2016, from 34.5 million to 72.2 million Americans. Annual spending on Medicaid is

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[5] *See* U.S. Dep't of Health & Human Servs. Office of Inspector General, "Providers Terminated From One State Medicaid Program Continued Participating In Other States," 17, Table B-1 (Aug. 2015), *available at* http://oig.hhs.gov/oei/reports/oei-06-12-00030.pdf.

[6] *See* Termination List, Kansas Dep't of Health & Envm't (Dec. 6, 2017), *available at* http://www.kdheks.gov/hcf/medicaid_program_integrity/download/Termination_List.pdf.

now more than $576 billion.[7] The CMS Office of Actuary recently announced that "Medicaid is projected to average 5.8 percent annual growth over 2017-2026."[8] In short, the question presented in this case affects one in every five Americans, and it is only increasing in importance each day. "In the ever-expanding Medicaid world in which we live, it is important that we get this decision right." *Gee,* 876 F.3d at 702 (Elrod, J., dissenting from denial of rehearing *en banc*).

Finally, the decision below casts significant doubt on the viability of several of this Court's precedents. The conflict among the circuits involves substantial disagreement about whether finding a private right of action here can be squared with this Court's decision in *O'Bannon. Compare, e.g.,* App. 51a (disagreeing with the argument "that *O'Bannon* controls this case"), *and Gee*, 862 F.3d at 460 (same), *with Gillespie*, 867 F.3d at 1047 (Shepherd, J., concurring) ("*O'Bannon* controls the outcome of this case), and *Gee*, 862 F.3d at 473 (Owen, J., dissenting) (same). There is also deep disagreement over whether the Court's approach to determining whether a private right is provided in the Medicaid statute in *Armstrong*

[7] *See* Medicaid and CHIP Payment and Access Commission Data Book, Exhibit 10 (Dec. 2017), *available at* http://www.macpac.gov/wp-content/uploads/2015/11/EXHIBIT-10.-Medicaid-Enrollment-and-Total-Spending-Levels-and-Annual-Growth-FYs-1966%E2%80%932016.pdf.

[8] *See* Press Release, "CMS Office of the Actuary Releases 2017-2026 Projections of National Health Expenditures," Centers for Medicare and Medicaid Services (Feb. 14, 2018), *available at* http://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2018-Press-releases-items/2018-02-14.html.

has superseded the analysis of *Wilder*. *Compare* App. 44a-46a, n.16 (distinguishing *Armstrong* and disagreeing with the argument that "*Armstrong* effectively overruled *Wilder*"), with *Gillespie*, 867 F.3d at 1045 (holding that "*Armstrong* confirmed that the 1990 *Wilder* decision has been repudiated by post-1994 precedent").

The Tenth Circuit has exacerbated a division among the courts of appeals that affects potentially every state in the country, thousands of Medicaid providers, and millions of Medicaid-eligible individuals. It threatens the authority of state administrative proceedings for unqualified Medicaid providers and gives patients of the same provider different rights based simply on which side of the state border they live. And it underscores the ongoing confusion about the effect of *three* prior decisions of the Supreme Court. This petition thus presents a critically "important question of federal law." Sup. Ct. Rule 10(c).

III. The Decision Below Is Incorrect and Inconsistent with This Court's Decisions in *Armstrong* and *O'Bannon*.

Finally, review is warranted because the decision below is incorrect. A faithful application of this Court's approach to private rights in *Gonzaga* compels the conclusion that § 23(A) does not permit beneficiaries to bring a private right of action to challenge a state's exclusion of a provider it deems unqualified. Indeed, the Court's recent decision in *Armstrong* made clear that *Gonzaga*'s requirement of a "clear and unambiguous" right applies with equal force to the Medicaid Act. The language of § 23(A), the broader

statutory context, and the practical complexities of having courts (rather than the states and federal government) police whether a particular provider is "qualified" do not establish Congress's unequivocal intent to create a private right of action. And the contrary conclusion directly contradicts this Court's ruling in *O'Bannon* that Medicaid patients have no substantive right to demand treatment from a provider who has been deemed unqualified.

This Court in *Armstrong* recently reiterated that *Gonzaga*'s requirement of an "unambiguously conferred right" applies fully in the Medicaid context. This is true notwithstanding the earlier decision in *Wilder*, where the Court recognized a right of action for providers under a now-repealed section of the Medicaid Act. In fact, the Court expressly noted that "our later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified." *Armstrong*, 135 S. Ct. at 1386 n.*. The Tenth Circuit gave short shrift to *Armstrong*, declining to read it as overruling *Wilder* despite this Court's plain language confirming that repudiation in a part of the opinion joined by the majority. App. 45a n.16.

Following other circuit decisions, the Tenth Circuit majority had "no trouble concluding that Congress unambiguously intended to confer an individual right on Medicaid-eligible patients." App. 37a. But it did so by focusing only on one sentence fragment—§ 23(A)'s reference to "any individual eligible for medical assistance." App. 37a-38a. "Congressional intent or meaning," however, "is not discerned by considering merely a portion of a statutory provision in isolation,

but rather by reading the complete provision in the context of the statute as a whole." *Gillespie*, 867 F.3d at 1043.

A review of the broader statutory context reveals the lack of the required clear congressional intent to make § 23(A) enforceable by Medicaid beneficiaries. To begin, the "statute [is] phrased as a directive to a federal agency," and is thus "two steps removed from the interests of the patients who seek services." *Id.* at 1041. As Judge Colloton noted: "Even where a subsidiary provision includes mandatory language that ultimately benefits individuals, a statute phrased as a directive to a federal agency typically does not confer enforceable federal rights on the individuals." *Id.* (citing *Univs. Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 756 n.1 (1981)); *see also Armstrong*, 135 S. Ct. at 1387 (finding no private right in a Medicaid provision "phrased as a directive to the federal agency charged with approving state Medicaid plans") (plurality).

Moreover, "Congress expressly conferred another means of enforcing a State's compliance with § 23(A)—the withholding of federal funds by the Secretary." *Gillespie*, 867 F.3d at 1041 (citing 42 U.S.C. § 1396c). The "'express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Armstrong*, 135 S. Ct. at 1385 (quoting *Alexander v. Sandoval*, 531 U.S. 275, 290 (2001)). The regulations governing Medicaid require states to give providers "the opportunity to submit documents and written argument against the exclusion," as well as "any additional appeals rights that would otherwise be available under procedures

established by the State." 42 C.F.R. § 1002.213.[9] It is thus far from clear and unambiguous that Congress intended to create an implied private right for beneficiaries when it explicitly provided these alternative enforcement mechanisms.

Indeed, by granting authority to states to exclude providers for various reasons, *see* 42 U.S.C. § 1396a(p), Congress necessarily would have expected state administrative procedures to govern those exclusions. Yet according to the Tenth Circuit, *patients* can proceed directly to federal court to enforce their right under § 23(A) and to challenge a provider's exclusion. This removes any incentive for the provider to participate in state remedies at all—which is precisely why the Respondent providers here prematurely terminated those proceedings. And a provider who fails to obtain relief in state administrative proceedings (including state court review) would benefit from their patients' collateral attacks in federal court. This is, to say the least, "a curious system for review of a State's determination that a Medicaid provider is not 'qualified,'" and "[t]he potential for parallel litigation and inconsistent results gives … further reason to doubt that Congress in § 23(A) unambiguously created an enforceable federal right for patients." *Gillespie*, 867 F.3d at 1041-42.

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[9] Although this is a regulation promulgated under the Act rather than a congressional enactment itself, it is consistent with provisions of the statute that anticipate a state's disqualification of providers. *See* 42 U.S.C. § 1320a-7(b)(5) (permitting the federal government to disqualify providers who are excluded by a state).

Finally, the text of the Medicaid statute reveals an aggregate focus, and the statute does not require the withdrawal of funding for *any* violation of its terms. *See* 42 U.S.C. § 1396c(2) (noting that payments shall not be made to states whose administration of plans results in "a failure to comply substantially with any such provision"). Both of these features were found to preclude the recognition of a private right in *Gonzaga*. 536 U.S. at 282, 288.[10] So too here.

When "structural elements of the statute and language in a discrete subsection give mixed signals about legislative intent, Congress has not spoken … with a 'clear voice' that manifests an 'unambiguous intent' to confer individual rights." *Gillespie*, 867 F.3d at 1043 (quoting *Gonzaga*, 536 U.S. at 280). The Tenth Circuit—like the Fifth, Sixth, Seventh, and Ninth Circuits—erred in reading part of § 23(A) in isolation and ignoring the burden imposed by the *Gonzaga* standard.

Although the text and structure of the Medicaid Act is sufficient to establish that Congress did not clearly and unambiguously confer a private right in § 23(A), there are two additional reasons to reject the Tenth Circuit's analysis. First, the Tenth Circuit's rule requires the courts to apply a "vague and

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[10] The Tenth Circuit's reliance on *Wilder* for the view that substantial compliance does not preclude a private right is misplaced because "[t]here is stronger reason after *Armstrong* to infer an aggregate focus for § 1396a(a)(23)(A) based on the substantial compliance funding requirement of § 1396c." *Gillespie*, 867 F.3d at 1042.

amorphous" standard that "would strain judicial competence." *Blessing*, 520 U.S. at 340-41. The Medicaid Act does not define "qualified," but the statute and its regulations provide numerous discretionary grounds upon which a state may exclude providers. *See*, *e.g.*, 42 U.S.C. § 1320a-7(b). Moreover, federal law authorizes a state to exclude providers "for any reason for which the Secretary could exclude that individual or entity from participation," 42 U.S.C. § 1396a(p)(1), and "for any reason or period authorized *by State law*," 42 C.F.R. § 1002.2(b) (emphasis added). Thus, the determination whether a health care provider is "qualified" may frequently involve expert judgments and questions of state law—including whether the provider exhibited "a pattern of unnecessary utilization"; "unethical or unprofessional conduct"; "provision of goods, services, or supplies harmful to individuals or of an inferior quality"; or "other good cause." Kan. Admin. Regs. §30-5-60(8), (9), (11), (17). These are precisely the type of "vague and amorphous" purported "rights" that would "strain judicial competence," and that require a "comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Blessing*, 520 U.S. at 340-41; *see also Armstrong*, 135 S. Ct. at 1385 (concluding that "[t]he sheer complexity associated with enforcing" a Medicaid provision, "coupled with the express provision of an administrative remedy, § 1396c, shows that the Medicaid Act precludes private enforcement … in the courts").

Second, recognition of the private right by the Tenth Circuit in this case cannot be reconciled with the holding in *O'Bannon*. As several circuit judges

have noted, "even if § 23(A) provides a substantive right that the plaintiffs can enforce through a § 1983 suit," *O'Bannon* limits that right "to a range of qualified providers—not the right to a particular provider the State has decertified." *Gillespie*, 867 F.3d at 1046 (Shepherd, J., concurring). In this case, the Jane Doe patients are not challenging an attempt by Kansas to "steer patients to certain qualified providers at the expense of other qualified providers" or to "artificially create a monopoly in Medicaid care." *Id.* at 1047; *see also Gee*, 862 F.3d at 474 (Owen, J., dissenting) (noting that § 23(A) at most provides a narrower private right that allows for enforcement "when [a Medicaid patient] has been denied access to a provider that a State has determined meets all state and federal Medicaid requirements and qualifications"). Rather, the Tenth Circuit determined that patients had a right to challenge the *merits* of a qualification decision about a specific provider.

The Tenth Circuit's attempts to distinguish *O'Bannon* do not hold up to scrutiny. It first seizes upon the fact that "no one contested that the nursing home was unqualified to perform the services." App. 50a. But the patients in *O'Bannon* were, in fact, seeking a "hearing on the merits of the decertification decision before the Medicaid payments were discontinued." 447 U.S. at 777. And the Court's holding was plain: § 23(A) does not "confer a right on a recipient to continue to receive benefits for care [from a provider] that has been decertified." *Id.* at 785. Nevertheless, that is precisely what the Tenth Circuit gave to the Jane Doe Respondents here.

The Tenth Circuit also claimed that "the nursing home residents in *O'Bannon* asserted procedural due-process rights, not substantive rights, as the patients do here." App. 50a. But this Court "clearly stated that it was defining the contours of the 'substantive right ... conferred by the statutes and regulations.'" *Gillespie*, 867 F.3d at 1048 (Shepherd, J., concurring) (quoting *O'Bannon*, 447 U.S. at 786). Moreover, "there is no right to due process unless there is a substantive right that may be vindicated if adequate process is accorded." *Gee*, 862 F.3d at 475 (Owen, J., dissenting).

Because the decision below departs from the general standards set forth in *Gonzaga* for identifying an enforceable private right, and because it cannot be reconciled with *Armstrong* and *O'Bannon*, this Court should grant the petition and correct the erroneous approach to § 23(A) taken by the court below and by four of its sister circuits.

CONCLUSION

For all of these reasons, the Court should grant the petition for a writ of certiorari and reverse the Tenth Circuit.

Respectfully submitted,

Derek Schmidt
Attorney General of Kansas
Jeffrey A. Chanay
Chief Deputy Attorney General
Toby Crouse
Solicitor General of Kansas
Bryan C. Clark
Assistant Solicitor General
Dwight R. Carswell
Assistant Solicitor General
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215

Patrick Strawbridge
Counsel of Record
CONSOVOY MCCARTHY PARK PLLC
Ten Post Office Square
8th Floor South, PMG, #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

Michael H. Park
CONSOVOY MCCARTHY PARK PLLC
745 Fifth Avenue, Suite 500
New York, NY 10151

Caroline A. Cook
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201

Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED FEBRUARY 21, 2018

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-3249

PLANNED PARENTHOOD OF KANSAS AND MID-MISSOURI; PLANNED PARENTHOOD OF ST. LOUIS REGION; JANE DOE #1, ON HER BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; JANE DOE #2, ON HER BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; JANE DOE #3, ON HER BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v.

JEFF ANDERSEN, ACTING SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT, IN HIS OFFICIAL CAPACITY,*

Defendant-Appellant.

CENTER FOR REPRODUCTIVE RIGHTS; IPAS; NATIONAL CENTER FOR LESBIAN RIGHTS; NATIONAL FAMILY PLANNING &

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*In accordance with Rule 43(c)(2) of the Federal Rules of Appellate Procedure, Jeff Andersen is substituted for Susan Mosier as the Defendant—Appellant in this action.

Appendix A

REPRODUCTIVE HEALTH ASSOCIATION; NATIONAL HEALTH LAW PROGRAM; NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH; NATIONAL WOMEN-S LAW CENTER; SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE U.S. (SIECUS); AMERICAN PUBLIC HEALTH ASSOCIATION,

Amici Curiae.

Appeal from the United States District Court for the District of Kansas (D.C. No. 2:16-CV-02284-JAR-GLR)

February 21, 2018, Filed

Before BACHARACH, PHILLIPS, and McHUGH, Circuit Judges.

PHILLIPS, Circuit Judge.

Medicaid's free-choice-of-provider provision grants Medicaid patients the right to choose for their medical care any qualified and willing provider. 42 U.S.C. § 1396a(a)(23). On May 3, 2016, Kansas sent notices of decisions to terminate (effective May 10) its Medicaid contracts with two Planned Parenthood affiliates, Planned Parenthood of Kansas and Mid-Missouri ("PPGP"), and Planned Parenthood of the St. Louis Region ("PPSLR").[1]

1. Planned Parenthood of Central Oklahoma merged into Planned Parenthood of Kansas and Mid-Missouri ("PPKM"), effective July 1, 2016. As a result, PPKM changed its name to Planned Parenthood Great Plains. In this opinion, we refer to that entity

The notices cited concerns about the level of PPGP's cooperation in solid-waste inspections, both Providers' billing practices, and an anti-abortion group's allegations that Planned Parenthood of America ("PPFA") executives had been video-recorded negotiating the sale of fetal tissue and body parts. Together, the Providers and three individual Jane Does ("the Patients") immediately sued Susan Mosier, Secretary of the Kansas Department of Health and Environment ("KDHE"), under 42 U.S.C. § 1983, alleging violations of 42 U.S.C. § 1396a(a)(23) and the Equal Protection Clause of the Fourteenth Amendment. The Plaintiffs sought a preliminary injunction enjoining Kansas from terminating the Providers from the state's Medicaid program.

States have broad authority to ensure that Medicaid healthcare providers are qualified to provide medical services—meaning that they are competent to provide medical services and do so ethically. But this power has limits. States may not terminate providers from their Medicaid program for any reason they see fit, especially when that reason is unrelated to the provider's competence and the quality of the healthcare it provides. We join four of five of our sister circuits that have addressed this same provision and affirm the district court's injunction prohibiting Kansas from terminating its Medicaid contract with PPGP. But we vacate the district court's injunction as it pertains to PPSLR and remand for further proceedings on that issue. Though the Plaintiffs have

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by its new name, PPGP. When we refer to both of these providers collectively, we refer to them as "the Providers."

provided affidavits from three Jane Does concerning their past and expected medical care from PPGP, the Plaintiffs have not provided affidavits from any persons receiving or expecting to receive medical care at PPSLR. Hence the Plaintiffs have failed to establish any injury they will suffer from the termination of PPSLR, meaning they have failed to establish standing to challenge that termination. But on this record, we cannot determine whether PPSLR itself can establish standing, an issue the district court declined to decide but now must decide on remand.[2] Though Kansas has not raised this standing issue, we have an independent duty to assure ourselves of the district court's subject-matter jurisdiction. *See City of Colo. Springs v. Climax Molybdenum Co.*, 587 F.3d 1071, 1078-79 (10th Cir. 2009).

BACKGROUND

I. The Medicaid Act and Kansas Regulations

The Medicaid Act's free-choice-of-provider provision states that "any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform

2. Though PPSLR's standing might not turn on whether it has a private right of action under the free-choice-of-provider provision, its likelihood of success on the merits may. *See Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S Ct. 1377, 1386-88, 188 L. Ed. 2d 392 & n.4 (2014); *Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 887 (10th Cir. 2017) (discussing footnote 4 of Lexmark and whether "statutory standing" after *Lexmark* must be understood as a failure to state a claim).

the service or services required . . . who undertakes to provide him such services." 42 U.S.C. § 1396a(a)(23). This provision "guarantees that Medicaid beneficiaries will be able to obtain medical care from the qualified and willing medical provider of their choice." *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 450 (5th Cir. 2017). Because the Medicaid Act is mostly administered by the states, the Act empowers states to determine whether entities are medical providers "qualified to perform the service or services required." States may exclude Medicaid providers—that is, withhold reimbursements for medical services provided to patients—"for any reason for which the [federal] Secretary [of Health and Human Services] could exclude the individual or entity from participation in a program under" specified statutes. 42 U.S.C. § 1396a(p)(1); 42 C.F.R. § 1002.3(a)-(b). As grounds for excluding the Providers from its Medicaid plan, Kansas has raised 42 U.S.C. § 1320a-7(b)(5)(B), (b)(12)(B).

Kansas, like all states, issues regulations to administer its Medicaid program. These regulations govern when, why, and how Kansas may terminate contracts between its Medicaid program and healthcare providers. Kan. Admin. Regs. § 30-5-60(a). If Kansas decides that a provider is no longer competent to provide medical services, it must send written notification to the provider of its intent to terminate the provider and its reasons for doing so. Kan. Admin. Regs. § 30-5-60(c). This notification must also inform the provider that it has a right to appear before the KDHE between five and fifteen days from the date the notice is mailed or served on the provider. *Id.*

If the state decides to terminate the provider, the provider may request a hearing from Kansas's Office of Administrative Hearings ("OAH") within thirty-three days after receiving notice of termination. Kan. Admin. Regs. §§ 30-7-67-68. According to Kansas, this decision to terminate "becomes final only after the time for a formal administrative hearing has passed." Appellant's Opening Br. at 6 (citing Kan. Admin. Regs. § 30-7-64-104). If the provider is dissatisfied with the results of this hearing, it may request a rehearing. *Id.* If, after that, it is still dissatisfied, the provider may appeal to state court. *See* Kan. Stat. Ann. § 77-601-31.

II. Planned Parenthood's Alleged Wrongdoing

Planned Parenthood affiliates, many of which are located in areas with shortages of primary-care providers, deliver essential services to Medicaid recipients. PPGP has two health centers in Kansas and three in Missouri, and PPSLR has one health center in Missouri that also serves Kansas Medicaid patients. The Providers' services include annual health exams; different types of contraception along with contraceptive counseling; breast- and cervical-cancer screening; cervical-cancer treatment; screening and treatment for sexually transmitted infections; human papillomavirus vaccinations; pregnancy testing and counseling; and other health services.[3] Though some Planned Parenthood clinics also perform abortions, Medicaid seldom pays for abortions. *See, e.g., Harris v.*

3. Though we only decide that the district court did not abuse its discretion in enjoining the termination of PPGP, we state the facts pertaining to both Providers to place our analysis in context.

McRae, 448 U.S. 297, 302-03, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980) (explaining that the Hyde Amendment prohibits using federal Medicaid funds to reimburse the cost of abortions except in limited circumstances such as rape or incest). The Patients chose Planned Parenthood for reproductive-healthcare services for many reasons, including the quality and availability of the services and expertise in reproductive healthcare.

In July 2015, the anti-abortion group Center for Medical Progress ("CMP") released on YouTube a series of edited videos purportedly depicting PPFA executives negotiating with undercover journalists for the sale of fetal tissue and body parts. Kansas alleges that the videos demonstrate that "Planned Parenthood manipulates abortions to harvest organs with the highest market demand" and that PPFA executives are willing to negotiate fetal-tissue prices to obtain profits. Appellant's Opening Br. at 7. According to Kansas, this evidence matters because "PPFA controls its 'affiliate' organizations, including [PPGP] and PPSLR." *Id.* Neither PPGP nor PPSLR is the subject of the videos and it is undisputed that neither participates in fetal-tissue donation or sale.

To prove PPFA's control over and affiliation with the Providers, Kansas claims that (1) "PPFA and its affiliates make no apparent effort to keep their finances separate"; (2) PPFA compiles a yearly "'combined balance sheet,'" which "aggregate[s] 'revenue and expenses'" for the entire Planned Parenthood organization; (3) according to its 2014 tax return, PPFA transferred over $50 million to its affiliates; (4) PPFA drafts rules of procedure and

operation for its affiliates and trains its affiliates' officers and employees in "management and medical practices"; and (5) PPFA's legal counsel represented PPGP and PPSLR in their meeting with the KDHE. *Id.* at 7-8 (quoting Appellant's App. at 479-82).

Based on CMP's videos of the PPFA executives, Kansas began investigating the Providers. In August 2015, Kansas's Board of Healing Arts ("BOHA"), the agency primarily responsible for medical licensure and regulation, requested from PPGP copies of "treatment records related to abortion procedures or stillbirths . . . in which fetal organs or tissues were transferred for any purpose other than those" permitted by law. Appellant's App. at 208-11. On January 7, 2016, the BOHA determined that, "[a]fter careful review of the investigative materials, . . . no further action will be taken at this time." *Id.* at 215.

On December 16, 2015, Kansas's Bureau of Waste Management ("BWM") also initiated a solid-waste investigation under Kan. Admin. Regs. § 28-29-16 of a PPGP-operated clinic in Overland Park, Kansas. "[O]ut of concern for clinic and patient privacy and safety," PPGP employees stopped the inspectors from taking photographs but invited the inspectors to finish their inspection visually. *Planned Parenthood of Kan. & Mid-Mo. v. Mosier*, No. 16-2284-JAR-GLR, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *5 (D. Kan. July 5, 2016). PPGP employees also refused to turn over waste-disposal-vendor lists—which would have become public information subject to the Kansas Open Records Act had PPGP turned over the lists to the investigators—because

the PPGP employees were concerned about "the history of harassment toward companies that work with Planned Parenthood." Appellee's Response Br. at 6. Kansas claims that the inspectors were thus "[u]nable to complete their inspection," so they left the clinic. Appellant's Opening Br. at 10-11. Kansas alleges that PPGP's conduct hindered the investigation, though BWM never cited PPGP for any violation related to the investigation.

On January 5, 2016, after counsel for BWM guaranteed the privacy of PPGP's patients, PPGP permitted the inspectors to take photographs on their return visit. The BWM inspectors left a report with PPGP's clinic employees, stating that BWM had found no violations. Later, on January 15, 2016, after PPGP had taken the necessary steps to make its vendor information confidential, PPGP provided BWM the requested waste-vendor information as well. Though Kansas points out that this was "an entire month after the first inspection," *id.* at 11, in reality, BWM had granted PPGP extra time so that PPGP could document its request to keep the information confidential.

Though Kansas never investigated PPSLR, the Missouri Attorney General did. In September 2015, after looking into PPSLR's fetal-tissue practices, the Missouri Attorney General's office announced that it had found no evidence of wrongdoing. Relevant to this appeal, Kansas also notes that "[a]llegations . . . emerged that Planned Parenthood offices around the country have engaged in questionable billing practices, including in the nearby states of Oklahoma and Texas." *Id.* at 8-9. And it claims

that "Planned Parenthood's practices have prompted numerous lawsuits under the False Claims Act ('FCA')." *Id.* at 9.

III. Termination Proceedings & District Court Case

On March 10, 2016, about two months after Kansas's inspection of one of PPGP's clinics and two months after Kansas Governor Sam Brownback announced that he had "signed legislation stopping most taxpayer funding from going to Planned Parenthood," and that "[t]he time had[d] come to finish the job," Kansas issued notices of intent to terminate PPGP and PPSLR as state Medicaid providers.[4] Governor Sam Brownback, 2016 State of the State (Jan. 12, 2016) (transcript available at https://governor.kansas.gov/2016-state-of-the-state-january-12-2016/). Those notices informed the Providers that, under Kan. Admin. Regs. § 30-5-60(a), Kansas "intend[ed] to terminate [their] participation in" Kansas's state Medicaid program. Appellant's App. at 78. Kansas cited the following paragraphs from § 30-5-60(a): "(2) noncompliance with applicable state laws, administrative regulations, or program issuances concerning medical providers; (3) noncompliance with the terms of a provider agreement; (9) unethical or unprofessional conduct; and (17) other good cause." *Id.*

The notices also informed the Providers that they could each challenge their proposed terminations in

4. Kansas also terminated eleven individual PPGP and PPSLR employees as Medicaid providers, but rescinded those terminations on June 13, 2016.

administrative reviews, where they would "have the opportunity to present any relevant evidence" regarding their terminations. *Id.* PPGP's administrative review was scheduled for March 23, 2016, and PPSLR's was scheduled for March 22, 2016. The notices included attachments listing the state's reasons for terminating the Providers—including the CMP videos, PPGP's supposed lack of cooperation during the waste disposal inspections, and the FCA allegations in neighboring states.

Together, the Providers participated in an administrative review on April 29, 2016. At this review, the Providers' counsel presented evidence and argued against termination. But on May 3, 2016, Kansas sent each Provider a "Notice of Decision to Terminate," which provided that "[a]fter thorough review of all information presented, . . . your participation in [Kansas's state Medicaid program] will be terminated effective **May 10, 2016**." *Id.* at 51, 53. The notices also informed the Providers that, under Kan. Admin. Regs. § 30-7-64, they had the right to "request a fair hearing" with the OAH within thirty-three days of the termination notice. *Id.*

Instead of requesting a hearing to review the terminations, the Providers, the Patients, and eleven individual PPGP and PPSLR employees (whose charges were later dropped after Kansas reconsidered and reversed its decision to terminate them from its state Medicaid program) sued Kansas under 42 U.S.C. § 1983, alleging violations of the Medicaid Act and the Equal Protection Clause of the Fourteenth Amendment. The Patients each had their own reasons for choosing PPGP

for reproductive-health services. Jane Doe #1 chose PPGP as a provider because it was the only provider that would accept her as a patient (because she was not pregnant) and schedule an annual appointment for her within a reasonable time. Jane Doe #2 is a long-time PPGP patient who trusts the provider's expertise in reproductive health care and relies on the PPGP for regularly administered birth-control shots. Jane Doe #3, who was pregnant when the lawsuit was filed, chose PPGP because she appreciated the continuity of having one reproductive-health-care provider and wanted to obtain birth control after giving birth.

The day after filing their lawsuit, the Plaintiffs filed a Motion for Temporary Restraining Order and Preliminary Injunction. On June 7, 2016, after Kansas twice continued the hearing date and agreed to extend the effective termination date to July 7, the parties argued the case before the district court. Kansas now argues that extending the termination date from May 10 to July 7 meant that the Providers had until August 10 to seek a hearing before the OAH. Kansas also notes that PPGP's Medicaid contract with the state dictated that the contract would terminate thirty days after "notification from the State that the provider's state fair hearing rights have expired or the state fair hearing has been completed related to the Medicaid termination." *Id.* at 586. To Kansas, this means that "the [termination] notice would have had no effect on [PPGP] until September 10, 2016." Appellant's Opening Br. at 13. On July 5, the district court granted the Plaintiffs' request and issued a temporary restraining order and preliminary injunction. *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *26.

In granting the Plaintiffs' request for relief, the district court held that the case was ripe, that the Plaintiffs[5] had standing, and that abstention wasn't necessary under *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). 2016 U.S. Dist. LEXIS 86948, [WL] at *8. On the merits, the district court found that the Patients had a private right of action and were likely to succeed on their free-choice-of-provider claim under the Medicaid Act. 2016 U.S. Dist. LEXIS 86948, [WL] at *14-*22. Specifically, the court concluded that states could not interfere with patients' choice of providers for reasons other than the providers' professional competence or fitness to provide medical services. 2016 U.S. Dist. LEXIS 86948, [WL] at *18. It also found that the Plaintiffs had met the other requirements for injunctive relief: that the Plaintiffs would suffer irreparable harm absent the requested relief, that the balance of harms favored the Plaintiffs, and that the injunction served the public interest. 2016 U.S. Dist. LEXIS 86948, [WL] at *22-*25. The district court declined to rule on the Equal Protection claim. 2016 U.S. Dist. LEXIS 86948, [WL] at *14. Kansas appealed.

ANALYSIS

First, we address Kansas's arguments regarding standing, ripeness, and *Younger* abstention. Then, we move on to address the claim's merits. Specifically, we

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5. The district court concluded that the Patients had standing to pursue their claim, so it declined to resolve whether the Providers also independently had standing. *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *17.

decide whether the Patients have a private right of action under the Medicaid Act, and whether they have met the requirements necessary to show that they are entitled to injunctive relief.

I. Justiciability

The United States Constitution empowers federal courts to address "Cases" and "Controversies." U.S. Const. art. III § 2, cl. 1. The cases-and-controversies requirement manifests in the dual justiciability doctrines of standing and ripeness. Kansas maintains that the district court erred in concluding that the Plaintiffs had standing and that the case was ripe.

A. Standing

We review de novo a district court's finding of standing. *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1215 (10th Cir. 2017). "The constitutional requirements for standing are (1) an injury in fact, (2) a causal connection between the injury and the challenged act, and (3) a likelihood that the injury will be redressed by a favorable decision." *Id.* at 1214-15 (quoting *Roe No. 2 v. Ogden*, 253 F.3d 1225, 1228-29 (10th Cir. 2001)). Kansas contends that the Plaintiffs failed to show that their injury was imminent and fairly traceable to Kansas's actions.

1. Injury in Fact

For standing, a plaintiff's injury must be "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs.*

of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)). "An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a '"substantial risk" that the harm will occur.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341, 189 L. Ed. 2d 246 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 414 n.5, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013)). Kansas argues that the Plaintiffs failed to show injury in fact because (1) it had issued only a preliminary, not final, decision and (2) the Plaintiffs' injuries are too speculative.

First, Kansas claims that only after the Plaintiffs had an administrative hearing (which took place on April 29), "may [it] then issue a written preliminary decision, setting forth the effective date of the termination and the basic underlying facts supporting the order." Appellant's Opening Br. at 6. And Kansas goes on to argue that the "preliminary decision . . . becomes final only after the time for a formal administrative hearing has passed." *Id.* (citing Kan. Admin. Regs. §§ 30-7-64-104). But Kansas's use of the term "preliminary" is without support in the statute. The regulations provide that "[i]f the decision is to terminate, a written order of termination shall be issued, setting forth the effective date of the termination and the basic underlying facts supporting the order." Kan. Admin. Regs. § 30-5-60(c). Thus, we reject Kansas's argument that its decision was preliminary rather than final.

Second, Kansas claims that the Plaintiffs' injuries are speculative because the Providers "refused to complete the

administrative process," so no one can say whether they would have been terminated at all. Appellant's Opening Br. at 20. This argument hinges on Kansas's characterization of the termination letters and their effect. According to Kansas, the notices it sent to the Providers were "far from . . . final termination[s]," but rather were "effectively . . . complaint[s] that the Providers could formally contest . . . or admit." *Id.* at 21. The providers had until August 10 to administratively appeal Kansas's decision to terminate them from the Medicaid program—thirty-three days from the termination's extended effective date of July 7. And Kansas says that under its contracts with PPGP, it couldn't cut the Provider's funding until September 10—thirty days after the expiration of the Providers' right of appeal.[6] *See* Kan. Admin. Regs. § 30-7-68.

This argument fails. As did the district court, we read the notices of termination literally. *See Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *9. The letters' plain language precludes us from treating them as mere warnings of possible future events. The March 10 letters that Kansas sent to the Providers were titled, "Notice of *Intent* to Terminate," and the May 3 letters were titled,

6. PPSLR has no such contracts with Kansas, so this thirty-day delay doesn't protect PPSLR's patients. *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *24. And the district court found that this additional thirty-day extension for PPGP was questionable. *Id.* PPGP has contracts with three Managed Care Organizations ("MCO") in Kansas. 2016 U.S. Dist. LEXIS 86948, [WL] at *2. Kansas submitted a sample MCO contract that included the thirty-day extension, but the contract in place between Kansas and PPGP when the Plaintiffs sued did not contain the extension, and instead provided for immediate termination.

"Notice of *Decision* to Terminate." Appellant's App. at 51, 53, 78, 83 (emphasis added). Also, the second letters were final because they stated that "it is the decision of [Kansas] that your participation in [Kansas's Medicaid Program] will be terminated," and that the Providers' terminations would be "effective May 10, 2016." *Id.* at 51, 53. This date was extended to July 7 only because Kansas requested more time to respond to the Plaintiffs' motion for preliminary injunction. Though the Providers' statutory right to appeal the termination may have delayed the date that Kansas cut off the Providers' funding, Kansas doesn't explain how that delay would change the legally effective date of the termination.[7]

7. After the parties had their evidentiary hearing on April 29, Kansas notified the Providers that they would be terminated effective May 10. It told the Providers that if they disagreed with this decision, they had the right to—but did not have to—request a fair hearing before the OAH within thirty-three days of the date on the notice. That date would have been June 6. So, if the Providers hadn't filed their lawsuit in federal court before May 10, they would have been terminated on May 10, subject to possibly obtaining a reversal of the termination in later proceedings. Nothing in the termination notice states that the termination would toll if the Providers requested a fair hearing before the OAH. Instead, Kansas states without support that the Providers' funding would not have terminated on the effective termination date (May 10). But the Providers' termination from Kansas's Medicaid Program would have triggered the loss of Medicaid funding within a few weeks. *See Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *8. In fact, Kansas's regulations state that even if the Providers had requested a hearing before the OAH, their Medicaid funding would be terminated pending the appeal's resolution because the request would concern "the termination of a provider from program participation." Kan. Admin. Regs. § 30-7-66(a)(1).

In fact, as the district court noted, Kansas's "position on the effective date of termination has been a moving target." *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *8. After the Providers' April administrative hearing, Kansas specifically declined the Plaintiffs' request to delay any termination decisions for thirty days from the date of the final terminations. Instead, Kansas made the effective termination date May 10, just a week from the date of the final termination letters. Kansas also rejected the district court's proposal of a mutually-agreed injunction that would "freeze the status quo" until September. *Id.* The first time Kansas argued that the terminations wouldn't take effect until September 10 was on May 31, in its response to the Plaintiffs' motion for preliminary injunction. And Kansas provided no concrete assurances to support this claim, refusing to draft even a simple statement attesting to the fact that it wouldn't cut off funding until September 10.

In light of such conduct, Kansas's claim that it wouldn't cut off funding to the Providers until September 10 is unpersuasive. We agree with the district court that Kansas cannot "have its cake and eat it too" by insisting that the terminations wouldn't be effective until September, yet refusing to agree to delay enforcement by guaranteeing that September effective date. 2016 U.S. Dist. LEXIS 86948, [WL] at *9. We also agree with the district court's position that "[t]he fact that [Kansas] is unwilling to put its counsel's representations into a stipulated order that would apply to both providers is entirely inconsistent with its position that this dispute is premature." *Id.*

In any case, we conclude that the Plaintiffs faced a substantial risk of injury from the moment Kansas sent its final notices of termination. Although the termination decisions would not have gone into effect until July 7, 2016 (accounting for Kansas's litigation-related extensions), the state "ha[d] already acted to terminate [the Providers'] Medicaid provider agreements; only the *effect* of [those] termination[s] ha[d] yet to be implemented." *Gee*, 862 F.3d at 455. Because the Plaintiffs chose not to pursue an administrative appeal, only Kansas's "unilateral reversal" of its terminations could have saved the Plaintiffs from injury, even accounting for all of the delays built into the termination process. *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *11. As Kansas itself states, we must determine standing "as of the time the action is brought." Appellant's Opening Br. at 22 (quoting *Utah Ass'n of Ctys. v. Bush*, 455 F.3d 1094, 1099 (10th Cir. 2006)). And the Patients, in particular, "need not wait to file suit until [the Providers are] forced to close [their] doors to them and all other Medicaid beneficiaries." *Gee*, 862 F.3d at 455. We do not think a two-month delay—from July 7 to September 10—renders the injuries too distant or speculative to confer standing on the Plaintiffs.

2. Causal Connection

Kansas alternatively argues that the Plaintiffs lack standing because their injuries resulted from their own failure to "use available procedures to remedy an alleged injury," rather than Kansas's actions, and thus are not traceable to Kansas. Appellant's Opening Br. at 23.

Kansas correctly states that a plaintiff cannot show that a defendant caused its injuries if the plaintiff's injuries resulted from its own acts or failures to act. *See Clapper*, 568 U.S. at 415 (concluding that plaintiffs challenging a surveillance statute couldn't show standing based on actions they took to protect themselves against hypothetical governmental surveillance). To support its argument that the Plaintiffs caused their own injuries, Kansas relies on *National Family Planning & Reproductive Health, Inc. v. Gonzales*, 468 F.3d 826, 828, 373 U.S. App. D.C. 346 (D.C. Cir. 2006). There, the D.C. Circuit held that a plaintiff-association lacked standing to challenge an anti-discrimination law for vagueness—the association argued that it couldn't comply with both the new law and existing regulations because they conflicted—in part because the association could have cured its uncertainty by asking the federal Department of Health and Human Services ("HHS") for clarification. *Id.* at 831. Kansas claims that, like the association in *Gonzales*, the Plaintiffs here could have avoided injury by pursuing and completing the administrative-appeal process.

But the Plaintiffs' dilemma is dissimilar from that in *Gonzales*. In *Gonzales*, HHS could have prevented the plaintiff-association from suffering any injury by explaining how it would implement the new law harmoniously with the existing regulations. *Id.* Here, Kansas had set a termination date for the Providers' Medicaid contracts, even if they could have opted to pursue an administrative appeal. But nothing in the record suggests that the appeal itself would have tolled the terminations, and the regulations contradict that

position.[8] *See* Kan. Admin. Regs. § 30-7-66(a)(1). This means that, absent injunctive relief, Kansas would have stopped funding the Providers within two months. The Plaintiffs could have avoided injury only by pursuing their administrative appeal and winning, and nothing required them to exercise that right to appeal. But even if the Plaintiffs had appealed the termination, Kansas had refused to stipulate that it would continue funding the Providers until September. And, unlike the Providers, the Patients had no administrative remedies available, and therefore no exhaustion requirements to satisfy. *See Gee*, 862 F.3d at 455. Therefore, *Gonzales* is inapposite.

We agree with the district court's decision not to "impose an indirect exhaustion requirement by finding that Plaintiffs caused their own injury by failing to pursue administrative remedies." *Mosier*, 2016 U.S. Dist.

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8. The termination letters provided an effective date of May 10 (later extended to July 7), and advised the Providers that to contest the termination, they could request a fair hearing before the OAH within thirty-three days of the notice. Thus, the letters say that absent appeal, the terminations would be effective even before the Providers' time in which to appeal had expired. So, under the state administrative-appeals system, the Providers couldn't avoid being terminated for at least some period of time, even if they succeeded in their appeal and the state ultimately reversed the terminations.

And again, though Kansas insisted the termination wouldn't take effect until September 10, meaning the Providers wouldn't lose funding until that date, it refused to extend the effective termination date itself to September. In doing so, the state created confusion around what effect the termination, slated to occur on July 7, would have had on the Providers and the Patients.

LEXIS 86948, 2016 WL 3597457, at *12. The Plaintiffs met their burden of showing that Kansas's actions created a substantial risk of injury, so they had standing to sue the state.

B. Ripeness

Kansas next argues that this case is not ripe for adjudication because the Plaintiffs didn't complete the administrative-appeal process. Ripeness is a prerequisite to justiciability with both constitutional and jurisdictional components. *See United States v. Bennett*, 823 F.3d 1316, 1325 (10th Cir. 2016). We review de novo the district court's ripeness finding. *Roe No. 2*, 253 F.3d at 1231. Ripeness doctrine ensures that courts don't interfere with agency action until it has progressed from abstract disagreement to a formal decision with concrete effects. *Farrell-Cooper Mining Co. v. United States DOI*, 728 F.3d 1229, 1234 (10th Cir. 2013). To determine a claim's ripeness, we evaluate (1) its fitness for judicial resolution and (2) the hardship the parties would suffer if the court declined to hear the case. *Id.*

1. Fitness for Judicial Resolution

"[T]o determine the fitness of issues for review, we may consider 'whether judicial intervention would inappropriately interfere with further administrative action' and 'whether the courts would benefit from further factual development of the issues presented.'" *Id.* at 1234-35 (quoting *Sierra Club v. United States DOE*, 287 F.3d 1256, 1262-63 (10th Cir. 2002)). Other

relevant factors include: "(1) whether the issues involved are purely legal, (2) whether the agency's action is final, (3) whether the action has or will have an immediate impact on the petitioner, and (4) whether resolution of the issue will assist the agency in effective enforcement and administration." *Id.* at 1235 n.3 (quoting *Los Alamos Study Group v. United States DOE*, 692 F.3d 1057, 1065 (10th Cir. 2012)). In sum, "[a]n agency's action will be ripe for review where 'the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him.'" *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *9 (quoting *Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 807-08, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003)).

Kansas's arguments on this point are related to its arguments on standing. The state claims that the administrative actions it took in this case were not final. Rather, it argues, the Plaintiffs could have requested a formal hearing and then a rehearing before the OAH. *See* Kan. Admin. Regs. §§ 30-7-68, 30-7-77. If they were dissatisfied with the outcome of those proceedings, they could then have challenged those decisions before a state appeals committee, and then, finally, in Kansas state court. *See* Kan. Admin. Regs. § 30-7-78; Kan. Stat. Ann. §§ 77-601, 77-607.

The district court disagreed, concluding that the "termination notices represent concrete actions by the KDHE that threatened to harm Plaintiffs by

excluding [PPGP] and PPSLR as Medicaid providers, notwithstanding the option of an administrative appeal." *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *9. The district court pointed out that if the Providers didn't appeal, their final termination would stand (which, we note, would have deprived the Patients of their provider of choice). 2016 U.S. Dist. LEXIS 86948, [WL] at *10. Further, the district court noted that "where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *Id.* (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128, 127 S. Ct. 764, 166 L. Ed. 2d 604 & n.8 (2007)). Finally, the district court found that the case involved primarily legal questions that did not require agency expertise or significant factual development. *Id.* Therefore, it concluded that the Plaintiffs' claims were ripe for judicial review. 2016 U.S. Dist. LEXIS 86948, [WL] at *11.

Again, we agree with the district court's thoughtful analysis, this time on this case's fitness for judicial resolution. "[B]oth parties have submitted evidence on these issues, and . . . neither party requested an evidentiary hearing on the motion for preliminary injunction." 2016 U.S. Dist. LEXIS 86948, [WL] at *10. This implies that no substantial factual disputes remained, and that the questions we must now answer are primarily legal questions. Kansas has presented its grounds for terminating the Providers, and it agrees that the propriety of the preliminary injunction rests on "whether the Providers' conduct and corporate affiliations justify the decision to terminate." Appellant's Opening Br. at

29. Though Kansas characterizes these issues[9] as factual rather than legal, the district court found it telling that after the parties had one evidentiary hearing, even if it was informal, neither party later requested an evidentiary hearing on the motion for preliminary injunction. *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *10. Kansas presented three grounds for terminating the Providers and supported its reasons with evidence. Further agency action was therefore unnecessary for the district court to determine "whether, as a matter of law, any of those grounds permit [Kansas] to terminate [PPGP's and PPSLR's] Medicaid provider agreement without violating Medicaid's free-choice-of-provider requirement." *Gee*, 862 F.3d at 456.

And, because the Providers had clearly stated that they did "not intend to pursue" further administrative appeal, Appellee's Response Br. at 58, the Patients' injuries are "sufficiently likely to happen to justify judicial intervention," *Gee*, 862 F.3d at 456 (quoting *Pearson v. Holder*, 624 F.3d 682, 684 (5th Cir. 2010)). Again, significantly, the Patients did not participate in the April 29 informal hearing and they had no administrative remedies available to them, so only "through a § 1983 action" in federal court could they "vindicate their federal right" to select the qualified provider of their choice. Appellee's Response Br. at 20; *see Gee*, 862 F.3d at 455.

9. The issues it names are "whether the Providers are 'qualified' under 42 U.S.C. § 1396a(a)(23), whether the State properly terminated the Providers under Section 1396a(p)(1), and whether the nature of the relationship between the Providers and the National Office is legally significant." Appellant's Opening Br. at 29.

Absent further administrative action by the Providers, the terminations were final for justiciability purposes because they would have become effective as of the dates stated in the termination letters. In other words, because the future held no uncertain events, the termination letters were not "of a merely tentative or interlocutory nature." Appellant's Opening Br. at 25-26 (quoting *Friends of Marolt Park v. United States DOT*, 382 F.3d 1088, 1093-94 (10th Cir. 2004)); *see also Gonzales*, 64 F.3d at 1499.

2. Hardship

Kansas also contends that the Plaintiffs failed to show that they would face hardship absent an injunction because possible future injury does not amount to hardship and the Providers' terminations were not final. We reject this argument for the same reason already given. Because the Providers chose not to appeal their terminations, the terminations were final and would have become effective no later than September 10. If this had happened, the Patients would have likely "suffer[ed] hardship by being denied access to the provider of their choice under 42 U.S.C. § 1396a(a)(23) and to medical services at [the Providers'] facilities." *Gee*, 862 F.3d at 457. Therefore, the Plaintiffs' claims are ripe.

II. *Younger* Abstention

Kansas next claims that the district court erred by declining to abstain under *Younger*. We review de novo the district court's decision on whether to abstain under *Younger*. *Amanatullah v. Colo. Bd. of Med. Exam'rs*,

187 F.3d 1160, 1163 (10th Cir. 1999). We first note that "abstention 'is the exception, not the rule,' and hence should be 'rarely . . . invoked.'" *Brown ex rel. Brown v. Day*, 555 F.3d 882, 888 (10th Cir. 2009) (omission in original) (quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 705, 112 S. Ct. 2206, 119 L. Ed. 2d 468 (1992)).

Younger abstention stems from the federal government's deference to and respect for the state government and its function. *Younger*, 401 U.S. at 44. "[F]or *Younger* abstention to apply, there must be 'an ongoing state judicial . . . proceeding, the presence of an important state interest, and an adequate opportunity to raise federal claims in the state proceedings.'" *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1008 (10th Cir. 2015) (quoting *Seneca-Cayuga Tribe of Okla. v. Oklahoma ex rel. Thompson*, 874 F.2d 709, 711 (10th Cir. 1989)). We conclude that no ongoing state proceedings precluded the district court from exercising jurisdiction.

Here, the issue is whether the Providers' right to appeal after their April 29 evidentiary hearing and after the resulting termination decisions would amount to an administrative proceeding entitled to *Younger* abstention. To decide this question, we ask "whether there is an *ongoing* proceeding," and then we "decide whether that proceeding is the *type* of state proceeding that is due the deference accorded by *Younger* abstention." *Brown*, 555 F.3d at 888 (first emphasis added).

A. Administrative Proceeding Not Ongoing

Kansas argues that state administrative proceedings were "well underway" and remained ongoing because the Providers still had the right to seek a formal hearing until August 10. Appellant's Opening Br. at 31-32. The district court disagreed, concluding that state administrative proceedings had not yet begun.[10] *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *12.

Before the Plaintiffs filed their § 1983 lawsuit and motion for preliminary injunction, the following events had taken place: (1) two different Kansas agencies had investigated the Providers to determine whether they had improperly sold or disposed of fetal tissue, and both agencies cleared the Providers of wrongdoing; (2) Kansas had sent the Providers notices of intent to terminate; (3) Kansas and the Providers had participated in one evidentiary hearing; and (4) Kansas had sent the Providers notices of decision to terminate with a termination date of May 10. Kansas argues that these decisions weren't final. But again, had the Providers taken no further action—and

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10. Kansas also argues that the district court conflictingly characterized the state administrative proceedings as both final and as having not yet begun. But these two characterizations do not conflict. The termination letters were final for justiciability purposes, and the Providers therefore had the option of appealing these final terminations via state administrative proceedings, though they chose not to. In fact, the Providers had the choice to pursue an administrative appeal only *because* the terminations were final. These circumstances are comparable to the rule that, absent certain, statutory exceptions, federal courts of appeals may hear appeals from only district courts' final decisions. *See* 28 U.S.C. §§ 1291, 1292.

nothing required the Providers to take further action—those terminations would have become effective. In other words, neither party would have had anything left to do to execute the terminations; the clock was running on certain termination.

After the Providers received Kansas's notices of termination, they had an optional right to challenge these decisions at an administrative hearing. But "no administrative proceeding commences until or unless [the Providers] appeal[], . . . and [the Providers] ha[ve] foresworn that option." *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F. Supp. 3d 604, 633 (M.D. La. 2015). Kansas tries to turn the Providers' right to initiate future state administrative proceedings into present, ongoing proceedings, claiming that "[b]ut for the district court's injunction, the state proceeding would have gone forward." Appellant's Opening Br. at 35. Kansas is mistaken: absent the district court's injunction, the termination would have gone into effect. That is so because the Providers had decided not to proceed with an administrative appeal. So nothing would have stood in the way of the termination being imposed on May 10 as promised absent a unilateral reversal. Because the Providers chose not to appeal this decision to the OAH, Kansas can point to no ongoing state proceedings.

B. Not the Type of Proceeding Entitled to *Younger* Abstention

For similar reasons, even if proceedings were ongoing, they aren't the type requiring *Younger* abstention.

Relevant to this appeal, civil enforcement proceedings merit abstention under *Younger*. *Sprint Communs., Inc. v. Jacobs*, 134 S. Ct. 584, 588, 187 L. Ed. 2d 505 (2013). Civil enforcement proceedings are generally "'akin to a criminal prosecution' in 'important respects,'" and "are characteristically initiated to sanction the federal plaintiff," meaning, in this case, the Providers. *Id.* at 592 (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604, 95 S. Ct. 1200, 43 L. Ed. 2d 482 (1975)). Abstention in such cases reflects "a proper respect for state functions" when the party seeking relief from the federal court "has an adequate remedy at law and will not suffer irreparably [sic] injury if denied equitable relief." *Id.* at 591 (quoting *Younger*, 401 U.S. at 43-44). We have also defined civil enforcement proceedings as coercive rather than remedial. *Brown*, 555 F.3d at 890. Though the Supreme Court has disclaimed this distinction "given the susceptibility of the designations to manipulation," *Sprint Communs.*, 134 S. Ct. at 593 n.6, *Brown* still provides valuable guidance for our analysis.

Under this framework, plaintiffs suing under § 1983 must "exhaust[] state administrative remedies only where the state administrative proceedings are coercive." *Brown*, 555 F.3d at 890. Civil enforcement proceedings are coercive when the state initiates the proceedings and the target of those proceedings challenges them as unlawful in federal court. *Id.* at 889; *Sprint Communs.*, 134 S. Ct. at 592. On the other hand, proceedings are remedial when the federal plaintiff initiates them seeking a remedy for a state-inflicted wrong. *Brown*, 555 F.3d at 890-91.

We agree with the district court that the administrative proceedings in this case were not civil enforcement actions

subject to *Younger* abstention. *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *13. As the district court pointed out, the Providers chose to participate in an evidentiary hearing on April 29—this hearing was not mandatory. *Id.* The proceedings that Kansas "initiated to sanction [the Providers]" were completed with the final termination notices—those notices were Kansas's sanctions. *Id.* (quoting *Sprint Communs.*, 134 S. Ct. at 592). After receiving the notices of termination, the Providers took no further action. Nor were they required to do so, because any further appeals would be optional avenues to seek redress for their injuries. In other words, even if Kansas's "administrative termination of the Providers [was] coercive, intended to sanction the Providers for misconduct," Appellant's Opening Br. at 36, that action was final when the Plaintiffs sued under § 1983. Therefore, any additional administrative proceedings could not be characterized as civil enforcement proceedings, meaning that contrary to Kansas's claims, the Providers faced no exhaustion requirement under these circumstances.[11]

Finally, but importantly, we also note that though the Providers had the right of appeal, the Patients did not. *See Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *13; *see Kliebert*, 141 F. Supp. 3d at 633. And the Patients are not subject to an exhaustion requirement under § 1983. *See Gee*, 862 F.3d at 455

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11. Kansas claims that "[t]he district court concluded that there was no exhaustion requirement in this case because Section 1983 has no exhaustion requirement." Appellant's Opening Br. at 33 n.8. This is incorrect. The district court concluded that there was no exhaustion requirement in this case because it was not a civil enforcement proceeding under *Sprint Communications* and *Brown*. *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *12-*13.

("[T]he Individual Plaintiffs have no administrative appeal rights, and they are not subject to (nor could they be) any administrative exhaustion requirement under 42 U.S.C. § 1983."); *Planned Parenthood Se., Inc. v. Bentley*, 141 F. Supp. 3d 1207, 1215 (M.D. Ala. 2015) ("[T]he Eleventh Circuit, like every other circuit to consider the issue, has concluded that exhaustion is not required for claims under the Medicaid Act."). In sum, the district court did not err in declining to abstain under *Younger* because the administrative proceedings were not ongoing, and were not the type of proceedings meriting *Younger* abstention.

III. Preliminary Injunction

We review a district court's preliminary injunction for abuse of discretion. *N.M. Dep't of Game & Fish v. United States DOI*, 854 F.3d 1236, 1245 (10th Cir. 2017). "An abuse of discretion occurs where a decision is premised on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." *Id.* (quoting *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016)). We will overturn a preliminary injunction order only if it is arbitrary, capricious, whimsical, or manifestly unreasonable. *See Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1231 (10th Cir. 2005). We review the district court's factual findings "under the deferential 'clear error' standard." *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1252 (10th Cir. 2016) (quoting *Glossip v. Gross*, 135 S. Ct. 2726, 2739, 192 L. Ed. 2d 761 (2015)). We review de novo the district court's legal determinations. *Nova Health Sys. v. Edmondson*, 460 F.3d 1295, 1299 (10th Cir. 2006).

Preliminary injunctions are extraordinary remedies requiring that the movant's right to relief be clear and unequivocal. *Wilderness Workshop v. United States BLM*, 531 F.3d 1220, 1224 (10th Cir. 2008). To obtain a preliminary injunction, a plaintiff must show "[(1)] that he is likely to succeed on the merits, [(2)] that he is likely to suffer irreparable harm in the absence of preliminary relief, [(3)] that the balance of equities tips in his favor, and [(4)] that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008).

Before we address the Patients' likelihood of success on the merits, we first decide the threshold issue of whether the Medicaid Act's free-choice-of-provider provision, § 1396a(a)(23), creates a private right of action for the Patients.[12] We then determine whether the Patients are likely to succeed on the merits of their claim.

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12. Because the district court limited its conclusion on this matter to the Patients and declined to address whether the Providers also had a private right of action, *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *17, we too limit our analysis to the Patients. Kansas argues that doing so improperly allows "the Providers to piggyback on the alleged standing of the [Patients]," to bypass justiciability requirements, and to dodge the question of whether the Providers have a valid § 1983 claim. Appellant's Opening Br. at 44. But we don't need to consider PPGP's claims at all—the Patients' share the same complaint. *See Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 966 n.4 (9th Cir. 2013) (suggesting that even if "the Medicaid free-choice-of-provider provision does not create a private right 'enforceable by health care providers' on their own behalf, . . . 'Medicaid *recipients* . . . have enforceable rights under [that provision].'" (second and third alterations in original) (quoting *Silver v. Baggiano*, 804 F.2d 1211, 1216-18 (11th Cir. 1986), *abrogated on other grounds by Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002))).

A. Private Right of Action Under § 1396a(a)(23)

We are comfortable joining four out of the five circuits that have addressed this issue, and we too hold "that § 1396a(a)(23) affords the [Patients] a private right of action under §1983." *Gee*, 862 F.3d at 457[13] *see also Planned Parenthood of Ariz. Inc. v. Betlach*, 727 F.3d 960, 966-68 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1283, 188 L. Ed. 2d 300 (2014) (reaching the same conclusion); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 974-75 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2738, 569 U.S. 1004, 186 L. Ed. 2d 193 (2013) (same); *Harris v. Olszewski*, 442 F.3d 456, 461-62 (6th Cir. 2006) (same). *But see Does v. Gillespie*, 867 F.3d 1034, 1041-42 (8th Cir. 2017) (holding in a split decision that § 1396a(a)(23) does not grant Medicaid patients an enforceable right). "Medicaid is a cooperative federal-state program that provides federal funding for state medical services to the poor." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 433, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004). Medicaid "offers the States a bargain: Congress provides federal funds in exchange for the States' agreement to

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13. Originally, the *Gee* panel ruled unanimously in favor of the Planned Parenthood plaintiffs. *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 837 F.3d 477 (5th Cir. 2016), *withdrawn and superseded by Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017). But after the panel filed its opinion, Judge Owen switched her vote, causing the panel to withdraw its unanimous opinion and replace it with a majority opinion in favor of the plaintiffs and a dissenting opinion from Judge Owen. *Gee*, 862 F.3d at 449. Later, the Fifth Circuit split 7 to 7 on a vote to rehear the case en banc. *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 876 F.3d 699 (5th Cir. 2017) (per curiam).

spend them in accordance with congressionally imposed conditions." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1382, 191 L. Ed. 2d 471 (2015). This means that the federal government will share a state's cost of providing medical care to residents who can't afford it, but only if the state complies with the Medicaid Act's requirements, including "federal criteria governing matters such as who receives care and what services are provided at what cost." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 541-42, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012); *see also Atkins v. Rivera*, 477 U.S. 154, 157, 106 S. Ct. 2456, 91 L. Ed. 2d 131 (1986) (explaining the federal-state partnership for implementing Medicaid).

As discussed, the statute at issue in this case is the Medicaid Act's free-choice-of-provider provision, 42 U.S.C. § 1396a(a)(23). That provision states:

> A state plan for medical assistance must . . . provide that (A) any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide him such services . . . .

42 U.S.C. § 1396a(a)(23)(A). This section goes on to state that "an enrollment of an individual eligible for medical assistance in a primary care case-management system . . . , a medicaid managed care organization, or a similar entity shall not restrict the choice of the qualified person

from whom the individual may receive services under section 1396d(a)(4)(C) of this title."[14] *Id.* at § 1396a(a)(23)(B). Section 1396d(a)(4)(C) specifically grants Medicaid patients the right to choose their provider for family-planning services. *See Betlach*, 727 F.3d at 964. So, under the free-choice-of-provider provision, "any individual Medicaid recipient is free to choose any provider so long as two criteria are met: (1) the provider is 'qualified to perform the service or services required,' and (2) the provider 'undertakes to provide [the recipient] such services.'" *Id.* at 967 (quoting 42 U.S.C. § 1396a(a)(23)(A)).

1. *Blessing/Gonzaga* Requirements

The question here is whether the free-choice-of-provider agreement creates a private right enforceable under 42 U.S.C. § 1983. To do so, (1) "Congress must have intended that the provision in question benefit the plaintiff," (2) the plaintiff must have "demonstrate[d] that the right assertedly protected . . . is not so 'vague and amorphous' that its enforcement would strain judicial competence," and (3) the statute that creates the right must be "couched in mandatory, rather than precatory, terms." *Blessing v. Freestone*, 520 U.S. 329, 340-41, 117

14. In addition, this section contains several carefully defined exceptions, including some contained in other sections of the Medicaid Act. Specifically, § 1396a(a)(23)(B) includes exceptions for providers convicted of a felony "for an offense which the State agency determines is inconsistent with the best interests of beneficiaries under the State plan," and for providers under a new-provider temporary moratorium. This section also states that it does not apply in Puerto Rico, the Virgin Islands, and Guam. *Id.*

S. Ct. 1353, 137 L. Ed. 2d 569 (1997) (quoting *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 431, 107 S. Ct. 766, 93 L. Ed. 2d 781 (1987)). If "the text and structure of a statute provide no indication that Congress intends to create new individual rights," then the § 1983 plaintiff cannot proceed further. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002). But if the plaintiff satisfies the three *Blessing* requirements, "the right is presumptively enforceable" under § 1983. *Id.* at 284. Still, defendants can rebut this presumption by showing that Congress either expressly foreclosed private enforcement, or impliedly did so "by creating a comprehensive enforcement scheme that is incompatible with" private enforcement. *Id.* at 284 & n.4 (quoting *Blessing*, 520 U.S. at 341).

a. Congress Intended to Benefit Medicaid Patients

As have the Fifth, Sixth, Seventh, and Ninth Circuits, we conclude that the free-choice-of-provider provision confers on Medicaid patients a private right of action. *See Gee*, 862 F.3d at 457; *Comm'r of Ind.*, 699 F.3d at 974-75; *Betlach*, 727 F.3d at 966-68; *Olszewski*, 442 F.3d at 461-62. *But see Gillespie*, 867 F.3d at 1046. First, we have no trouble concluding that Congress unambiguously intended to confer an individual right on Medicaid-eligible patients. *See Betlach*, 727 F.3d at 966. "The statutory language unambiguously confers such a right," because it mandates that "all state Medicaid plans provide that 'any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community

pharmacy, or person, qualified to perform the service or services required.'" *Id.* (omission in original) (emphasis omitted) (quoting 42 U.S.C. § 1396a(a)(23)). Further, "Section 1396a(a)(23)(B) . . . carves out and insulates family planning services from limits that may otherwise apply under approved state Medicaid plans, assuring covered patients an unfettered choice of provider for family planning services." *Id.* at 964 (citing §§ 1396a(a)(23)(B), 1396d(a)(4)(C)). Congress has therefore clearly intended to grant a specific class of beneficiaries—Medicaid-eligible patients—an enforceable right to obtain medical services from the qualified provider of their choice.

Kansas also claims that *Armstrong* supports its claim that the free-choice-of-provider provision does not confer on the Patients an enforceable right because in it, Justice Scalia opined that Spending Clause legislation does not provide a private right of action. 135 S. Ct. at 1387. But in *Armstrong*, the Supreme Court analyzed an entirely different section of the Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A), concluding that this specific section did not create a private right of action. *Id.* Section 1396a(a)(30)(A) provides that "[a] State plan for medical assistance must . . . provide such methods and procedures relating to the utilization of, and the payment for" Medicaid services to ensure that Medicaid pays for only necessary, efficient, economic, and high-quality care while still setting reimbursement rates high enough to encourage providers to continue serving Medicaid patients. In his opinion, the last portion of which Justice Breyer declined to join, thus making that portion a plurality, Justice Scalia stated that "Section 30(A) lacks the sort of rights-creating language needed to imply a

private right of action." *Id.* But the plaintiffs there did not sue under § 1983 to enforce a right established by the Medicaid Act. *Id.* ("The last possible source of a cause of action for respondents is the Medicaid Act itself. They do not claim that, and rightly so.").

Unlike § 1396a(a)(23), which provides that "any individual eligible for medical assistance . . . may obtain such assistance from any [provider] . . . qualified to perform the service or services required," the Medicaid Act section at issue in *Armstrong* directed states to adopt rate-setting plans in accordance with certain general standards. The free-choice-of-provider provision, "[i]n contrast [to *Armstrong*'s Medicaid Act section,] § 1396a(a)(23) . . . is phrased in individual terms that are specific and judicially administrable, as recognized by the Sixth, Seventh, and Ninth Circuits." *Gee*, 862 F.3d at 462. Justice Scalia also noted in *Armstrong* that the plaintiffs were providers, as opposed to the providers' patients, who are the Medicaid Act's intended beneficiaries. 135 S. Ct. at 1387. As such, he doubted "that providers are intended beneficiaries (as opposed to mere incidental beneficiaries) of the Medicaid agreement." *Id.* Indeed, the majority speculated that the provider-plaintiffs in *Armstrong* likely chose not to sue under § 1983 because they had no unambiguously conferred right under *Gonzaga*. *Id.* at 1386 n.*. So *Armstrong* does nothing to undermine the Patients' claim that Congress intended to confer on them an enforceable right of action with the free-choice-of-provider provision.

b. Right Not Vague or Amorphous

Second, the free-choice-of-provider agreement is not so "'vague and amorphous' that its enforcement would strain judicial competence." *Blessing*, 520 U.S. at 340-41 (1997) (quoting *Wright*, 479 U.S. at 431). Kansas contends that the term "qualified" makes the free-choice-of-provider provision judicially unadministrable because it is neither defined in the Medicaid Act, nor self-defining. Appellant's Opening Br. at 41. This position is at odds with four of the five circuits that have decided the issue. *See Gee*, 862 F.3d at 457-58; *Betlach*, 727 F.3d at 967-68; *Comm'r of Ind.*, 699 F.3d at 974; *Olszewski*, 442 F.3d at 462; *see also Gillespie*, 867 F.3d at 1050 (Melloy, J., dissenting) (agreeing that the right conferred by the freedom-of-choice provision is not so vague and amorphous that it would strain judicial competence). We agree with the reasoning expressed by these four circuits.

Under the Medicaid Act, plaintiffs need show only that their provider of choice was (1) qualified to perform the medical services, and (2) undertaking to do so. *See* 42 U.S.C. § 1396a(a)(23). These requirements are "'concrete and objective standards for enforcement,' which are 'well within judicial competence to apply.'" *Gee*, 862 F.3d at 459 (quoting *Betlach*, 727 F.3d at 967). As the Ninth Circuit held and the Fifth Circuit has reiterated, "courts addressing this provision confront 'a simple factual question no different from those courts decide every day,'" which requires no "balancing of competing concerns or subjective policy judgments." *Id.* (quoting *Betlach*, 727 F.3d at 967).

"[W]hile there may be legitimate debates about the medical care covered by or exempted from the [free-choice-of-provider] provision," the definition of the word "qualified" cannot be legitimately debated. *Olszewski*, 442 F.3d at 462. Though determining whether a provider is qualified "may require more factual development or expert input, [it] still falls well within the range of judicial competence." *Betlach*, 727 F.3d at 967. Whether a provider was qualified to perform medical services and undertaking to do so "is 'likely to be readily apparent.'" *Id.* (quoting *Olszewski*, 442 F.3d at 462).

Kansas again relies heavily on *Armstrong* to support its claim that § 1396a(a)(23) is judicially unadministrable. It claims that "determining whether a provider is 'qualified' is a [sic] dependent upon judgment, industry experience, and technical expertise," and that such a determination implicates "expert judgments and questions of state law." Appellant's Opening Br. at 41. But in making this claim, Kansas compares the free-choice-of-provider provision's willing-and-qualified requirements to the requirements contained in § 1396a(a)(30)(A) of the Medicaid Act, which was at issue in *Armstrong*. That section requires state plans to "provide for payments that are 'consistent with efficiency, economy, and quality of care,' all the while 'safeguard[ing] against unnecessary utilization of . . . care and services.'" *Armstrong*, 135 S. Ct. at 1385 (alterations in original) (quoting 42 U.S.C. § 1396a(a)(30)(A)).

Compared to that "judgment-laden standard," *id.*, the decision of whether a provider is qualified is much simpler. Indeed, "the statutory term here, 'qualified,' is

tethered to an objective benchmark: 'qualified *to perform the service or services required.*'" *Betlach*, 727 F.3d at 967-68 (quoting 42 U.S.C. § 1396a(a)(23)(A)). Courts can determine whether providers are qualified by "drawing on evidence such as descriptions of the service required; state licensing requirements; the provider's credentials, licenses, and experience; and expert testimony regarding the appropriate credentials for providing the service." *Id.* at 968. This analysis is "no different from the sorts of qualification or expertise assessments that courts routinely make." *Id.*

c. Right Stated in Mandatory Terms

On the third element, we conclude that the statute is "couched in mandatory, rather than precatory, terms." *Blessing*, 520 U.S. at 341. Kansas doesn't contest this prong of the *Blessing/Gonzaga* analysis, nor could it. The statute provides that "[a] State plan for medical assistance *must*" allow Medicaid-eligible individuals to obtain medical services from the qualified provider of their choice. 42 U.S.C. § 1396a(a)(23)(A) (emphasis added). The statute confers a private right on Medicaid-eligible individuals; it is not merely "a directive to the federal agency." *Armstrong*, 135 S. Ct. at 1387; *see Gee*, 862 F.3d at 461; *Betlach*, 727 F.3d at 967; *Comm'r of Ind.*, 699 F.3d at 974; *Olszewski*, 442 F.3d at 462. *But see Gillespie*, 867 F.3d at 1041. Rather, it affirmatively requires state plans to allow Medicaid-eligible people to obtain medical services from their willing and qualified provider of choice.

2. Congressional Intent to Foreclose Private Enforcement

Still, even if a plaintiff meets these three threshold requirements, the plaintiff has established "only a rebuttable presumption that the right is enforceable under § 1983." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120, 125 S. Ct. 1453, 161 L. Ed. 2d 316 (2005) (quoting *Blessing*, 520 U.S. at 341). "The defendant may defeat this presumption by demonstrating that Congress did not intend that remedy for a newly created right." *Id.* The statute creating the right may contain evidence of such congressional intent; otherwise, we may infer it if the statute contains a "comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* (quoting *Blessing*, 520 U.S. at 341).[15]

15. We don't read *City of Rancho Palos Verdes* as requiring us to presume that Congress foreclosed a private right of action under the Medicaid Act simply because it was enacted under the Spending Clause. The Court discussed the *Gonzaga/Blessing* framework for determining whether a statute creates a privately enforceable right under § 1983, and nowhere suggested that it intended to change or abandon this framework. *City of Rancho Palos Verdes*, 544 U.S. at 119-20. Assuming that the plaintiff had met the *Gonzaga-Blessing* requirements and established a rebuttable presumption of individual enforcement under § 1983, the Court limited its analysis to the question of "whether Congress meant the judicial remedy expressly authorized by [the statute at issue] to coexist with an alternative remedy available in a § 1983 action." *Id.* at 120-21. But, even if *City of Rancho Palos Verdes* "upended the *Blessing* 'presumption,'" *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 801 (3d Cir. 2007), and somehow required a presumption *against* private enforcement of Medicaid Act provisions, it wouldn't change our conclusion. Congress's individually-oriented, mandatory, and rights-

Here, again, Kansas relies on *Armstrong* to support its claim. There, the providers sued Idaho, claiming that it had violated § 1396a(a)(30)(A) by reimbursing them at rates lower than the Medicaid Act permitted. *Armstrong*, 135 S. Ct. at 1382. The providers asserted "an implied right of action under the Supremacy Clause to seek injunctive relief against the enforcement or implementation of state legislation." *Id.* at 1383 (quoting *Exceptional Child Ctr., Inc. v. Armstrong*, 567 F. App'x 496, 497 (9th Cir. 2014) (unpublished), *rev'd, Armstrong*, 135 S. Ct. 1378, 191 L. Ed. 2d 471). Justice Scalia stated that "Spending Clause legislation like Medicaid" doesn't confer a private right of action because the "sole remedy Congress provided for a State's failure to comply with Medicaid's requirements . . . is the withholding of Medicaid funds by the [federal] Secretary of Health and Human Services." *Id.* at 1385, 1387.

But *Armstrong* isn't a § 1983 case. Plus, an earlier Supreme Court case, *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 522, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990), had previously rejected Kansas's argument. *Wilder* held that "[the Medicaid Act's] administrative scheme cannot be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983. . . . '[G]eneralized powers' . . . to audit and cut off federal funds [are] insufficient to foreclose reliance

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creating language in the free-choice-of-provider provision is strong enough to overcome a presumption against individual enforcement actions, especially considering the weight of precedent favoring such individual enforcement.

on § 1983 to vindicate federal rights."[16] 496 U.S. at 522 (quoting *Wright*, 479 U.S. at 428). And because Justice Kennedy didn't join Justice Scalia's Spending Clause reasoning, it is not binding on us; *Wilder* still is. Moreover, *Armstrong*'s analysis of a state's violation of the Medicaid Act is inapplicable to the Patients' claim that Kansas is attempting to deprive them of their right to receive medical services from their chosen, qualified providers, because the federal Secretary's withholding Medicaid funds would not redress their injuries at all. Unlike the

16. The Eighth Circuit contends that *Armstrong* effectively overruled *Wilder*. *See Gillespie*, 867 F.3d at 1044-1046. Even if the Supreme Court had done so—and we do not think it did—it would not impact our analysis. We rely on *Wilder* not for its holding that the Medicaid Act confers on providers a right enforceable under § 1983 but for its conclusion that the Medicaid Act's administrative scheme isn't sufficiently comprehensive that it demonstrates Congress's intent to preclude enforcement under § 1983. *Wilder*, 496 U.S. at 522. *Armstrong* neither discussed nor "plainly repudiate[d]" this portion of *Wilder*. *Armstrong*, 135 S. Ct. at 1386 n.*. Also, *Wilder* concerned an amendment to the Medicaid Act that has since been repealed. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4711, 111 Stat. 251, 507-08. And *Wilder* decided whether that amendment conferred private-enforcement rights on Medicaid providers, 496 U.S. at 510, as opposed to our question here, which is whether a different section of the Medicaid Act confers private-enforcement rights on Medicaid patients. And importantly, *Armstrong* took issue only with *Wilder*'s implication that any time a statute imposes a binding obligation, it creates a private right of enforcement under § 1983. *Armstrong*, 135 S. Ct. at 1386 n.* (noting that *Gonzaga* rejected *Wilder*'s implication "that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983" (quoting *Gonzaga*, 536 U.S. at 283)). *Armstrong* did no more than reaffirm *Gonzaga*'s requirement that rights must be unambiguously conferred. *Id.; Gonzaga*, 536 U.S. at 283.

plaintiffs in *Armstrong*, who were providers, the Patients here are individual beneficiaries of the Medicaid Act; and unlike in *Armstrong*, they are not merely contesting reimbursement rates, they are asserting that the state has violated their substantive right to receive medical care from their chosen medical providers. Also importantly, the providers in *Armstrong* asserted a right of action under a Medicaid Act rate-setting provision and the Supremacy Clause, unlike the Patients here, who assert their right under § 1983 and the Medicaid Act's free-choice-of-provider provision.

Even if § 1396a(a)(30)(A) could fairly be read to display congressional intent to foreclose the availability of equitable relief, *id*. at 1386, § 1396a(a)(23)—the free-choice-of-provider provision—can't be read that way.

B. Preliminary Injunction Factors

1. Likelihood of Success on the Merits

Having concluded that the free-choice-of-provider provision confers on the Patients a private right of action, we now turn to the first and most important preliminary-injunction factor: whether the Patients are likely to succeed on the merits.

Again, § 1396a(a)(23) requires a state plan to provide that "any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required

. . . who undertakes to provide him such services[.]" In evaluating what it means for a provider to be "qualified to provide services," we agree with the district court and "the Seventh and Ninth Circuits, [that] '[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." *Gee*, 862 F.3d at 462 (quoting *Comm'r of Ind.*, 699 F.3d at 978); *see also Betlach*, 727 F.3d at 969 (concluding that qualified means "having an officially recognized qualification to practice as a member of a particular profession; fit, competent" (quoting Oxford English Dictionary (3d ed. 2007)). In the district court, Kansas did not contest this meaning of the term "qualified." *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *17.

All agree that states have considerable discretion in establishing provider qualifications. *See* 42 C.F.R. § 431.51(c)(2) (stating that a recipient's right to the services of any provider qualified and willing to perform the services does not prohibit states from "[s]etting reasonable standards relating to the qualifications of providers"). But that authority entitles Kansas to set qualifications only for professional competency and patient care. *See Betlach*, 727 F.3d at 970 (declaring that states are not free to define "qualified" however they wish for their own purposes). We agree with the district court that the Plaintiffs may assert that they were denied their right to receive Medicaid services from the willing and qualified provider of their choice because their provider was wrongfully removed

from the pool of providers.[17] *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *18.

The Plaintiffs must be allowed to challenge PPGP's termination. After all, if a state wrongly terminates a provider—whether on grounds raised by Kansas under § 1320a-7(b)(5)(B) or 7(b)(12)(B) or otherwise—it will have wrongly removed a qualified provider from the available pool. If a state could terminate providers without any challenge by affected patients, the patients' § 1396a(a)(23) right would lose force and be easily eviscerated. We agree with the district court that when Kansas shrinks the pool of qualified providers by terminating them under § 1396a(p)(1), patients must have a § 1396a(a)(23) right to challenge the state's termination decision as improper or wrongful. *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *17.

Kansas takes a different view. It argues that termination decisions under § 1396a(p)(1) (which references § 1320a-7(b)) are separate from the right of patients to any qualified and willing provider under § 1396a(a)(23). In effect, Kansas argues that patients have no right to services from qualified providers whom it has terminated.

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17. As we understand it, the dissent agrees with us that a provider can be terminated but remain qualified. Dissent at 2 ("But other federal Medicaid provisions allow states to exclude providers even when they are considered 'qualified' under § 1396a(a)(23)."), 11 (declaring that "Medicaid allows states to exclude providers from Medicaid, sometimes even when the providers are qualified. *E.g.*, 42 U.S.C. § 1396a(a)(39), (p)(1).").

We agree that states have broad powers to terminate Medicaid providers. After all, § 1396a(p)(1) "empowers states to exclude individual providers on such grounds directly, without waiting for the [federal] Secretary to act, while also reaffirming state authority to exclude individual providers pursuant to analogous state law provisions relating to fraud or misconduct." *Betlach*, 727 F.3d at 972. These grounds include a wide swath of misconduct set out in federal law—including fraud, drug crimes, obstructing investigations, license revocations, federal or state sanctions, and certain felony convictions. They also include violations of "state laws concerning health and safety, and federal regulations expressly permit States to establish 'reasonable standards relating to the qualifications of providers.'" Appellant's Brief at 48 (quoting 42 C.F.R. § 431.51(c)(2)). But these provisions do not make the state's termination decision unchallengeable. Patients must have a right to challenge termination decisions to protect themselves against wrongful deprivation of access to qualified and willing providers, that is, to protect their guaranteed right expressly given by § 1396a(a)(23). In short, § 1396a(a)(23) confers the right and cabins the state's authority under § 1396a(p)(1), such that patients can challenge the termination decisions.

In support of its view that termination decisions under § 1396a(p)(1) are final and beyond patients' ability to challenge under § 1396a(a)(23), Kansas relies in part on *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 100 S. Ct. 2467, 65 L. Ed. 2d 506 (1980). Kansas argues that "the free-choice-of-provider provision entitles beneficiaries only to 'the right to choose among

a range of qualified ***providers***, without government interference.'" Appellant's Opening Br. at 46 (quoting *O'Bannon*, 447 U.S. at 785). But *O'Bannon* addressed a different situation—one where no one contested that the nursing home was unqualified to perform the services. We agree that § 1396a(a)(23) "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." 447 U.S. at 785. But unlike in *O'Bannon*, the Providers in the case before us remained qualified to perform the medical services.

In addition, we note that the nursing home residents in *O'Bannon* asserted procedural due-process rights, not substantive rights, as the patients do here. *See Gee*, 862 F.3d at 460. *But see Gillespie*, 867 F.3d at 1048 (Shepherd, J., concurring).[18] And in *O'Bannon*, the patients didn't

18. Judge Shepherd's concurrence in *Gillespie* states that the previous four circuits are wrong that *O'Bannon* concerns only procedural rights, stating that this view "ignores the very language of *O'Bannon*. The Supreme Court clearly stated that it was defining the contours of the 'substantive right . . . conferred by the statutes and regulations.'" 867 F.3d at 1048 (alteration in original) (quoting *O'Bannon*, 447 U.S. at 786). But the language omitted from this quote matters. The whole sentence reads, "In holding that these provisions create a substantive right to remain in the home of one's choice absent specific cause for transfer, the Court of Appeals failed to give proper weight to the contours of the right conferred by the statutes and regulations." *O'Bannon*, 447 U.S. at 786. We read this sentence to mean that § 1396a(a)(23) confers a substantive "right to continued benefits to pay for care in the qualified institution of his choice" but not a right to remain in a home that the state has already

contest that the nursing home's decertification had resulted from the home's failure to provide adequate medical, physical, nursing, and pharmaceutical services, as well as its failure to maintain adequate records and an adequate system of governance. 447 U.S. at 776 n.3. Rather, the elderly Medicaid patients stressed the harm they would suffer if their nursing home closed and they were forced to move. *Id.* at 777. So the Supreme Court's holding concerned whether Medicaid recipients were entitled to a hearing to continue receiving care from an unqualified, decertified provider. *Id.* at 786 ("[W]hile a patient has a right to continued benefits to pay for care in the qualified institution of his choice, he has no enforceable expectation of continued benefits to pay for care in an institution that has been determined to be unqualified."). Here, the Patients are not challenging the right to continue receiving care from an unqualified provider. Instead, they contend Kansas wrongfully terminated the Providers, thereby infringing their choice-of-provider rights. For this reason, we disagree with Kansas that *O'Bannon* controls this case in Kansas's favor.

a. Waste Inspections

The state first claims that PPGP's Overland Park clinic violated Kansas law by hindering the state's investigation of its waste-disposal practices. *See* Kan. Admin. Regs. § 28-29-16(a)(1) (authorizing Kansas BWM employees to enter and inspect premises dealing with

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determined to be unqualified. *Id.* So the residents were asking the state to grant them procedural due process for a substantive right that they did not have.

solid waste and to gather information about conditions and procedures); Kan. Stat. Ann. §§ 65-3409(a)(6), 65-3401 (declaring it unlawful to refuse to permit or hinder waste-disposal investigations, including examination and copying records).

Specifically, Kansas argues that the clinic violated the Medicaid Act by failing "to grant immediate access" to the Kansas BWM employees who investigated the clinic's waste-disposal practices. 42 U.S.C. § 1320a-7(b)(12)(B). "Failure to grant immediate access means the failure to grant access at the time of a reasonable request or to provide a compelling reason why access may not be granted." 42 C.F.R. § 1001.1301(a)(2). But § 1320a-7(b)(12)(B) allows states to terminate providers who refuse to grant immediate access to state employees conducting reviews under, in relevant part, § 1396a(a)(33). And § 1396a(a)(33)(A) requires states to establish plans to have "appropriate professional health personnel" review "the appropriateness and quality of care and services furnished to" Medicaid recipients.

We agree with the district court that the Plaintiffs are likely to succeed in proving "that they did grant immediate access to the inspectors," as well as "that the solid waste inspection here d[id] not constitute a review bearing on" the quality of care the Providers furnished to Medicaid recipients. *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *20. The Providers presented sufficient evidence that PPGP employees at the Overland Park clinic accommodated BWM investigators' unannounced arrival at the clinic by inviting them to conduct their inspection,

but asking them not to take photographs while patients were present. The inspectors chose to leave instead. And while initially withholding the list of the clinic's waste-services vendors, PPGP provided that information after assuring its confidentiality would be protected.

Even if this conduct could be labeled a "[f]ailure to grant immediate access" to Kansas officials, which is doubtful, clinic employees "provide[d] a compelling reason" for their refusal to allow photographs or to turn over its vendor list: they were concerned for patient safety and privacy. 42 C.F.R. § 1001.1301(a)(2). Notably, Kansas never cited PPGP for allegedly impeding the inspection. *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *21. And despite Kansas's claim that PPGP's "providing some access to its facility nearly a month after the inspection was initiated, along with its opportunity to fix any problems, hardly satisfied the 'immediate access' requirement of federal law," Appellant's Opening Br. at 50, the record shows that when the state's investigators first visited the clinic, PPGP employees granted them complete access to the clinic and invited them to complete a visual inspection. And Kansas points to no law that would require a medical provider to permit photographs to be taken of its operations while patients are present and being served.

As its second basis for termination, Kansas relies on § 1320a-7(b)(5)(B). That provision allows the Secretary to terminate any individual or entity "for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity." We agree with the district court "that PPKM's [now PPGP's]

purported failure to cooperate with the BWM's solid waste inspection in December 2015 does not bear on PPKM's [PPGP's] 'professional competence, professional performance, or financial integrity.'" *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *19. As the district court found, "it is undisputed that no solid waste violations were found, so the only basis for termination associated with the inspection was the alleged failure to cooperate." *Id.* We agree that Kansas has not explained how this purported failure to cooperate would bear on PPGP's professional competence, professional performance, or financial integrity. *Id.* In its brief, Kansas references § 1320a-7(b)(5)(B) just twice, first simply citing its standard, and second, saying that the Providers showed a lack of "professional competence" in "refusing to allow public health inspectors to do their job[.]" Appellant's Brief at 48, 54. And Kansas's reply brief does even less, failing even to cite § 1320a-7(b)(5)(B).

The Dissent

The dissent does not contend that Kansas is entitled to prevail on § 1320a-7(b)(12)(B) or (b)(5)(B). As grounds authorizing termination, the dissent instead relies on a neighboring section unmentioned by Kansas in its brief—42 U.S.C. § 1320a-7(b)(12)(C). Dissent at 19. In fashioning a new argument, the dissent steps beyond our usual practice. *See Modoc Lassen Indian Hous. Auth. v. United States HUD*, 878 F.3d 889, 2017 WL 7369692, at *10 n.9 (10th Cir. 2017) (declining to consider an argument unraised by the parties). In response to the dissent, we

discuss why the dissent's cited statutory provision fails to provide Kansas a basis for termination. We will not decide an argument that Kansas failed to raise in the district court or on appeal.

That said, in responding to the dissent's argument, we turn to § 1320a-7(b)(12)(C) which reads as follows:

> (12) Failure to grant immediate access. Any individual or entity that fails to grant immediate access, upon reasonable request (as defined by the [HHS] Secretary in regulations) to any of the following:
>
> * * *
>
> (C) To the Inspector General of the Department of Health and Human Services, for the purpose of reviewing records, documents, and other data necessary to the performance of the statutory functions of the Inspector General.

The dissent argues that Kan. Reg. § 28-29-16(a)(1) is analogous to this federal statute subsection, authorizing Kansas to terminate the Providers' contracts based on its regulation. The dissent relies on this portion of the state regulation:

> The [Kansas Secretary of Health and Environment] or any duly authorized representative of the secretary, at any reasonable hour of the day, having identified

> themselves and giving notice of their purpose, may . . . [e]nter . . . any environment where solid wastes are generated, stored, handled, processed, or disposed, and inspect the premises and gather information of existing conditions and procedures . . . .

Dissent at 18-19.

The dissent ignores an applicable federal regulation bearing on inspections, which allows OIG immediate access on reasonable request to review "records, documents and other materials or data . . . necessary to the [performance of the Inspector General's] statutory functions[.]" 42 C.F.R. § 1001.1301(a)(1)(iii). But in defining "failure to grant immediate access," the federal regulation requires that a provider have 24 hours to provide compelling evidence why the records cannot be produced, except on OIG's reasonable belief of imminent alteration or destruction of the records (and Kansas has not alleged that it had such a belief). 42 C.F.R. § 1001.1301(a)(3)(i). And as a "reasonable request" the regulation requires a written request for documents signed by a designated representative of OIG "where there is information to suggest that the [individual or entity] has violated statutory or regulatory requirements under Titles V, XI, XVIII, XIX or XX of the Act." 42 C.F.R. § 1001.1301(a)(3)(ii). Further, the regulation requires that the agency request include these definitions and advise the individual or entity of the length of exclusion for failure to comply with the request. 42 C.F.R. § 1001.1301(a)(3), (b). In short, the federal regulation provides considerably more protections to a provider. In this circumstance, the state regulation is not analogous to federal law.

So we reject the view that Kansas was entitled to terminate PPGP on the dissent's independently raised ground. In doing so, we also rely on the district court's reasoning when it rejected Kansas's reliance on § 1320a-7(b)(12)(B)—namely, that PPGP was willing to let the inspection continue absent photographs (having confidentiality concerns), that the Kansas regulation did not provide for photography, and that PPGP willingly released the vendor lists after negotiating a confidentiality agreement with the inspecting agency. *See Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *19.

b. CMP Videos of Fetal Tissue Negotiation

Kansas next argues that it was entitled to terminate PPGP's and PPSLR's provider agreements because "PPFA's affiliates" violated federal and state law prohibiting the for-profit sale of human body parts and fetal tissue. *Id.* at 51 (citing 42 U.S.C. §§ 274e, 289g-2; Kan. Stat. Ann. § 65-6704). Importantly, Kansas doesn't claim that PPGP or PPSLR engaged in such illegal conduct; rather, it claims that "[e]ven if these activities were conducted by PPFA, . . . the Medicaid Act permits the State to terminate its provider agreement based on those activities or the entity's unlawful or unethical activities in other States." *Id.* at 51-52 (citing 42 U.S.C. §§ 1320a-7(a)(3), (a)(1), (b)(1)(A)(ii)). According to Kansas, "providers must be terminated from participation in 'any Federal health care program'—no matter where that program is administered—if they commit certain felony offenses in connection with a health care program administered

by '*any* Federal, State, or local government agency.'" *Id.* (quoting 42 U.S.C. § 1320a-7(a)(3)).

But, first, all of the termination provisions Kansas relies on require a criminal conviction or related sanction; and no PPFA affiliate, including PPGP and PPSLR, has been convicted or sanctioned for any wrongdoing. And the district court rightly explained that even if PPFA had negotiated the illegal sale of fetal body parts (and this allegation has never been proved), "under [§ 1396a(p)(1)], the 'entity' that a 'State may exclude' must be the same entity that committed the infraction defined in § 1320a-7(b)." *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *18. Indeed, the sole provision allowing termination on the basis of affiliation applies exclusively to entities controlled by a sanctioned individual and mandates that the sanctioned individual must have ownership interest or control over the affiliated entity. 42 U.S.C. § 1320a-7(b)(8). Thus, if the statute allows a state to exclude a provider based on its affiliation with a different provider, the affiliation must involve ownership or control. *See Bentley*, 141 F. Supp. 3d at 1223-24 & n.9.

Kansas never addresses the district court's conclusion, instead arguing that PPGP and PPSLR never established that they were separate and independent from PPFA. We agree with the district court that the Providers are not sufficiently affiliated with PPFA so that Kansas can attribute this alleged conduct to them under the law. *See Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *21. Kansas states that PPFA's affiliates aggregate their finances, share executives, and share legal counsel.

Kansas also states that PPFA establishes and imposes medical and ethical policies on its affiliates.

But these factors do nothing to show that PPFA exercises control over its affiliates' daily operations. In fact, because many PPFA affiliates don't offer abortions—and Kansas provides nothing to show that PPFA could or would require them to do so—we cannot attribute PPFA's alleged abortion-related conduct to PPFA affiliates absent evidence that specifically implicates the affiliates.[19] *See Gee*, 862 F.3d at 450. Kansas discusses when courts treat two corporate entities as one, but it presents no authority to support its argument that "one corporation can be held responsible for the policies of an umbrella organization regarding a practice that other *affiliated* corporations engage in." *Bentley*, 141 F. Supp. 3d at 1224 n.10.

In sum, the Plaintiffs are likely to succeed in proving that Kansas cannot terminate PPGP from the state's Medicaid program for PPFA's alleged unlawful conduct.

19. Nor do we find it significant that PPFA does not offer abortions. Kansas relies on this irrelevant allegation to suggest that any sales of fetal tissue "could have been coordinated only through the abortion-providing 'affiliates' that [PPFA's national medical director] supervises." Appellant's Opening Br. at 53. The state seems to imply that this must mean that PPSLR and PPGP are doing the PFFA director's dirty work. This conclusion is both speculative and conclusory. Kansas presented no evidence showing that PPGP and PPSLR sold fetal tissue for profit, and neither of the two Kansas agencies that investigated PPGP and PPSLR found any wrongdoing.

c. Medicaid Fraud by PPFA Affiliates

Last, Kansas claims it was justified in terminating PPGP and PPSLR in light of allegations that other PPFA affiliates had committed Medicaid fraud. Kansas claims that the numerous allegations of Medicaid fraud by Planned Parenthood affiliates around the country provide relevant evidence of PPGP's and PPSLR's "questionable billing practices." Appellant's Opening Br. at 8-9. This argument fails for the same reason the previous argument fails. Kansas never alleged that PPGP or PPSLR engaged in fraud, but it claims that because PPGP merged with Planned Parenthood of Central Oklahoma ("PPCO"), "the new combined entity has necessarily inherited PPCO's record of fraud." *Id.* at 54. But this "merger" doesn't have the effect that Kansas desires it to.

First, the only thing this "merger" changed was PPGP's name: the former PPKM now operates under the name "Planned Parenthood Great Plains." Appellant's App. at 828. The merger resulted in "no change of ownership or management structure" for PPGP. *Id.* Second, though Oklahoma Governor Mary Fallin cited two "integrity reviews" finding error rates in billing of 20.3% and 14.1% in calling for PPCO's termination from Oklahoma's Medicaid plan, *id.* at 417-19, Kansas presented no evidence that Oklahoma had sanctioned or terminated PPCO, and PPCO is still an Oklahoma Medicaid provider. Third, Kansas cites nothing to support its claim that one corporate entity can inherit another's "record of fraud," even when the two entities merge into a single entity (which does not appear to have happened here).

After considering all of Kansas's bases for terminating PPGP from its state Medicaid plan as unqualified, we conclude that, as in *Gee, Commissioner of Indiana*, and *Betlach*, Kansas "is seeking to do exactly what [other circuits] warned against: 'simply labeling any exclusionary rule as a "qualification"' to evade the mandate of the free-choice-of-provider requirement." *Gee*, 862 F.3d at 469 (quoting *Comm'r of Ind.*, 699 F.3d at 978). "[T]he free-choice-of-provider provision unambiguously requires that states participating in the Medicaid program allow covered patients to choose among the family planning medical practitioners they could use were they paying out of their own pockets." *Betlach*, 727 F.3d at 971. Because Kansas has not otherwise sanctioned or charged PPGP for any wrongdoing, allowing the state to terminate PPGP from its Medicaid program would cause exactly this result. We therefore conclude that the district court did not abuse its discretion in finding that Plaintiffs are likely to succeed on the merits of their claim, and we move on to the remaining preliminary-injunction factors.

2. Irreparable Harm

We next consider whether the Patients have shown that they would suffer irreparable harm absent injunctive relief.[20] Irreparable harm is "certain, great, actual 'and not theoretical.'" *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (quoting *Wisconsin Gas Co. v.*

20. Again, we follow the district court's lead in limiting our review on this issue to whether the Patients, as opposed to the Providers, met their burden of showing irreparable harm. *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *23.

Federal Energy Regulatory Com., 758 F.2d 669, 674, 244 U.S. App. D.C. 349 (D.C. Cir. 1985)). The district court found that the Patients had met their burden because they would lose medical treatment from the qualified providers of their choice if Kansas's terminations of the Providers were allowed to stand. *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *23. "A disruption or denial of these patients' health care cannot be undone after a trial on the merits." *Id.*

Kansas argues that the Patients' injuries are speculative for the same reason it contested the Plaintiffs' standing and the case's ripeness: that the administrative appeal is still pending, meaning the state can't terminate the providers until that process is complete or the time period for appeal has expired.[21] *See Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1260 (10th Cir. 2003). It also reiterates its argument that "[PPGP's] [state Medicaid] contracts are ***not*** subject to immediate termination." Appellant's Opening Br. at 56.

We reject that argument here for the same reason we did above. Only the Providers have a right—not an obligation—to appeal Kansas's decision; the Patients do not. And the Providers have declared that they will not pursue administrative appeal. *Mosier*, 2016 U.S.

21. Kansas also disputes the district court's reliance on the possibility that if PPGP and PPSLR are terminated in Kansas, other states will terminate their Medicaid contracts as well. *See Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at 24. We need not address this concern because we conclude that the Patients have established the risk of irreparable harm based on other grounds.

Dist. LEXIS 86948, 2016 WL 3597457, at *24. Absent injunctive relief, the state would have stopped reimbursing the PPGP for the Patients' care sometime between July 7, 2016 (Kansas's self-proclaimed termination date) and September 10, 2016 (the date that accounts for the allegedly required exhaustion period and the alleged contractual delays that apply only to PPGP). Even if the effective date had been two months away, it would not change our conclusion that the Patients were "likely to suffer irreparable harm before a decision on the merits can be rendered." *Greater Yellowstone Coal.*, 321 F.3d at 1260.

Last, Kansas argues that the Patients would not be injured because the Providers "were conspicuously non-committal about whether termination would even force them to stop seeing the [Patients]," and that the Patients "alleged only that they will not have access to their preferred provider and (at worst) are unsure where else they might receive care." Appellant's Opening Br. at 58-59 & n.13. First, because the Patients all qualify for Medicaid, we cannot disagree with the district court, which "easily [found] that these patients will be unable to afford to pay out of pocket to see the health care provider of their choice without Medicaid assistance." *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *23. Second, "[t]his argument misses the mark. That a range of qualified providers remains available is beside the point." *Comm'r of Ind.*, 699 F.3d at 981. Section 1396a(a)(23) gives the Patients the exact right they seek to enforce: to obtain medical care from their *preferred* qualified provider, not to obtain familyplanning services from *any* qualified provider. The Patients have given uncontroverted evidence

explaining why they prefer PPGP, including quality of care, lack of bias, and scheduling convenience. *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *23. At least four of the Providers' clinics are located in areas with shortages of primary-care providers. And the district court also rightly rejected Kansas's claims that Patients had plenty of other family-planning-services providers to choose from, finding that the state's evidence on this point was exaggerated. *See id.*

The district court did not abuse its discretion in concluding that the Patients would suffer irreparable harm absent entry of a preliminary injunction enjoining Kansas from terminating PPGP as a provider.

3. Balance of Harms & Public Interest

We address the last two preliminary-injunction factors together. The final steps in assessing a preliminary injunction's propriety require us to ask whether the balance of equities tips in the Plaintiffs' favor, and whether an injunction is in the public interest. *Winter*, 555 U.S. at 20. Based on its findings that the three allegations against the Providers were either unfounded or unrelated to the Providers' qualifications, the district court found that "the risk of taxpayer harm is quite low as compared to the certain injury to Medicaid patients if the injunction does not issue." *Mosier*, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *24. Similarly, because the district court found that there was no ongoing administrative proceeding, it concluded that issuing a preliminary injunction and allowing the Plaintiffs to vindicate their Medicaid-Act

rights by pursuing their § 1983 claim in federal court would serve the public interest, despite the availability of state administrative remedies. 2016 U.S. Dist. LEXIS 86948, [WL] at *25.

On appeal, neither Kansas nor the Plaintiffs addressed this step in the analysis. Either way, we agree with the district court's thorough, reasoned analysis concerning PPGP. The court did not err in concluding that the Plaintiffs have met their burden on this point as well.

Thus, the district court did not abuse its discretion in finding that Plaintiffs have satisfied all of the elements required for entry of a preliminary injunction on the Patients' free-choice-of-provider claim concerning PPGP.

CONCLUSION

For the reasons stated above, as relates to PPGP, we AFFIRM the district court's order granting the Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, thus restraining Kansas from terminating PPGP's Medicaid-provider agreement. And as relates to PPSLR, we VACATE the district court's order, because we conclude that the Patients have not met standing requirements—they have not alleged that they receive medical care at PPSLR. We remand for the district court to determine whether PPSLR itself has sufficiently alleged standing to proceed and whether it is entitled to a preliminary injunction.

BACHARACH, J., concurring in part and dissenting in part.

A preliminary injunction would be appropriate only if the Jane Doe plaintiffs had standing and were likely to succeed on the merits. I agree with the majority that the Jane Doe plaintiffs lacked standing as to Planned Parenthood of the Saint Louis Region and Southwest Missouri (referred to below as "PPSLR") because they had not alleged any desire to obtain medical care from this affiliate. But I also believe the Jane Doe plaintiffs lacked an enforceable right to challenge Kansas's action as to Planned Parenthood of Kansas and Mid-Missouri (referred to below as "PPKM"). Thus, I would reverse the grant of a preliminary injunction to the Jane Doe plaintiffs as to both affiliates.

For PPKM, the Jane Doe plaintiffs could prevail on the merits only by showing that they had an enforceable right to challenge what Kansas did. The burden on the Jane Doe plaintiffs was stiff, for the Supreme Court has held that a right is individually enforceable only if it was unambiguously conferred. If an individually enforceable right existed here, its scope would have been ambiguous because of the combination of two provisions in Medicaid: § 1396a(a)(23) and § 1396a(p)(1).

Under 42 U.S.C. § 1396a(a)(23), the free-choice-of-provider clause, state Medicaid programs must provide that Medicaid patients can obtain medical care from any willing, qualified provider. Kansas's program satisfied this requirement by providing that Medicaid patients

could obtain medical care from qualified providers. But other federal Medicaid provisions allow states to exclude providers even when they are considered "qualified" under the free-choice-of-provider clause. These provisions include 42 U.S.C. § 1396a(p)(1), which allows states to exclude medical providers for violating state laws that serve a Medicaid-related goal.

Based on § 1396a(p)(1), Kansas terminated PPKM, contending that it had violated such state laws; the Jane Doe plaintiffs disagreed and sought to litigate whether the Kansas laws had been properly applied. The Jane Doe plaintiffs thus brought a § 1983 lawsuit for violation of their rights under the free-choice-of-provider clause.

The resulting issue is whether this clause unambiguously provided the Jane Doe plaintiffs with an enforceable right to have states properly apply their state laws (authorized by § 1396a(p)(1)) to Medicaid providers. In this context, the applicability of the free-choice-of-provider clause was ambiguous, which is not enough for an individually enforceable right. Thus, the Jane Doe plaintiffs were unlikely to succeed on the merits and the district court should have denied the motion for a preliminary injunction with regard to PPKM.

I. The district court granted a preliminary injunction.

Acting through the Kansas Department of Health and Environment, the State of Kansas terminated participation in Medicaid by two Planned Parenthood

affiliates—PPKM and PPLSR.[1] In terminating the two affiliates, Kansas relied on its findings involving violations of state law.[2]

Following the terminations, PPKM, PPSLR, and three "Jane Doe" patients of PPKM brought a 42 U.S.C. § 1983 claim in federal district court, alleging that Kansas's decision violated the Medicaid Act's free-choice-of-provider clause.[3]

The plaintiffs moved for a preliminary injunction. Following a hearing, the district court granted the motion by the Jane Doe plaintiffs, preliminarily barring termination of PPKM and PPSLR. *Planned Parenthood of Kan. & Mid-Mo. v. Mosier*, No. 16-2284-JAR-GLR, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *25 (D. Kan. July 5, 2016).[4]

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1. These affiliates are medical providers offering family planning health services to Kansas Medicaid patients. After this suit began, PPKM merged with another Planned Parenthood affiliate (Planned Parenthood of Central Oklahoma) and changed the name to "Planned Parenthood Great Plains."

2. I focus on PPKM's alleged refusal to allow the inspectors to photograph waste-disposal areas. But Kansas also alleged that PPKM and PPSLR had withheld vendor lists, allowed the illegal sale of fetal organs, and engaged in fraudulent billing practices. Consideration of these allegations is unnecessary for us to reverse.

3. The plaintiffs also based their motion for a preliminary injunction on a claim involving denial of equal protection. But the district court did not rely on this claim. Nor does the majority.

4. Reasoning that the Jane Doe plaintiffs had a cause of action, the district court declined to decide whether PPKM and PPSLR

In granting the preliminary injunction, the district court concluded that the case was justiciable and that abstention was unnecessary. The court then considered the factors for a preliminary injunction, including whether the plaintiffs were likely to succeed on the merits. *See Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016).[5] In applying this factor, the court first addressed whether the plaintiffs had a cause of action under § 1983 to enforce the free-choice-of-provider clause. The court held that the Jane Doe plaintiffs had a cause of action and that it was broad enough to encompass the claims brought by the Jane Doe plaintiffs.

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could bring the suit on their own. 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *17. The majority takes the same approach, as do I.

5. The other factors are

- whether the plaintiffs would suffer irreparable harm without a preliminary injunction,

- whether the threatened harm outweighs the harm to the adversary from a preliminary injunction, and

- whether the preliminary injunction would harm the public interest.

Dine Citizens Against Ruining Our Env't, 839 F.3d at 1281.

II. For PPKM, any individual right would not have been broad enough for the Jane Doe plaintiffs to challenge Kansas's termination under § 1396a(p)(1).

For PPKM, the critical question is the scope of the Jane Doe plaintiffs' alleged right under the free-choice-of-provider clause. In district court, Kansas argued that

- it had excluded PPKM based on § 1396a(p)(1) and

- the Jane Doe plaintiffs lacked an unambiguous right allowing them to challenge Kansas's application of § 1396a(p)(1).

The district court rejected these arguments, holding that the Jane Doe plaintiffs could challenge Kansas's determination that PPKM had violated state law. The court reasoned that if the result were otherwise, a state could simply evade judicial review by improperly terminating a provider under state law:

> If a State could defeat a Medicaid recipient's right to select a particular qualified healthcare provider merely by terminating its agreement with that provider on an unlawful basis, the right would be totally eviscerated.

Planned Parenthood of Kan. & Mid-Mo. v. Mosier, No. 16-2284-JAR-GLR, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *17 (D. Kan. July 5, 2016) (quoting *Planned Parenthood Se., Inc. v. Bentley*, 141 F. Supp. 3d 1207, 1218 (M.D. Ala. 2015)).

This reasoning led the court to consider whether PPKM had violated Kansas law. The court answered "no" and concluded, as a result, that Kansas had likely violated the free-choice-of-provider clause. Because the other preliminary-injunction factors supported the Jane Doe plaintiffs, the district court granted the motion for a preliminary injunction.

Kansas appeals, presenting four pertinent arguments as to PPKM[6]:

1. This case is not justiciable.

2. The district court should have abstained.

3. The plaintiffs lack an individually enforceable right under the free-choice-of-provider clause.

4. Even if an individually enforceable right existed, it would not allow the plaintiffs to challenge Kansas's actions, which were based on Kansas law as authorized by 42 U.S.C. § 1396a(p)(1).

I agree with the majority that the case is justiciable and that the district court had no need to abstain. I will also assume, for the sake of argument, that the Jane Doe plaintiffs have an individual right under the free-choice-of-provider clause. The resulting question entails the extent of that right.

6. Kansas also defends its findings that PPKM had violated state law and argues that the Jane Doe plaintiffs had not faced irreparable harm.

Under the free-choice-of-provider clause, the state's Medicaid program must provide that Medicaid patients can obtain medical care from qualified providers. 42 U.S.C. § 1396a(a)(23). Kansas's Medicaid program complied with this requirement, for the program's only exclusions were based on provisions authorized by Medicaid itself.[7]

Kansas terminated PPKM for purportedly violating Kansas laws authorized by a separate Medicaid provision: 42 U.S.C. § 1396a(p)(1). In light of this termination, the Jane Doe plaintiffs seek to litigate whether PPKM actually violated Kansas law. But the Jane Doe plaintiffs can litigate this issue only if their underlying right unambiguously extends to Kansas's application of its own state law. *See Harris v. James*, 127 F.3d 993, 1011-12 (11th Cir. 1997).[8]

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7. In some of the cases invoked by PPKM, the state Medicaid programs contained exclusions unauthorized by Medicaid or any other federal law. *See, e.g., Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 962-63 (9th Cir. 2013) (state law that excluded all abortion providers from Medicaid was not authorized by § 1396a(p)(1) or other federal law); *Planned Parenthood of Ind. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 979-80 (7th Cir. 2012) (same).

8. In *Harris v. James*, Medicaid recipients sued under § 1983, alleging that the state's Medicaid program failed to provide transportation to and from providers. 127 F.3d 993, 995 (11th Cir. 1997). The Medicaid recipients relied in part on the free-choice-of-provider clause. *Id.* at 1011. The Eleventh Circuit assumed, for the sake of argument, that the free-choice-of-provider clause provided an individually enforceable right. *Id.* at 1011 & n.27. But the court concluded that this potential right would not have unambiguously included transportation to and from providers:

As a result, we must ask: Has Congress unambiguously conferred the Jane Doe plaintiffs with a right to have states properly apply their laws (authorized by § 1396a(p)(1)) to Medicaid providers? Or, as the text of the free-choice-of-provider clause suggests, has Congress conferred the Jane Doe plaintiffs with only a right to be covered under a program (like Kansas's program) that does not contain unauthorized exclusionary provisions? In my view, the answer is—at best—ambiguous. Thus, if an individually enforceable right existed here, it would not encompass a challenge to Kansas's termination of PPKM.

A. Standard of Review

We review the district court's grant of a preliminary injunction for an abuse of discretion. *Verlo v. Martinez*,

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> In other words, we do not think that transportation to and from providers is reasonably understood to be part of the *content* of a right to . . . choice among providers. Instead, if the regulation [invoked by the Medicaid recipients] is a valid interpretation of [Medicaid provisions including the free-choice-of-provider clause], it would be because transportation may be a reasonable means of *ensuring* the prompt provision of . . . choice among providers. Such links to Congressional intent may be sufficient to support the validity of a regulation; however, we think they are too tenuous to support a conclusion that Congress has unambiguously conferred upon Medicaid recipients a federal right to transportation enforceable under § 1983.

Id. at 1011-12 (emphasis in original).

820 F.3d 1113, 1124 (10th Cir. 2016). The court abuses its discretion when committing an error of law or making factual findings that are clearly erroneous. *Id.* In my view, the district court committed a legal error by ruling that the Jane Doe plaintiffs could litigate Kansas's application of its laws authorized by § 1396a(p)(1).

B. Section 1983

This suit is brought under § 1983, not the Medicaid Act. Thus, we must start with the scope of § 1983. This statute creates a private right of action for U.S. citizens denied rights created by federal laws. 42 U.S.C. § 1983. But § 1983 does not authorize relief for every violation of federal law. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119, 125 S. Ct. 1453, 161 L. Ed. 2d 316 (2005).

To determine whether § 1983 provides a mechanism for relief, the Jane Doe plaintiffs must demonstrate that Congress intended to create an enforceable right. *Id.* at 120. The Supreme Court said in *Gonzaga University v. Doe* that a right is individually enforceable only if Congress had unambiguously created that right. 536 U.S. 273, 283-84, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002). "After *Gonzaga*, an enforceable private right exists only if the statute contains nothing 'short of an unambiguously conferred right' and not merely a vague benefit or interest." *Mandy R. ex rel. Mr. & Mrs. R. v. Owens*, 464 F.3d 1139, 1147 (10th Cir. 2006) (quoting *Gonzaga*, 536 U.S. at 283). It is not enough simply to show that a plaintiff "falls within the general zone of interest that the statute is intended to protect." *Gonzaga*, 536 U.S. at 283.

C. Medicaid

We must apply this § 1983 requirement against the backdrop of Medicaid.

Medicaid is a cooperative federal-state program in which states obtain federal funds to provide medical care to needy individuals. *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990). State participation is voluntary; but once states opt into the program, they must adhere to statutory requirements and regulations promulgated by the Secretary of Health and Human Services ("HHS"). *Id.* Congress has directed the HHS Secretary to withhold federal funds from states violating these requirements. 42 U.S.C. § 1396c.

To participate in Medicaid, states must obtain approval of their plans from the HHS Secretary. *Wilder*, 496 U.S. at 502. These plans must describe the nature and scope of the state's proposed health-care program. *Id.* The statutory requirements for the plans are set forth in 42 U.S.C. § 1396a(a). One such requirement appears in the free-choice-of-provider clause underlying this suit.

Under this clause, a state plan must provide for eligible individuals to obtain medical care from any willing provider "qualified to perform the service." 42 U.S.C. § 1396a(a)(23)(A). Based on this provision, the Jane Doe plaintiffs claim that Kansas improperly terminated PPKM even though it was "qualified" to provide medical care.

But a federal court would ordinarily lack jurisdiction to consider a Medicaid recipient's claim involving the

state's violation of its own Medicaid program. *Concourse Rehabilitation & Nursing Ctr. Inc. v. DeBuono*, 179 F.3d 38, 43-44 (2d Cir. 1999). To create federal jurisdiction, the Medicaid recipient must allege a conflict between the state Medicaid program and a federal law. *Id.* Thus, we must consider whether the Jane Doe plaintiffs have alleged a conflict between the Kansas Medicaid program and a federal law. *See id.*

The Jane Doe plaintiffs point to the free-choice-of-provider clause. Thus, we must first consider whether this clause provides Medicaid patients with a federal right enforceable under § 1983. Four circuits have said "yes";[9] one has said "no."[10] Today, the majority joins the four circuits that have answered "yes." Majority Op. at 32. We can assume, for the sake of argument, that the majority is right.

With this assumption, we must consider whether the Jane Doe plaintiffs have alleged a conflict between Kansas's Medicaid program and the free-choice-of-provider clause. To answer that question, we must determine the scope of this clause. At first glance, the free-choice-of-provider clause might appear to force a state to allow any qualified provider into the state's Medicaid

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9. *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 460-61 (5th Cir. 2017); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 966-67 (9th Cir. 2013); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 974-75 (7th Cir. 2012); *Harris v. Olszewski*, 442 F.3d 456, 461-62 (6th Cir. 2006).

10. *Does v. Gillespie*, 867 F.3d 1034, 1042-43 (8th Cir. 2017).

program. But "Medicaid's freedom of choice provision is not absolute." *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 177 (2d Cir. 1991). Rather, Medicaid allows states to exclude providers from Medicaid, sometimes even when the providers are qualified. *E.g.*, 42 U.S.C. § 1396a(a)(39), (p)(1).

For example, states can exclude providers from Medicaid for violating certain types of state laws. A state's authority to take such action stems partly from 42 U.S.C. § 1396a(p)(1), which is entitled "Exclusion power of State." Section 1396a(p)(1) identifies grounds for a state to exclude a provider:

> In addition to any other authority, 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 under subchapter XVIII of this chapter under section 1320a-7, 1320a-7a, or 1395cc(b)(2) of this title.

42 U.S.C. § 1396a(p)(1).

The HHS implements § 1396a(p)(1) through a regulation, which states that the listed exclusion provisions are "[i]n addition to any other authority [a state] may have." 42 C.F.R. § 1002.3(a). This language is to be read broadly: "Nothing 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." *Id.* § 1002.3(b).

Kansas maintains that the legality of its actions is determined by § 1396a(p)(1), not the free-choice-of-provider clause, and argues that the Jane Doe plaintiffs therefore lacked an applicable right to challenge Kansas's application of its laws.

D. Section 1983 does not provide a mechanism for the Jane Doe plaintiffs to challenge Kansas's application of its laws authorized by § 1396a(p)(1).

To determine whether the free-choice-of-provider clause supports relief under § 1983, we must resolve two questions:

1. Do the pertinent Kansas laws fall within the scope of § 1396a(p)(1)? I would answer "yes."

2. Does the free-choice-of-provider clause entitle the Jane Doe plaintiffs to challenge Kansas's application of these laws? If such an entitlement exists, it is at least ambiguous, which is fatal to the Jane Doe plaintiffs' claim.

1. Kansas's laws fall within § 1396a(p)(1).

Kansas terminated PPKM under Kansas Administrative Regulation § 30-5-60(a). This provision authorizes Kansas to terminate a provider that has violated applicable state regulations. Kan. Admin. Regs. § 30-5-60(a)(2). Invoking this authority, Kansas found that PPKM had violated a Kansas solid-waste regulation—§ 28-29-16(a)(1)—by obstructing a solid-waste inspection of PPKM's facility. The resulting issue

is whether Congress has authorized Kansas under § 1396a(p)(1) to exclude providers from Medicaid for violating Kansas's solid-waste regulation.

We begin with the statutory text. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685, 105 S. Ct. 2297, 85 L. Ed. 2d 692 (1985). The critical part of the statute is the word "any" in the phrase "any other authority." 42 U.S.C. § 1396a(p)(1). When construing the word "any," we consider its "'ordinary meaning.'" *Moskal v. United States*, 498 U.S. 103, 108, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990) (quoting *Richards v. United States*, 369 U.S. 1, 9, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962)). The word "any" ordinarily means "[o]ne, some, every, or all without specification." *The American Heritage College Dictionary* 61 (3d ed. 1997). Thus, at first glance, § 1396a(p)(1) would appear to provide states with unchecked authority to exclude providers from Medicaid for any reason permitted by state law.

But we have always construed statutory language in context. *United States v. Collins*, 859 F.3d 1207, 1213 (10th Cir. 2017); *see Christopher v. SmithKline Beecham Corp*, 567 U.S. 142, 162, 132 S. Ct. 2156, 183 L. Ed. 2d 153 (2012) ("[T]he modifier 'any' can mean 'different things depending upon the setting . . . .'" (quoting *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132, 124 S. Ct. 1555, 158 L. Ed. 2d 291 (2004))). The context here comprises Congress's list of permissible reasons for a state to terminate providers. *See* 42 U.S.C. § 1396a(p)(1). If Congress had intended to allow unlimited authority, the listed provisions in § 1396a(p)(1) would have been superfluous. *See McDonnell*

v. United States, 136 S. Ct. 2355, 2369, 195 L. Ed. 2d 639 (2016) (recognizing a presumption that statutory language is not superfluous). Thus, the phrase "any other authority" in § 1396a(p)(1) must bear some limitation.

What is that limitation? To answer, we consider the canon of *noscitur a sociis*. Under this canon, an ambiguous term may be "given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008). Thus, we consider the limitation of "any other authority" based on the surrounding words in the statute. *United States v. Phillips*, 543 F.3d 1197, 1206 (10th Cir. 2008).

In this case, the neighboring words in § 1396a(p)(1) are three specific statutory provisions that a state may invoke to justify a provider's termination: 42 U.S.C. §§ 1320a-7, 1320a-7a, and 1395cc(b)(2). *See* 42 U.S.C. § 1396a(p)(1) ("[A] State may exclude . . . for any reason for which the Secretary could exclude . . . under [§§] 1320a-7, 1320a-7a, or 1395cc(b)(2) of this title."). Having identified these three provisions, we should consider whether they help define the phrase "any other authority" in § 1396a(p)(1). *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226, 128 S. Ct. 831, 169 L. Ed. 2d 680 (2008).[11]

11. Of the situations listed in those three statutes, we are concerned only with exclusionary powers that are optional for the HHS Secretary. *See* 42 U.S.C. § 1396a(p)(1) (stating "reason[s] for which the Secretary could exclude" a provider from participation). The three statutes also include exclusionary provisions that are mandatory. A separate section requires that states exclude providers under these mandatory provisions. *See* 42 U.S.C. § 1396a(a)(39).

The three cited statutes include grounds to exclude or terminate providers. *See* 42 U.S.C. §§ 1320a-7, 1320a-7a, 1395cc(b)(2). The Fifth, Seventh, and Ninth Circuits have observed that the grounds for termination involved "various forms of malfeasance," such as "fraud, drug crimes, and failure to disclose necessary information to regulators." *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 979 (7th Cir. 2012); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 469 (5th Cir. 2017); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 972 (9th Cir. 2013). I agree with these courts. Thus, I too conclude that the phrase "any other authority" likely refers to state laws that prohibit acts of "malfeasance."

But what do we mean by "malfeasance"? The Fifth and Ninth Circuits answer that the state laws must address conduct "analogous" to what is covered in the three cited statutes. *Planned Parenthood of Gulf Coast*, 862 F.3d at 465; *Planned Parenthood Ariz.*, 727 F.3d at 972. The majority takes a similar approach. Majority Op. at 45-46.

In my view, this approach rests on an unduly restrictive definition of "malfeasance." Certainly Congress intended to impose some limits on the states' adoption of Medicaid-related laws. But Congress intended to give states broad authority in light of the HHS regulations and the legislative history.

The regulations interpret the phrase "any other authority" in § 1396a(p)(1) to mean "any other authority [*that a State*] *may have*." 42 C.F.R. § 1002.3(a) (emphasis

added). And the regulations allow a state to exclude a provider "for *any reason* or period authorized by state law." *Id.* § 1002.3(b) (emphasis added). In fact, when promulgating § 1002.3, the HHS Secretary expressly rejected a suggestion to add the words "for cause" into § 1002.3(b). *See* Amendments to OIG Exclusion and CMP Authorities Resulting from Public Law 100-93, 57 Fed. Reg. 3298, 3322-23 (Jan. 29, 1992). The HHS Secretary explained that Congress had spoken broadly, so it was "up to the various courts and legislative bodies" to consider whether § 1396a(p)(1) had a limitation. *Id.* at 3323.

A Senate Report also indicates that Congress intended for § 1396a(p)(1) to provide the states with broad authority: "This provision is not intended to preclude a State from establishing, under State law, *any other bases* for excluding individuals or entities from its Medicaid program." S. Rep. No. 100-109, at 20 (1987) (emphasis added), *as reprinted in* 1987 U.S.C.C.A.N. 682, 700; *see also First Med. Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46, 53 (1st Cir. 2007) ("The legislative history clarifies that this 'any other authority' language was intended to permit a state to exclude an entity from its Medicaid program for *any* reason established by state law." (emphasis in original)).

In light of the HHS regulations and the legislative history, the need to provide some limitation does not require us to narrowly read the phrase "any other authority." Doing so "would defeat Congress' intent to define [this phrase] in a broad manner." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 163, 132

S. Ct. 2156, 183 L. Ed. 2d 153 (2012). Thus, the term "malfeasance" should be read broadly.

Under a broad reading of "malfeasance," a state would not be able to pass any law and claim that violating the law constitutes an act of malfeasance. Rather, the state law must "serve[] some Medicaid-related goals." *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 663, 123 S. Ct. 1855, 155 L. Ed. 2d 889 (2003) (plurality op.). For this reason, § 1396a(p)(1) authorizes states to enact laws against wrongful conduct affecting Medicaid-related goals. And states may then enact a law, as Kansas did, which excludes a provider for violating these laws.

Under this definition, a state would enjoy broad authority, but this authority would not go unchecked. For example, a state could not circumvent Medicaid's purpose by enacting laws to undermine or bypass the Medicaid provisions. Here the Jane Doe plaintiffs have not alleged that Kansas's laws were designed to undermine or bypass Medicaid.

But let's assume for the sake of argument that the majority's narrow definition of "malfeasance" is right. Under this approach, § 1396a(p)(1) allows states to exclude providers for violating state laws that prohibit conduct "analogous" to conduct excludable under the three statutes listed in § 1396a(p)(1). Majority Op. at 45-46. Even under the majority's approach, Kansas's termination of PPKM would constitute action authorized by § 1396a(p)(1).

Kansas's termination of PPKM was based on Kansas Administrative Regulation § 28-29-16(a)(1). That provision states:

> The [Kansas Secretary of Health and Environment] or any duly authorized representative of the secretary, at any reasonable hour of the day, having identified themselves and giving notice of their purpose, may . . . [e]nter . . . any environment where solid wastes are generated, stored, handled, processed, or disposed, and inspect the premises and gather information of existing conditions and procedures . . . .

Kan. Admin. Regs. § 28-29-16(a)(1). This provision is analogous to the federal statute, 42 U.S.C. § 1320a-7(b)(12)(C),[12] which is identified in § 1396a(p)(1) as a basis to

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12. Kansas has argued that it could exclude PPKM under Kansas Administrative Regulation § 28-29-16(a)(1) because it had been enacted under § 1396a(p)(1). Appellant's Opening Br. at 48 (quoting *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 972 (9th Cir. 2013)). In making this argument, Kansas did not specifically point to 42 U.S.C. § 1320a-7(b)(12)(C). Instead, Kansas relied on 42 U.S.C. § 1320a-7(b)(12)(B). But to address Kansas's interpretation of § 1396a(p)(1), we must address the Medicaid statute as a whole. *See Samantar v. Yousuf*, 560 U.S. 305, 319, 130 S. Ct. 2278, 176 L. Ed. 2d 1047 (2010) ("In sum, '[w]e do not . . . construe statutory phrases in isolation; we read statutes as a whole.'" (quoting *United States v. Morton*, 467 U.S. 822, 828, 104 S. Ct. 2769, 81 L. Ed. 2d 680 (1984)) (alteration and omission in original)); *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290, 130 S. Ct. 1396, 176 L. Ed. 2d 225 (2010) ("Courts have a 'duty to construe statues, not isolated provisions.'" (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995))). In construing the statute as a whole, we are not restricted to the sections cited by the parties. *See United States v. Vallery*, 437 F.3d 626, 632-33 (7th Cir. 2006) (considering parts of a statute not relied

terminate a provider. *See* 42 U.S.C. § 1396a(p)(1). The federal statute, 42 U.S.C. § 1320a-7(b)(12)(C), allows for the termination of

> [a]ny individual or entity that fails to grant immediate access, upon reasonable request (as defined by the [HHS] Secretary in regulations) to any of the following: . . . .
>
> To the Inspector General of [HHS], for the purpose of reviewing records, documents, and other data necessary to the performance of the statutory functions of the Inspector General.

42 U.S.C. § 1320a-7(b)(12)(C). The question here is whether § 1320a-7(b)(12)(C) and Kansas Administrative Regulation § 28-29-16(a)(1) are analogous. The two can be analogous if they bear similarities even though some differences exist. *See American Heritage College Dictionary* 48 (3d ed. 1997) (defining an "analogy" as "[s]imilarity in some respects between things that are otherwise dissimilar"). In addressing whether the provisions are analogous, we are trying to determine whether the state law prohibits the same type of "malfeasance" covered in the statutes listed in § 1396a(p)(1). *See Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 972 (9th Cir. 2013). Thus, we must focus on the conduct covered by Kansas Administrative

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upon by either side because of the court's obligation to take into account the meaning of the statute as a whole); *see also WWC Holding Co. v. Sopkin*, 488 F.3d 1262, 1276 n.10 (10th Cir. 2007) (stating that the court can interpret a statute differently than both parties because we engage in de novo review when interpreting statutes).

Regulation § 28-29-16(a)(1) and determine whether this conduct bears similarities to the conduct addressed in § 1320a-7(b)(12)(C).

The conduct being prohibited is similar in the two provisions. For example, both provisions require certain entities to provide access to government officials so that they can inspect the premises. A provider violates both provisions by refusing to allow access to government inspectors, rendering the prohibited conduct analogous. In light of these similarities, 42 U.S.C. § 1396a(p)(1) authorized Kansas to terminate providers from Medicaid based on a violation of the state law requiring access for a governmental inspection.

2. The Jane Doe Plaintiffs' Cause of Action

The resulting issue is whether the free-choice-of-provider clause allowed the Jane Doe plaintiffs to challenge Kansas's application of § 1396a(p)(1). The answer is (at best) ambiguous, which is fatal to the Jane Doe plaintiffs' claim.

The district court allowed the Jane Doe plaintiffs to invoke § 1983 to challenge Kansas's action as a violation of the free-choice-of-provider clause. The problem is that Kansas's action was of a type authorized by a separate Medicaid provision: § 1396a(p)(1). The district court acknowledged this authorization, but feared that the inability to use § 1983 in these circumstances could allow states to evade judicial review of Medicaid-related decisions, rendering the free-choice-of-provider clause a

hollow right. *See Planned Parenthood of Kan. & Mid-Mo. v. Mosier*, No. 16-2284-JAR-GLR, 2016 U.S. Dist. LEXIS 86948, 2016 WL 3597457, at *17 (D. Kan. July 5, 2016).

This fear does not permit us to broaden § 1983 to allow a private right of action to challenge administrative action taken under § 1396a(p)(1), for it is not our function as judges to create a cause of action to enforce a statute that does not confer an unambiguous federal right. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002).

Until today, no majority opinion of another circuit court has addressed this issue in a holding: The issue did not arise in *Planned Parenthood of Indiana* or in *Planned Parenthood Arizona*, as the states' actions there were not of a type authorized by a Medicaid provision. Rather, the states in *Planned Parenthood of Indiana* and *Planned Parenthood Arizona* had tried to preemptively exclude—as a class—any provider that performed abortion services. *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 962 (9th Cir. 2013); *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 967 (7th Cir. 2012). Section 1396a(p)(1) was relevant only because the states had argued that § 1396a(p)(1) provided *unchecked* authority to terminate providers. That argument has been soundly rejected. *See Planned Parenthood Ariz.*, 727 F.3d at 971-72; *Planned Parenthood of Ind.*, 699 F.3d at 979-80.

Unlike in those cases, Kansas argues that its actions under Kansas Administrative Regulation § 28-29-16(a)(1) were justified under the provisions listed in § 1396a(p)(1).

That difference matters, as the Ninth Circuit explained in *Planned Parenthood Arizona*:

> [Section 1396a(p)(1)] do[es] not apply here. [Arizona's abortion law] does not set out grounds for excluding *individual* providers from Arizona's Medicaid program demonstrated to have engaged in some type of criminal, fraudulent, abusive, or otherwise improper behavior. Rather, it preemptively bars a *class* of providers on the ground that their scope of practice includes certain perfectly legal medical procedures.

Planned Parenthood Ariz., 727 F.3d at 973 (emphases in original).[13] Kansas is doing here what the state had declined to do in *Planned Parenthood Arizona*.

The Fifth Circuit in *Planned Parenthood of Gulf Coast* did address the issue. But the court there did so only in dicta, as the state had not argued that its actions were analogous to any of the provisions listed in § 1396a(p)(1). *See Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 466 (5th Cir. 2017) ("[The State agency does not] even assert that its grounds for termination are consistent or analogous with 42 U.S.C. § 1396a(p)(1)'s enumerated grounds for exclusion."). *But see id.* at 478-79 (Owen, J., dissenting) (concluding that the state *had* justified its

13. Similarly, in *Harris v. Olszewski*, the Sixth Circuit did not consider our issue involving the interplay between the free-choice-of-provider clause and § 1396a(p)(1). *See generally Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006).

actions under § 1396a(p)(1), which should have prevented the majority from reaching the merits). In dicta, the court discussed the bounds of the right under the free-choice-of-provider clause:

> [T]he free-choice-of-provider [clause] gives individuals the right to demand care from a qualified provider when access to that provider is foreclosed by reasons *unrelated* to that provider's qualifications. Otherwise, any right to which the [plaintiffs] are entitled to under [the free-choice-of-provider clause] would be hollow.

Id. at 462 (majority op.) (emphasis in original) (citing *Planned Parenthood Se., Inc. v. Bentley*, 141 F. Supp. 3d 1207, 1218 (M.D. Ala. 2015)).

The Fifth Circuit feared that limiting the plaintiffs' cause of action would render the free-choice-of-provider clause "hollow," relying on *Planned Parenthood Southeast, Inc. v. Bentley*, a district court case. 141 F. Supp. 3d at 1217-18. In *Planned Parenthood Southeast*, the district court squarely considered the present issue. *Id.* The court acknowledged that there "plainly are some reasons that a State may terminate a provider . . . other than the provider being unqualified." *Id.* at 1218. But the district court concluded—without any pertinent citation—that the free-choice-of-provider clause must allow plaintiffs to challenge those reasons or result in "evisceration" of the clause. *Id.* This reasoning is unconvincing for two reasons.

First, even with the absence of a private right of action to litigate the application of state laws authorized by § 1396a(p)(1), plaintiffs could still challenge a state Medicaid program that expressly limited the choice of qualified providers without any separate statutory authority. *E.g., Planned Parenthood Ariz.*, 727 F.3d at 964 (state program excluded all abortion providers from Medicaid); *Planned Parenthood of Ind.*, 699 F.3d at 967 (same); *Harris*, 442 F.3d at 460 (state program limited the sale of incontinence products to a single provider). Thus, even if the Jane Doe plaintiffs were forbidden from bringing the present suit, their right under the free-choice-of-provider clause would not be a hollow one.

Second, even if the inability to invoke § 1983 would render the free-choice-of-provider clause "a hollow right," this problem would be for Congress to fix. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 579, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979) ("[Plaintiffs] contend that the result we reach sanctions injustice. But even if that were the case, the argument is made in the wrong forum, for we are not at liberty to legislate."). Our job is only to determine whether Congress has "manifest[ed] an 'unambiguous[]' intent to confer individual rights." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002) (first alteration in original) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981)). "[W]hat matters is the law the Legislature *did* enact," not what we think the law should have said. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 403, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010) (emphasis in original).

The resulting issue is whether the free-choice-of-provider clause unambiguously provided the Jane Doe plaintiffs with a right to have states properly apply their laws (authorized by § 1396a(p)(1)) to Medicaid providers. Or, instead, has Congress simply conferred the Jane Doe plaintiffs with a right to be covered under a program (like Kansas's) that does not contain unauthorized exclusionary provisions? Though Congress has arguably created an individual right under the free-choice-of-provider clause, the scope of that right remains ambiguous when the state terminates a provider under § 1396a(p)(1).

* * *

In district court, the plaintiffs did not demonstrate the presence of a federal right that is actionable under § 1983. The text of the free-choice-of-provider clause directs states to create Medicaid programs that do not limit access to qualified providers without separate statutory authorization.

To claim an enforceable right to obtain medical care from any provider, it is not enough to show that Congress generally intended for the free-choice-of-provider clause to protect the Jane Doe plaintiffs' choice of providers. *See Gonzaga*, 536 U.S. at 283; *see also Planned Parenthood of Gulf Coast*, 862 F.3d at 474 (Owen, J., dissenting) ("[The free-choice-of-provider clause] does not give a patient the right to contest a State's determination that a provider . . . has not otherwise met state or federal statutory requirements."). Instead, the Jane Doe plaintiffs could succeed on the merits only if Congress had unambiguously

extended the right under the free-choice-of-provider clause to allow challenges to a state's application of its laws adopted under § 1396a(p)(1). *See Gonzaga*, 536 U.S. at 283. In my view, the applicability of this right is, at best, ambiguous.

The ambiguity prevents an applicable right, which in turn prevents the Jane Doe plaintiffs from establishing likelihood of success in their challenge to PPKM's termination. And the inability to establish likelihood of success prevents a preliminary injunction. *Diné Citizens Against Ruining our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016).

III. Conclusion

In my view, the free-choice-of-provider clause does not unambiguously provide the Jane Doe plaintiffs with a right to challenge Kansas's application of § 1396a(p)(1). Therefore, the Jane Doe plaintiffs lacked an enforceable right to challenge Kansas's action. The lack of an enforceable right should have precluded the award of a preliminary injunction to the Jane Doe plaintiffs.

For these reasons, I would reverse the grant of a preliminary injunction to the Jane Doe plaintiffs as to both PPSLR and PPKM. The majority reverses the grant of a preliminary injunction as to PPSLR but affirms the grant of a preliminary injunction as to PPKM. Therefore, I join the majority as to PPSLR and respectfully dissent as to PPKM.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, FILED JULY 5, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 16-2284-JAR-GLR

PLANNED PARENTHOD OF KANSAS
AND MID-MISSOURI, *et al*.,

Plaintiffs,

v.

SUSAN MOSIER, M.D., SECRETARY,
KANSAS DEPARTMENT OF HEALTH AND
ENVIRONMENT, IN HER OFFICIAL CAPACITY,

Defendant.

July 5, 2016, Decided
July 5, 2016, Filed

MEMORANDUM AND ORDER

In May 2016, after an informal administrative hearing, Defendant Susan Mosier, in her official capacity as Secretary of the Kansas Department of Health and Environment ("KDHE"), at the direction of Governor Sam Brownback, terminated as Medicaid providers Plaintiffs Planned Parenthood of Kansas and Mid-Missouri

("PPKM"), Planned Parenthood of the St. Louis Region and Southwest Missouri ("PPSLR"), and eleven current and former individual provider Plaintiffs who are, or were in the past, employees of PPKM and PPSLR. The KDHE provided three grounds for the termination decisions: (1) video evidence about practices by other Planned Parenthood Federation of America ("PPFA") affiliates that include unlawful agreements to procure fetal tissue after abortions; (2) PPKM's failure to cooperate with KDHE solid waste disposal inspections; and (3) claims submission concerns about other PPFA affiliates identified by neighboring states. Plaintiffs PPKM, PPSLR, the individual providers, and three Jane Doe patient Plaintiffs filed this action challenging the KDHE's decision under the Medicaid Act and the Equal Protection Clause of the United States Constitution, and sought preliminary injunctive relief from the termination decisions. On June 13, 2016, the KDHE reconsidered and reversed its decision to terminate the eleven individual health care provider plaintiffs from the Medicaid program. On June 29, 2016, the individual providers voluntarily dismissed their claims in this matter.[1]

Before the Court are Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 12); Motion to Certify Class (Doc. 14), and Motion to Strike Exhibits (Doc. 51). These motions are fully briefed, and the Court heard argument on the preliminary injunction motion on June 7, 2016. The Court considers the motion for preliminary injunction as it pertains to PPKM and PPSLR only.

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1. Doc. 61.

On June 24, 2016, Defendant filed a Motion to Dismiss (Doc. 59), re-arguing some of the justiciability arguments raised in response to the motion for preliminary injunction, adding others, and challenging both of Plaintiffs' claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. This motion is not fully briefed, but the Court at this time considers Defendant's justiciability challenges, to the extent necessary to rule on the motion for preliminary injunction.

Having fully considered the parties' arguments and evidence on these issues, the Court is prepared to rule. As described more fully below, Plaintiffs' motion for preliminary injunction is granted and the class certification motion is denied without prejudice. The motion to strike is denied. Defendant's motion to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction is denied in part; the motion otherwise will remain pending and the Court will rule on the remaining issues raised therein after it is fully briefed.

I. Background

Plaintiffs have submitted the sworn declarations of Laura McQuade, President and CEO of PPKM, and Mary Kogut, President and CEO of PPSLR in support of their motions for preliminary injunction.[2] Each declarant is responsible for the management of their respective organization and is therefore familiar with operations

2. Doc. 13-2, Ex. 1, McQuade Decl.; Doc. 13-3, Ex. 2, Kogut Decl.; *see also* Doc. 49-2, Ex. 1, McQuade Supp. Decl.; Doc. 49-3, Ex. 2, Kogut Supp. Decl.

and finances, including the services they provide and the communities they serve. The Court finds that the information provided in these declarations is within the scope of each declarant's personal knowledge, given their roles in these organizations.

For forty years, PPKM (and its predecessor organizations) has been a Medicaid provider for thousands of Kansans. PPKM provides Medicaid services to Kansas residents at two health centers in Kansas and three health centers in nearby cities in Missouri. In 2014, PPKM and affiliated providers provided family planning services at approximately 750 visits to nearly 500 Medicaid patients. In 2015, PPKM and affiliated providers provided services at over 650 visits to nearly 450 Medicaid patients. PPKM offers a range of family planning and other health services, including annual exams, contraception (including long-acting reversible contraception or "LARC") and contraceptive counseling, hormonal counseling, screening for breast cancer, screening and treatment for cervical cancer, screening and treatment for sexually transmitted infections ("STIs"), including human papilloma virus ("HPV") vaccines, pregnancy testing and counseling, and other limited general health services, such as hemoglobin testing for anemia. The Wichita, Kansas City, and Independence health centers are in areas that have primary care provider shortages.

PPSLR operates several health centers in Missouri, including a health center in Joplin, Missouri, which is located approximately seven miles from the Kansas border and provides family planning health services to a small number of Kansas Medicaid patients each year, including

well-woman exams, contraception (including LARC) and contraceptive counseling, hormonal counseling, screening for breast cancer, screening and treatment for cervical cancer, screening and treatment for STIs, including HPV vaccines, and pregnancy testing and counseling. PPSLR's Joplin, Missouri health center is located in a Primary Care Health Professional Shortage Area ("HPSA"), and Cherokee County, Kansas, the county directly across the border from Joplin, Missouri is also in a Primary Care HPSA and is designated as a Medically Underserved Population Area.

In 2013, the Kansas Medicaid program implemented KanCare and moved from a fee-for-service program model to a managed care program model. PPKM enrolled as a KanCare provider at that time with three managed care organizations ("MCOs") that the State of Kansas contracted with to coordinate care for nearly all of its Medicaid beneficiaries. Defendant has submitted a 2016 contractual amendment to its contracts with the MCOs, which provides that a contract termination with a Medicaid provider "shall be effective 30 calendar days after notification from the State that the provider's state fair hearing rights have expired or the state fair hearing has been completed related to the Medicaid termination."[3] But PPKM has attested that its contracts with the various MCOs do not contain this provision, and instead allow for a quicker contract termination.[4] PPSLR does not have contracts with the MCOs that coordinate care for most Medicaid patients in Kansas.

3. Doc. 37-11, Ex. 1-J at 10.

4. Doc. 49-2, Ex. A ¶ 17, Ex. A-1.

In order to qualify for Kansas Medicaid/KanCare, among other requirements, an adult must be low-income and either pregnant, disabled or a parent. For example, the monthly income for a family of four cannot exceed $768. Medicaid does not pay for abortions for Kansas women except under very narrow circumstances allowed for under federal law: if their lives are in danger or if they are a victim of rape or incest.[5]

According to evidence presented by both sides of this dispute, PPKM and PPSLR are both independently incorporated affiliates of Planned Parenthood Federation of America.[6] For example, Defendant presents PPFA's Consolidated Financial Statements and Supplementary Information from June 30, 2015 and 2014, as evidence that Planned Parenthood affiliates are "financially integrated" with PPFA. That document provides details about the organizational structure of PPFA:

> PPFA, which is the nation's oldest and largest voluntary family planning organization, maintains primary domestic offices in New York

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5. This funding restriction is commonly referred to as the "Hyde Amendment." *See, e.g., Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 963 (9th Cir. 2013) ("actually, a rider that Congress attaches to each year's appropriations legislation"), *cert. denied*, 134 S. Ct. 1283, 188 L. Ed. 2d 300 (2014).

6. Doc. 13-2, Ex. 1, McQuade Decl. ¶ 26; Doc. 13-3, Ex. 2, Kogut Decl. ¶ 9; Doc. 37-8, Def. Ex. 1-G, Planned Parenthood 2014-2015 Annual Report ("PPFA supports 59 independently incorporated affiliates that operate 661 health centers across the U.S.").

> City and Washington, DC . . . . The Organization is also affiliated with 61 independent medical and related entities, and 104 ancillary entities (including 55 Political Action Committees and 55-501(c)(4) organizations), all of which are separately incorporated in their respective states and which collectively constitute PPFA's membership. Accordingly, the accompanying consolidated financial statements do not include the financial position or the changes in net assets and cash flows of these independent affiliated organizations.[7]

With respect to financial support from PPFA, the document explains:

> The National Program Support Plan (NPS) is a membership program between PPFA and Planned Parenthood Affiliates. NPS requires affiliates to pay quarterly membership dues to PPFA for the support and national visibility PPFA provides as well as the right to use the PPFA brand. The revenue is recognized as an increase to unrestricted net assets as the membership fees become due.[8]

Another fund, the Fund for the Future ("the Fund"), is a PPFA fund designed to help "long-term development of the Organization's affiliates. The Fund receives

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7. Doc. 37-9, Def. Ex. 1-H at 9.

8. *Id.* at 13.

board-designated resources as well as affiliate and general-public contributions. The Fund's investment returns are used for development grants to affiliates."[9] As stated repeatedly throughout the record, PPKM and PPSLR are not subsidiaries of PPFA; they are separate corporations. PPKM and PPSLR are members of PPFA, which promulgates medical and other standards to which affiliates must adhere in order to operate under the name "Planned Parenthood" and otherwise use the Planned Parenthood mark.[10] PPFA does not provide medical services or operate health centers. PPFA exerted no control or ownership interest in PPKM or PPSLR in providing them with grants or other funding.

Plaintiff Jane Doe #1 is a PPKM patient who lives in Overland Park, Kansas and has received her annual well-woman gynecological exam at the Overland Park health center. She qualifies for Medicaid until the spring of 2017. Jane Doe #1 characterizes her care as excellent based on the friendliness of the staff, and the fact that she does not feel judged because she is a single mother. She states that the providers she saw at PPKM spent as much time as necessary explaining to her the care she was getting and talked with her about her concerns. PPKM was the only provider that would schedule an appointment for her annual exam, getting her in for an appointment very quickly. She wants to continue to receive her reproductive health care from PPKM and is not sure where she would get her care if it is not an option.

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9. *Id.* at 23.

10. Doc. 13-2, Ex. 1, McQuade Decl. ¶ 27; Doc. 13-2, Ex. 2, Kogut Decl. ¶ 10.

Plaintiff Jane Doe #2 is a long-time Planned Parenthood patient who has most recently received care at PPKM's Overland Park health center. She has received a range of health care services including annual examinations, birth control (Depo-Provera shots), screening for STIs, treatment for pre-cancerous cells, sexual health education, and breast cancer screenings. Jane Doe #2 is currently disabled and relies on Medicaid for her health insurance. She prefers going to Planned Parenthood because she believes they have an expertise in reproductive health care that is unmatched by other providers, and she feels comfortable asking Planned Parenthood about anything related to her reproductive health care. She wishes to continue to obtain her reproductive health care from Planned Parenthood and does not wish to find another provider.

Plaintiff Jane Doe #3 is a PPKM patient who lives in Wichita, Kansas. She is a KanCare recipient and has no other health insurance. At the PPKM health center in Wichita, she receives her annual examinations, follow up care after some abnormal pap smears, birth control, and STI screening and treatment. At a Planned Parenthood clinic in another state, she also received an abortion. Most recently, the PPKM health center in Wichita provided her with a pregnancy confirmation test. She is currently 33 weeks pregnant. After she has the baby, Jane Doe #3 plans to return to the Wichita health center for birth control. Given her status as an established patient at PPKM, it is important to her to be able to return there for her reproductive health care. She believes that Planned

Parenthood "saved my life in many ways by providing me the health care that I needed at critical points in my life."[11]

In July 2015, a group called the Center for Medical Progress ("CMP") released a series of YouTube videos purporting to depict representatives from PPFA and from Planned Parenthood affiliates in other states discussing the illegal sale of fetal tissue and altering abortion procedures to preserve fetal tissue. The videos themselves are not part of this record. Instead, Defendant submits unauthenticated transcripts from two videos dated July 25, 2014,[12] and February 6, 2015.[13] The 2014 transcript identifies the speakers as "Two actors posing as Fetal Tissue Procurement Company," and Deborah Nucatola, MD, Senior Director of Medical Services, PPFA. The 2015 transcript identifies the speakers as Mary Gatter, MD, President, Medical Directors' Council, PPFA and Medical Director, Planned Parenthood Pasadena & San Gabriel Valley, Laurel Felczer, WHCNP, Senior Director of Medical Services, Planned Parenthood Pasadena & Sun Gabriel Valley, and "Two actors posing as Fetal Tissue Procurement Company." The parties vehemently dispute whether the transcripts are complete and reliable.[14] But

11. Doc. 7-2, Ex. A, Decl. of Jane Doe #3 ¶ 6.

12. Doc. 37-2, Ex. 1-A.

13. Doc. 37-3, Ex. 1-B.

14. Plaintiffs move to strike the transcripts of these videos, attached to Defendant's response as Exhibits 1-A and 1-B. The motion is denied. The Rules of Evidence do not apply at the preliminary injunction stage of this proceeding. *See, e.g., Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003). Moreover, the Court

it is undisputed that neither video transcript mentions PPKM, PPSLR, or any of their current or former employees. It is also undisputed that PPKM and PPSLR do not participate in fetal tissue donation or sale.

Kansas investigated PPKM about whether it failed to comply with Kansas law regarding fetal organs and tissue. "After careful review of the investigative materials," the Disciplinary Panel of the Kansas Board of Healing Arts ("KBHA") concluded on January 7, 2016, that no further action should be taken against PPKM.[15] Also, the Missouri Attorney General investigated PPSLR and determined that there was no evidence of wrongdoing.

A few weeks before the KBHA concluded its investigation, KDHE's Bureau of Waste Management ("BWM") inspectors appeared unannounced at the PPKM Overland Park health care center on December 16, 2015, for a solid waste inspection pursuant to K.A.R. § 28-29-16. That regulation provides that a duly authorized representative of Secretary Mosier

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finds that the authenticity and reliability of this evidence is not at issue at this time, given the Court's finding *infra* that because there is no dispute that the videos do not depict PPKM or PPSLR or their employees, and because Plaintiffs are likely to succeed in showing that these affiliates are separate and distinct from PPFA and its other affiliates, attributing the conduct portrayed in these videos to these Plaintiffs was not a proper basis to exclude them as Medicaid providers under the Medicaid Act.

15. Doc. 13-2, Ex. 1-A at 27.

at any reasonable hour of the day, having identified themselves and giving notice of their purpose, may:

(1) Enter a factory, plant, construction site, solid waste disposal area, solid waste processing facility, or any environment where solid wastes are generated, stored, handled, processed, or disposed, and inspect the premises and gather information of existing conditions and procedures;

(2) Obtain samples of solid waste from any person or from the property of any person, including samples from any vehicle in which solid wastes are being transported;

(3) Drill test wells on the affected property of any person holding a permit or liable for a permit under K.S.A. 65-3407 or amendments of that statute and obtain samples from the wells;

(4) Conduct tests, analyses, and evaluations of solid waste to determine whether the requirements of these regulations are otherwise applicable to, or violated by, the situation observed during the inspection;

(5) Obtain samples of any containers or labels; and

(6) Inspect and copy any records, reports, information, or test results relating to wastes generated, stored, transported, processed, or disposed.

BWM had never previously inspected the PPKM Overland Park health care facility. The BWM inspectors were escorted to two exam rooms, but when they reached the laboratory about one hour into the inspection, PPKM staff informed them that they had spoken to PPKM's attorney and that although the inspectors could continue, they could not take further photographs out of concern for clinic and patient privacy and safety. At this point during the inspection, patients were present at the facility. The BWM inspectors also asked PPKM staff for a list of its vendors, including linen service and regular trash hauler vendors. PPKM was concerned about whether this information would become unprotected public information, exposing the vendors to anti-abortion harassment that has occurred in other states were such information was made public. PPKM staff asked the inspectors about whether the requested vendor information would remain confidential and the inspectors responded that it would be available through the Kansas Open Records Act and PPKM would have to go through the official process of claiming the information as confidential. PPKM would not provide the inspectors the names of the facility's solid waste vendors, and asked the inspectors to return with a signed warrant. They returned later that day with a signed warrant. PPKM's legal counsel told the inspectors that they could inspect, but could not take photographs due to concern for patient and staff safety. Again, counsel declined to provide the list of solid waste vendors, and the BWM inspectors left.

On January 5, 2016, BWM inspectors returned again with a warrant, and stated that they would only

photograph relevant areas and take measures to protect patient privacy. PPKM eventually provided vendor information to the BWM on January 15, 2016, after agreeing to allow PPKM additional time to provide the vendor information and to document PPKM's request to keep any photographs confidential. After the inspection, the facility was provided with a report that stated no violations had been identified.[16]

One week later, Governor Sam Brownback announced during his State of the State address on January 12, 2016:

> In 2011, I signed legislation stopping most taxpayer funding from going to Planned Parenthood. The time has come to finish the job.
>
> Planned Parenthood's trafficking of baby body parts is antithetical to our belief in human dignity.
>
> Today, I am directing Secretary Susan Mosier to ensure that not a single dollar of taxpayer money goes to Planned Parenthood through our Medicaid program. I welcome legislation that would enshrine this directive in state law.[17]

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16. Doc. 13-4, Ex. 3 ¶ 20; Ex. 3-E.

17. Governor Sam Brownback, 2016 State of the State (Jan. 12, 2016) (transcript available at http://governor.ks.gov/media-room/speeches/2016/01/13/2016-state-of-the-state---january-12-2016).

Almost two months later, on March 10, 2016, the KDHE sent the Plaintiff providers a Notice of Intent to Terminate Provider, "[a]t the direction of Governor Sam Brownback as set forth in his letter to Secretary Susan Mosier, M.D.," attached to each notice. The notices state that KDHE intends to terminate the provider's participation in the Kansas Medical Assistance Program ("KMAP") under K.A.R. 30-5-60(a), subsections (2) noncompliance with applicable state laws, administrative regulations, or program issuances concerning medical providers; (3) noncompliance with the terms of a provider agreement; (9) unethical or unprofessional conduct; and (17) other good cause. In an attachment to the letters of intent to terminate, KDHE provided three grounds for termination: (1) video evidence about practices by Planned Parenthood Federation of America affiliates that include unlawful agreements to procure fetal tissue after abortions; (2) failure to cooperate with solid waste disposal inspections; and (3) claims submission concerns identified by neighboring states about other PPFA affiliates.

The notice of intent to terminate letters provided for an administrative review on March 23, 2016. But an informal administrative review with legal counsel for PPKM and PPSLR was held on April 29, 2016. PPKM and PPSLR counsel presented evidence to rebut the allegations in the notice of termination letters and requested that if the KDHE decided to follow through with the termination, that it be made effective thirty days from the issuance of the decision.

On May 3, 2016, the provider Plaintiffs received final notices of termination, with an effective date of May 10, 2016. The notices state that "[a]fter thorough review of all information presented, it is the decision of DHCF that your participation in KMAP will be terminated effective May 10, 2016."[18] The final notices provided no further information about the grounds for termination. The final notices advised the providers of their right to request a hearing under K.A.R. § 30-7-64, et seq. within 33 days of the notice.

The day after receiving the final termination notices, Plaintiffs filed this lawsuit and sought a temporary restraining order ("TRO") before the May 10 termination date, and a preliminary injunction pending a final decision on the merits. The Complaint alleges the following claims for relief under 42 U.S.C. § 1983: (1) violation of the Medicaid Act, 42 U.S.C. § 1396a(a)(23) "free-choice-of-provider" provision; and (2) an Equal Protection violation under the Fourteenth Amendment.

The Court set a TRO hearing for May 6. But soon after setting the hearing, the parties jointly agreed to proceed on the request for preliminary injunction only and requested a continuance of the hearing until May 17. On May 10, the parties again jointly requested a continuance of the hearing until May 25. On May 17, outside counsel for the KDHE withdrew from the case and the Court conducted a status conference by telephone. Upon assurance from the KDHE that its termination

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18. *See, e.g.*, Doc. 1, Ex. A at 2 (notice to PPKM).

decision would not become effective until July 7, 2016, the Court again reset the briefing deadlines on the motion for preliminary injunction and continued the hearing until June 7. On June 13, 2016, the KDHE reversed its termination decisions as to the individual provider Plaintiffs; these Plaintiffs have voluntarily dismissed their claims. The Court therefore considers the motion for preliminary injunction motion as it applies to the PPKM and PPSLR termination decisions only.[19]

II. Administrative Review and Justiciability

Under the KDHE regulations promulgated in furtherance of the Kansas Administrative Procedure Act ("KAPA"), the providers have the right to request a fair hearing administered by a hearing officer from the KDHE's administrative hearings section to review an unfavorable decision.[20] The hearing may be by telephone unless a party shows good cause why a fair and impartial hearing could not be conducted by telephone.[21] Either

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19. On July 5, 2016, Defendant submitted a letter to the Court notifying it that it received a notice of name change from PPKM and Comprehensive Health of PPKM to Planned Parenthood Great Plains, effective July 1, 2016. Doc. 62. The letter states that this may render PPKM's claims moot, and argues that the fraudulent billing practices basis for the termination decision "is now directly at issue." The letter further states that the "merger may have significant regulatory implications, such as requiring PPGP to obtain a new Medicaid provider identification number and provider agreement." *Id.* at 1.

20. K.A.R. § 30-7-67.

21. K.A.R. § 30-7-72.

party can then request a rehearing before a state appeals committee.[22] Once the administrative process concludes, a party may further appeal through the state courts under the Kansas Judicial Review Act.[23] Defendant argues that because Plaintiffs have the right to request this fair hearing within 33 days of the effective date of the KDHE's termination decisions, or by August 10, 2016,[24] the administrative process has not yet been exhausted, and therefore Plaintiffs lack standing and the case is not ripe for review. Alternatively, Defendant argues that this Court should abstain in deference to the KDHE's administrative proceeding. Plaintiffs attest through declarations that they do not intend to file an administrative appeal. They further argue that the Court must rule before the effective date of the decisions in order to provide them with meaningful relief, and that abstention is not warranted.

Article III of the Constitution gives federal courts the power to exercise jurisdiction only over "Cases" and "Controversies." As the Supreme Court has explained, "[i]n limiting the judicial power to 'Cases' and 'Controversies,' Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law."[25] A court

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22. K.A.R. §§ 30-7-77, -78.

23. K.S.A. §§ 77-604 through -631.

24. K.A.R. § 30-7-68(a).

25. *Summers v. Earth Island Inst.*, 555 U.S. 488, 492, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009).

lacking jurisdiction must dismiss the case, regardless of the stage of the proceeding, when it becomes apparent that jurisdiction is lacking.[26] The party who seeks to invoke federal jurisdiction bears the burden of establishing that such jurisdiction is proper.[27] "Thus, plaintiff bears the burden of showing why the case should not be dismissed." [28] Mere conclusory allegations of jurisdiction are not enough.[29]

As described more fully below, the Court rejects Defendant's ripeness, standing, and abstention challenges to this Court's jurisdiction.[30] In so doing, the Court is mindful that Defendant's position on the effective date of termination has been a moving target so far in

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26. *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995).

27. *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002).

28. *Harms v. IRS*, 146 F. Supp. 2d 1128, 1130 (D. Kan. 2001).

29. *United States ex rel. Hafter, D.O. v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999).

30. Defendant has suggested a potential mootness challenge in a footnote to its response brief, at oral argument, and in a July 5, 2016 letter to the Court, based on the merger between PPKM and Planned Parenthood of Central Oklahoma. The Court does not consider this issue to be in a posture for disposition at this time. As Defendant admits in its July 5 letter, it is unclear whether the merger means merely a name change to PPKM, or whether it would require an entirely new Medicaid provider contract. Until this development is resolved, the Court will not find that this case is moot based on this development. Instead, the Court evaluates the record as it exists today by evaluating whether the KDHE's termination decision as to the named Plaintiffs must be enjoined.

this short-lived litigation. First, the KDHE declined Plaintiffs' request after an April administrative hearing to delay any termination decision for thirty days from the date that the final termination letters were issued, and instead set an original termination date of May 10 (one week from the date of the final termination letters). This prompted Plaintiffs to immediately file suit and request a temporary restraining order, which the Court set for hearing on May 6 in order to render a decision before the May 10 effective date. The parties then jointly requested two continuances of the hearing until May 17 and then May 25, which were both tied to the KDHE's agreement to extend the effective date of the termination decisions. Then, during a May 17 status conference, outside defense counsel advised that they would be withdrawing, and agency counsel Mr. Dernovish advised that he would be entering an appearance. Mr. Dernovish sought a thirty-day extension of all deadlines, including the effective date of the termination, which he pledged to extend to July 7. At this status conference, the Court proposed that the parties enter into an agreed injunction until September that would freeze the status quo, conduct expedited discovery over the summer, and set this case for a trial on the merits in late-September. Plaintiffs were amenable to this schedule but the KDHE was not, stating that while it did not oppose a fall trial date, it objected to any injunction being entered in the interim. This Court therefore set deadlines tied to a July 7 termination date; the preliminary injunction hearing was continued to June 7 to allow the Court time to render a decision before the terminations were set to go into effect.

When it filed its response to the motion for preliminary injunction on May 31, Defendant argued for the first time that the preliminary injunction motion is premature because the provider terminations could not possibly take effect until September 10, 2016, at the earliest.[31] Defendant takes the position that this case is not ripe, that the Court should abstain under *Younger*, that Plaintiffs lack standing, and that there is no irreparable harm based on the repeated contention that no provider termination will actually occur until the provider Plaintiffs' administrative appeal time runs on August 10, 2016, and then thirty more days pass—a period provided under the State's contracts with the various MCOs that administer the Kansas Medicaid program. Defendant attached no statement from the agency attesting to the fact that it would stay its decision until that time period passed.

The Court expressed frustration at the June 7 hearing about the procedural posture of this case. Newly-retained defense counsel, who entered their appearances

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31. *See, e.g.*, Doc. 37 at 15 ("The termination of Medicaid funding thus will not occur before September 10, 2016, perhaps months later if Plaintiffs simply file an appeal."), 20 ("Planned Parenthood will not lose a dime of Medicaid funding until after their appeals are exhausted."), 37 ("Planned Parenthood and the Individual Provider Plaintiffs will not lose any Kansas Medicaid funding while state administrative appeals are pending. The Individual Plaintiffs will have their services at Planned Parenthood reimbursed under the same standards, through the same mechanism (the MCOs), as before KDHE initiated this administrative process, while any appeals are pending. No harm of any kind will befall any Plaintiffs until at least September 10, 2016 . . . ."), 38 ("Any modification of funding is at least three and one-half months away, perhaps more.").

after the response brief was filed and four days before the hearing, took the odd position that entering into a stipulated injunction would somehow require a concession on the merits of the case. The Court understood at the conclusion of oral argument that these issues were ripe for adjudication, and made clear that it intended to rule on Plaintiffs' request for relief before the July 7 effective date. The Court was therefore surprised to learn of Defendant's lengthy motion to dismiss filed on Friday, June 24, 2016, reasserting several justiciability arguments, adding others, and seeking to dismiss the substantive claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Once again, many of the KDHE's arguments are tied to its contention that no enforcement action can take place before September 10, 2016.[32]

Defendant's motion to dismiss does nothing to allay the Court's concern that Defendant wishes to have its cake and eat it too. The Court cannot fathom why Defendant objects to some form of agreed injunctive relief during the period between the KDHE's July 7 termination date, and the date upon which Defendant claims reimbursements would be declined under the MCO contracts unless it intends to enforce the terminations. Defendant repeatedly asserts in its briefs that no action may be taken before this September date, but never addresses Plaintiffs' argument that there is nothing in the law or record that would guarantee a stay of the termination decisions while the appeal time runs, and pending any appeal that may be taken. Plaintiffs further point out that the contractual

32. Doc. 60 at 1, 2, 22, 23.

extension does not apply to PPSLR, and that their contracts with the MCOs do not reflect that January amendment in the contracts between the State and the MCOs. In the Court's view, absent some sort of stipulation or other assurance, Plaintiffs reasonably do not take counsel's briefing statements at their word that the termination decisions will not become effective until September. This refusal to commit to the KDHE's intended course of action has created a procedural headache for the parties and for the Court, especially given the newly-filed motion to dismiss that deserves responsive briefing before decision. As Defendant is no doubt fully aware, it is impossible at this juncture for the Court to allow full briefing, and decide the motion to dismiss in its entirety before July 7. The fact that Defendant is unwilling to put its counsel's representations into a stipulated order that would apply to both providers is entirely inconsistent with its position that this dispute is premature.

A. Ripeness

Defendant urges this Court to deny the motion for preliminary injunction without prejudice based on "prudential considerations" associated with the timing of the motion. Although buried in the response brief and not articulated as such at oral argument, Defendant clarifies in the motion to dismiss that this is a ripeness challenge based on the fact that the effective date of the Medicaid terminations is potentially two months away.

Ripeness is a jurisdictional prerequisite to suit that has both constitutional and prudential components.[33] "Ripeness doctrine prevents courts from 'entangling themselves in abstract disagreements' and interfering in agency policy until 'an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'"[34] When considering whether a claim is ripe for adjudication, the Court must consider a two-part test evaluating the "fitness of the issue for judicial resolution and . . . the hardship to the parties of withholding judicial consideration."[35]

1. Fitness for Judicial Resolution

To determine the fitness for judicial resolution prong, the Court asks "whether judicial intervention would inappropriately interfere with further administrative action and whether the courts would benefit from further factual development of the issues presented."[36] Plaintiffs took advantage of their optional right to an administrative hearing, where Plaintiffs' counsel was informally allowed

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33. *See, e.g., United States v. Bennett*, 823 F.3d 1316, 2016 U.S. App. LEXIS 9643, 2016 WL 3034664, at *7 (10th Cir. May 26, 2016).

34. *Farrell-Cooper Mining Co. v. United States DOI*, 728 F.3d 1229, 1234 (10th Cir. 2013) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)).

35. *U.S. West Inc. v. Tristani*, 182 F.3d 1202, 1208 (10th Cir. 1999) (citing *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995)) .

36. *Farrell-Cooper*, 728 F.3d at 1235 (quoting *Sierra Club v. United States DOE*, 287 F.3d 1256, 1262-63 (10th Cir. 2002)).

to present evidence to rebut the allegations in the notices of intent to terminate. After hearing this evidence, Defendant proceeded to issue final termination decisions. An agency's action will be ripe for review where "the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him."[37] Here, the "final" termination notices represent concrete actions by the KDHE that threatened to harm Plaintiffs by excluding PPKM and PPSLR as Medicaid providers, notwithstanding the option of an administrative appeal.[38] Unlike the cases cited by Defendant, this case does not call upon the Court to consider contingent future events.[39]

Defendant argues that judicial intervention would interfere with an ongoing administrative proceeding, and

37. *Nat'l Park Hospitality Ass'n v. U.S. Dep't of Interior*, 538 U.S. 803, 807-08, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003).

38. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 151, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967) (finding challenged regulation final where it is "definitive," not merely the "ruling of a subordinate official," nor "tentative.").

39. *See, e.g., Park Lake Res. LLC v. U.S. Dep't of Agric.*, 197 F.3d 448, 451-52 (10th Cir. 1999) (finding claim not ripe because applicable regulations required agency to revise determination during implementation, so claim rested upon contingent events); *Friends of Marolt Park v. United States DOT*, 382 F.3d 1088, 1094 (10th Cir. 2004) (finding decision not concrete where outcome was dependent upon voter approval of part of the project, a purely hypothetical outcome).

that the KDHE's decision "is without imminent practical effect" because it cannot take effect until the time to administratively appeal passes, plus an additional thirty days provided under the State's contracts with the MCOs. Although the termination letters advise the providers of their right to a fair hearing, they do not state that the decisions will be stayed pending review, nor that these are tentative or advisory decisions. If Plaintiffs do not appeal, they can be assured that on August 10, 2016, the KDHE's decision will stand. And even if they do request a fair hearing, under K.A.R. § 30-4-66, assistance is not terminated *unless* it concerns "the termination of a provider from program participation." While it is true that the MCO contract submitted by Defendant states that a provider termination is effective thirty calendar days "after notification from the State that the provider's state fair hearing rights have expired or the state fair hearing has been completed related to Medicaid termination,"[40] this provision changes nothing about the termination decision itself. Further, it is not clear that the contractual provision relied upon by Defendant applies to PPSLR, nor that it applies to the contracts between the MCOs and PPKM.[41] There are no contracts in the record between those parties except for the contract between PPKM and one KanCare MCO, Amerigroup Kansas, Inc.[42] That contract provides for immediate termination. There is no foundational evidence in the record providing this Court

40. Doc. 37-11, Ex. 1-J at 10-11.

41. Doc. 37-11, Ex. 1-J.

42. Doc. 49-2, Ex. A-1.

with a basis to conclude that the amendment submitted by Defendant caused the MCO's to supersede their agreements with PPKM. And PPSLR does not contract with the KanCare MCOs,[43] so the KDHE decision will certainly be effective for PPSLR on August 10, 2016.

When considering threatened action by the government for purposes of standing and ripeness, the Supreme Court has explained that "where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced."[44] The Court finds that the KDHE's final termination decisions are sufficiently concrete and imminent to make the claims in this case ripe.

Defendant argues that the Court should allow the KDHE to exercise its agency expertise because the issues in this case are fact driven and deserve a more fully developed administrative record. To be sure, the parties dispute the degree to which PPFA and the Planned Parenthood affiliates in this case are connected. And there is some dispute about the details involving the solid waste

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43. PPSLR maintains that it does not bill the MCOs or Kansas directly because it is billed as an "out of network" provider, which still requires a Medicaid provider agreement.

44. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128, 127 S. Ct. 764, 166 L. Ed. 2d 604 & n.8 (2007); *see also Consumer Data Ind. Ass'n v. King*, 678 F.3d 898, 907 (10th Cir. 2012) (ripeness is seldom an obstacle to a pre-enforcement challenge in this posture, where the plaintiff faces a "credible threat" of enforcement").

inspection. But both parties have submitted evidence on these issues and, tellingly, neither party requested an evidentiary hearing on the motion for preliminary injunction. They treated the hearing as oral argument, resting on the evidence submitted with the briefs. Defendant provides the Court with no explanation about how these non-legal issues demand "agency expertise" in order to resolve the claims in this case. Certainly it does not take agency expertise to determine the relationship between affiliated organizations. Instead, the Court finds that this case predominately involves purely legal questions: the meaning of 42 U.S.C. § 1396a(a)(23), and the applicability of the Equal Protection clause to the facts of this case.[45] While additional factual development is expected, given its procedural posture, "in the vast majority of cases in which ripeness is not found, 'additional factual development' is absolutely 'necessary,' a feature wholly absent from a proceeding focused on the outer parameters of a statute's meaning."[46]

2. Hardship

The Court also finds Plaintiffs have demonstrated hardship if this Court declines to review the decision—the KDHE's termination decisions result in a legal and practical harm by terminating the providers' status as Medicaid providers.[47] Plaintiffs need not await the

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45. *Accord Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F. Supp. 3d 604, 627 (M.D. La. 2015).

46. *Id.* at 629.

47. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733-34, 118 S. Ct. 1665, 140 L. Ed. 2d 921 (1998) .

effective date of the decisions in order to suffer a legal hardship—there is no chance that the decisions will change before the effective date absent Plaintiffs' deciding to file an optional appeal. And, as described, it is not clear under the regulations that the termination decision would be stayed even if the providers requested a fair hearing.

As discussed above, while September 10, 2016 may be the effective date for the MCOs to terminate the provider agreements based on the KDHE's summary decision, the KDHE's decision itself becomes final on August 10, 2016. The Court finds that the claims in this case are fit for judicial resolution, and that Plaintiffs will suffer a hardship if this Court declines to review their § 1983 challenges to the KDHE's termination decisions.

B. Standing

In its recently filed motion to dismiss, Defendant argues for the first time that Plaintiffs lack standing under Article III of the Constitution to assert their claims in this case because the alleged injury is neither imminent nor fairly traceable to Defendant's actions. One of several doctrines reflecting Article III's case-or-controversy limitation on the judicial power is the doctrine of standing. That doctrine requires federal courts, before considering the merits of an action, to "'satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant [the plaintiff's] invocation of federal-court jurisdiction.'"[48] Standing is evaluated

48. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)).

based on the facts as they exist at the time the complaint is filed.[49] At the pleading stage, the Court "'presume[s] that general allegations embrace those specific facts that are necessary to support the claim,'"[50] and "general factual allegations of injury resulting from the defendant's conduct may suffice.'"[51] Nonetheless, the Court is "not bound by conclusory allegations, unwarranted inferences, or legal conclusions."[52]

The Supreme Court has found the "irreducible constitutional minimum of standing" to contain three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result of the independent action of some third party not

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49. *Tandy v. City of Wichita*, 380 F.3d 1277, 1284 (10th Cir. 2004).

50. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)).

51. *Id.*

52. *Hackford v. Babbitt*, 14 F.3d 1457, 1465 (10th Cir. 1994).

> before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[53]

"An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur."[54]

For the same reasons explained under the Court's ripeness analysis,[55] the Court finds that Plaintiffs have suffered an injury in fact. Defendant argues that the injury is not imminent because the effective date of the termination decisions is four months after the Complaint was filed. But that is not the correct benchmark. First, the original effective date of the termination decisions (known to Plaintiffs when they filed the Complaint) was May 10, 2016, a mere six days after the Complaint was filed. The only reason the effective date was extended in the first place was by agreement of the parties, to allow Defendant time to respond to the motion for preliminary injunction and for the dispute to be fairly heard on a less expedited timeline. The Court and the Plaintiffs were

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53. *Lujan*, 504 U.S. at 560-61 (quotation marks and citations omitted).

54. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341, 189 L. Ed. 2d 246 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 n.5, 185 L. Ed. 2d 264 (2013)).

55. The issues of imminence and ripeness really "boil down to the same question" in this case. *Susan B. Anthony List*, 134 S. Ct. at 2341; *see also Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F. Supp. 3d 604, 630 (M.D. La. 2015).

prepared to proceed with a hearing on this matter back on May 6. Moreover, the availability of administrative review does not impede Plaintiffs' injury for standing purposes, particularly given Plaintiffs' assertion that they will not pursue an administrative appeal. Given this, they have demonstrated that there is a "substantial risk" that the harm alleged in this case will occur. The KDHE's final decision will stand absent a unilateral reversal by the agency of that decision, or an appeal by Plaintiffs, which they have foresworn. And under the contract provision submitted by Defendant, the KanCare MCOs are required to terminate PPKM and PPSLR from the Medicaid program once this happens, even if the effective date of the action is delayed for thirty days. Plaintiffs have met their burden to show that the injury is certainly impending and that there is a substantial risk that the harm will occur.

The Court also finds that the alleged injury is fairly traceable to Defendant's action. Plaintiffs need not show that Defendant's conduct was the "proximate cause" of its injury in fact, but, "[i]f 'speculative inferences are necessary to connect [a plaintiff's] injury to the challenged action,' this burden has not been met. Moreover, where 'the independent action of some third party not before the court'—rather than that of the defendant—was the direct cause of the plaintiff's harm, causation may be lacking."[56] Defendant argues that the termination action cannot be fairly traceable to Defendant's action

56. *Habecker v. Town of Estes Park, Colo.*, 518 F.3d 1217, 1225 (10th Cir. 2008) (quoting *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159 (10th Cir. 2005); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 45, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976)).

because it will be the result of Plaintiffs' decision not to pursue an administrative appeal. There is no allegation, nor evidence that the alleged injury in fact—PPKM and PPSLR's termination as Kansas Medicaid providers and the denial of their Medicaid patients' right to choose them as a family planning provider—is due to the independent actions of a third party not involved in this lawsuit. And as already discussed, any administrative appeal in this case is optional; administrative exhaustion is not required for Plaintiffs to pursue their § 1983 claims.[57] Likewise, the Court will not impose an indirect exhaustion requirement by finding that Plaintiffs caused their own injury by failing to pursue administrative remedies.

C. *Younger* Abstention

The Court next considers Defendant's argument that it should abstain under the *Younger* abstention doctrine. Under *Younger*, a federal court considers whether:

> "(1) there is an ongoing state criminal, civil, or administrative proceeding, (2) the state court provides an adequate forum to hear the claims raised in the federal complaint, and (3) the state proceedings involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies." Once these three

57. *Houghton ex rel. Houghton v. Reinertson*, 382 F.3d 1162, 1167 n.3 (10th Cir. 2004) (citing *Porter v. Nussle*, 534 U.S. 516, 523, 122 S. Ct. 983, 152 L. Ed. 2d 12 (2002); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 521-22, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990)).

> conditions are met, *Younger* abstention is non-discretionary and, absent extraordinary circumstances, a district court is required to abstain.[58]

The issue in this case is whether the administrative appeal process available to Plaintiffs constitutes an ongoing administrative proceeding, which involves two inquiries: (1) whether there is an ongoing proceeding; and (2) "whether the proceeding is the *type* of state proceeding that is due the deference accorded by *Younger* abstention."[59] Plaintiffs argue that neither component of the initial prong of *Younger* is met here.

The Court agrees with Plaintiffs that the administrative proceeding here is not ongoing. If PPKM and PPSLR decide to appeal the KDHE's termination decisions, the fair hearing would be conducted under the KAPA.[60] If the administrative decision was unfavorable to the provider Plaintiffs, they would be able to further appeal that decision in the state courts. There can be no dispute that the trial and appellate stages of state court litigation are considered a unitary process for purposes

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58. *Crown Point I, LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1215 (10th Cir. 2003) (quoting *Amanatullah v. Colo. Bd. of Med. Exam'rs*, 187 F.3d 1160, 1163 (10th Cir.1999)) (citations omitted).

59. *Brown ex rel. Brown v. Day*, 555 F.3d 882, 888 (10th Cir. 2009).

60. K.S.A. § 77-501 to -566.

of *Younger*.[61] The Supreme Court has twice left open the question of whether "an administrative adjudication and the subsequent state court's review of it count as a 'unitary process' for *Younger* purposes."[62] Several other circuits have held that the administrative proceeding is part of that unitary process and therefore a litigant must exhaust judicial review of administrative decisions before filing suit in federal court.[63] However, Defendant has pointed the Court to no authority that this unitary process is considered ongoing before it even begins. The cases considering this issue examine whether a pending or completed administrative proceeding is ongoing where the plaintiff files a federal claim instead of completing the administrative process and pursuing judicial review of the administrative decision.[64] Here, the only

61. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608, 95 S. Ct. 1200, 43 L. Ed. 2d 482 (1975).

62. *Sprint Communs., Inc. v. Jacobs*, 134 S. Ct. 584, 592, 187 L. Ed. 2d 505 (2013); *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 369, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989) ("*NOPSI*")).

63. *See, e.g., Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 166 (4th Cir. 2008); *Maymo-Melendez v. Alvarez-Ramirez*, 364 F.3d 27, 35 (1st Cir. 2004); *Majors v. Engelbrecht*, 149 F.3d 709, 713 (7th Cir. 1998); *see also Brown*, 555 F.3d at 901 (Tymkovich, J., dissenting).

64. *See Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 627, 106 S. Ct. 2718, 91 L. Ed. 2d 512 (1986) (considering federal case filed while administrative proceedings were pending that had been initiated by school board); *Alleghany Corp. v. McCartney*, 896 F.2d 1138, 1144 (8th Cir. 1990) (federal complaint filed instead of seeking state court judicial review); *O'Neill v. City*

administrative decisions are summary decisions by the KDHE terminating benefits. No administrative appeal has been filed and the Plaintiffs have made clear that they do not intend to file an administrative appeal.

Even if the administrative proceeding is ongoing, the Court finds that the administrative decision here is not the type that requires *Younger* abstention. In 2013, the Supreme Court made clear that abstention is warranted in only three types of proceedings: (1) state criminal prosecutions; (2) certain civil enforcement proceedings; and (3) "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions."[65] The administrative appeal in this case clearly does not meet the first or third category; the parties dispute whether the administrative appeal procedure available to the provider Plaintiffs constitutes a "civil enforcement proceeding." In *Sprint Communications, Inc. v. Jacobs*, the Court explained that civil enforcement proceedings are generally "akin to a criminal prosecution in important respects," and "are characteristically initiated to sanction the federal plaintiff, *i.e.*, the party challenging the state action, for some

of Philadelphia, 32 F.3d 785, 790 (3d Cir. 1994) (failure to seek state court judicial review of administrative proceeding). *But see Moore v. City of Asheville*, 396 F.3d 385, 389 (4th Cir. 2005) (finding *Younger* applied where plaintiff did not seek administrative remedies and where the federal suit was duplicative and would disrupt state substantive policies).

65. *Sprint*, 134 S. Ct. at 588 (quoting *NOPSI*, 491 U.S. at 368).

wrongful act."[66] The Court cannot find that the KDHE's termination decision constitutes a "civil enforcement proceeding" under this guidance. First, the KDHE's termination decision is not akin to a criminal prosecution. A state agency is permitted under the law to initiate an enforcement action under K.S.A. § 77-624, but this was a summary termination decision by the KDHE. While there was presumably an investigation before the termination decision was made, there was no proceeding that began with a complaint or formal charge against the providers. The providers chose to avail themselves of an informal administrative review; it was not required. Therefore, the administrative review was initiated by Plaintiffs; it was not a coercive proceeding "initiated by the State in its sovereign capacity."[67] Under *Sprint*, the Court does not find that the KDHE's termination decision was a civil enforcement proceeding.

Tenth Circuit authority also supports the conclusion that the KDHE's termination decision is not the type of proceeding entitled to deference for purposes of *Younger*. In *Brown ex rel. Brown v. Day*, which was decided before the *Sprint* case, the Tenth Circuit considered whether the district court was correct to abstain in favor of an administrative proceeding for which state court judicial review was still available.[68] The court decided that this inquiry turned on whether the administrative proceeding

66. *Id.* at 592 (internal quotation omitted).

67. *Id.* (quoting *Trainor v. Hernandez*, 431 U.S. 434, 444, 97 S. Ct. 1911, 52 L. Ed. 2d 486 (1986)).

68. 555 F.3d 882, 888 (10th Cir. 2009).

is remedial or coercive.[69] Only coercive administrative proceedings require deference.[70] To determine whether an administrative proceeding is coercive or remedial, the court should consider: (1) "whether the federal plaintiff initiated the state proceeding of her own volition to right a wrong inflicted by the state (a remedial proceeding) or whether the state initiated the proceeding against her, making her participation mandatory";[71] (2) whether "the federal plaintiff contends that the state proceeding is unlawful (coercive)" or whether "the federal plaintiff seeks a remedy for some other state-inflicted wrong (remedial)";[72] and (3) "if the federal plaintiff sought to thwart a state administrative proceeding initiated to punish the federal plaintiff for a bad act."[73]

First, the "state proceeding" was initiated by the provider Plaintiffs—they opted to avail themselves of an informal administrative hearing before a final termination decision was issued by the KDHE. If any further administrative appeal is taken before August 10, 2016, it must be initiated by the provider Plaintiffs as well. Neither the informal administrative hearing nor any administrative appeal is mandatory under Kansas law and Plaintiffs declare that they will not pursue their optional

69. *Id.* at 889.

70. *Id.* at 888-89.

71. *Id.* at 889.

72. *Id.*

73. *Id.* at 891.

administrative remedy. Importantly, any potential appeal would only be available to PPKM and PPSLR; the patient Plaintiffs would have no recourse for pursuing their claims in this case.[74] Second, the provider Plaintiffs do not contend that the administrative proceeding itself was unlawful; they seek a remedy for violations of the federal Medicaid Act and the United State Constitution. Finally, there is no bad act identified in this case that triggered coercive proceedings. While the grounds cited for the termination decision allege violations of Kansas law, they were not alleged in the context of a coercive proceeding.[75]

74. *See id.* at 893 ("Brown initiated a challenge to Kansas state action by requesting a hearing before HPF. Kansas did not mandate that she participate in any such proceedings. Rather, HPF summarily terminated her benefits . . . ."); *see also Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F. Supp. 3d 604, 633 (M.D. La. 2015) ("no administrative proceeding commences until or unless PPGC appeals, and PPGC has foresworn that option. Meanwhile, the Individual Plaintiffs cannot possibly initiate such a proceeding as a matter of state law as Defendant's two lawyers have admitted.); *Shifrin v. Colorado*, No. 09-cv-3040-REB-MEH, 2010 U.S. Dist. LEXIS 108614, 2010 WL 3843083, at *7 (D. Colo. Aug. 11, 2010) (applying *Brown* and finding that the plaintiff initiated the state court proceeding by requesting a hearing after being denied a mortgage license). This is a particularly important point given that the Court has deferred ruling on whether the providers have standing to raise the Medicaid Act claim in this case on behalf of the patients.

75. The Court does not agree with Defendant that Judge Marten's decision in *Wright v. McClaskey* commands a different result. There, the plaintiff did not deny that he was the subject of an ongoing state administrative proceeding. No. 15-1098-JTM, 2015 U.S. Dist. LEXIS 118495, 2015 WL 5199217, at *5 (D. Kan. Sept. 4, 2015). The *Brown* factors also applied differently—the administrative proceeding was mandatory, it was not initiated by the

Even if the administrative proceeding in this case is considered ongoing, the Court finds that it is remedial and not coercive, and thus under Tenth Circuit precedent would not constitute a civil enforcement proceeding.

The Court therefore finds that there is no ongoing state administrative proceeding that requires this Court to abstain under *Younger*. In reaching this conclusion, the Court is mindful that the Court's "duty to exercise [its] jurisdiction is so imperative" in the § 1983 context because "Congress specifically created a federal cause of action enforceable in federal courts." [76]

IV. Preliminary Injunction Factors

A preliminary injunction "is an extraordinary remedy," so "the right to relief must be clear and unequivocal."[77] "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and

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plaintiff, and the plaintiff committed an alleged bad act by statutory noncompliance and by failing to pay fines that had been issued to him. 2015 U.S. Dist. LEXIS 118495, [WL] at *7.

76. *Brown*, 555 F.3d at 894. Because this Court finds that there is no an ongoing proceeding entitled to abstention under *Younger*, the Court does not address the second and third prongs of the abstention doctrine.

77. *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1256 (10th Cir. 2003).

that an injunction is in the public interest."[78] A relaxed standard applies if the movant can show that the harm and public interest factors "tip strongly in its favor."[79] If the movant can make this showing, it can meet the likelihood of success on the merits prong "by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation."[80] However, there is a qualification to the relaxed standard: 'where a preliminary injunction seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme," the traditional standard applies.[81] The Court therefore applies the traditional standard in deciding Plaintiff's motion.

A. Likelihood of Success on the Merits

Plaintiffs argue that they are likely to succeed on both of their claims—that the State violated the Medicaid Act free-choice-of-provider provision, and the Equal Protection Clause of the Fourteenth Amendment when it terminated the Plaintiff providers from the Medicaid

78. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008).

79. *Oklahoma ex rel. Okla. Tax Comm'n v. Int'l Registration Plan, Inc.*, 455 F.3d 1107, 1113 (10th Cir. 2006) (quoting *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002)).

80. *Id.*(footnote omitted).

81. *See, e.g., Nova Health Sys. v. Edmondson*, 460 F.3d 1295, 1298 n.6 (10th Cir. 2006) (quoting *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003)).

program. Because the Court finds that Plaintiffs are likely to succeed on their Medicaid Act claim, it does not consider the likelihood of success on the merits of the Equal Protection claim at this time.

Plaintiffs argue that the KDHE's decision to terminate the provider Plaintiffs from Medicaid violates 42 U.S.C. § 1396a(a)(23), often referred to as the "free-choice-of-provider" requirement. "Medicaid is a cooperative federal-state program that provides federal funding for state medical services to the poor."[82] State participation in the program is voluntary, "but once a State elects to join the program, it must administer a state plan that meets federal requirements."[83] Section 1396a provides for several requirements for State plans for medical assistance. Under § 1396a(a)(23), a State plan must

> provide that (A) any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services, and (B) an enrollment of an individual eligible for medical assistance in a primary care case-management system

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82. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 433, 124 S. Ct. 899, 157 L. Ed. 2d 855 (1986).

83. *Id.*

> (described in section 1396n(b)(1) of this title), a Medicaid managed care organization, or a similar entity shall not restrict the choice of the qualified person from whom the individual may receive services under section 1396d(a)(4)(C) of this title, except as provided in subsection (g) of this section, in section 1396n of this title, and in section 1396u-2(a) of this title, except that this paragraph shall not apply in the case of Puerto Rico, the Virgin Islands, and Guam, and except that nothing in this paragraph shall be construed as requiring a State to provide medical assistance for such services furnished by a person or entity convicted of a felony under Federal or State law for an offense which the State agency determines is inconsistent with the best interests of beneficiaries under the State plan or by a provider or supplier to which a moratorium under subsection (kk)(4) is applied during the period of such moratorium.

1. Whether § 1396a(a)(23) creates an enforceable right that may be vindicated under 42 U.S.C. § 1983

Defendant first challenges whether the free-choice-of-provider provision creates an enforceable right that may be vindicated under § 1983. All of the circuit courts to consider this issue have concluded after a thorough analysis that Medicaid patients may bring an enforcement action under § 1983 to vindicate their rights under this

provision.[84] To determine whether a federal statute provides a private right of action under § 1983, three factors guide the Court's analysis:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.[85]

The Supreme Court has cautioned that "where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is

84. *Harris v. Olszewski*, 442 F.3d 456, 461-65 (6th Cir. 2006); *Planned Parenthood of Ind., Inc.v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 972-77 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2736, 186 L. Ed. 2d 193 (2013); *Planned Parenthood v. Betlach*, 727 F.3d 960, 965-68 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1283, 188 L. Ed. 2d 300 (2014). *But cf. Silver v. Baggiano*, 804 F.2d 1211, 1217-18 (11th Cir. 1986) (remanding case to district court to consider whether § 1396a(a)(23) is enforceable by the health care provider, given that it had not been decided below, and given that a patient who was "an actual recipient" had moved to intervene in the case), *abrogated on other grounds by Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002).

85. *Blessing v. Freestone*, 520 U.S. 329, 340-41, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997) (citations omitted).

no basis for a private suit, whether under § 1983 or under an implied right of action."[86]

This Court follows the Sixth, Ninth, and Seventh Circuits in holding that the patient Plaintiffs have a private right of action to enforce the Medicaid free-choice-of-provider provision under this three factor test. The statute creates unambiguous rights-creating language sufficient to show that Congress intended to benefit Medicaid beneficiaries.[87] The statute provides courts with sufficiently concrete and objective standards for enforcement by requiring states to determine whether a "provider is qualified to perform the services required," and whether the provider "undertakes to provide such services."[88] And the statute is couched in mandatory terms because it says that states "must provide" in their Medicaid plans that beneficiaries can choose from a provider qualified to perform the medical services required.[89] The Medicaid Act does not otherwise foreclose a private cause of action through § 1983.[90] "Neither is the Act's requirement that States 'grant[ ] an opportunity for

86. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002).

87. *Betlach*, 727 F.3d at 966-67; *Comm'r of Ind.*, 699 F.3d at 974; *Harris*, 442 F.3d at 461-62.

88. *Betlach*, 727 F.3d at 967; *Comm'r of Ind.*, 699 F.3d at 974; *Harris*, 442 F.3d at 462.

89. *Betlach*, 727 F.3d at 967; *Comm'r of Ind.*, 699 F.3d at 974; *Harris*, 442 F.3d at 462

90. *Harris*, 442 F.3d at 462.

a fair hearing before the State agency to any individual whose claim for medical assistance under the [State] plan is denied,' 42 U.S.C. § 1396a(a)(3), inconsistent with a private action under § 1983."[91]

Defendant argues that a more recent Supreme Court decision dictates a different result. In *Armstrong v. Exceptional Child Center, Inc.*[92] the Supreme Court considered whether a different subsection of § 1396a(a) confers a private right of action to Medicaid providers. Subsection (30)(A) requires State plans to:

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

The lower court found that the plaintiff providers had an implied right of action under the Supremacy Clause to seek injunctive relief against enforcement of state

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91. *Id.* at 463 (citing *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 520-22, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990)).

92. 135 S. Ct. 1378, 191 L. Ed. 2d 471 (2015) (plurality opinion).

legislation that failed to set rates in a manner consistent with § 30(A).[93] The Supreme Court disagreed, holding that there was no implied right of action under either the Supremacy Clause, or in equity.[94] Justice Scalia further wrote that Congress did not provide a private right of action under the Medicaid Act itself.[95] In explaining that the Medicaid Act conferred no cause of action, Justice Scalia reasoned that (1) § 30(A) lacked "rights-creating language needed to imply a private right of action," and (2) that intended beneficiaries of a contract are generally unable to sue where the contract is between two governments, as with the Medicaid Act, at least in the absence of an "unambiguously conferred" private right of action."[96] But this portion of Justice Scalia's opinion was not joined by a majority of justices and is therefore not binding.[97] Moreover, the Court agrees with Plaintiffs that *Armstrong*'s holding is narrow and applies only to subsection 30(A), which does not contain the type of rights-creating language contained in subsection 23. As the Court noted in *Armstrong*, § 30(A) "is phrased as s

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93. *Id.* at 1382.

94. *Id.* at 1383-87 & 1388 (Breyer, J., concurring).

95. *Id.* at 1383-87.

96. *Id.* at 1387-88.

97. *Id.* at 1388 (Breyer, J., concurring); *see Altria Group, Inc. v. Good*, 555 U.S. 70, 96, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008) ("Because the 'plurality opinion . . . did not represent the views of a majority of the Court, we are not bound by its reasoning.'" (quoting *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81, 107 S. Ct. 1637, 95 L. Ed. 2d 67 (1987))).

directive to the federal agency charged with approving state Medicaid plans," whereas § 23 allows "any individual" to choose among qualified providers who undertake to provide medical services.[98] Further, § 30(A) is a rate setting statute that that contains a broad standard that would be difficult to judicially administer.[99] Plaintiffs are likely to succeed in arguing that the Jane Doe Plaintiffs have a private right of action under § 1983 to enforce their rights under § 1396a(a)(23).

Defendant argues for the first time in the motion to dismiss that if there is a private right of action, it runs only to Medicaid patients and therefore PPKM and PPSLR lack standing to assert a claim under § 1396a(a)(23). Because the Court finds that the Jane Doe Plaintiffs have a private right of action, the Court need not resolve at this time whether PPKM and PPSLR have standing in their own right, or on behalf of the patients, in order to grant injunctive relief. The Court will instead consider this issue in the context of the motion to dismiss, after allowing full briefing.

2. Whether there is a violation of § 1396a(a)(23)

The free-choice-of-provider requirement is subject to two limitations: "(1) the provider is 'qualified to perform

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98. *Accord Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F. Supp. 3d 604, 640-41 (M.D. La. 2015).

99. *Accord Planned Parenthood S.E., Inc. v. Bentley*, 141 F. Supp. 3d 1207, 1217-18 (M.D. Ala. 2015).

the service or services required,' and (2) the provider 'undertakes to provide [the recipient] such services.'"[100] All courts to consider the question have determined that the term "qualified" is unambiguous and may be defined according to its ordinary meaning,[101] which is "having an officially recognized qualification to practice as a member of a particular profession; fit, competent."[102] In the context of the statute, a provider must be "qualified to perform the service or services required," so the provider therefore must "be capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner."[103] The Seventh and Ninth Circuits have both held that under this standard, States are not permitted "to establish provider-eligibility criteria based on any legitimate state interest."[104]

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100. *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 967 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1283, 188 L. Ed. 2d 300 (2014) (quoting § 1396a(a)(23)).

101. *Id.* at 969 (quoting Oxford English Dictionary (3d ed. 2007)); *see also, e.g., Comm'r of Ind.*, 699 F.3d at 978 (citing Black's Law Dictionary 1360 (9th ed. 2009)) .

102. *See id.*at 969; *Planned Parenthood of Ind., Inc.v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 978 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2736, 186 L. Ed. 2d 193 (2013); *Kliebert*, 141 F. Supp. 3d at 643; *Planned Parenthood Ark. & E. Okla. v. Selig*, No. 4:15-cv-00566-KGB, 2015 U.S. Dist. LEXIS 146466 Doc. 45 at 26-27(E.D. Ark. Oct. 2, 2015), attached as Doc. 13, Ex. 4.

103. *Comm'r of Ind.*, 699 F.3d at 978.

104. *Id.*; *Betlach*, 727 F.3d at 970 ("Giving the word 'qualified' such an expansive meaning would deprive the provision within which it appears of any legal force.").

Defendant does not contest this meaning of "qualified" in its brief, nor does it argue that the Provider Plaintiffs are not qualified under § 1396a(a)(23).[105] Instead, Defendant argues that Plaintiffs brought their claim under the wrong statute because they challenge the decision to terminate the provider agreements, not the lack of patient choice. The Court disagrees and follows the guidance provided by another district court that considered an identical argument. In *Planned Parenthood S.E., Inc. v. Bentley*,[106] the United States District Court for the Middle District of Alabama explained that the scope of the patients' claim was that their provider of choice was wrongfully excluded from the pool of providers from which they have a right to choose:

> If a State could defeat a Medicaid recipient's right to select a particular qualified healthcare provider merely by terminating its agreement with that provider on an unlawful basis, the right would be totally eviscerated. If the Governor and the Acting Commissioner were correct that allegedly unlawful terminations of provider agreements could not be challenged by recipients pursuant to the free-choice-of-provider provision, that provision's "*individual*

105. Because the Court finds that the free-choice-of-provider statute is unambiguous, the Court does not defer to the CMS Administrator's interpretation of that statute. *See Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); *Comm'r of Ind.*, 699 F.3d at 980; *Betlach*, 727 F.3d at 975.

106. 141 F. Supp. 3d 1207, 1217-18 (M.D. Ala. 2015).

> entitlement," the "personal right" it gives recipients, would be an empty one.[107]

The Court finds that Plaintiffs properly brought their claim under the free-choice-of-provider requirement because they allege that the Jane Doe Plaintiffs were denied their right to receive covered Medicaid services from any qualified provider of their choice willing to provide the services. They contend that their provider was wrongfully removed from the pool of providers.

The Court therefore proceeds to consider Defendant's position that it properly terminated PPKM and PPSLR under the exclusion provision of the Medicaid Act, § 1396a(p)(1). That provision states:

> In addition to any other authority, 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 under subchapter XVIII of this chapter under section 1320a-7, 1320a-7a, or 1395cc(b)(2) of this title.[108]

This provision permits termination in two ways: (1) for any reason that the Secretary could exclude under the cross-referenced Medicaid Act provisions, and (2) pursuant to the "any other authority," savings clause. Under the

107. *Id.* at 1218 (citations and footnote omitted).

108. 42 U.S.C. § 1396a(p)(1).

savings clause, Defendant argues that it may terminate a provider agreement if it determines that the providers violated Kansas law or some other federal law.

1. Alleged Medicaid Act Violations

Defendant first argues that it was justified in terminating the providers' Medicaid provider agreements under 42 U.S.C. § 1320a-7(b), which provides for permissive termination under circumstances involving certain types of fraud and malfeasance. Plaintiffs are likely to succeed in showing that this statute does not justify the termination decisions.

a. § 1320a-7(b)(5)

Under § 1320a-7(b)(5)(B), the Secretary of Health and Human Services may terminate "any individual or entity" "for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity." Defendant contends that all three grounds it provided for the provider Plaintiffs' terminations constitute violations of this statute. Plaintiffs are likely to demonstrate that this statute is inapplicable for several reasons. First, under § 1396a-p(1), the "entity" that a "State may exclude" must be the same entity that committed the infraction defined in § 1320a-7(b).[109] Although the statute allows for exclusion of an entity based on affiliation with "a sanctioned individual," that only applies when the affiliated "person" is sanctioned under

109. *Bentley*, 141 F. Supp. 3d at 1223-24 & n.9.

the Medicaid Act and has an ownership or control interest in the entity, or is an officer, director, agent, or managing employee.[110] Defendant points the Court to no authority that Congress intended to otherwise allow for exclusion based solely on affiliation outside of the strict confines of the statutory provision. There is no dispute that neither PPKM, PPSLR, nor their current or former employees were portrayed on the CMP videos. There is no dispute that the provider Plaintiffs have no direct or indirect ownership or control interest of five percent or more in PPFA or the affiliate identified in the videos. There is no dispute that PPKM and PPSLR do not participate in fetal tissue donation or sale. There is no dispute that PPKM and PPSLR are not the subjects of any Medicaid billing fraud claim relied upon by the KDHE in their notices of intent to terminate.

Defendant points the Court to evidence that Governor Mary Fallin of Oklahoma has called for termination of her State's Medicaid provider contracts with the two Planned Parenthood affiliates located there. She cites two October 2015 Integrity Reviews, finding a 20.3% and 14.1% billing error rate.[111] The Governor's comments come from a letter she sent to the Director of the Oklahoma Health Care Authority Board, encouraging him to consider terminating these two affiliates' Medicaid provider contracts. Outside of these integrity reviews, which are not part of this record, Governor Fallin points to False Claims Act cases in other states. There is no evidence

110. 42 U.S.C. § 1320a-7(b)(8).

111. Doc. 37-5, Ex. 1-D.

about the action taken, if any, by the Oklahoma Health Care Authority Board based on this letter. Defendant argues that this evidence directly relates to PPKM given its intended merger with Planned Parenthood of Central Oklahoma, one of the affiliates referenced in Governor Fallin's letter. But on this record, the Court finds that Plaintiffs would succeed in arguing that the Oklahoma affiliate was not sanctioned under either the Medicaid Act, or Oklahoma law, and that it does not have an ownership or controlling interest in PPKM.

Plaintiffs are likely to succeed in arguing that § 1320a-7(b) does not apply by virtue of affiliation, and therefore could not be applied to the provider Plaintiffs in this case as to two of the grounds for termination: the videos and the alleged Medicaid fraud. It also renders the grounds for termination against PPSLR entirely baseless since the KDHE inspection involved only one PPKM clinic.

The Court further finds that Plaintiffs are likely to succeed in showing that PPKM's purported failure to cooperate with the BWM's solid waste inspection in December 2015 does not bear on PPKM's "professional competence, professional performance, or financial integrity."[112] First, it is undisputed that no solid waste

112. Although Defendant does not make this argument in responding to the preliminary injunction motion, the Court further finds that the inspection basis for termination does not touch upon PPKM's qualifications under § 1396a(a)(23) given the undisputed fact that the inspection did not reveal any infractions that touch upon PPKM's capability of performing the needed medical services in a professionally competent, safe, legal, and ethical manner. In

violations were found, so the only basis for termination associated with the inspection was the alleged failure to cooperate. Defendant cannot explain how the failure to cooperate in the inspection, standing alone, bears on PPKM's competence, performance, or financial integrity. Second, although the evidence makes clear that PPKM prohibited the inspectors from taking photographs of the facility on the first visit, and that it negotiated with the KDHE to maintain the confidentiality of its solid waste vendors before identifying them, there is no evidence that PPKM otherwise prevented the inspectors from performing their inspections. Although the BWM officials have submitted declarations stating that photographs of certain solid waste disposal containers were warranted, there is nothing in the regulatory authority that required PPKM to allow photographs to be taken. K.A.R. § 28-29-16 provides these inspectors with authority to "gather information of existing conditions and procedures," but it does not require photographs be taken. There is no dispute in the record that PPKM would have allowed the inspection to continue but for the inspectors' insistence on taking photographs. It was the BWM inspectors who opted to leave instead of continuing without photographs. More importantly, there was never any determination made by BWM or the KDHE that PPKM hindered the solid waste inspection—no enforcement action was ever brought against the facility. Given this record, Plaintiffs

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addition to finding no evidence of solid waste disposal infractions, the KBHA previously investigated PPKM in relation to the CMP videos and found no further action should be taken. This finding was reached in between the first and second attempts to conduct a solid waste inspection.

are likely to succeed in showing that they were not properly excluded from the Medicaid program under § 1320a-7(b)(5).

b. § 1320a-7(b)(12)

Next, Defendant claims that the termination decisions were justified under § 1320a-7(b)(12)(B), which allows the Secretary to terminate a provider "that fails to grant immediate access, upon reasonable request (as defined by the Secretary in regulations) . . . (B) To the Secretary or the State agency, to perform the reviews and surveys required under State plans under paragraphs (26), (31), and (33) of section 1396a(a) of this title and under section 1396b(g) of this title." Section 1396a(a)(33), requires a State health or other appropriate medical agency to establish a plan for "the review by appropriate professional health personnel of the appropriateness and quality of care and services furnished to recipients of medical assistance under the plan in order to provide guidance with respect thereto in the administration of the plan to the State agency." The Court finds that Plaintiffs are likely to succeed in demonstrating that the solid waste inspection here does not constitute a review bearing on "the appropriateness and quality of care and services furnished to recipients of medical assistance under the plan." As already discussed, the failure to cooperate in the inspection, standing alone, does not implicate PPKM's competence, performance, or financial integrity. Moreover, Plaintiffs have shown a likelihood of success in their contention that they did grant immediate access to the inspectors. And even after the inspectors insisted on taking photographs and obtaining

confidential material, PPKM allowed the inspection to continue; the inspectors opted to come back in January instead.

c. § 1320a-7(a)(1), (3), or (b)(1)(A)(ii)

Finally, Defendant appears to argue that its decision was justified under § 1320a-7(a)(1), (3), or (b)(1)(A)(ii) based on evidence that other PPFA affiliates submitted false Medicaid claims.[113] Plaintiffs are likely to succeed in arguing that these provisions are entirely inapplicable because they all either require or permit exclusions based on criminal convictions. Moreover, as described above, they are tied to the conduct of other entities, not the Plaintiff providers that have been excluded by the KDHE. Defendant's contention that there is an impending merger between PPKM and Planned Parenthood of Central Oklahoma does not change this analysis. At the time of the termination decisions, this planned merger was not known to the State, so it could not have formed the basis for its termination decision.

2. Savings Clause

Defendant makes the same argument advanced and rejected by the many courts that have been called upon to review whether termination decisions under the Medicaid Act violate the free-choice-of-provider provision: that under the savings clause, the states have plenary power to exclude providers as they deem fit under § 1396a(p)

113. *See* Doc. 37 at 34-35.

(1) without running afoul of the free-choice-of-provider provision.[114] To be sure, the Seventh Circuit in *Planned Parenthood of Indiana, Inc. v. Commissioner of the Indiana State Department of Health*, acknowledged that the states retain regulatory authority over provider qualifications in terms of "licensing standards and other related practice qualifications," but the claim in this case, like in the Seventh Circuit's case "raises a question about the *limits* of that authority."[115] The Seventh Circuit also explained that the savings clause "signals only that what follows is a non-exhaustive list of specific grounds upon which states may bar providers from participating in Medicaid. It does not imply that the states have an unlimited authority to exclude providers for any reason whatsoever."[116] As the court explained, if states were able to exclude a provider based on any rule that they declared related to qualifications, it "would make the free-choice-of-provider requirement a nullity."[117] The nonexhaustive list of grounds for excluding a provider cross-referenced in the statute refer to "various forms of malfeasance such as fraud, drug crimes, and failure to disclose necessary information to regulators."[118] Therefore, the statute's "savings clause empowers states to exclude individual

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114. *Betlach*, 727 F.3d at 971-72; *Comm'r of Ind.*, 699 F.3d at 979; *Bentley*, 141 F. Supp. 3d 1207, 2015 WL 6517875, at *9-10; *Selig*, Doc. 13-5 at 25.

115. *Comm'r of Ind.*, 699 F.3d at 979.

116. *Id.*

117. *Id.*

118. *Id.*; *Betlach*, 727 F.3d at 972.

providers on such grounds directly, without waiting for the Secretary to act, while also reaffirming state authority to exclude individual providers pursuant to analogous state law provisions relating to fraud or misconduct."[119]

Defendant argues that PPKM violated state law by refusing to cooperate with a solid waste inspection in December 2015, which makes it unlawful for a person to interfere with a solid waste inspection. But as already discussed, the Court finds the Plaintiffs are likely to succeed in showing that they did not run afoul of state regulations by refusing to allow the BWM inspectors to take photographs in the facility while patients were present. And there is no evidence that PPKM was cited for impeding an inspection. The KDHE argues that it was justified in inferring that there was a solid waste violation by PPKM's refusal to allow inspectors to "do their job," when viewed in conjunction with the YouTube videos. But the KBHA conducted a "thorough investigation" into PPKM after the CMP videos were released, and issued its finding that no further action be taken after PPKM allegedly interfered with the first solid waste inspection. And it is undisputed that PPKM does not participate in fetal tissue donation or sale. After the KBHA finding was issued, and after the parties negotiated BWM's permission to take certain photographs and receive confidential solid waste vendor information, the BWM was able to finish its unannounced inspection and found no infractions.

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119. *Betlach*, 727 F.3d at 972.

Finally, Defendant argues that it was justified in terminating the providers' Medicaid contracts based on the video evidence that Planned Parenthood affiliates "have sold body parts and manipulated abortions. These violations likely run afoul of State and Federal law, contravene the terms of the provider agreement, and fall well below the professional standard of care."[120] Assuming, without deciding that PPFA or other Planned Parenthood affiliates violated state and federal laws concerning fetal tissue donation, the providers in this case are likely to succeed in showing that such conduct cannot be attributed to them under the law. Based on the record provided to the Court, which is largely comprised of publicly available documents and the attestation of PPKM and PPSLR executives, PPKM and PPSLR are separate and distinct entities from those described in the video transcripts. Plaintiffs are likely to succeed in arguing that they cannot be terminated under Kansas law on the basis of this affiliation.[121]

First, Defendant cites several state law cases that explain when piercing the corporate veil is warranted.[122] The Court cannot discern the relevance of these cases where it is undisputed that the Plaintiff affiliates are neither subsidiaries of PPFA, nor officers or shareholders in PPFA. "None of these decisions stands for the

120. Doc. 37 at 28.

121. *See* K.A.R. § 30-5-60(14), (15).

122. *Milgo Elec. Corp. v. United Bus. Commc'ns, Inc.*, 623 F.2d 645, 659 (10th Cir. 1980); *NLRB v. Greater Kan. City Roofing*, 2 F.3d 1047, 1052 (10th Cir. 1993).

proposition that one corporation can be held responsible for the policies of an umbrella organization regarding a practice that other *affiliated* corporations engage in."[123]

Next, Defendant asserts that there is financial overlap between the affiliates, which she characterizes as "spokes of a common hub." Defendant relies on PPFA's financial statements, to show that the affiliates are required to pay dues that are redistributed in part back to the affiliates, and that the Annual Report is a joint balance statement. The Court does not read the financial statements as sweepingly as the Defendant. The joint financial statement referenced by Defendant states that, "the accompanying consolidated financial statements do not include the financial position or the changes in net assets and cash flows of these independent affiliated organizations."[124] There is no evidence that dues paid to PPFA and returned in part to the affiliates translates into quid pro quo action on the part of the affiliates. Plaintiffs have submitted evidence that PPFA exerted no control or ownership interest in PPKM or PPSLR in providing this funding.

Defendant next argues that PPFA and its fifty-nine affiliates have a "unity of interest" that is evidenced by certain language used by PPFA and it officers when describing the organization and its affiliates. But again, Plaintiffs are likely to succeed in showing that these stray references to the organizational structure does not

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123. *Planned Parenthood S.E., Inc. v. Bentley*, 141 F. Supp. 3d 1207, 1224 n.10 (M.D. Ala. 2015) (citations omitted).

124. Doc. 37-9, Def. Ex. 1-H at 9.

overcome the declarations and other legal statements showing that PPKM and PPSLR are independent entities that are merely members of PPFA. The record shows that PPFA does not provide medical services or operate health centers. As described in *Bentley*, there is no evidence

> that PPFA had adopted and enforced a policy *requiring* that all affiliates engage in fetal-tissue donation, alter abortion procedures to better preserve intact specimens, and accept compensation in excess of costs. . . . [A]t most [they] suggest that PPFA has supported the decisions of some affiliates to engage in these practices. . . . What PPFA *permits* other affiliates to do therefore has no bearing on PPSE, which to reiterate, has elected not to engage in fetal-tissue donation.[125]

Defendant cites the transcript from one of the CMP videos, suggesting that PPFA coordinates fetal tissue donation policy with its affiliates. Assuming the authenticity of this video, which has not yet been provided to the Court, any question that the KDHE had about such coordination is negated by the fact that the KBHA conducted a thorough investigation of the allegations in those videos and found no evidence to support such activity by PPKM. Likewise, the Missouri Attorney General investigated and cleared PPSLR of wrongdoing.

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125. *Id.* at 1224.

Finally, Defendant points to filings in another case involving affiliate Planned Parenthood of the Great Northwest, Inc. ("PPGNW"), as evidence that PPFA and its affiliates present themselves as "a single organization."[126] But again, neither PPKM nor PPSLR were parties in that case and made no representations that relate to their status. Second, the Court does not agree with Defendant's reading of the Appellee's brief in that case. That case was brought as a qui tam action alleging certain overbilling practices by PPGNW. PPGNW argued that there was adequate prior public information about the billing practices in question that had been litigated in a prior qui tam suit with an affiliate in California, and so the relator in that case was not a whistleblower, but "an opportunistic plaintiff."[127]

In sum, the Court determines that Plaintiffs are likely to succeed on the merits of their claim that PPKM and PPSLR may not be terminated as Kansas Medicaid providers based on the activities of other Planned Parenthood affiliates.

B. Irreparable Harm

To constitute irreparable harm, the injury "must be both certain and great."[128] It "is often suffered when 'the

126. Doc. 37-15, Ex. 1-N, *Bloedow v. Planned Parenthood of the Great Nw., Inc.*, No. 14-35017, Appellee Br. at 5 (9th Cir. July 2, 2014).

127. *Id.*

128. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (quoting *Wis. Gas Co. v. Fed. Energy*

injury can[not] be adequately atoned for in money,' or when 'the district court cannot remedy [the injury] following a final determination on the merits.'"[129] The Court has withheld ruling on whether the provider Plaintiffs have representational standing to raise the Medicaid Act claim. Likewise, because the Court finds that the Jane Doe Plaintiffs have demonstrated irreparable harm without injunctive relief, the Court need not proceed to consider whether Plaintiffs have shown irreparable harm to PPKM and PPSLR. The Jane Doe Plaintiffs' declarations establish that they choose to be treated at PPKM due to scheduling conveniences, and that they have had positive experiences with PPKM staff as compared to other providers for gynecological services. All three Plaintiffs rely on Medicaid for their health insurance and all three wish to continue to be treated at Planned Parenthood clinics. Jane Doe #3 was 33 weeks pregnant at the time she executed her declaration, and given her status as an established patient at PPKM, it is important to her to be able to return there for her reproductive health care after the baby is born.

Defense counsel suggested at oral argument that the Jane Doe declarations filed in this case were not specific enough because they lacked information such as how far away alternative providers are located. The Court does not require such detailed information from these Plaintiffs

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Regulatory Comm'n, 758 F.2d 669, 674, 244 U.S. App. D.C. 349 (D.C. Cir. 1985)).

129. *Id.* (quoting *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (1980)).

in order to credit their declarations of injury. As already discussed, the Court gives weight to their uncontroverted declarations that they depend on Planned Parenthood clinics for their reproductive health care, and that these Planned Parenthood clinics are their providers of choice for a host of reasons. They are happy with the quality of care they receive, they do not feel judged by the provider's staff, and they have indicated scheduling and convenience benefits to being treated by these providers. Defense counsel also suggested that the fact that these patients could still be treated at PPKM, albeit without Medicaid reimbursement, negates any finding that they could not be treated by the provider of their choice. It is uncontroverted that to be eligible for Medicaid assistance, a family of four must have a net income of $768 per month or less. The Court easily finds that these patients will be unable to afford to pay out of pocket to see the health care provider of their choice without Medicaid assistance.

In 2014, PPKM and affiliated providers provided family planning services at approximately 750 visits to nearly 500 Medicaid patients. In 2015, PPKM and affiliated providers provided services at over 650 visits to nearly 450 Medicaid patients. PPSLR operates a health center in Joplin, Missouri, which is located approximately seven miles from the Kansas border and provides family planning health services to a small number of Kansas Medicaid patients each year. These clinics offer important health services, including: annual exams, contraception and contraceptive counseling, hormonal counseling, screening for breast cancer, screening and treatment for cervical cancer, screening and treatment for STIs, including HPV

vaccines, pregnancy testing and counseling, and other limited general health services. Many of these clinics are located in places with health care provider shortages. Plaintiffs have demonstrated that both the named Jane Doe Plaintiffs, and hundreds of other Kansas Medicaid patients that currently depend on PPKM and PPSLR for their family planning and reproductive health services would be unable to be treated by these providers if they are terminated from the KanCare/Medicaid program. A disruption or denial of these patients' health care cannot be undone after a trial on the merits. The Court finds that Plaintiffs has shown irreparable harm to Medicaid patients who have chosen PPKM and PPSLR as their family planning and reproductive health care providers.

Defendant submits evidence that Kansas Medicaid recipients can choose from other qualified family planning providers in Kansas. But as several courts have found, this argument "misses the mark" because "[t]hat a range of qualified providers remains available is beside the point. Section 1396a(a)(23) give Medicaid patients the right to receive medical assistance from the provider of their choice without state interference save on matters of provider qualifications."[130] Moreover, the

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130. *Planned Parenthood of Ind., Inc.v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 981 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2736, 186 L. Ed. 2d 193 (2013); *Planned Parenthood S.E., Inc. v. Bentley*, 141 F. Supp. 3d 1207, 1225-26 (M.D. Ala. 2015); *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F. Supp. 3d 604, 650 (M.D. La. 2015); *Planned Parenthood Ark. & E. Okla. v. Selig*, No. 4:15-cv-00566-KGB, 2015 U.S. Dist. LEXIS 146466, Doc. 45 at 22 (E.D. Ark. Oct. 2, 2015), attached as Doc. 13, Ex. 4.

evidence submitted by Defendant in support of its claim that Medicaid patients will have access to other health care providers is exaggerated. Defendant submits a report based on procedure codes that are "commonly used by certain obstetric and gynecological medical providers," resulting in a list of 9199 Kansas Medicaid providers.[131] A cursory review of this list shows that the same providers are listed multiple times, and many of the listed providers appear to have practices wholly unrelated to family planning and reproductive health services, such as sleep centers, podiatrists, and dermatologists. The Court cannot conclude from this evidence that the Kansas Medicaid patients who choose PPKM and PPSLR for their family planning could be assured of "ready and convenient" alternative reproductive health services in the absence of an injunction.[132]

Finally, Defendant urges that the availability of administrative review negates the imminence of patient harm because it could be months before the provider terminations become effective, and because the harm is within Plaintiffs' control. First, as already discussed at length, there is no requirement that the providers pursue a fair hearing in order to obtain relief in this Court, and the providers have stated on the record that they do not intend to pursue that channel of relief. It is certain therefore that the KDHE's termination decisions will become final on August 10, 2016, at the latest. There is no evidence or legal authority in this record that the

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131. Doc. 37-21, Ex. 5 ¶¶ 3-4.

132. *See Kliebert*, 141 F. Supp. 3d at 650.

termination decisions would not be enforced on the July 7 effective date stated in the termination letter, or pending an administrative appeal if one was filed, other than defense counsel's assertions in the briefs. Second, as the Court has already discussed, PPSLR has no contracts with KanCare MCOs, so the contractual extension would not apply to it. Third, there are dueling contractual provisions in the record that make it unclear how quickly the MCOs would terminate their contracts with PPKM. Fourth, Plaintiffs have submitted authority that the termination decisions themselves may create a domino effect because termination from the Kansas program puts PPKM and PPSLR at risk of termination in neighboring states—PPKM is also a Missouri and soon-to-be Oklahoma provider and PPSLR is also Missouri and Illinois Medicaid provider. Regulations in Oklahoma and Missouri allow for those Medicaid programs to terminate a provider based on termination decisions in other states; they are not tied to the "effective date" of the other state's Medicaid provider terminations.[133] Therefore, not only is there strong evidence that Kansas Medicaid patients will be irreparably harmed by the termination decisions, but there is also a risk that Medicaid patients in neighboring states will lose PPKM and PPSLR as their chosen providers as early as July 7. For all of these reasons, the Court finds that Plaintiffs have alleged a sufficiently imminent irreparable harm that justifies issuing injunctive relief.

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133. Mo. Code Regs. tit. 13, § 70-3.030(3)(A)(12), (13), (14), (18), (19); Okla. Admin. Code § 317:30-3-19.1(2).

C. Balance of Harms and Public Interest

Defendant contends that it will suffer irreparable harm if an injunction ensues, because it would allow taxpayer money to flow to the provider Plaintiffs despite evidence that they have violated Federal and State law, the terms of their provider agreements, and applicable professional standards. Defendant further argues that an injunction would disrupt ongoing administrative proceedings. Plaintiffs urge that the irreparable harm it has cited cannot be undone, particularly the domino effect that a for cause termination could have by allowing other states to terminate based on the Kansas decision. Plaintiffs further argue that it is in the public interest to preserve patients' freedom to choose their provider without government interference and that an injunction would simply freeze the status quo of reimbursing these providers until a decision can be reached on the merits.

The Court is not persuaded that the risk of taxpayer harm if the Court issues the injunction outweighs the established irreparable injury to Kansas Medicaid patients if an injunction does not issue. As the Court has explained, neither the fetal tissue donation allegation nor the Medicaid fraud allegation have any relation to the Planned Parenthood affiliates who were terminated by the KDHE, so no taxpayer money is at risk of flowing to providers that have violated State or Federal law on those grounds. And Plaintiffs have made a strong showing that the solid waste disposal ground for termination is unrelated to the provider's qualifications as defined in § 1396a(a)(23). Given these showings, the risk of taxpayer

harm is quite low as compared to the certain injury to Medicaid patients if the injunction does not issue—they will be unable to seek treatment from their providers of choice. This is a right explicitly provided in the Medicaid Act, and the Court finds that protecting this right until the case can be decided on the merits is in the public interest.

The Court further finds that the injunction will not interfere with an ongoing administrative proceeding. As the Court has explained throughout this opinion, there is no "ongoing" administrative proceeding to interfere with and Plaintiffs have made clear that they will not be exercising their optional right to a fair hearing. Moreover, Defendant cannot explain how this implicates the balance of harms. If, for example, Plaintiffs opted to avail themselves of the administrative process and the KDHE reversed its decision, Defendant could always ask this Court for relief from the preliminary injunction.[134] Similarly, if the intended merger between PPKM and Planned Parenthood of Central Oklahoma ultimately requires not just a name change to the PPKM entity for which the KDHE's termination decision would extend, but instead an entirely new Medicaid provider identification number and provider agreement for which the termination decision potentially would not apply, the parties can apply to this Court for relief from the preliminary injunction.

Moreover, the Supreme Court has explained that requiring administrative exhaustion of state remedies for

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134. *See Comm'r of the Ind.*, 699 F.3d at 981 (rejecting state's claim that preliminary injunction will undermine the public's interest in the administrative process).

a § 1983 claim is inconsistent with Congressional intent that the statute "interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"[135] The Court thus finds it to be in the public interest's to allow Plaintiffs to pursue their federal claims in federal court notwithstanding the availability of state administrative remedies.

The Court further finds that it is in the public's interest to ensure that the goals of Medicaid are served—"to afford medical assistance to persons whose income and resources are insufficient to meet the financial demands of necessary care and services."[136] Medicaid patients have the explicit right to seek family planning services from the qualified provider of their choice.[137] It is uncontroverted that PPKM

135. *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 503-07, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972)).

136. *Houghton ex rel. Houghton v. Reinertson*, 382 F.3d 1162, 1164 (10th Cir. 2004) (quoting *N.M. Dep't of Human Servs. v. Dep't of Health & Human Servs. Health Care Fin. Admin.*, 4 F.3d 882, 883 (10th Cir. 1993)).

137. 42 U.S.C. § 1396a(a)(23); *see also, e.g., Planned Parenthood S.E., Inc. v. Bentley*, 141 F. Supp. 3d 1207, 1217 (M.D. Ala. 2015) ("Congress saw fit to identify family planning as the area of medical care with respect to which a recipient's free choice of provider was most critical. It is not hard to imagine why—just as business owners do, healthcare providers and Medicaid recipients have widely varying "honest conviction[s]" about the appropriateness of different family-planning methods." (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779, 189 L. Ed. 2d 675 (2014)).

and PPSLR serve hundreds of underprivileged women in the State of Kansas. It is in the public interest to allow these individuals to be treated by the qualified provider of their choice, and to have that provider reimbursed under Medicaid pending a trial on the merits in this case.

In sum, Plaintiffs have satisfied the elements required to obtain a preliminary injunction on the Jane Doe Plaintiffs' Medicaid Act claim. The KDHE's termination decisions shall therefore be held in abeyance until the case can be decided on the merits.

D. Security

Plaintiffs asks that the preliminary injunction be issued without a bond requirement. Fed. R. Civ. P. 65(c) provides that "[t]he Court may 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." The Court may exercise its discretion, and determine a bond is unnecessary "if there is an absence of proof showing a likelihood of harm."[138] The Court finds no evidence of financial harm to the State if the Court does not require a bond; the State would simply continue reimbursing the Plaintiff providers as it has before and since the termination decision, until a decision on the merits can be reached. No bond is required.

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138. *Coquina Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d 1461, 1462 (10th Cir. 1987).

V. Motion for Class Certification

Also pending is Plaintiffs' Motion for Class Certification. In their motion, Plaintiffs seek to certify a class of all Kansas Medicaid beneficiaries who obtain, or who seek to obtain, covered health care services from PPKM and PPSLR and their current affiliated providers.[139] The motion is brought pursuant to Fed. R. Civ. P. 23(b)(2), which applies where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

The injunctive relief requested in this case does not require individualized remedies. Moreover, case law supports this Court's authority to issue classwide injunctive relief based on its general equity powers before deciding a class certification motion.[140] Additionally, the so-called "necessity doctrine" has been invoked by most circuits in Rule 23(b)(2) cases, requiring a need for

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139. Doc. 14 at 1.

140. *See, e.g., Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758, 2015 U.S. Dist. LEXIS 168836, 2015 WL 9239821, at *6 (M.D. Tenn. Dec. 17, 2015); *Lee v. Orr*, No. 13-cv-8719, 2013 U.S. Dist. LEXIS 173801, 2013 WL 6490577, at *2 (N.D. Ill. Dec. 10, 2013). *See generally* Newberg on Class Actions § 4:30 (5th ed. 2015) ("Rule 23(b)(2) authorizes certification of a class solely for the purpose of final injunctive or declaratory relief. Hence, a case seeking only a provisional remedy like a preliminary injunction cannot be certified under Rule 23(b)(2) on that basis alone.").

class relief.[141] Class relief is denied under this doctrine where the putative class members will benefit from any injunction issued on behalf of the individual plaintiffs. Both parties in this case point the Court to *Kansas Health Care Association, Inc. v. Kansas Department of Social & Rehabilitative Services*,[142] where the Tenth Circuit recognized the necessity doctrine and upheld the district court's decision that class certification was not necessary in order to award classwide preliminary injunctive relief.[143] Other cases in this circuit suggest that foregoing class certification under these circumstances is appropriate: (1) where the nature of the rights asserted require that the injunction run to the benefit of all persons similarly situated;[144] and (2) where there is little risk of the named plaintiffs' claims becoming moot during a live controversy.[145]

141. *See* Charles Wright, Arthur Miller, & Mary Kay Kane, Federal Practice & Procedure § 1785.2 (3d ed.); Newburg § 4:35 ("As of 2012, courts in six circuits have applied some version of necessity analysis," including the Tenth Circuit).

142. 31 F.3d 1536 (10th Cir. 1994).

143. *Id.* at 1548; *see also Planned Parenthood S.E., Inc. v. Bentley*, 141 F. Supp. 3d 1207, 1226-27 (M.D. Ala. 2015) (granting preliminary injunction that reinstates provider agreement without ruling on motion for class certification); *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F. Supp. 3d 604, 652 (M.D. La. 2015) (same).

144. *E.g, Aacen v. San Juan Cnty. Sheriff's Dep't*, 944 F.2d 691, 700 & n.12 (10th Cir. 1991); *Everhart v. Bowen*, 853 F.2d 1532, 1538 n.6 (10th Cir. 1988), *rev'd on other grounds sub nom. Sullivan v. Everhart*, 494 U.S. 83, 110 S. Ct. 960, 108 L. Ed. 2d 72 (1990).

145. *Jackson v. Ash*, No. 12-CV-2504-EFM, 2014 U.S. Dist. LEXIS 38805, 2014 WL 1230225, at *6-7 (D. Kan. Mar. 25, 2014)

Under the circumstances of this case, class certification is unnecessary in order to award relief to all Kansas Medicaid patients who obtain or seek to obtain covered health services from PPKM and PPSLR. The Court has granted the motion for preliminary injunction, enjoining the KDHE from enforcing its termination decisions until this case can be decided on the merits. This directive will allow all Kansas Medicaid patients who seek to obtain covered services from these providers, to have those services covered. And there is no suggestion by either party that the Jane Doe Plaintiffs' claims will become moot during the pendency of the lawsuit. Under these circumstances, Plaintiffs' motion for class certification is denied without prejudice.

IT IS THEREFORE ORDERED BY THE COURT that Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 12) is **granted**. Defendant, her employees, agents, and successors in office are hereby restrained from terminating the Medicaid provider agreements of PPKM and PPSLR;

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss (Doc. 59) is **denied in part and taken under advisement in part**;

IT IS FURTHER ORDERED that Plaintiffs' Motion to Certify Class (Doc. 14) is **denied without prejudice**; and

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(erring on side of class action where claims involved "ever-changing jail or prison population"); *Clay v. Pelle*, No. 10-cv-1840-WYD-BNB, 2011 U.S. Dist. LEXIS 27630, 2011 WL 843920, at 7 (D. Colo. Mar. 8, 2011) (same).

IT IS FURTHER ORDERED that Plaintiffs' Motion to Strike Exhibits (Doc. 51) is **denied**.

IT IS SO ORDERED.

Dated: July 5, 2016

/s/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

APPENDIX C — LETTERS TO PLANNED PARENTHOOD FROM JASON OSTERHAUS, PROGRAM INTEGRITY UNIT MANAGER, KDHE DIVISION OF HEALTH CARE FINANCE, DATED MAY 3, 2016

KANSAS DEPARTMENT OF
HEALTH & ENVIRONMENT

Sam Brownback, Governor
Susan Mosier, MD, Secretary

Division of Health Care Finance
Landon State Office Building
900 SW Jackson, Suite 900 N
Topeka, Kansas 66612-1220
Phone: 785-296-3981
Fax: 785-296-4813
www.kdheks.gov

May 3, 2016

Planned Parenthood of Mid Miss
4401 W 109th St, Suite 200
Overland Park, KS 66211-1303

RE: Notice of Decision to Terminate Provider #s: 100216210A NPI#s: 1679614838

Sent Certified, Return Receipt Requested

Dear Provider:

Appendix C

On March 10, 2016, the Kansas Department of Health and Environment (KDHE) Division of Health Care Finance (DHCF) notified you of the intention to terminate your participation in the Kansas Medical Assistance Program (KMAP) at the direction of the Governor as set forth in his letter to the Secretary of KDHE and pursuant to KAR 30-5-60(a):

(2) noncompliance with applicable state laws, administrative regulations, or program issuances concerning medical providers;

(3) noncompliance with the terms of a provider agreement;

(9) unethical or unprofessional conduct;

and

(17) other good cause.

You were entitled to an administrative review on April 29, 2016, before representatives of DHCF to explain why you should remain a KMAP provider.

You attended the administrative review through counsel and presented your explanation as to why you should remain a KMAP provider. After thorough review of all information presented, it is the decision of DHCF that your participation in KMAP will be terminated effective **May 10, 2016.**

If you disagree with this termination, you have the right to request a fair hearing under KAR 30-7-64, *et seq*. Under Kansas Regulations, the request for fair hearing must be in writing and received by the Office of Administrative Hearings, 1020 S. Kansas Ave, Topeka, KS 66612-1327, within thirty-three (33) days of this notice to be timely.

Sincerely,

Jason Osterhaus
Program Integrity Unit Manager
KDHE Division of Health Care Finance

Appendix C

KANSAS DEPARTMENT OF
HEALTH & ENVIRONMENT

Sam Brownback, Governor
Susan Mosier, MD, Secretary

Division of Health Care Finance
Landon State Office Building
900 SW Jackson, Suite 900 N
Topeka, Kansas 66612-1220
Phone: 785-296-3981
Fax: 785-296-4813
www.kdheks.gov

May 3, 2016

Planned Parenthood of the St Louis Region
4251 Forest Park Ave
Saint Louis, MO 631 08-2810

RE: Notice of Decision to Terminate Provider #s: 200663360A NPI#s: 1205898574

Sent Certified, Return Receipt Requested

Dear Provider:

On March 10, 2016, the Kansas Department of Health and Environment (KDHE) Division of Health Care Finance (DHCF) notified you of the intention to terminate your participation in the Kansas Medical Assistance Program (KMAP) at the direction of the Governor as set forth in

his letter to the Secretary of KDHE and pursuant to KAR 30-5-60(a):

(2) noncompliance with applicable state laws, administrative regulations, or program issuances concerning medical providers;

(3) noncompliance with the terms of a provider agreement;

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and

(17) other good cause.

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Sincerely,

Jason Osterhaus
Program Integrity Unit Manager
KDHE Division of Health Care Finance

APPENDIX D — LETTERS TO PLANNED PARENTHOOD AND SUSAN MOSIER, FILED MAY 4, 2016

KANSAS DEPARTMENT OF
HEALTH & ENVIRONMENT

Sam Brownback, Governor
Susan Mosier, MD, Secretary

Division of Health Care Finance
Landon State Office Building
900 SW Jackson, Suite 900 N
Topeka, Kansas 66612-1220
Phone: 785-296-3981
Fax: 785-296-4813
www.kdheks.gov

March 10, 2016

Planned Parenthood of Mid Miss
4401 W 109th St, Suite 200
Overland Park, KS 66211-1303

RE: Notice of Intent to Terminate Provider
#s: 100216210A NPI#s: 1679614838

Sent Certified, Return Receipt Requested

Dear Provider:

At the direction of Governor Sam Brownback as set forth in his letter to Secretary Susan Mosier, M.D., of the Kansas Department of Health and Environment (KDHE),

attached hereto as Exhibit A, the KDHE Division of Health Care Finance (DHCF) intends to terminate your participation in the Kansas Medical Assistance Program (KMAP) pursuant to KAR 30-5-60(a):

> (2) noncompliance with applicable state laws, administrative regulations, or program issuances concerning medical providers;
> (3) noncompliance with the terms of a provider agreement;
> (9) unethical or unprofessional conduct;
> and
> (17) other good cause.

Information supporting these findings is attached hereto as Exhibit B.

You are entitled to an administrative review before representatives of DHCF to explain why you should remain a KMAP provider. At the review, you have the opportunity to present any relevant evidence on the question of continuing participation in KMAP. DHCF will consider all evidence presented.

Your administrative review is on March 23, 2016 at 11:00 am and will take place in Topeka at the office of DHCF unless you request it be by telephone. Please contact Krista Engel at (785) 296-7286 by March 18, 2016 no later than 4:00 pm to confirm you will attend the review and whether you will participate in person or via telephone. If we do not hear from you, as requested above, or you do not attend the review, DHCF will proceed with the termination.

Sincerely,

/s/_________________
Jason Osterhaus
Program Integrity Unit Manager
KDHE Division of Health Care Finance

Susan Mosier, M.D., Secretary
Kansas Department of Health and Environment
1000 S.W. Jackson
Topeka, Kansas 66612

Dear Secretary Mosier:

This letter is to direct your agency to take all necessary steps to terminate Planned Parenthood of Kansas and Mid-Missouri and all associated medical providers from Kansas Medicaid, including KanCare. My direction to you is based on their affiliation with the national Planned Parenthood Federation of America (PPFA) and other information provided by your agency.

The medical needs of the women of Kansas who are members of Medicaid are well served by the excellent women's health care providers that will remain on Medicaid's and KanCare's robust provider networks. Kansans deserve a higher quality of services, more transparency, and more fiscal responsibility than has been shown by the PPFA and, either directly or by association, by Planned Parenthood of Kansas and Mid-Missouri.

Accordingly, I am directing you to terminate Planned Parenthood of Kansas and Mid-Missouri, and any other individual providers that are affiliated with Planned Parenthood, from participation in Kansas Medicaid, including KanCare, following the provision of appropriate notice to those providers.

Sincerely,

/s/________________
Sam Brownback
Governor

Exhibit B

Video Evidence Regarding PPFA Clinics

Planned Parenthood of Kansas and Mid-Missouri is affiliated with the PPFA. As a result, it abides by the medical and operational standards of the national organization. Extensive video evidence from across the country indicates practices by PPFA affiliates that warrant termination of PPFA's Kansas affiliates under Kansas law and regulations. Other states have recently taken similar action against PPFA affiliates as a result of information revealed in these videos. For example, the Inspector General of the Texas Health and Human Services Commission, in its letter to a Houston Planned Parenthood clinic dated October 19, 2015, PPFA clinics in Texas and across the country, noted that PPFA repeatedly violated the minimum standards of medical care by: (a) Practicing a policy of agreeing to procure fetal tissue even if it means altering the timing or method of an abortion; (b) Failing to prevent conditions that allow the spread of infectious disease among employees, patients and the general public; and (c) Failing to adequately train staff with regards to the handling of fetal blood and tissue so that they meet the minimum standards, or if training was performed, failure to comply with such training. In addition to falling below the minimum medical standard of care, they also are in violation of federal law and regulations. *See* 42 U.S.C. 289g-1; 29 C.F.R. 1910.1030.

The Texas HHSC OIG further noted that "video footage of the Medical Director of PPFA ... appears to not

only condone such program violations but also endorse them. This suggests that the program violations ... reflect PPFA national policy or accepted practice ....”

Failure to Cooperate with Solid Waste Disposal Inspections

On December 16, 2015, the Overland Park Planned Parenthood clinic refused to allow a Kansas Department of Health and Environment solid waste inspector to complete her inspection and photograph certain portions of its facility. The inspector was allowed to inspect the waste receptacles in only two exam rooms. After that, the inspector was stopped by Planned Parenthood staff and told to cease taking pictures. The facility took this position in spite of the fact that the inspector presented them with an administrative search warrant signed by a Johnson County judge. The KDHE inspector uses photographs as a tool to “gather information of existing conditions and procedures,” as permitted by K.A.R. 28-29-16(a).

Planned Parenthood attorneys have claimed that the facility did not “hinder” the waste inspection, and that the move was to protect patient and staff privacy. However, the facility’s lack of cooperation with the inspection causes the State concern that further investigation could have led to discoveries of solid waste violations, in addition to discoveries like those identified in the videos of other national PPFA affiliates.

Claims Submission Concerns

Kansas' neighboring states have identified potentially fraudulent Medicaid claims from the PPFA affiliates in those states and nationally as grounds for terminating the Medicaid participation of their respective states' PPFA affiliates. Oklahoma Gov. Mary Fallin, in her November 18, 2015 letter to the director of Oklahoma Medicaid, noted one pending case in Oklahoma where it is alleged that a Tulsa Planned Parenthood affiliate submitted nearly one-half million false claims and received payment of nearly $28 million for those claims (*U.S. ex rel. Thayer v. Planned Parenthood of the Heartland*). In addition, both Gov. Fallin's letter and the Texas HHSC OIG's October 19 letter reference a recent Texas case where a Texas PPFA affiliate paid $4.3 million to settle fraud issues.

Gov. Fallin's letter also highlights national research by the Alliance Defending Freedom, in its 2015 report to Congress, suggesting that Oklahoma and other national PPFA affiliates "engage in a pattern of practices resulting in the overbilling of state Medicaid programs."

Appendix D

KANSAS DEPARTMENT OF
HEALTH & ENVIRONMENT

Sam Brownback, Governor
Susan Mosier, MD, Secretary

Division of Health Care Finance
Landon State Office Building
900 SW Jackson, Suite 900 N
Topeka, Kansas 66612-1220
Phone: 785-296-3981
Fax: 785-296-4813
www.kdheks.gov

March 10, 2016

Planned Parenthood of the St Louis Region
4251 Forest Park Ave
Saint Louis, MO 63108-2810

RE: Notice of Intent to Terminate Provider
#s: 200663360A NPI#s: 1205898574

Sent Certified, Return Receipt Requested

Dear Provider:

At the direction of Governor Sam Brownback as set forth in his letter to Secretary Susan Mosier, M.D., of the Kansas Department of Health and Environment (KDHE), attached hereto as Exhibit A, the KDHE Division of Health Care Finance (DHCF) intends to terminate your

participation in the Kansas Medical Assistance Program (KMAP) pursuant to KAR 30-5-60(a):

> (2) noncompliance with applicable state laws, administrative regulations, or program issuances concerning medical providers;
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> (9) unethical or unprofessional conduct; and
> (17) other good cause.

Information supporting these findings is attached hereto as Exhibit B.

You are entitled to an administrative review before representatives of DHCF to explain why you should remain a KMAP provider. At the review, you have the opportunity to present any relevant evidence on the question of continuing participation in KMAP. DHCF will consider all evidence presented.

Your administrative review is on March 22, 2016 at 1:00 pm and will take place in Topeka at the office of DHCF unless you request it be by telephone. Please contact Krista Engel at (785) 296-7286 by March 18, 2016 no later than 4:00 pm to confirm you will attend the review and whether you will participate in person or via telephone. If we do not hear from you, as requested above, or you do not attend the review, DHCF will proceed with the termination.

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Program Integrity Unit Manager
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Gov. Fallin's letter also highlights national research by the Alliance Defending Freedom, in its 2015 report to Congress, suggesting that Oklahoma and other national PPFA affiliates "engage in a pattern of practices resulting in the overbilling of state Medicaid programs."

APPENDIX E — RELEVANT STATUTORY PROVISIONS

42 USCS § 1396a

(a) Contents. A State plan for medical assistance must—

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(23) except as provided in subsection (g), in section 1915 [42 USCS § 1396n], and in section 1932(a) [42 USCS § 1396u-2(a)] and except in the case of Puerto Rico, the Virgin Islands, and Guam, provide that (A) any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services, and (B) an enrollment of an individual eligible for medical assistance in a primary care case-management system (described in section 1915(b)(1) [42 USCS § 1396n(b)(1)]), a medicaid managed care organization, or a similar entity shall not restrict the choice of the qualified person from whom the individual may receive services under section 1905(a)(4)(C) [42 USCS § 1396d(a)(4)(C)], except as provided in subsection (g) and in section 1915 [42 USCS § 1396n], except that this paragraph shall not apply in the case of Puerto Rico, the Virgin Islands, and Guam, and except that nothing in this paragraph shall be construed as requiring a State to provide medical assistance for such services furnished by a person or

entity convicted of a felony under Federal or State law for an offense which the State agency determines is inconsistent with the best interests of beneficiaries under the State plan or by a provider or supplier to which a moratorium under subsection (kk)(4) is applied during the period of such moratorium;

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(p) Exclusion power of State; exclusion as prerequisite for medical assistance payments; "exclude" defined.

(1) In addition to any other authority, a State may exclude any individual or entity for purposes of participating under the State plan under this title [42 USCS §§ 1396 et seq.] for any reason for which the Secretary could exclude the individual or entity from participation in a program under title XVIII [42 USCS §§ 1395 et seq.] under section 1128, 1128A, or 1866(b)(2) [42 USCS § 1320a-7, 1320a-7a, or 1395cc(b)(2)].

(2) In order for a State to receive payments for medical assistance under section 1903(a) [42 USCS § 1396b(a)], with respect to payments the State makes to a medicaid managed care organization (as defined in section 1903(m) [42 USCS § 1396b(m)]) or to an entity furnishing services under a waiver approved under section 1915(b)(1) [42 USCS § 1396n(b)(1)], the State must provide that it will exclude from participation, as such an organization or entity, any organization or entity that--

(A) could be excluded under section 1128(b)(8) [42 USCS § 1320a-7(b)(8)] (relating to owners and managing employees who have been convicted of certain crimes or received other sanctions),

(B) has, directly or indirectly, a substantial contractual relationship (as defined by the Secretary) with an individual or entity that is described in section 1128(b)(8)(B) [42 USCS § 1320a-7(b)(8)(B)], or

(C) employs or contracts with any individual or entity that is excluded from participation under this title [42 USCS §§ 1396 et seq.] under section 1128 or 1128A [42 USCS § 1320a-7 or 1320a-7a] for the provision of health care, utilization review, medical social work, or administrative services or employs or contracts with any entity for the provision (directly or indirectly) through such an excluded individual or entity of such services.

(3) As used in this subsection, the term "exclude" includes the refusal to enter into or renew a participation agreement or the termination of such an agreement.

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