

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

United States Court of Appeals  
Fifth Circuit

**FILED**

September 14, 2016

Lyle W. Cayce  
Clerk

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No. 15-30987

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PLANNED PARENTHOOD OF GULF COAST, INCORPORATED; JANE  
DOE #1; JANE DOE #2; JANE DOE #3,

Plaintiffs - Appellees

v.

REBEKAH GEE, Secretary, Louisiana Department of Health and Hospitals,

Defendant - Appellant

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Appeal from the United States District Court  
for the Middle District of Louisiana

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Before WIENER, PRADO, and OWEN, Circuit Judges.

WIENER, Circuit Judge:

Medicaid's free-choice-of-provider provision, 42 U.S.C. § 1396a(a)(23), guarantees that Medicaid beneficiaries will be able to obtain medical care from the qualified and willing medical provider of their choice. In response to secretly recorded videos released by the Center for Medical Progress depicting conversations with Planned Parenthood employees elsewhere, Defendant-Appellant Louisiana Department of Health and Hospitals ("LDHH") terminated Plaintiff-Appellee Planned Parenthood Gulf Coast's ("PPGC") Louisiana Medicaid provider agreements. PPGC and the individual Plaintiffs-Appellees Jane Doe #1, Jane Doe #2, and Jane Doe #3 (the "Individual

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Plaintiffs”)—women who receive care at one of PPGC’s Louisiana facilities—(collectively “the Plaintiffs”) filed this suit against LDHH under 42 U.S.C. § 1983, alleging violations of 42 U.S.C. § 1396a(a)(23) and the First and Fourteenth Amendments of the U.S. Constitution. The Individual Plaintiffs are three women who are Medicaid beneficiaries and who receive medical care from one of PPGC’s Louisiana facilities. They seek to continue receiving care from PPGC’s facilities. They specifically contend that LDHH’s termination action will deprive them of access to the qualified and willing provider of their choice, PPGC, in violation of Medicaid’s free-choice-of-provider provision. The district court entered a preliminary injunction against LDHH’s termination of PPGC’s Medicaid provider agreements. LDHH appeals.

## I.

### FACTS

PPGC is a non-profit corporation domiciled in Texas and licensed to do business in Louisiana. It operates two clinics in Louisiana: the Baton Rouge Health Center and the New Orleans Health Center. Both centers participate in Louisiana’s Medicaid program. PPGC’s two clinics provide care to over 5200 Medicaid beneficiaries, which comprise more than half of the patients they serve in Louisiana. Those clinics offer physical exams, contraception and contraceptive counseling, screening for breast cancer, screening and treatment for cervical cancer, testing and treating specified sexually transmitted diseases, pregnancy testing and counseling, and other listed procedures, including colposcopy. Neither clinic performs abortions, nor have they ever participated in a fetal tissue donation program.

Doe #1 relies on PPGC’s health center in Baton Rouge for her annual examinations. According to Doe #1, PPGC also helped her obtain treatment for cancer in December 2013. Her cancer is now in remission, but it has rendered

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her unable to take birth control pills. She does not wish to have any more children and continues to rely on PPGC to advise her on future contraception options. Doe #1 wishes to continue receiving health care at PPGC because she does not know of any other providers that will take her insurance. She prefers to receive care at PPGC because she is comfortable with the staff, trusts the providers, and is easily able to make appointments.

Doe #2 is enrolled in Louisiana's Take Charge Plus program<sup>1</sup> and has received care at PPGC's health center in New Orleans since 2012. Until health issues left her unable to work full time, at which point she lost her private health insurance, Doe #2 had used a private obstetrician-gynecologist. That physician stopped treating Doe #2 once she lost her private insurance. Doe #2 now visits PPGC every year for her annual gynecological examination. She does not know where else she could obtain this care and prefers to continue receiving it from PPGC.

Doe #3 is a patient of PPGC's health center in Baton Rouge. There, she receives pap smears, testing for sexually transmitted diseases, and cancer screenings. Doe #3 prefers receiving care at PPGC and feels that it is easy for her to make appointments there. She states that it "is very difficult to find doctors in Baton Rouge who will accept Medicaid." She needed to visit another Baton Rouge clinic for a necessary gynecological procedure, but had to wait seven months to receive an appointment.

In July 2015, the Center for Medical Progress, an anti-abortion organization, released a series of undercover videos and allegations purportedly showing that Planned Parenthood and its affiliates were contracting to sell aborted human fetal tissue and body parts. At a later

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<sup>1</sup> The Take Charge Plus program provides family planning services to eligible women and men with incomes at or below 138 percent of the federal poverty level.

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hearing, the district court found that “none of the conduct in question [depicted in the videos] occurred at PPGC’s two Louisiana facilities.” Nevertheless, then-Louisiana Governor Bobby Jindal directed LDHH and the State Inspector General to investigate PPGC.

On July 15, 2015, then-secretary of LDHH, Kathy Kleibert, wrote to PPGC requesting responses to a range of questions about its activities. PPGC promptly responded on July 24, 2015, relevantly stating that (1) it “does not offer abortion services,” and (2) it does not sell or donate any unborn baby organs or body parts. PPGC acknowledged that Planned Parenthood Center for Choice, Inc. (“PPCFC”), a separate corporation,<sup>2</sup> provides abortions in Texas, but that PPCFC does not operate a fetal tissue donation program.

Secretary Kleibert wrote to PPGC on August 4, 2015, claiming that several of PPGC’s responses “directly contradict” the recently released videos. According to her, one video taken in Houston, Texas, depicted Melissa Farrell, Director of Research at PPGC, “discuss[ing] existing contracts for fetal tissue donation for the purpose of research.” Secretary Kleibert emphasized that LDHH “is extremely concerned that [PPGC or PPCFC], or both have not only participated in the sale or donation of fetal tissue, but also deliberately misinformed [LDHH] about this practice in its July 24 response letter.” In that same letter, Secretary Kleibert requested more information about the practices of PPGC and PPCFC.

PPGC responded on August 14, 2015, repeating that neither PPGC nor PPCFC sells or donates fetal tissue. PPGC explained that the secretly recorded conversation “does not discuss existing contracts for fetal tissue donation,” but

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<sup>2</sup> As PPGC’s letter indicates, PPCFC was operated as a division of PPGC until 2005, at which point it was separately incorporated in Texas. PPCFC also has a Certificate of Authority to Transact Business in Louisiana.

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rather, “concerns a list of tissue specimens a major Texas research institution had expressed interest in obtaining, in discussions about a possible future fetal tissue donation program.”

In the midst of these communications, LDHH notified PPGC on August 3, 2015, that it would terminate PPGC’s Medicaid provider agreements. Secretary Kleibert stated no basis for the termination. She noted only that the provider agreements are voluntary contracts subject to termination “by either party 30 days after receipt of written notice” under La. R.S. § 46:437.11. That same day, then-Governor Jindal published a press release: “Governor Jindal and DHH decided to give the required 30-day notice to terminate the Planned Parenthood Medicaid provider contract because Planned Parenthood does not represent the values of the State of Louisiana in regards to respecting human life.” Secretary Kleibert’s letter notified PPGC of its right to a hearing and stated that PPGC may request an administrative appeal within 30 days. At a subsequent hearing before the district court, LDHH’s counsel clarified that this termination action did *not* relate to PPGC’s ability to provide adequate care to its patients.<sup>3</sup>

On August 25, 2015, PPGC and the Individual Plaintiffs filed suit under 42 U.S.C. § 1983, contending that LDHH’s termination of PPGC’s Medicaid

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<sup>3</sup> The district court asked LDHH’s counsel several questions pertaining to this issue:

**THE COURT:** All right. So the reason [for LDHH’s termination action] is unrelated to the ability of these two facilities to provide adequate care to their patients; is that true?

**MR. RUSSO:** That I would agree with, yes, sir.

**THE COURT:** So Ms. Kliebert’s position is that these are terminated without a relationship of any kind to the adequacy of care; correct?

**MR. RUSSO:** Correct, at this time, your honor, exactly.

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provider agreements violated Medicaid's free-choice-of-provider requirement, 42 U.S.C. § 1396a(a)(23), and the U.S. Constitution. On that date, the Plaintiffs also moved for entry of a temporary restraining order and preliminary injunction.

LDHH voluntarily rescinded the August 4, 2015, "at will" termination letters on September 14, 2015. On that same day, LDHH advised the district court by letter that it believed that the Plaintiffs claims and pending motions were now moot. But the next day, September 15, 2015, LDHH notified PPGC that it was "terminating/revoking" PPGC's Medicaid provider agreements for "cause" under La. R.S. §§ 46:437.11(D)(2), 437.14 and Title 50 of the Louisiana Administrative Code. LDHH also informed PPGC that it may request an informal hearing or suspensive administrative appeal within 30 days. PPGC has not requested either a hearing or an appeal. LDHH has further notified PPGC that the effected terminations would be suspended during this 30-day period. LDHH advanced three grounds for termination.

First, LDHH identified PPGC's settlement of a qui tam False Claims Act ("FCA") claim in *Reynolds v. Planned Parenthood Gulf Coast, Inc.*,<sup>4</sup>—in which PPGC disclaimed all liability—and its failure to notify LDHH of that settlement and any corresponding violations. LDHH categorized these actions as "fraud." LDHH identified a second qui tam FCA claim against PPGC in *Carroll v. Planned Parenthood Gulf Coast*.<sup>5</sup> At the time of the proceedings before the district court in the instant case, the court in *Carroll* had denied PPGC's motion to dismiss. LDHH identified the *Carroll* suit as another example of PPGC's failure to comply with applicable laws and to notify LDHH

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<sup>4</sup> No. 9:09-cv-124-RC (E.D. Tex.).

<sup>5</sup> No. 4:12-cv-03505 (S.D. Tex.).

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of such violations. PPGC subsequently settled that suit, again disclaiming all liability.

Second, LDHH stated that PPGC's responses in its July and August letters contained misrepresentations. LDHH did not identify any particular misrepresentations either in its August 3 termination letter or before the district court. At most, LDHH urged that PPGC's responses differed from the content of the videos released by the Center for Medical Progress.

Finally, LDHH claimed that PPGC was subject to termination because it was being investigated by LDHH and the Louisiana Office of Inspector General.

On October 7, 2015, the Plaintiffs filed a motion to amend their complaint, seeking to continue asserting their claims under Medicaid's free-choice-of-provider provision and to add claims under the First and Fourteenth Amendments of the U.S. Constitution. Two days later, the Plaintiffs also renewed their request for a temporary restraining order and preliminary injunction.

LDHH moved to dismiss the Plaintiffs' amended complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). After a hearing on the parties' motions, the district court granted in part the Plaintiffs' motion for temporary restraining order and preliminary injunction and denied LDHH's motion to dismiss. The district court held a subsequent telephone conference with the parties, at which point both parties consented to converting the temporary restraining order to a preliminary injunction to allow for an immediate appeal. Both parties agreed that no evidentiary matters required further discovery.

The district court issued an amended ruling and order on October 29, 2015, granting the Plaintiffs' renewed motion for temporary restraining order

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and for preliminary injunction and denying LDHH's motion to dismiss. The district court therefore preliminarily enjoined LDHH from terminating PPGC's Medicaid provider agreements. In a lengthy and detailed opinion, the district court rejected LDHH's standing, ripeness, and abstention challenges to the Plaintiffs' claims. The court also found sufficient grounds to issue a preliminary injunction on the basis of the Individual Plaintiffs' claim under Medicaid's free-choice-of-provider provision. Specifically, the district court held that 42 U.S.C. § 1396a(a)(23) affords the Individual Plaintiffs a private right of action enforceable under 42 U.S.C. § 1983. The district court expressly declined to determine whether PPGC possesses such a right. The court then held that the Individual Plaintiffs' claims are substantially likely to succeed and that the remaining factors—irreparable injury to the plaintiffs, balancing of the injury to the plaintiffs versus the harm to the defendant, and the public interest—weigh in favor of issuing a preliminary injunction.

LDHH appealed. It contends that the district court erred in concluding that the Plaintiffs have standing and that their claims are ripe for review. It further asserts that the district court erred in entering a preliminary injunction.

## II.

### JUSTICIABILITY

Article III of the U.S. Constitution extends the federal judicial power to “Cases” and “Controversies.”<sup>6</sup> The justiciability requirements of standing and ripeness animate Article III's cases-and-controversies requirement in this appeal. LDHH contends that the Plaintiffs lack standing to bring their claims and that their claims are not ripe for review. Because the district court issued

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<sup>6</sup> U.S. CONST. art. III, § 2, cl. 1.



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the preliminary injunction as to the Individual Plaintiffs' claims alone, we confine our analysis to the justiciability of the Individual Plaintiffs' claims.<sup>7</sup>

### A. Standing

LDHH first contends that the Individual Plaintiffs lack standing to assert their claims. We review issues of standing de novo.<sup>8</sup> To establish standing, a plaintiff must prove that (1) she has sustained an "injury in fact" that is both (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical," (2) there is "a causal connection between the injury and the conduct complained of," and (3) a favorable decision is likely to redress the injury.<sup>9</sup> "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."<sup>10</sup>

LDHH asserts that the Individual Plaintiffs have failed to demonstrate an injury because PPGC's provider agreements have not yet been terminated and the Individual Plaintiffs have not been denied access to PPGC's services. LDHH further contends that any injury results not from its actions, but from PPGC's failure to avail itself of its administrative appeal rights.

The Individual Plaintiffs counter that they have standing because LDHH has acted to terminate PPGC's Medicaid provider agreements, which will (1) deny them access to the healthcare services they seek and (2) deny

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<sup>7</sup> Therefore, we decline to address LDHH's arguments related to the justiciability of PPGC's claims.

<sup>8</sup> *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 428 (5th Cir. 2011).

<sup>9</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks and citations omitted).

<sup>10</sup> *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (internal quotation marks omitted) (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147, 1150, n.5 (2013)).

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them a legal right: access to a qualified and willing provider of their choice under 42 U.S.C. § 1396a(a)(23). In other words, the Individual Plaintiffs will sustain an injury (denial of services from PPGC and a legal right to the qualified provider of their choice) caused by LDHH (LDHH's termination of PPGC's provider agreements) that will be redressed by a favorable decision (an injunction barring LDHH from terminating PPGC's provider agreements).

The heart of LDHH's challenge to the Individual Plaintiffs' standing is its insistence that, because PPGC's provider agreements have not yet been terminated, the Individual Plaintiffs have sustained no injury. This argument ignores the well-established principle that a threatened injury may be sufficient to establish standing.<sup>11</sup> As LDHH itself asserts, "[t]hreatened injury must be certainly impending to constitute injury in fact."<sup>12</sup> LDHH has notified PPGC that it has terminated PPGC's provider agreements, but has suspended those terminations pending PPGC's decision whether to pursue an administrative appeal. PPGC has stated that it will not avail itself of administrative appeal. In other words, LDHH has already acted to terminate PPGC's provider agreements; only the effect of that termination has yet to occur. And, importantly, the 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.<sup>13</sup> The Individual Plaintiffs

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<sup>11</sup> See *Comsat Corp. v. FCC*, 250 F.3d 931, 936 (5th Cir. 2001) ("A threatened injury satisfies the injury in fact requirement so long as that threat is real rather than speculative."); *Loa-Herrera v. Trominski*, 231 F.3d 984, 988 (5th Cir. 2000) ("Mere threatened injury is sufficient, and the threat in this case is real.").

<sup>12</sup> *Clapper*, 133 S. Ct. at 1147–48 (2013) (internal quotation marks omitted) (quoting *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990)).

<sup>13</sup> LDHH concedes separately that "exhaustion is often not a barrier to a claim based on 42 U.S.C. § 1983."

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need not wait to file suit until PPGC is forced to close its doors to them and other Medicaid beneficiaries.

LDHH also argues that the Individual Plaintiffs have not and will not sustain any legal injury—presumably even when the termination of PPGC’s provider agreements takes effect—because the Individual Plaintiffs have a right to choose only a “qualified” provider, and PPGC is not a qualified provider. This issue turns on the substantive issue before us. We decline to allow LDHH to bootstrap this issue into our standing inquiry. And, we note that a violation of a statutory right, even standing alone, is sufficient to satisfy the injury requirement: “Congress may create a statutory right of entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.”<sup>14</sup>

LDHH finally contends that even if an injury exists, it is not fairly traceable to LDHH. Instead, asserts LDHH, PPGC’s decision not to avail itself of an administrative appeal will alone be the cause of the Individual Plaintiffs’ injury. The Supreme Court has warned against “wrongly equat[ing] injury ‘fairly traceable’ to the defendant with injury as to which the defendant’s actions are the very last step in the chain of causation.”<sup>15</sup> Although injury resulting from “the *independent* action of some third party not before the court” will not suffice, “that does not exclude injury produced by determinative or coercive effect upon the action of someone else.”<sup>16</sup> LDHH essentially asks us to conduct a proximate cause analysis to determine the immediate cause of the Individual Plaintiffs’ injuries, but this is not what the Supreme Court

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<sup>14</sup> *Warth v. Seldin*, 422 U.S. 490, 514 (1975).

<sup>15</sup> *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997).

<sup>16</sup> *Id.* at 169 (internal citations omitted).

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requires.<sup>17</sup> We therefore affirm the district court's determination that the Individual Plaintiffs have standing to pursue their claims.

## **B. Ripeness**

LDHH next contends that the Plaintiffs' claims are not ripe. It asserts that the issues are not fit for review because no injury has occurred and the administrative process and the factual development that it entails are still pending. LDHH goes as far as to claim that, for an issue to be ripe for review, this court requires a full administrative record.

We review *de novo* the issue of ripeness.<sup>18</sup> In evaluating whether a case is ripe for adjudication, we balance “(1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration.”<sup>19</sup> “A case is generally ripe if any remaining questions are purely legal ones.”<sup>20</sup>

We conclude that the Individual Plaintiffs' claims are ripe for review because the issues before us present purely legal questions. LDHH has already terminated PPGC's provider agreements, and it has proffered three specific grounds for doing so. The operative question on appeal is whether, as a matter of law, any of those grounds permit LDHH to terminate PPGC's provider agreement without violating Medicaid's free-choice-of-provider requirement. Further, although PPGC had the option to engage in the administrative appeal process, it has elected not to do so. And, as noted by the district court, LDHH

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<sup>17</sup> See *City of Boerne*, 659 F.3d at 431 (“The causation element does not require a party to establish proximate causation, but only requires that the injury be ‘fairly traceable’ to the defendant.” (citing *Bennett*, 520 U.S. at 168–69)).

<sup>18</sup> *Venator Grp. Specialty, Inc. v. Matthew/Muniot Family, LLC*, 322 F.3d 835, 838 (5th Cir. 2003).

<sup>19</sup> *Texas v. United States*, 497 F.3d 491, 498 (5th Cir. 2007) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

<sup>20</sup> *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 833 F.2d 583, 587 (5th Cir. 1987).

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has already terminated PPGC's provider agreements with "its 'effect' alone delayed." LDHH's own briefing implies the same: "The initial decision maker, the State of Louisiana, through LDHH, has not taken final action on the issue of whether PPGC's provider contracts *were properly terminated*."<sup>21</sup>

The Individual Plaintiffs' injuries are "sufficiently likely to happen to justify judicial intervention."<sup>22</sup> The Individual Plaintiffs, as already discussed, are also likely to suffer hardship by being denied access to the provider of their choice under 42 U.S.C. § 1396a(a)(23) and to medical services at PPGC's facilities. The Individual Plaintiffs' claims are ripe.

### III.

#### PRELIMINARY INJUNCTION

Concluding that the Individual Plaintiffs have standing to bring their claims and that such claims are ripe for review, we turn to LDHH's challenge to the district court's entry of a preliminary injunction.

A plaintiff seeking a preliminary injunction must clearly show

(1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) granting the preliminary injunction will not disserve the public interest.<sup>23</sup>

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<sup>21</sup> (emphasis added).

<sup>22</sup> *Pearson v. Holder*, 624 F.3d 682, 684 (5th Cir. 2010) (quoting *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993)).

<sup>23</sup> *Google, Inc. v. Hood*, 822 F.3d 212, 220 (5th Cir. 2016) (quoting *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 195–96 (5th Cir. 2003)).

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We “review the district court’s determination on each of these elements for clear error, its conclusions of law de novo, and the ultimate decision whether to grant relief for abuse of discretion.”<sup>24</sup>

The district court entered a preliminary injunction on the basis of the Individual Plaintiffs’ claims that LDHH’s termination of PPGC’s Medicaid provider agreements violates their free-choice-of-provider rights under 42 U.S.C. § 1396a(a)(23). LDHH raises multiple challenges to the grant of the preliminary injunction. First, it insists that the district court erred in holding that the Individual Plaintiffs’ claims are substantially likely to succeed because (1) 42 U.S.C. § 1396a(a)(23) does not afford the Individual Plaintiffs a private right of action, and, in the alternative, (2) its termination action does not violate the Individual Plaintiffs’ free-choice-of-provider rights. Second, LDHH contends that the district court committed clear error in holding that the remaining factors—irreparable injury to the plaintiffs, balancing of the injury to the plaintiffs versus the harm to the defendant, and the public interest—weighed in favor of issuing the preliminary injunction.

### **A. Substantial Likelihood of Success**

We turn first to whether 42 U.S.C. § 1396a(a)(23) affords the Individual Plaintiffs a private right of action and, if so, whether the Individual Plaintiffs are substantially likely to succeed in their claim that LDHH’s termination of PPGC’s provider agreements runs afoul of that right.

#### **1. Private Right of Action**

We begin by joining every other circuit to have addressed this issue to conclude that § 1396a(a)(23) affords the Individual Plaintiffs a private right of action under § 1983. Medicaid is a cooperative program between the federal

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<sup>24</sup> *Id.* (citing *Bluefield Water Ass’n v. City of Starkville*, 577 F.3d 250, 253 (5th Cir. 2009)).

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government and the states in which the federal government gives financial assistance to states to provide medical services to Medicaid-eligible individuals. The federal government and participating states share the costs of Medicaid.<sup>25</sup> “In return, participating States are to comply with requirements imposed by the Act and by the Secretary of Health and Human Services.”<sup>26</sup> This means that states “must comply with federal criteria governing matters such as who receives care and what services are provided at what cost.”<sup>27</sup> Stated differently, “Medicaid offers the States a bargain: Congress provided federal funds in exchange for the States’ agreement to spend them in accordance with congressionally imposed conditions.”<sup>28</sup>

This appeal concerns the contours of the federal Medicaid statute’s free-choice-of-provider requirement, 42 U.S.C. § 1396a(a)(23). That provision mandates 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 . . . who undertakes to provide him such services.”<sup>29</sup> Discussing this provision in *O’Bannon v. Town Court Nursing Center*, the Supreme Court explained that it “gives recipients the right to choose among a range of *qualified* providers, without government interference.”<sup>30</sup> Most recently, the Ninth Circuit explained that “[t]he provision specifies that any individual Medicaid recipient is free to choose any provider so long as two criteria are met: (1) the provider is ‘qualified to perform the

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<sup>25</sup> *Atkins v. Rivera*, 477 U.S. 154, 156–57 (1986) (“The Federal Government shares the costs of Medicaid with States that elect to participate in the program.”).

<sup>26</sup> *Id.* at 157 (citing 42 U.S.C. § 1396a; *Schweiker v. Gray Panthers*, 453 U.S. 34, 36–37 (1981)).

<sup>27</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2581 (2012).

<sup>28</sup> *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1382 (2015) (Scalia, J.) (plurality opinion).

<sup>29</sup> 42 U.S.C. § 1396a(a)(23)(A).

<sup>30</sup> 447 U.S. 773, 785 (1980).

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service or services required,’ and (2) the provider ‘undertakes to provide [the recipient] such services.’”<sup>31</sup>

Because the Individual Plaintiffs assert their claim under 42 U.S.C. § 1983, we analyze whether § 1396a(a)(23) creates a right of action under that statute. Title 42 U.S.C. § 1983 “provides redress only for a plaintiff who asserts a ‘violation of a federal *right*, not merely a violation of federal *law*.””<sup>32</sup> To determine whether a federal statute provides a right of action enforceable under § 1983, we consider “(1) whether Congress intended for the provision to benefit the plaintiff; (2) whether the plaintiff can show that the right in question is not so ‘vague and amorphous’ that its enforcement would ‘strain judicial competence’; and (3) whether the statute unambiguously imposes a binding obligation on the states.”<sup>33</sup>

Every circuit court to have addressed this issue, as well as multiple district courts, has concluded that § 1396a(a)(23) creates a private right enforceable under § 1983.<sup>34</sup> The Ninth Circuit in *Planned Parenthood Arizona Inc. v. Betlach* addressed this question most recently. As to the first element, that court held that “[t]he statutory language unambiguously confers [an individual] right upon Medicaid-eligible patients, mandating that all state Medicaid plans provide that ‘*any individual* eligible for medical assistance . . .

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<sup>31</sup> *Planned Parenthood of Ariz. Inc. v. Betlach*, 727 F.3d 960, 967 (9th Cir. 2013) (second alteration in original) (quoting 42 U.S.C. § 1396a(a)(23)(A)).

<sup>32</sup> *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 602 (5th Cir. 2004) (quoting *Blessing v. Freestone*, 520 U.S. 329, 340 (1997)).

<sup>33</sup> *Id.*

<sup>34</sup> See *Planned Parenthood of Ariz.*, 727 F.3d 960; *Planned Parenthood of Ind., Inc. v. Comm’r of Ind. State Dep’t of Health*, 699 F.3d 962 (7th Cir. 2012); *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006); *Planned Parenthood of Kan. & Mid-Mo. v. Mosier*, No. 16-2284-JAR-GLR, 2016 WL 3597457 (D. Kan. July 5, 2016); *Planned Parenthood Se., Inc. v. Bentley*, 141 F. Supp. 3d 1207 (M.D. Ala. 2015); *Planned Parenthood Ark. & E. Okla. v. Selig*, No. 4:15-cv-566, slip op. (E.D. Ark. Oct. 2, 2015); *Women’s Hosp. Found. v. Townsend*, No. 07-711, 2008 WL 2743284 (M.D. La. July 10, 2008).



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may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required.”<sup>35</sup> As to the second element, it held that “[t]he free-choice-of-provider requirement does ‘supply concrete and objective standards for enforcement,’<sup>36</sup> which are ‘well within judicial competence to apply.’<sup>37</sup> Under the statute, Medicaid recipients have the right to choose any provider so long as ‘(1) the provider is ‘qualified to perform service or services required,’ and (2) the provider ‘undertakes to provide [the recipient] such services.’”<sup>38</sup> According to the Ninth Circuit, courts addressing this provision confront “a simple factual question no different from those courts decide every day,” and free from “any balancing of competing concerns or subjective policy judgments.”<sup>39</sup>

In so holding, the Ninth Circuit rejected Arizona’s contention that “qualified,” as used in 42 U.S.C. § 1396a(a)(23)(A), is too vague to enforce. Because the term “is tethered to an objective benchmark”—“qualified *to perform the service or services required*”—“[a] court can readily determine whether a particular health care provider is qualified to perform a particular medical service, drawing on evidence such as descriptions of the service required; state licensing requirements; the provider’s credentials licenses, and experience; and the expert testimony regarding the appropriate credentials for providing the service.”<sup>40</sup>

The Seventh Circuit reached the same conclusion in *Planned Parenthood of Indiana, Inc. v. Commissioner of the Indiana State Department of Health*.<sup>41</sup>

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<sup>35</sup> 727 F.3d at 966 (quoting 42 U.S.C. § 1396a(a)(23)(A)).

<sup>36</sup> *Id.* at 967 (quoting *Watson v. Weeks*, 436 F.3d 1152, 1161 (9th Cir. 2006)).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (alteration in original) (quoting 42 U.S.C. § 1396a(a)(23)(A)).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 967–68.

<sup>41</sup> 699 F.3d 962 (2012).

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As to the third element—which the Ninth Circuit did not discuss at length because Arizona had not challenged that point—the Seventh Circuit held that the free-choice-of-provider requirement is couched in mandatory terms: “[T]he free-choice-of-provider statute explicitly refers to a specific class of people—Medicaid-eligible patients—and confers to them an individual entitlement—the right to receive reimbursable medical services from any qualified provider.”<sup>42</sup> Likewise, the Sixth Circuit in *Harris v. Olszewski*,<sup>43</sup> held that the free-choice-of-provider requirement provides a private right of action enforceable under § 1983.

We agree with the Sixth, Seventh, and Ninth Circuits and hold that 42 U.S.C. § 1396a(a)(23) creates a private right of action that the Individual Plaintiffs may enforce through 42 U.S.C. § 1983. LDHH’s remaining arguments fail to convince us otherwise.

LDHH cites the Supreme Court’s decision in *O’Bannon v. Town Court Nursing Center*<sup>44</sup> for the proposition that the Individual Plaintiffs have no right to challenge LDHH’s provider-qualifications determination. That case is inapposite because, there, the patient-plaintiffs’ injuries stemmed from an alleged deprivation of due process rights: specifically, the right to a hearing to contest the state’s disqualification of a health care provider. Accordingly, the Supreme Court’s holding that “while 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,”<sup>45</sup> is not probative. The limit of the Court’s holding in *O’Bannon* is that § 1396a(a)(23) does not afford a *procedural right*

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<sup>42</sup> *Id.* at 974.

<sup>43</sup> 442 F.3d 456 (2006).

<sup>44</sup> 447 U.S. 773 (1980).

<sup>45</sup> *Id.* at 786.

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to a hearing. In contrast, here, the Individual Plaintiffs assert a violation of a substantive right.<sup>46</sup>

LDHH's reliance on the recent Supreme Court opinion, *Armstrong v. Exceptional Child Center, Inc.*,<sup>47</sup> is equally unavailing. There, the relevant issue was whether 42 U.S.C. § 1396a(a)(30)(A) creates a private right of action.<sup>48</sup> Writing for a plurality, Justice Scalia noted that this provision "lacks the sort of rights-creating language needed to imply a private right of action," because it "is phrased as a directive to the federal agency . . . , not as a conferral of the right to sue upon the beneficiaries of the State's decision to participate in Medicaid."<sup>49</sup> Justice Scalia also observed that § 1396a(a)(30)(A) was "judicially unadministrable": "It is difficult to imagine a requirement broader and less specific than § 30(A)'s mandate that state plans 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.'"<sup>50</sup> In contrast, the provision at issue here is phrased in individual terms and in specific, judicially administrable terms, as recognized by the Sixth, Seventh, and Ninth Circuits.

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<sup>46</sup> See *Planned Parenthood of Ind.*, 699 F.3d at 977 (distinguishing *O'Bannon* on the same basis). LDHH also relies on *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170 (2d Cir. 1991), but that case is distinguishable for the same reason as *O'Bannon*. See *Planned Parenthood of Ind.*, 699 F.3d at 977 (distinguishing *Kelly Kare* on the same basis).

<sup>47</sup> 135 S. Ct. 1378 (2015).

<sup>48</sup> That provision of the Medicaid statute 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[.]

42 U.S.C. § 1396a(a)(30)(A).

<sup>49</sup> *Armstrong*, 135 S. Ct. at 1387.

<sup>50</sup> *Id.* at 1385 (alteration and omission in original).

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LDHH finally argues that § 1396a(a)(23) provides Medicaid recipients with only the right to choose a qualified provider, not to choose a provider that it has deemed unqualified. Understandably, LDHH does not make the next inferential step, but it would follow that the free-choice-of-provider requirement 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 the Individual Plaintiffs possess under § 1396a(a)(23) would be hollow.<sup>51</sup> Importantly, the Individual Plaintiffs contend that LDHH has deprived them of their choice to receive care from PPGC—a provider LDHH has conceded is competent to render the relevant medical services—for reasons *unrelated to its qualifications*. The operative issue, therefore, is resolved by determining whether LDHH terminated PPGC's provider agreements based on its qualifications or based on some unrelated reason.

## **2. Likelihood of Success**

Concluding that § 1396a(a)(23) affords the Individual Plaintiffs a right of action, we turn to whether their claim that LDHH's termination of PPGC's provider agreements violates their rights under § 1396a(a)(23) is substantially likely to succeed.

### *i. Statutory Background*

The free-choice-of-provider requirement mandates that a state's Medicaid plan must allow beneficiaries to obtain medical care from *any* entity or person who is “qualified to perform the service or services required” and

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<sup>51</sup> See *Planned Parenthood Se.*, 141 F. Supp. 3d at 1218 (“If [it] 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 entitlement,’ the ‘personal right’ it gives recipients, would be an empty one.” (quoting *Planned Parenthood of Ind.*, 699 F.3d at 974)).

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“who undertakes to provide him such services.”<sup>52</sup> Medicaid regulations allow states to set “reasonable standards relating to the qualifications of providers.”<sup>53</sup> The Medicaid statute does not define the term “qualified.” But LDHH concedes, as held by 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.”<sup>54</sup> Separately, Medicaid’s exclusion provision, 42 U.S.C. § 1396a(p)(1), provides, “[i]n addition to any other authority,” mandatory and permissive grounds—including fraud, drug crimes, and failure to disclose necessary information to regulators—under which a state may terminate a provider’s Medicaid agreements. That provision’s implementing regulation states that “[n]othing contained in this part should be construed to limit a State’s own authority to exclude an individual or entity from Medicaid for any reason or period authorized by State law.”<sup>55</sup>

Against this backdrop, the Seventh Circuit, in *Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana State Department of Health*, upheld a district court’s entry of a preliminary injunction to prevent Indiana from enforcing a law that “excludes a class of providers from Medicaid for reasons unrelated to provider qualifications” because Planned Parenthood was likely to succeed on its claim that the law violated 42 U.S.C. § 1396a(a)(23).<sup>56</sup> The

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<sup>52</sup> 42 U.S.C. § 1396a(a)(23)(A).

<sup>53</sup> 42 C.F.R. § 431.51(c)(2).

<sup>54</sup> *Planned Parenthood of Ind.*, 699 F.3d at 978; see also *Planned Parenthood of Ariz.*, 727 F.3d at 969 (“We agree with the Seventh Circuit that ‘[r]ead in context, the term ‘qualified’ as used in § 1396a(a)(23) unambiguously relates to a provider’s . . . capab[ility] of performing the needed medical services in a professionally competent, safe, legal, and ethical manner.’” (alterations and omissions in original) (quoting *Planned Parenthood of Ind.*, 699 F.3d at 978)).

<sup>55</sup> 42 C.F.R. § 1002.2.

<sup>56</sup> *Planned Parenthood of Ind.*, 699 F.3d at 980.

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law at issue prohibited state agencies from providing state or federal funds to “any entity that performs abortions or maintains or operates a facility where abortions are performed.”<sup>57</sup> The Seventh Circuit recognized that “[a]lthough Indiana has broad authority to exclude unqualified providers from its Medicaid program, the State does not have plenary authority to exclude a class of providers for *any* reason—more importantly, for a reason unrelated to provider qualifications.”<sup>58</sup> Because the law “exclude[d] Planned Parenthood from Medicaid for a reason unrelated to its fitness to provide medical services, [it] violat[ed] its patients’ statutory right to obtain medical care from the qualified provider of their choice.”<sup>59</sup>

The Ninth Circuit addressed a similar law in *Planned Parenthood Arizona Inc. v. Betlach*.<sup>60</sup> That court held that the “law violates [the free-choice-of-provider] requirement by precluding Medicaid patients from using medical providers concededly qualified to perform family planning services to patients in Arizona generally, solely on the basis that those providers separately perform privately funded, legal abortions.”<sup>61</sup> In doing so, the Ninth Circuit rejected Arizona’s contention that it “can determine for any reason that a provider is not qualified for Medicaid purposes, even if the provider *is* otherwise legally qualified, through training and licensure, to provide the requisite medical services within the state.”<sup>62</sup> That court gave four reasons.

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<sup>57</sup> *Id.* at 967 (quoting Ind. Code § 5-22-17-5.5(b)).

<sup>58</sup> *Id.* at 968.

<sup>59</sup> *Id.*

<sup>60</sup> 727 F.3d 960 (9th Cir. 2013). The law at issue provided: “[Arizona] or any political subdivision of [Arizona] may not enter into a contract with or make a grant to any person that performs nonfederally qualified abortions or maintains or operates a facility where nonfederally qualified abortions are performed for the provision of family planning services.” 2012 Ariz. Leg. Serv. Ch. 288 (H.B. 2800) (West) (codified at Ariz. Rev. Stat. § 35-196.05(B)).

<sup>61</sup> *Planned Parenthood Ariz.*, 727 F.3d at 963.

<sup>62</sup> *Id.* at 970 (emphasis in original).

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First, “[n]owhere in the Medicaid Act has Congress given a special definition to ‘qualified,’ much less indicated that each state is free to define this term for purposes of its own Medicaid program however it sees fit.”<sup>63</sup> Second, that reading would “detach[] the word ‘qualified’ from the phrase in which it is embedded; ‘qualified to perform the service or services rendered’ (and from the overall context of the Medicaid statute, which governs *medical* services).”<sup>64</sup> Third, that reading would render the free-choice-of-provider requirement “self-eviscerating” because “[i]f states are free to set any qualifications they want—no matter how unrelated to the provider’s fitness to treat Medicaid patients—then the free-choice-of-provider requirement could be easily undermined by simply labeling any exclusionary rule as a ‘qualification.’”<sup>65</sup> “Giving the word ‘qualified’ such an expansive meaning would deprive the provision within which it appears of any legal force,” and “would permit states freely to erect barriers to Medicaid patients’ access to family planning medical providers others in the state are free to use.”<sup>66</sup> This “would eliminate ‘the broad access to medical care that § 1396a(a)(23) is meant to preserve.’”<sup>67</sup> Finally, “permit[ting] states self-referentially to impose for Medicaid purposes whatever standards for provider participation it wishes” would contravene the “*mandatory* requirements [in the free-choice-of-provider provision] that apply to all state Medicaid plans.”<sup>68</sup>

The Seventh and Ninth Circuits have also addressed the impact of Medicaid’s exclusion provision, 42 U.S.C. § 1396a(p). LDHH seems to rely on 42 U.S.C. § 1396a(p)(1) for only its opening phrase: “In addition to any other

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (quoting *Planned Parenthood of Ind.*, 699 F.3d at 978).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* (quoting *Planned Parenthood of Ind.*, 699 F.3d at 978).

<sup>68</sup> *Id.* at 971 (emphasis in original).

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authority.” Like Arizona and Indiana, LDHH contends that this phrase allows a state to exclude a provider for “any” reason supplied by state law. The Seventh and Ninth Circuits rejected that same contention.<sup>69</sup>

The Seventh Circuit rejected this reasoning, explaining that this argument “reads the phrase for more than it’s worth.”<sup>70</sup> The phrase—“[i]n addition to any other authority”—“signals only that what follows is a non-exclusive list of specific grounds upon which states may bar providers from participating in Medicaid.”<sup>71</sup> “It does not imply that the states have an unlimited authority to exclude providers for any reason whatsoever.”<sup>72</sup>

The Ninth Circuit adopted the Seventh Circuit’s reasoning and further explained why this assertion “undermines, rather than aids, [the state’s] argument”:

The language refers to “any *other* authority” . . . , followed by a provision providing states with authority to exclude providers on specified grounds. This sequence indicates that the Medicaid Act itself must provide that “other” authority, just as it supplies the “authority” covered by the rest of the subsection. Were it otherwise—were states free to exclude providers as they see fit—then the bulk of § 1396a(p)(1) itself would be unnecessary, as the “authority” it supplies would be superfluous.<sup>73</sup>

According to the Ninth Circuit, this “clause empowers states to exclude individual providers on such grounds directly, without waiting for the

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<sup>69</sup> The First Circuit in *First Med. Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46 (1st Cir. 2007), however, read 42 U.S.C. § 1396a(p)(1)’s “[i]n addition to any other authority” language much more broadly. That court held that the “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.” *Id.* at 53. That case is distinguishable because it did not involve § 1396a(a)(23)’s free-choice-of-provider requirement, most notably because § 1396a(a)(23) does not apply in Puerto Rico, the forum from which the dispute arose in *Vega-Ramos*.

<sup>70</sup> *Planned Parenthood of Ind.*, 699 F.3d at 979.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Planned Parenthood of Ariz.*, 699 F.3d at 972.



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Secretary to act, while also reaffirming state authority to exclude individual providers pursuant to analogous state law provisions relating to fraud or misconduct.”<sup>74</sup> As to § 1396a(p)’s implementing regulation, 42 C.F.R. § 1002.2, which provides that “[n]othing contained in this part should be construed to limit a State’s own authority to exclude an individual or entity from Medicaid for any reason or period authorized by State law,” the Ninth Circuit noted that “[t]hat provision is only a limitation on interpretation of the referenced ‘part’ of the regulations . . . which does not encompass the free-choice-of-provider requirement.”<sup>75</sup>

These cases stand for the general rule that a state may terminate a provider’s Medicaid agreements for reasons bearing on that provider’s qualification. And “qualified” means “to be capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner.”<sup>76</sup> States may also exclude providers on the grounds provided by 42 U.S.C. § 1396a(p)(1) and on analogous state law grounds relating to provider qualification. To be sure, states retain broad authority to define provider qualifications and to exclude providers on that basis. That authority, however, is limited by the meaning of “qualified.”

*ii. Analysis*

LDHH asserts that its terminations do not violate the Individual Plaintiffs’ free-choice-of-provider rights because LDHH has determined that PPGC is not “qualified” to render medical services. In support, LDHH offers three grounds for its terminations: (1) two qui tam FCA claims, one that PPGC settled, disclaiming all liability, and another that was pending at the time of

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 972 n.8; accord *Planned Parenthood of Se.*, 141 F. Supp. 3d at 1221.

<sup>76</sup> *Planned Parenthood of Ind.*, 699 F.3d at 978.

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LDHH's termination action, but that has recently settled with PPGC disclaiming all liability; (2) unspecified misrepresentations in PPGC's letters responding to LDHH's inquiry into whether PPGC or PPCFC operate a fetal tissue donation program; and (3) LDHH's and the Louisiana Office of Inspector General's pending investigations into PPGC.

We conclude that the Individual Plaintiffs are substantially likely to succeed in showing that LDHH's termination of PPGC's provider agreements violates their free-choice-of-provider rights. This is because LDHH's grounds for termination (1) do not relate to PPGC's "qualifications," (2) are not authorized by § 1396a(p), and (3), with one exception, are not even authorized by state law.

We recognize initially that LDHH does not even attempt to articulate how its grounds for termination relate to PPGC's qualifications. That failure is exacerbated by the fact that LDHH has separately conceded that PPGC is competent to provide the relevant medical services. LDHH adopts the Seventh and Ninth Circuits definition of "qualified" and contends that its grounds for termination fall within the statute's broad meaning of "qualified." But LDHH makes no attempt to reconcile its grounds for termination with its borrowed definition of "qualified." Its briefing is devoid of argument on this point. And LDHH's grounds for termination do not speak for themselves. LDHH cannot show that PPGC's settlement of qui tam FCA claims, in which it *disclaimed all liability*, constitutes actual fraud or renders PPGC unqualified in some other way. Neither does LDHH explain how unspecified misrepresentations related to a program, the existence of which PPGC unequivocally denies, render PPGC unqualified. Likewise, that PPGC is the subject of an investigation alone does not render PPGC unqualified. Importantly, LDHH raises no separate concerns regarding PPGC's provision of medical services in Louisiana. Indeed, it bears

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repeating that LDHH has conceded that PPGC is competent to provide the relevant medical services.

Instead of attempting to show that PPGC is not “qualified” under § 1396a(a)(23), LDHH seems to rely on its bare assertion that it may terminate a provider for *any reason* supplied by state law. In other words, LDHH argues that PPGC is unqualified simply because state law says so. The fallacy of this tactic is underscored by LDHH’s failure to articulate or apply any limiting principle to its authority to exclude a Medicaid provider. We reject that argument because, as explained by the Ninth Circuit, states cannot “determine for any reason that a provider is not qualified for Medicaid purposes, even if the provider *is* otherwise legally qualified, through training and licensure, to provide the requisite medical services within the state.”<sup>77</sup>

Next, LDHH 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. LDHH might have attempted to make some argument as to this point, but it has not invoked any of the grounds for termination provided by § 1396a(p)(1). This is likely because, as the United States’s amicus curiae brief explains, LDHH’s grounds for termination are not authorized by any of the grounds enumerated in § 1396a(p)(1). And, to the extent LDHH relies on that provision’s “[i]n addition to any other authority” language, we join the Seventh and Ninth Circuits in rejecting such a broad interpretation.

Finally, two of LDHH’s grounds for termination—fraud and misrepresentations by PPGC—are not even supported by the state laws it invokes. LDHH labels its first ground for termination as “fraud,” citing two FCA suits filed against PPGC by qui tam plaintiffs. As to the first suit, LDHH

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<sup>77</sup> *Planned Parenthood of Ariz.*, 727 F.3d at 970 (emphasis in original).

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asserts that it may exclude PPGC for (1) settling a qui tam FCA suit, and (2) failing to notify LDHH of the settlement. We have noted that, in *Reynolds v. Planned Parenthood of Gulf Coast, Inc.*, PPGC settled a qui tam FCA suit *without admitting liability*. Louisiana Administrative Code § 50.4147(A)(12) states that a Medicaid provider may be terminated for “entering into a settlement agreement under . . . the Federal False Claims Act,” and further places an “affirmative duty” on a provider to inform LDHH in writing of any violations. But, that same statute states that “[i]f a False Claims Act action or other similar civil action is brought by a Qui-Tam plaintiff, no violation of this provision has occurred until the defendant has been found liable in the action.”<sup>78</sup> Because PPGC settled the *Reynolds* qui tam FCA claim without admitting liability, that settlement cannot provide the basis for applying the subject statute.

LDHH next cites another qui tam FCA case against PPGC, *Carroll v. Planned Parenthood Gulf Coast*. At the time of the district court’s opinion and the parties’ briefing, that case was still pending and the district court had denied PPGC’s motion to dismiss. LDHH argued that this lawsuit creates a violation of Title 50 of the Louisiana Administrative Code because providers “are required to ensure that all their agents and affiliates are in compliance with all federal and state laws as well as rules, policies and procedures of the Medicaid program. PPGC and its parent organization PPFA has failed to do so and has failed to notify DHH of violations and misconduct by affiliates and providers-in-fact.” In so arguing, LDHH failed to demonstrate how the district court’s denial of a motion to dismiss in a pending lawsuit indicates that PPGC had violated any laws or Medicaid program requirements. More significantly,

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<sup>78</sup> La. Admin Code § 4147(A)(12)(c).

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on May 25, 2016, PPGC filed a Rule 28(j) letter with this court, informing us that PPGC has settled this matter (as of February 29, 2016) *without admitting liability*. Accordingly, the *Carroll* case provides no basis for termination.

LDHH's asserted termination on the basis of "misrepresentations" suffers from similar flaws. Louisiana Revised Statute § 46:437.14(A)(1) states that a provider's enrollment may be revoked for a "[m]isrepresentation."<sup>79</sup> That statute separately defines "misrepresentation" to mean "the knowing failure to truthfully or fully disclose any and all information required, or the concealment of any and all information required on a claim or a provider agreement or the making of a false or misleading statement to the department *relative to the medical assistance programs*."<sup>80</sup>

LDHH contends that PPGC made misrepresentations in responding to questions about whether it operates a fetal tissue donation program, as evidenced by one of the discussed videos, which serves as the basis for application of La. R.S. § 46:437.14(A)(1) and PPGC's termination. Neither in the letters nor at any time during this litigation has LDHH identified a single misrepresentation. Moreover, the undisputed evidence establishes that PPGC does not perform any abortions or operate any fetal tissue donation

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<sup>79</sup> This provision is part of Louisiana's Medical Assistance Programs Integrity Law, La. R.S. § 437.1 *et seq.*, which was "enacted to combat and prevent fraud and abuse committed by some health care providers participating in the medical assistance programs and by other persons and to negate the adverse effects such activities have on fiscal and programmatic integrity." La. R.S. § 437.2(A). More specifically, the Louisiana legislature sought to provide a remedy against "health care providers and other persons who engage in fraud, misrepresentation, abuse, or other ill practices . . . *to obtain payments* to which these health care providers or persons are not entitled." La. R.S. § 437.2(B) (emphasis added).

<sup>80</sup> La. R.S. § 46:437.3(15) (emphasis added); *see also Caldwell v. Janssen Pharm., Inc.*, 144 So. 3d 898, 911 (La. 2014) ("[W]e determine that a 'misrepresentation' under La. Rev. Stat. 46:437.3(15) is (1) the knowing failure to truthfully or full disclose any information required on a claim or provider agreement; (2) the concealment of any and all information required on a claim or provider agreement; or (3) the making of a false or misleading statement to the department relative to the medical assistance programs.").

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programs.<sup>81</sup> The district court found that the undisputed evidence revealed no indication that PPGC had made any misrepresentations, and LDHH does not even challenge that factual finding on appeal. LDHH's only response is that its lack of specificity regarding the misrepresentations "should be addressed at an administrative hearing." LDHH's strategy to terminate PPGC's provider agreements for misrepresentations *before* it can even identify a single misrepresentation does not pass muster.

Additionally, the statute cited by LDHH requires the misrepresentation to be made "relative to the medical assistance programs."<sup>82</sup> Because the undisputed evidence establishes that PPGC does not provide abortions or operate a fetal tissue donation program in Louisiana (or elsewhere), any statements contained in PPGC's letter are likely not "relative to" Louisiana's Medicaid program. This conclusion is bolstered by LDHH's August 4, 2015, letter that cites two statements made in relation to PPCFC, a separate Texas corporation, as contradicting statements made in one of the videos.<sup>83</sup> LDHH provides no explanation of how the unspecified misrepresentations are "relative to" Louisiana's Medicaid program. For this reason alone, the statute is inapplicable.

As to LDHH's final ground for termination—pending investigations—Louisiana Revised Statute § 46:437.11(D)(2) states that the "secretary may terminate a provider agreement immediately and without written notice if a health care provider is the subject of a sanction or of a criminal, civil, or

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<sup>81</sup> PPGC's August 14, 2015, letter states: "To be very clear, there is no contradiction here. As already stated, neither PPCFC nor PPGC currently has a fetal tissue donation program in Texas, and neither sells nor donates any fetal tissue."

<sup>82</sup> La. R.S. § 46:437.3(15)

<sup>83</sup> In the August 4, 2015, letter, LDHH recites two responses PPGC made in relation to *only* PPCFC's operations. It then states that those responses were contradicted by one of the Center for Medical Progress's videos made on April 9, 2015.

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departmental proceeding.” That provision is facially applicable to PPGC as it is the subject of ongoing investigations. Regardless, we cannot reconcile the free-choice-of-provider requirement’s mandate with a state law that would enable LDHH to terminate a provider agreement by simply instigating an investigation, much less on the basis of just *any* investigation. If states were able to exclude Medicaid providers on the basis of *any* investigation, § 1396a(a)(23)’s guarantee would be meaningless. And here, the investigations pertain to conduct that, as described, does not independently provide grounds for termination.

*iii. Limits of Our Opinion*

In concluding that the Individual Plaintiffs are likely to succeed in proving that LDHH’s termination of PPGC’s provider agreements violates their § 1396a(a)(23) rights, we emphasize the unique circumstances of the instant case. LDHH initially terminated PPGC’s agreements “at will,” *i.e.*, for no reason at all. That termination would plainly run afoul of § 1396a(a)(23)’s guarantee. Despite LDHH’s categorization of its termination as “at will,” then-Governor Jindal released a contemporaneous statement indicating that the state was terminating PPGC’s agreements “because Planned Parenthood does not represent the values of the State of Louisiana in regards to respecting human life.” Again, that termination would violate the Individual Plaintiffs’ § 1396a(a)(23) rights because, as the Seventh and Ninth Circuits have held, a state may not exclude a provider simply based on the scope of services it provides. Only after the Plaintiffs filed suit to challenge the terminations did LDHH rescind its “at will” terminations. It then represented to the district court that it believed the Plaintiffs’ claims were moot. But, LDHH was not finished: The very next day, it issued new termination letters to PPGC, which provided new grounds for termination. LDHH has effectively run circles

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around PPGC and the district court. This course of conduct further convinces us that LDHH's termination of PPGC's provider agreements has nothing to do with PPGC's qualifications.

To be sure, the general grounds for termination invoked by LDHH—fraud, misrepresentations, and investigations—will often relate to a provider's qualifications. States undoubtedly must be able to terminate provider agreements in cases of criminal activity, fraud and abuse, and other instances of malfeasance. Medicaid's 42 U.S.C. § 1396a(p)(1)'s exclusionary provision makes that clear. And, there is no dispute that Louisiana retains authority to establish licensing standards and other qualifications for providers.<sup>84</sup> Title 42 U.S.C. § 1320a-7(b)(4) expressly contemplates that a state licensing authority may revoke a provider's license “for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity,” and that the Secretary may exclude such a provider from any federal health care program under that provision. Hence 42 U.S.C. § 1396a(p)(1), which cross references § 1320a-7(b)(4), necessarily authorizes states to terminate a Medicaid provider's agreements when that same state revokes that provider's license “for reasons bearing on the [provider's] professional competence, professional performance, or financial integrity.” Here, however, it bears repeating that LDHH has taken no action to revoke PPGC's or its healthcare providers' licenses or any other qualification that it and they might have that enables them to offer medical care generally.

At the most, LDHH has simply pasted the labels of “fraud” and “misrepresentations” on PPGC's conduct, and then insisted that these labels

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<sup>84</sup> See *Planned Parenthood of Ind.*, 699 F.3d at 980 (“No one disputes that the states retain considerable authority to establish licensing standards and other related practice qualifications for providers—this residual power is inherent in the cooperative-federalism model of the Medicaid program and expressly recognized in the Medicaid regulations.”).



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should insulate its termination actions from any § 1396a(a)(23) challenges. LDHH seeks to do exactly what the Seventh and Ninth Circuits have already warned against: “simply labeling any exclusionary rule as a ‘qualification’” to evade the mandate of the free-choice-of-provider requirement.<sup>85</sup> PPGC’s settlement of qui tam FCA claims *without admitting liability* does not constitute fraud under any relevant definition of that term. And LDHH’s accusation that PPGC made misrepresentations related to inquiries into whether it operates a fetal tissue donation program is devoid of any factual support or linkage. LDHH’s labeling of its grounds for termination as fraud and misrepresentations cannot insulate its actions from a § 1396a(a)(23) challenge. If it were otherwise, states could terminate Medicaid providers with impunity and avoid § 1396a(a)(23)’s mandate altogether.

We further emphasize that LDHH has never complained that PPGC is not competent to render the relevant medical services, and it has taken no independent action to limit PPGC’s entitlement to render medical services to the general population, for example, by revoking its license. As a result, LDHH’s termination of PPGC’s provider agreements appears to produce precisely the result that the free-choice-of-provider provision is meant to avoid: LDHH will deny PPGC’s services only to Medicaid recipients, but all other individuals will be free to seek care from PPGC. But, “the 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.”<sup>86</sup>

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<sup>85</sup> *Planned Parenthood of Ind.*, 699 F.3d at 978; *Planned Parenthood of Ariz.*, 727 F.3d at 970.

<sup>86</sup> *Planned Parenthood of Ariz.*, 727 F.3d at 971.

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In sum, we conclude that the Individual Plaintiffs are substantially likely to succeed in showing that LDHH's termination of PPGC's provider agreements violates their rights under § 1396a(a)(23). This is because LDHH seeks to terminate PPGC's provider agreements for reasons unrelated to its qualifications.

### **B. Remaining Factors**

Finally, we turn to the other issues weighed by the district court: irreparable injury, harm to the enjoined party, and public interest.

As to whether the Individual Plaintiffs will suffer irreparable injury in the absence of a preliminary injunction, LDHH first argues that because § 1396a(a)(23) guarantees the Individual Plaintiffs the right to choose only a *qualified* provider, they will suffer no harm because PPGC is not qualified. We have already rejected that obviously flawed argument.

LDHH next argues that irreparable injury may not be presumed from a statutory violation, and the Individual Plaintiffs' legal injury is not sufficiently concrete, great, and imminent to constitute irreparable harm. LDHH further contends that any inconvenience the Individual Plaintiffs sustain by being forced to seek medical care elsewhere is not significant enough to support a finding of irreparable harm.

The district court found that the Individual Plaintiffs would suffer irreparable injury because they will be unable to receive medical care from the Medicaid provider of their choice. It relied on "uncontroverted" declarations, in which the Individual Plaintiffs state that they wish to continue receiving care at PPGC and that they do not know where else they could get the same kind and quality of care. The court further emphasized that even if the Individual Plaintiffs could find medical care elsewhere, this is beside the point: The

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Individual Plaintiffs would be denied the provider of their choice guaranteed under 42 U.S.C § 1396a(a)(23).

The Seventh Circuit squarely addressed this issue, rejecting an identical argument from the state:

Indiana maintains that any harm to [the] patients is superficial because they have many other qualified Medicaid providers to choose from in every part of the state. This argument misses the mark. That a range of qualified providers remains available is beside the point. Section 1396a(a)(23) gives Medicaid patients the right to receive medical assistance from the provider of their choice without state interference, save on matters of qualifications.<sup>87</sup>

The Ninth Circuit has also stated that “[t]here is no exception to the free-choice-of-provider requirement for ‘incidental’ burdens on patient choice.”<sup>88</sup> Separately, that circuit has “several times held that beneficiaries of public assistance may demonstrate a risk of irreparable injury by showing that enforcement of a proposed rule may deny them needed medical care.”<sup>89</sup>

We conclude that the district court did not clearly err in holding that the Individual Plaintiffs will suffer irreparable harm, absent entry of a preliminary injunction. Because the Individual Plaintiffs would otherwise be denied both access to a much needed medical provider and the legal right to the qualified provider of their choice, we agree that they will almost certainly suffer irreparable harm in the absence of a preliminary injunction.

LDHH next contends that its substantial interest in administering its Medicaid program, overseeing the expenditures of the state’s Medicaid funds, and ensuring that Medicaid providers are complying with applicable laws and

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<sup>87</sup> *Planned Parenthood of Ind.*, 699 F.3d at 981.

<sup>88</sup> *Planned Parenthood of Ariz.*, 727 F.3d at 975.

<sup>89</sup> *M.R. v. Dreyfus*, 697 F.3d 706, 732 (9th Cir. 2011) (internal quotation marks omitted).

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regulations, outweighs any injury to the Individual Plaintiffs, which it construes as “the mere inconvenience . . . of having longer wait times or longer lead times for appointments for family planning services.” The district court rejected this rationale, holding that LDHH will not be deprived of its ability to administer Louisiana’s Medicaid program. Rather, the injunction relates only to LDHH’s termination of a single provider. The district court also held that any interest is outweighed by the harm the Individual Plaintiffs will suffer.

The district court did not commit clear error in concluding that the harm to the Individual Plaintiffs will outweigh any harm inflicted on LDHH. As to LDHH’s interest in administering the state’s Medicaid program, LDHH simply does not have a legitimate interest in administering the state’s Medicaid program in a manner that violates federal law.

As to LDHH’s fiscal interests, the Ninth Circuit addressed a balancing of similar interests in *Independent Living Center of Southern California, Inc. v. Maxwell-Jolly*.<sup>90</sup> That court explained that because a “budget crisis does not excuse ongoing violations of federal law, particularly when there are no adequate remedies available other than an injunction,” “[s]tate budgetary considerations do not therefore, in social welfare cases, constitute a critical public interest that would be injured by the grant of preliminary relief.”<sup>91</sup> And, “[i]n contrast, there is a robust public interest in safeguarding access to health care for those eligible for Medicaid, whom Congress has recognized as ‘the most needy in the country.’”<sup>92</sup> The Fourth Circuit has reached a similar conclusion: “Although we understand that the North Carolina legislature must make

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<sup>90</sup> 572 F.3d 644 (9th Cir. 2009) *vacated and remanded on other grounds*, 132 S. Ct. 1204 (2012).

<sup>91</sup> *Id.* at 659.

<sup>92</sup> *Id.* (quoting *Schweiker v. Hogan*, 457 U.S. 569, 590 (1982) (quoting H.R. Rep. No. 213 89th Conf. 1st Sess., 66 (1965))).

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difficult decisions in an imperfect fiscal climate, the public interest in this case lies with safeguarding public health rather than with assuaging North Carolina's budgetary woes.”<sup>93</sup>

For these reasons, we conclude that the district court did not commit clear error in holding that the harm to the Individual Plaintiffs outweighs that to LDHH.

LDHH finally challenges the district court's determination that an injunction serves the public interest. It contends that the general public has an interest in the proper expenditure of the state's Medicaid funds, including the oversight of providers who are receiving those funds. The district court found that the injunction serves the public interest by ensuring that Medicaid recipients have continuing access to medical care at PPGC.

Because LDHH's termination of PPGC's provider agreements likely violates federal law, there is no legitimate public interest in allowing LDHH to complete its planned terminations of PPGC's provider agreements under these immediate facts. Instead, the public interest weighs in favor of preliminarily enforcing the Individual Plaintiffs' rights and allowing some of the state's neediest individuals to continue receiving medical care from a much needed provider. We emphasize that “there is a legitimate public interest in safeguarding access to health care for those eligible for Medicaid.”<sup>94</sup> The district court did not err in concluding that preliminarily enjoining LDHH's terminations will serve the public interest.

#### IV.

#### CONCLUSION

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<sup>93</sup> *Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013).

<sup>94</sup> *Maxwell-Jolly*, 572 F.3d at 659.

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We hold that the Individual Plaintiffs met their burden to show their entitlement to a preliminary injunction. We also hold that the district court did not abuse its discretion in preliminarily enjoining LDHH's termination of PPGC's provider agreements. The district court's preliminary injunction is **AFFIRMED** and we **REMAND** for further proceedings.