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

PLANNED PARENTHOOD OF GREATER TEXAS FAMILY PLANNING AND PREVENTATIVE HEALTH SERVICES, INC., et al., Plaintiffs, v. CHARLES SMITH, Executive Commissioner, Texas Health and Human Services Commission, et al., Defendants.	No. 1:15-CV-01058

APPLICATION AND MEMORANDUM OF LAW IN SUPPORT THEREOF FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs hereby apply for a temporary restraining order and preliminary injunction.

INTRODUCTION

This case challenges the Texas Health and Human Services Commission's ("HHSC") politically-driven campaign to terminate the Medicaid provider contracts of Planned Parenthood of Greater Texas Family Planning and Preventative Health Services ("PPGT"); Planned Parenthood San Antonio, Planned Parenthood Cameron County, and Planned Parenthood South Texas Surgical Center (collectively, "PPST"); and Planned Parenthood Gulf Coast, Inc. ("PPGC") (collectively, "Planned Parenthood Providers" or "Provider Plaintiffs").

Through Medicaid, the Provider Plaintiffs provide critically needed family planning and other preventive health services, 90% federally funded, to nearly 11,000 low-income Texas residents each year, including the individual Doe Plaintiffs.

In October 2015, without prior warning, HHSC issued termination letters to the Provider Plaintiffs (who are the only Planned Parenthood Providers in Texas), relying primarily on

deceptively edited and misleading YouTube videos made by a radical anti-abortion group with ties to violent extremists, videos that have been widely debunked and that are wholly irrelevant to four out of the five Provider Plaintiffs. HHSC also relied on a prior settlement of qui tam litigation, again, by only one of the providers (PPGC), even though the settlement contained no admission of liability and also contained an *agreement* by Texas that it would *not* seek to use the litigation as a basis to exclude PPGC from Medicaid.

Perhaps aware of its failure to identify any legitimate basis for the terminations, after Plaintiffs filed suit seeking a TRO and/or preliminary injunction from this Court, HHSC backtracked, taking the position that it did not yet know if it would terminate the Provider Plaintiffs. But it did not rescind the pending termination letters, instead promising ongoing investigations. Without further contacting the Provider Plaintiffs about this, fourteen months later, on December 20, 2016 HHSC issued a final notice of termination. Despite this lengthy delay and supposed ongoing investigation, HHSC makes only vague allegations–all about PPGC–that seem to relate almost entirely to the same YouTube video HHSC cited last October.

Defendants' unprecedented and indefensible actions show these terminations to be nothing more than a politically motivated witch hunt and the culmination of a concerted effort over more than a decade to come between the Provider Plaintiffs and the thousands of low-income patients they serve for a variety of family planning and sexual health needs. Indeed, Texas is not the first state to try to exclude Planned Parenthood entities from the Medicaid program. Louisiana, Alabama, Arkansas, Kansas, and Mississippi have each tried to terminate or exclude Planned Parenthood organizations from their Medicaid programs, for reasons that overlap heavily with those asserted here by Texas. But courts have unanimously prevented these terminations and agreed that preventing Medicaid enrollees from obtaining care from the

qualified provider of their choice violates federal law, and that an injunction is warranted to permit Medicaid enrollees to continue receiving services from Planned Parenthood health centers. Indeed, a unanimous three-judge panel of the Fifth Circuit has already rejected an attempted termination of PPGC–the only Provider Plaintiff here claimed to have done anything wrong–based on the same video at issue in this case. *See Planned Parenthood of Gulf Coast Inc. v. Gee*, 837 F.3d 477 (5th Cir. 2016) (affirming preliminary injunction of termination of PPGC).

Without an order from this Court before January 21, 2017, the Doe Plaintiffs and the Provider Plaintiffs' other patients not only will have their rights under federal law violated but also will lose access to their provider of choice, will find their medical care interrupted, and, in many cases, will be left with few or no adequate alternative providers. The Provider Plaintiffs will also be irreparably harmed since the loss of Medicaid funds will significantly impact their operating budgets as well as their mission to provide health services to low-income patients.

This Court should enter a preliminary injunction or, in the alternative, a temporary restraining order ("TRO") to prevent these irreparable harms.

STATEMENT OF FACTS

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

Texas has some of the most stringent Medicaid requirements in the country: in addition to having a low income, an individual must also meet a special characteristic, such as having dependent children or a disability, to be eligible for Medicaid. For example, a woman with dependent children qualifies for Medicaid only if she has an income up to 15% of the federal poverty level, which amounts to an annual household income of $3756 for a family of three. Decl. of Ken Lambrecht in Supp. of Pls.' Appl. for TRO and Prelim. Inj. ¶ 35, attached hereto as Ex.1 of App. I (hereinafter "Lambrecht Decl."). Caring for Medicaid-insured patients is central

to the Provider Plaintiffs' broader mission of protecting and improving the health and welfare of underserved individuals.

The Provider Plaintiffs provide Medicaid services across the state of Texas at thirty health centers. In 2015, Plaintiffs served nearly 11,000 Medicaid patients. Plaintiffs offer patients a range of family planning and other health services at these centers, including physical exams, contraception (including long-term contraception) and contraceptive counseling, screening for breast cancer, screening and treatment for cervical cancer, testing for certain sexually transmitted infections ("STIs"), pregnancy testing and counseling, and certain procedures including biopsies and colposcopies. Medicaid does not pay for abortions for Texas women except if their lives are in danger or if they are victims of rape or incest.

The Plaintiffs providing these services—PPST, PPGT, and PPGC—are wholly separate organizations from each other, with no overlap whatsoever in ownership, control, operations, personnel, or finances. Lambrecht Decl. ¶ 30; Decl. of Melaney Linton in Supp. of Pls.' Appl. for TRO and Prelim. Inj. ¶ 17, Ex. 2 of App. I ("Linton Decl."); Decl. of Jeffrey Hons in Supp. of Pls.' Appl. for TRO and Prelim. Inj. ¶ 18, Ex. 3 of App. I ("Hons Decl."). The only legal relationship between them is that each is a member of Planned Parenthood Federation of America ("PPFA"), a membership organization that promulgates medical and other standards to which members (known as "affiliates") must adhere in order to operate under the name "Planned Parenthood" and otherwise use the Planned Parenthood mark. Lambrecht Decl. ¶ 28; Linton Decl. ¶ 16; Hons Decl. ¶ 20. Provider Plaintiffs are not affiliates, subsidiaries, parents, employees, contractors, vendors, or agents of one another. Lambrecht Decl. ¶ 28; Hons Decl. ¶20. There are fifty-six Planned Parenthood affiliates across the country, each with its own board, CEO, and management structure, and each with control of its own finances and operations.

Lambrecht Decl. ¶ 29; Linton Decl. ¶ 17; Hons Decl. ¶ 21. Each also maintains its own protocols, procedures, and policies. Lambrecht Decl. ¶ 32; Hons Decl. ¶ 23.

The Provider Plaintiffs have a unique position in the Medicaid provider network. Unlike community health providers, they specialize in family planning and sexual health. As specialists, they use up-to-date technology and evidence-based practices and devote substantial time and resources to patient education. Lambrecht Decl. ¶¶ 7, 9; Linton Decl. ¶¶ 46-48; Hons Decl. ¶¶ 27-28; *see also* Decls. of Jane Does 1 ¶5; 2 ¶5; 4 ¶5; 7 ¶¶ 5, 7 (Exs. 5-9 of App. I).

Patients also choose the Provider Plaintiffs because they are known and trusted for non-judgmental care related to family planning, STIs, and other reproductive health issues, which involve topics that can be sensitive for patients. Lambrecht Decl. ¶ 8; Linton Decl. ¶ 48; Hons Decl. ¶ 32; Doe 7 ¶ 5, 7; Doe 10 ¶ 6. Many individuals who receive other health care from community care providers or other Medicaid providers choose the Provider Plaintiffs for their reproductive health care because of privacy concerns and because they fear being judged by other providers. Lambrecht Decl. ¶ 8; Linton Decl. ¶ 48; Hons Decl. ¶ 32; Doe 7 ¶ 7; Doe 10 ¶ 5. This is critically important, because patients may forego family planning care altogether if they do not find a provider that makes them comfortable. Lambrecht Decl. ¶ 8; Doe 2 ¶ 6; Doe 7 ¶ 9; Doe 10 ¶¶ 7, 9.

The Provider Plaintiffs have designed their services around the reality that low-income patients often have very little time to devote to their own health care and face such additional barriers as competing childcare and work obligations, limited transportation resources, limited English proficiency, and often inflexible and/or unpredictable work schedules. Lambrecht Decl. ¶ 10; Linton Decl. ¶ 49; Hons Decl. ¶ 27; Doe 1 ¶ 5; Doe 9 ¶ 7; Doe 10 ¶ 8. To ensure that these patients have access to family planning services, the Provider Plaintiffs offer evening and

Saturday hours; next-day or walk-in appointments, flexible scheduling, short wait-times, and same-day contraceptive services, including for long-acting contraception, so that patients only need to make one trip to the health center. Lambrecht Decl. ¶ 10; Linton Decl. ¶ 49; Hons Decl. ¶ 27; Doe 1 ¶ 6; Doe 7 ¶ 6; Doe 10 ¶ 8. The Provider Plaintiffs also have bilingual staff or translator services available at all times. Lambrecht Decl. ¶ 10; Linton Decl. ¶ 50; Hons Decl. ¶ 27. In addition, many of the Provider Plaintiffs' health centers are located in areas that have been designated as underserved, where patients are most in need of these services. Lambrecht Decl. ¶ 47; Linton Decl. ¶ 45; Hons Decl. ¶ 31.

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

Because Planned Parenthood organizations either provide abortion or are related to other Planned Parenthood organizations that do so, politicians and private groups opposed to safe and legal abortion have waged a long campaign to exclude them from a variety of publicly-funded healthcare programs. For some time now, Texas has been ground zero of that campaign.

Even though the Provider Plaintiffs are leading providers of family planning and preventive health services in Texas, Texas has long sought to terminate them from all publicly-funded health programs for reasons unrelated to quality of care and regardless of the cost to patients or even to the state budget. Starting in 2003, the Texas legislature enacted several funding restrictions aimed at preventing providers associated with abortion from participating in any publicly-funded family planning programs. Lambrecht Decl. ¶ 11.

As Attorney General, now-Governor Greg Abbott issued the interpretations HHSC relied on in its 2012 rule excluding all Planned Parenthood organizations from the Women's Health Program ("WHP"), which is 90% federally funded and at one point enrolled over 150,000 Texas women. Lambrecht Decl. ¶ 12. At the time, Planned Parenthood providers served approximately

45% of WPH enrollees. *Id*. Texas was so determined to defund the Planned Parenthood Plaintiffs that it did so in violation of federal law, which means that the state has had to forgo over $30 million in federal family planning funds each year since 2013, creating instead the wholly state-funded Texas Women's Health Program ("TWHP"). Lambrecht Decl. ¶ 13. And the legislature was so determined to defund the Planned Parenthood Plaintiffs at any cost that it included a "poison pill" provision dissolving TWHP in the event a court held Planned Parenthood organizations entitled to participate in that program. *Id*. Instead of viewing the massive loss of federal WHP funds as a public health crisis, Governor Abbott celebrated the state's role in "ensuring that Planned Parenthood is closing down clinics across the state of Texas." *Id.* ¶ 14.

Until now, Medicaid was the only public health program from which Texas had not yet excluded the Planned Parenthood Providers. Then, starting in July 2015, a radical anti-abortion group, the Center for Medical Progress ("CMP"), released a series of videos, including one taken at a PPGC affiliate headquarters. CMP, which opposes *all* safe and legal abortion and has ties to violent extremists, obtained this footage under false pretenses by masquerading as a biotechnology company. Linton Decl. ¶ 6. CMP repeatedly baited Planned Parenthood staff and spliced together heavily edited footage to try to create an appearance of wrongdoing in connection with some affiliates' facilitation of tissue donation for research purposes. *Id*. ¶ 8.

CMP's videos do not show any violations of the law or other applicable standards by Planned Parenthood organizations. To the contrary, leading medical organizations, including the American Congress of Obstetricians and Gynecologists, the American Public Health Association, and the New England Journal of Medicine, have called the CMP-created videos what they are—baseless attacks—and continue to strongly support Planned Parenthood organizations as providing high-quality, essential health services to millions of underserved women and men

annually. *See* George P. Topulous, M.D. et al., *Editorial, Planned Parenthood at Risk*, 373 N. Eng. J. Med. 963 (Sept. 3, 2015); Letter from Am. C. Nurse-Midwives et al. to Hon. Mitch McConnell, Majority Leader, U.S. S., and Hon. John Boehner, Speaker, U.S. H.R. (Aug. 3, 2015),http://www.midwife.org/acnm/files/ccLibraryFiles/Filename/000000005551/ProviderLetteronPlannedParenthood.pdf. Following the release of the videos, officials in thirteen states–including Texas–launched investigations and all of them fully vindicated Planned Parenthood, finding no evidence of wrongdoing. Eight other states have declared that there was not sufficient evidence to waste government resources on such an investigation.[1]

Despite the fraudulent nature of the videos, state government officials—all of whom also oppose safe and legal abortion—have pounced on the videos as an excuse to exclude Planned Parenthood from participation in public health programs. This movement, which started in Arkansas, Utah, Alabama, and Louisiana, reached Texas last October.[2]

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

1. First Notice of Termination

On October 19, 2015, without prior warning, HHSC sent a letter titled "Notice of Termination" to each Provider Plaintiff terminating its Medicaid provider numbers, to be effective fifteen days after the receipt of a final notice of termination. Notice, attached as Ex. A to Decls. of Lambrecht, Linton, and Hons. Each stated: "The State has determined that you . . . are no longer capable of performing medical services in a professionally competent, safe, and legal manner," and that "[i]f you fail to respond to this Notice of Termination within 30 calendar days of receipt, then we will issue a Final Notice of Termination." Notice of Termination

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

[2] Following Texas, there have been similar efforts in Kansas, Mississippi, Ohio, and Florida.

(emphasis in original). While sent to all of the Provider Plaintiffs, those Notices focus entirely on (false) allegations against Plaintiff PPGC and Planned Parenthood's national office, PPFA. The Notices claimed four bases for terminating PPGC from the Medicaid program (though the State now has abandoned three of the four), none of which were sustainable grounds for terminating PPGC—much less PPST and PPGT.

On November 23, 2015, Plaintiffs filed this litigation and moved for a TRO and/or preliminary injunction to ensure that Medicaid patients, including the Doe Plaintiffs, could continue receiving services at the Provider Plaintiffs. Compl. For Injuctive and Declaratory Relief–Class Action, (ECF No. 1); Appl. And Mem. Of Law in Supp. Thereof for TRO and Prelim. Inj., (ECF No. 5.2). Perhaps aware that the terminations lacked any plausible basis, HHSC reversed course and took the position that it had not yet determined whether it would terminate the Provider Plaintiffs from Medicaid–despite having issued a "Notice of Termination" to each. Given HHSC's inaction, the Court dismissed the pending preliminary injunction motion, and postponed the hearing that had been scheduled. *See* Alexa Ura and Edgar Walters, *After Sound and Fury, Planned Parenthood Still Funded*, Texas Trib., (Dec. 12 2015), https://www.texastribune.org/2015/12/12/past-efforts-cast-doubt-states-fight-planned-paren/; Proposed Order, (ECF No. 42). HHSC did not, however, rescind the pending termination letters; rather, the State promised further investigations in order to reach its stated goal of ensuring no Medicaid funds go to Planned Parenthood. *See LIFE Initiative*, Abbott–Governor, https://www.gregabbott.com/life-initiative/ (Dec. 29, 2016) ("As Planned Parenthood is investigated, Governor Greg Abbott has announced the "LIFE Initiative" to protect the unborn and prevent the sale of baby body parts . . . . Funding for Planned Parenthood [will be] COMPLETELY ELIMINATED.") (emphasis in original); Statement by Att'y Gen. Ken Paxton,

(Jan. 25, 2016), http://ow.ly/X1op307y8jJ ("The state's investigation of Planned Parenthood is ongoing."); Governor Abbott Statement on Planned Parenthood Investigation, (Jan. 25, 2016) http://ow.ly/Q0zj307y8gZ ("[HHSC]'s Inspector General and the Attorney General's office have an ongoing investigation into Planned Parenthood's actions . . . . The State of Texas will continue to protect life.").

2. The Intervening Year

Indeed, in the 17 months since the CMP videos came out, "investigations" of Planned Parenthood have been unrelenting–and yet have yielded no evidence of actual wrongdoing.

(a) Texas State investigations

The day after the CMP video concerning PPGC came out, Lieutenant Governor Dan Patrick directed the Harris County District Attorney to initiate a criminal investigation. *Governor Dan Patrick Asks Harris County D.A. To Immediaely Open Criminal Investigation of Planned Parenthood in Texas,* Lieutenant Governor of Texas—Dan Patrick, (Aug. 5, 2015), http://ow.ly/KwWY307y8tt. The District Attorney (a Republican appointee) conducted a thorough joint investigation, together with the Texas Rangers and the Houston Police Department; this investigation (with which PPGC cooperated in full) included hours of interviews with PPGC staff members, a two-hour tour of the PPGC health center where the fraudulent video was taken, the production and review of over 800 pages of documents from PPGC, and the review of what PPGC believes was the unedited version of the CMP video. Linton Decl. ¶ 24. On January 26, 2016, the District Attorney announced: "For more than two months, the 232nd Grand Jury extensively reviewed the joint investigation into allegations of misconduct by PPGC [and] cleared PPGC of breaking the law." Harris County DA Press

Release, Jan 25, 2016. Instead, the grand jury indicted two of the anti-abortion extremists who created the videos. *Id*. [3]

Nor was this the only Texas investigation. To the contrary, in the months and weeks following the CMP videos the Attorney General's office, DSHS, and HHSC all conducted separate, overlapping investigations, with which PPGC and the other Provider Plaintiffs cooperated fully, making employees available to speak with Attorney General's office and DHSS officials during health center inspections; making documents available for inspection on short notice; and producing documents to all three entities, for a total of thousands of pages of documents on topics encompassing fetal tissue donation, fetal tissue disposal, Medicaid billing, vendor arrangements, patient consent forms, organizational charts, and communications with the fictitious biotechnology company. Lambrecht Decl. ¶¶ 19-21; Linton Decl. ¶¶ 27-30; Hons Decl. ¶¶11-13. These investigations started immediately after the release of the first CMP video (which did not even involve any Texas Planned Parenthood entity), and continued even after HHSC issued the October 2015 Notices of Termination. Lambrecht Decl. ¶ 18; Linton Decl. ¶ 27; Hons Decl. ¶¶10,13. [4]

(b) Congressional investigations

Four Congressional Committees—the House Energy and Commerce, Judiciary, and Oversight and Government Reform Committees, and the Senate Judiciary Committee—have also launched their own investigations and requested a broad range of information from PPFA and

[3] While those charges were eventually dismissed on technical legal grounds, one of the extremists remains under investigation elsewhere. Linton Decl. ¶ 10, n. 1.

[4] PPGC believes that near the beginning of these multiple investigations, the Attorney General obtained what purports to be an unedited version of the CMP tape fraudulently taken at its health center. PPGC requested a copy from the Attorney General, both directly and through counsel, but was advised it was being withheld pursuant to the Attorney General's pending investigation. Linton Decl. ¶ 31.

Planned Parenthood affiliates, including the Provider Plaintiff. In response, PPFA and Planned Parenthood affiliates voluntarily produced over 25,000 pages of documents and made members of their staffs from across the country available for interviews with Congressional staff. PPFA's CEO, Cecile Richards, testified for almost five hours in front of the House Oversight and Government Reform Committee. Letter from Democratic Members, Select Investigative Panel ("Select Panel") to Blackburn (Jan. 21, 2016),https://schakowsky.house.gov/uploads/2016-01 21%20SP%20Dems%20Letter%20to%20Chair.pdf. After this lengthy testimony and review of thousands of pages of documents, Jason Chaffetz, the chair of the House Oversight and Government Reform Committee admitted: "Was there any wrongdoing? I didn't find any."[5] The investigations by these Committees have found no wrongdoing by the Provider Plaintiffs. [6]

In October 2015, while Planned Parenthood organizations were still in the process of turning over documents to Congress, the House of Representatives formed and tasked yet another committee, which according to its website is known informally as the "Select Panel on Infant Lives", with investigating Planned Parenthood and its tissue donation practices. Planned Parenthood once again fully cooperated with the Select Panel, voluntarily producing documents and members of its staff for interviews.

As the Democrat minority members of the Select Panel made clear in their December 2016 report, the Select Panel majority has used the committee "as a political weapon to punish women, their doctors, and researchers," "adopt[ed] McCarthy-era tactics to demand names and bully witnesses," "conducted an end-to-end attack on fetal tissue donation and women's health

[5] Jennifer Bendery, *GOP Probe Into Planned Parenthood Funding Comes Up Empty*, The Huffington Post (Oct. 12, 2015), http://www.huffingtonpost.com/entry/jason-chaffetz-planned-parenthood-funding_us_5616ed01e4b0dbb8000de134.

[6] While Representative Charles Grassley, the chair of the Senate Judiciary Committee, wrote a letter suggesting further investigation of four Planned Parenthood affiliates, the Provider Plaintiffs were not among them. Linton Decl. ¶32.

care," and "abused congressional authority and made repeated inflammatory claims of criminal misconduct in continued reliance on the discredited Daleiden/CMP videos and without any actual evidence of wrongdoing." Report of the Democratic Members, *Setting the Record Straight: The Unjustifiable Attack on Women's Health Care and Life-Saving Research*, at 1-2 (Dec. 2016) (executive summary), available at https://selectpaneldems-energycommerce.house.gov/news/press-releases-in-the-news/2016-12-05/democrats-release-select-investigative-panel-report (hereinafter "Minority Report").[7]

After considering the exhaustive documentary and testimonial evidence supplied by Planned Parenthood entities and others involved in the research process, the minority members found that "the key concern for [Planned Parenthood] providers is always patient safety, and they do not alter the timing or method of abortions . . . to enhance fetal tissue donation," and that "Planned Parenthood affiliates do not profit and actually lose money when they facilitate fetal tissue donation, as do other clinics." *Id*. at 2 (further detailed at 46–70).

Nonetheless, on December 1, 2016, Representative Marsha Blackburn, the chair of the Select Panel, sent a letter to Texas attorney general Ken Paxton, urging his office to conduct an investigation into whether PPGC violated Texas law in connection with its facilitation of the

[7] Examples of the Select Panel's abuse of power include that they that they "denied Democrats access to Committee records, and held Republican-only negotiations, briefings, and interviews," *id*. at 7; failed to attend interviews that contradicted allegations of wrongdoing, *id*. at 7; and used unsourced and unverified documents, deceptively edited and misleading CMP videos, and misleading staff-created exhibits to question witnesses, *id*. at 73, 88–91. Equally disturbingly, the Select Panel majority has continually demanded that entities involved in fetal tissue research and donation "name names" of individuals involved–and then refused to safeguard the confidentiality of those names, and in some cases publicly released them, thereby endangering the safety of these individuals. *See id*. at 29–33. The Select Panel majority's continual flouting of proper procedure and complete disregard for the safety of researchers and clinicians seriously undermines the legitimacy of its investigation.

donation of fetal tissue.[8] *See* Letter from Marsha Blackburn, Chair, Select Panel, to Ken Paxton, Tex. Att'y Gen. (Dec. 1, 2016) (hereinafter "Blackburn Letter"), attached as Ex. H to Linton Decl.

While it is difficult to determine from the Blackburn Letter exactly what PPGC has allegedly done wrong, the Letter appears to suggest that the Attorney General should investigate whether PPGC violated a Texas statute forbidding transferring a human organ for valuable consideration (a charge already investigated by the Harris County District Attorney), as well as whether PPGC made unspecified misrepresentations to a law enforcement officer, apparently in connection with that same investigation. The Blackburn Letter relies primarily on supposed transcripts of CMP's widely debunked video, as well as on emails and other communications between PPGC and the public medical schools with which it had or considered research partnerships–most or all of which appear to have been available to the Harris County District Attorney as part of its investigation that resulted in the exoneration of PPGC and indictment of the CMP extremists who created the videos. Linton Decl. ¶ 33.

3. The Final Notice of Termination

Shortly after the Blackburn Letter–and fourteen months after its initial, stalled attempt to terminate the Provider Plaintiffs from Medicaid–on December 20, 2016, HHSC issued a Final Notice of Termination ("Final Notice") to each provider. Final Notice, attached as Ex. B to

[8] While the Final Notice describes the Blackburn Letter as the "bipartisan" Select Panel "refer[ing] its evidence" to the Attorney General, Final Notice n.1, the letter is only from Representative Blackburn and indeed, is contrary to the minority's conclusions (hence, not bipartisan). Representative Blackburn is a strong opponent of abortion, who has consistently voted against embryonic stem cell research. *See* On The Issues, Marsha Blackburn on Abortion, available at http://www.ontheissues.org/House/Marsha_Blackburn.htm#Abortion; *see also* Editorial Board, *Enough Grandstanding on Fetal Tissue*, L.A. Times (Mar. 30, 2016), http://www.latimes.com/opinion/editorials/la-ed-0330-congressional-fetal-tissue-20160330-story.html (describing Blackburn as "an opponent of abortion rights who has worked hard to defund Planned Parenthood").

Decls. of Lambrecht and Hons; Ex. I to Linton Decl. While the Final Notice sets forth the same bases for termination as to each of the Provider Plaintiffs, its accusations all relate to the PPGC CMP video taken, and thus appears to focus entirely on (false) allegations against Plaintiff PPGC, as the purported basis for terminating all of the Provider Plaintiffs from Medicaid. *Id*.

As noted above, following its long delay HHSC has now abandoned three of its four prior bases for termination as untenable,[9] and while its Notice of Termination is not entirely clear, it seems to have staked its claim on the theory that PPGC "follows a policy of agreeing to procure fetal tissue, potentially for valuable consideration, even if it means altering the timing or method of an abortion," and that "these practices violate accepted standards, as reflected in federal and state law, and are Medicaid program violations that justify termination."[10] Final Notice at 2.[11]

[9] Two of those abandoned bases related to supposed infection control and infection control training violations purportedly seen in the CMP video. Notice of Termination at 2. The third was supposed "fraud and other related program violations" based on two *qui tam* False Claims Act cases, one of which was pending at the time and the other had settled with no admission of liability and *with an express agreement* by the State of Texas not to use the settlement as a basis for termination from the Medicaid program. *Id*. at 3; Reynolds Settlement Agreement, attached as Ex. B to Linton Decl. in App. I. As detailed in Plaintiffs' prior motion for preliminary injunction and supporting declarations, these accusations are baseless as both a legal and factual matter, *see id*; Decl. of Paul Fine in Supp. of Pls.' first Appl. for TRO and Prelim. Inj., attached as Ex. 4 in App. I, ECF No. 8-1 (Nov. 23, 2015); *see also Gee*, 837 F.3d at 496 (State "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").

[10] The federal law Defendants cite is limited to HHS-funded research on "the transplantation of human fetal tissue for therapeutic purposes," 42 U.S.C. § 289g-1, and does not apply to research Planned Parenthood Center for Choice has done which has nothing to do with such transplantation. Fine Decl. ¶ 13.

[11] The Final Notice also includes several additional, unclear examples of what HHSC claims are violations of accepted standards of medical practice, including that PPGC has "a history of deviating from accepted standards to procure samples that meet researcher's needs" and "a history of permitting staff physicians to alter procedures to obtain targeted tissue samples needed for their specific outside research," expressed a "willingness" to do so, and/or expressed a "willingness" to charge more than the costs incurred for procuring fetal tissue, among others. Final Notice at 2. Like the Final Notice's reference to unspecified "evidence" from the Select Committee, Plaintiffs are unable to respond fully to these allegations at this time since they

To be clear, as discussed below, neither PPGC nor the related entity Planned Parenthood Center for Choice ("PPCFC") (which, unlike PPGC, provides abortions) has a policy of 'agreeing to procure fetal tissue, potentially for valuable consideration, even if it means altering the timing or method of an abortion," and neither alters the method of abortion in order to procure fetal tissue, or accept "valuable consideration" for doing so.[12]

While PPCFC is not currently involved in any fetal tissue donation and has not been for several years, it has facilitated such donation for a limited number of research projects in the past, most recently for a project requiring placental tissue at a major Texas public medical school and research institution. Decl. of Dr. Paul Fine ¶ 10, attached as Ex. 10 of App. I ("Fine Decl."). PPCFC's express policy forbids alteration of the timing or method of the abortion for the purpose of obtaining fetal tissue. Fine Decl. ¶¶ 13-14. Nor has there ever been a research request for intact tissue that would give the abortion-providing physician any reason to make such an adjustment. Fine Decl. ¶ 21. Indeed, at the time of the procedure, the physician commonly does not know whether a patient is a donor. Fine Decl. ¶ 22. Thus, in Dr. Fine's nineteen years as Medical Director, he has never made, nor heard of any physician providing abortion services at PPCFC making, any type of adjustment to the abortion procedure in order to facilitate tissue donation for research purposes. Fine Decl. ¶ 20. Nor has PPCFC ever accepted "valuable consideration" for tissue donation; to the contrary, it has only been reimbursed for permissible expenses incurred. Linton Decl. ¶ 37.

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neither have the supposedly unedited version of the CMP video nor any other evidence upon which HHSC purports to rely.

[12] As set forth in greater detail in the declaration of Dr. Paul Fine, the Medical Director of PPGC and PPCFC, PPGC provides family planning services and other preventive care through the Medicaid program at seven health centers in the Houston metropolitan area; PPCFC provides abortion services in Houston at the PPCFC Ambulatory Surgical Center ("ASC") and does not provide services through the Medicaid program. Fine Decl. ¶ 1.

Yet Defendants' accusation regarding alteration of timing and method appear to be based solely on conversations depicted in the CMP video, in which anti-abortion activists posing as representatives from a fake tissue procurement company asked PPGC's Director of Research (who is not a physician) repeated questions about whether it would be possible to make alterations to increase the chances of obtaining tissue that would meet their supposed research needs. As the Director of Research appropriately noted, this is a question she would have to ask the doctors who would be performing the abortions. *Id*. Similarly, Defendants' accusations regarding "valuable consideration" and "a willingness to charge more than the costs incurred for procuring fetal tissue" appear to be based solely on these same conversations.

Indeed, after over a year of repeated investigations, it is not clear whether Defendants are taking the position that anyone at PPGC or PPCFC ever *actually* altered the timing or method of an abortion in order to facilitate fetal tissue donation, or received improper reimbursement for doing so–as opposed to their tortured theory that PPGC "follows a policy of agreeing" to facilitate such donation, and that its "willingness to engage in these practices" violates medical standards. Final Notice at 2. Such a policy or agreement, or "willingness," even if present (which it is not), is far from a showing that PPGC provided *medical services* in violation of accepted medical standards, as required by the termination provisions on which the Final Notice relies.[13]

[13] The Final Notice asserts that this "policy of agreeing to procure fetal tissue, potentially for valuable consideration, even if it means altering the timing or method of an abortion" is a Medicaid program violation that justifies termination pursuant to 1 Tex. Admin. Code § 371.1659(2) and (6), among others. Subsection 371.1659(2) authorizes sanctions if a Medicaid provider "fails to provide an item or service to a recipient in accordance with accepted medical community standards or standards required by statute, regulation, or contract." And Section 371.1659(6) authorizes sanctions if a Medicaid provider "fails to abide by applicable statutes and standards governing providers." Defendants identify only a supposed "policy" of PPGC (which does not exist)—not that any actual medical service was provided contrary to accepted medical standards (which it was not). *See* Fine Decl. ¶¶ 13-15, 20. Moreover, even if Defendants could identify that PPGC had such an abortion practice, it was not done by PPGC (which does not

Finally, the only other termination basis HHSC now asserts is unspecified "evidence that you engaged in misrepresentations about your activity related to fetal tissue procurement." Final Notice at 3. HHSC neither identifies the supposed misrepresentations nor offers any explanation of what this "evidence" is, beyond that it comes from the Select Panel discussed at Section II.A(2)(b), *supra*. Such cryptic and vague allegations cannot constitute a basis for termination.[14]

At any rate, as with everything else in the Final Notice, Defendants' allegations against PPGC, even if true, would have no bearing on whether PPST or PPGT are qualified to provide Medicaid services. HHSC's ambiguous and unsupported allegations against PPGC, and desperate effort to sweep in other Planned Parenthood organizations wholly unconnected to those allegations, only confirms that this is about politics, not the quality or integrity of Texas's Medicaid program. Texas has tried to cut reimbursements to Planned Parenthood organizations for non-abortion preventive health services for over a decade as part of an agenda to eliminate access to safe, legal abortion in the state, even before the witch-hunt of the last fourteen months began. While the administration now claims to be targeting the Provider Plaintiffs because they are supposedly not qualified providers, the Attorney General has admitted that, whatever the

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provide abortions) or in the context of the Medicaid program (which generally does not cover abortions in Texas, 1 Tex. Admin. Code § 354.1167). The other provisions on which HHSC relies similarly each require some act done in violation of the provision's prohibition. *See, e.g.*, 42 U.S.C. § 289g-1 (pertaining to statement to be signed for certain fetal tissue donation); 42 U.S.C. § 289g-2 (prohibiting receipt of valuable consideration); 1 Tex. Admin. Code § 371.1661 (conviction of or engaging in certain criminal acts); 1 Tex. Admin. Code § 371.1703(c)(6) (termination for program violations); 1 Tex. Admin. Code § 371.1605(a) (holding provider responsible for "actions" or "omissions").

[14] This contentless accusation is in blatant violation of HHSC's obligations under 42 U.S.C. § 1320a-7(c),(f), which requires excluded providers be provided "reasonable notice" to the extent specified in the regulations and in 42 U.S.C. § 405(b). Reasonable notice under these provisions includes notice of "[t]he basis for the exclusion" and "a statement of the case . . . setting forth a discussion of the evidence" and the reasons upon which the Commissioner's determination was based. *See* 42 C.F.R. § 1001.2002(c)(1); 42 U.S.C. § 405(b); *see also* 1 Tex. Admin. Code § 371.1609(b) (requiring notice of "basis of the action"); 1 Tex. Admin. Code § 371.1703(e) (requiring notice include "basis for termination").

videos turn out to show or not show at the end of the day, "the true abomination in all this is the institution of abortion." Lambrecht Decl. ¶ 33 (quoting Attorney General statement).

III. The Impact of Defendants' Action on the Provider Plaintiffs and Their Patients

The Provider Plaintiffs' exclusion from Medicaid would have devastating consequences for them and their patients, including the Doe Plaintiffs as well as, more broadly, the nearly 11,000 Texas Medicaid patients who receive care through Planned Parenthood clinics each year.

Starting as soon as January 21, 2017, the Provider Plaintiffs will be forced to turn away these patients. Patients will see their care disrupted and will be deprived of their chosen provider. As noted above, patients choose Planned Parenthood Providers for various reasons; they trust them to provide high-quality, respectful care and can access their services more easily. Not only will patients lose their known and preferred provider, many will also face difficulties finding other providers who will see them, especially if they have a condition requiring urgent care. In part because of low reimbursement rates and onerous reimbursement policies, Texas suffers from a shortage of willing Medicaid providers. Lambrecht Decl. ¶ 38. Moreover, as noted above, many of the Provider Plaintiffs' clinics are located in underserved areas where their loss would be particularly harmful. *Id*. ¶ 47; Linton Decl. ¶ 45; Hons Decl. ¶ 31.

The shortage of willing Medicaid providers is exacerbated when it comes to family planning services. There is a serious, unmet need for publicly supported family planning services in Texas. For example, in 2014, an estimated 1,795,160 Texas women needed publicly supported contraceptive services and supplies. Lambrecht Decl. ¶ 40. Texas regularly ranks among the worst states for reproductive health. In 2010, 54% of pregnancies in Texas were unintended. *Id*. ¶ 39. The state has the fifth highest teen pregnancy rate nationally. *Id*. Texas's STI rates and rate of publicly funded unplanned births are higher than the national average. *Id*.

Indeed, the situation has worsened for people who depend on subsidized care—thanks to Texas's actions, which, as set forth above, were mainly intended to strip reimbursements from abortion providers and entities related to them. As a result of these actions, nearly 30,000 fewer patients accessed family planning services through TWHP in 2013, as compared to its predecessor in 2011. Lambrecht Decl. ¶ 41. And, according to recent research published in the *New England Journal of Medicine* and the journal *Contraception*, Texas saw a 35% decline in women using the most effective methods of birth control and a dramatic 27% spike in births among women who had previously used injectable contraception after Texas banned Planned Parenthood from TWHP in 2013. *Id* ¶ 42. The unfortunate result of blocking access to care at Planned Parenthood resulted in the State serving 54% fewer patients. Another study in *American Economic Journal: Applied Economics* found significantly increased driving distances for patients, and corresponding significantly decreased rates of clinical breast exams, cervical cancer screenings, and even (for women with lower educational levels) secondary care such as mammograms (for which family planning organizations refer patients). *Id*. This time period also coincides with a near doubling of the rate of pregnancy-related deaths in Texas. *Id*. ¶ 43. Even before Texas started cutting family planning funding and restricting the provider network, only about a third of reproductive-age women received adequate family planning services. Lambrecht Decl. ¶ 41.

Other Medicaid providers are already stretched thin; some only take pregnant Medicaid patients, and others have long wait-times (even when patients call with urgent symptoms). *Id*. ¶ 44; Linton Decl. ¶ 44; Hons Decl. ¶¶ 29–30; Doe 4 ¶ 6; Doe 9 ¶ 5. Many providers offer more limited services than the Provider Plaintiffs; for example, they do not offer LARCs, which are the most effective forms of birth control, or lifesaving cancer screening procedures. Lambrecht

Decl. ¶¶ 32–33; Hons Decl. ¶ 19; Doe 8 ¶ 6. Indeed, other Medicaid providers often refer their patients to the Provider Plaintiffs for those services. Lambrecht Decl. ¶ 44.

If the Provider Plaintiffs are forced to stop providing care in the Medicaid program, this situation will worsen. Women and men who are unable to obtain family planning care, or encounter delays in obtaining it, can face devastating consequences, including undetected cancers and diseases. Hons Decl. ¶ 30. Delays in obtaining contraception will result in unintended pregnancies, many of which may end in abortion. Lambrecht Decl. ¶ 48; Linton Decl. ¶ 51; Hons Decl. ¶ 33. The Provider Plaintiffs, for their part, will lose substantial reimbursements, forcing them to reduce services and hours and potentially close clinics. Lambrecht Decl. ¶¶ 5, 49; Linton Decl. ¶ 41; Hons Decl. ¶¶ 2, 34. They will also be prevented from fulfilling their mission to protect the health and well-being of underserved patients. Lambrecht Decl. ¶ 50; Linton Decl. ¶ 52; Hons Decl. ¶ 35.

ARGUMENT

Plaintiffs are entitled to a preliminary injunction, or in the alternative, TRO. The standards for issuance of a TRO or a preliminary injunction are the same. The moving party must show "(1) a substantial likelihood of success on the merits; (2) a substantial threat that failure to grant the injunction will result in irreparable injury to the moving party; (3) the threatened injury outweighs any damages the injunction may cause defendant; and (4) the injunction will not disserve the public interest." *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 288 (5th Cir. 2012). Courts faced with similar cases have uniformly held Planned Parenthood providers meet this standard when a state improperly terminates their Medicaid funding.

I. Plaintiffs Are Likely to Succeed on the Merits of their Federal Medicaid Claim.

Defendants' attempt to terminate the Provider Plaintiffs from Medicaid violates the federal law guaranteeing a Medicaid patient's right to receive care from the qualified provider of her choice because HHSC has not identified any factually supported grounds for termination that relate to Provider Plaintiffs' competence to provide care for their patients. For this reason, termination of the Provider Plaintiffs from the Medicaid program would violate the right of their patients, including the Doe Plaintiffs.

A. The Medicaid Act Bars States from Excluding Providers for Reasons Unrelated to Their Competence to Provide Medicaid Services

Medicaid is a cooperative federal-state program through which the federal government provides financial aid to states that furnish medical assistance to eligible low-income individuals. *See* 42 U.S.C. § 1396a *et seq.*; *Atkins v. Rivera*, 477 U.S. 154, 156 (1986). "State participation is voluntary; but once a State elects to join the program, it must administer a state plan that meets federal requirements." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 433 (2004). "To qualify for federal assistance, a state must submit to the [federal government] and have approved a 'state plan' for 'medical assistance' that contains a comprehensive statement describing the nature and scope of the state's Medicaid program." *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 586 (5th Cir. 2004) (citations omitted). Texas participates in the Medicaid program and is therefore bound by all of its requirements.

One of these requirements is that the state plan "must 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 . . . who undertakes to provide him such services." 42 U.S.C. § 1396a(a)(23)(A); *see also* 42 C.F.R. § 431.51(a)(1) (recipients "may obtain services from any qualified Medicaid provider that

undertakes to provide the services to them"); *see also* 42 C.F.R. § 431.51(b). This is known as the "Free Choice of Provider" requirement. *Id.*[15]

As the U.S. Supreme Court has explained, the Free Choice of Provider requirement gives beneficiaries "an absolute right" to choose any qualified provider "without government interference." *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980). As the Fifth Circuit and two other federal courts of appeals have found, the Free Choice of Provider Requirement is "subject only to two limitations: (1) the provider is 'qualified to perform the service or services required' and (2) the provider 'undertakes to provide [the patient] such services.'" *Planned Parenthood Gulf Coast, Inc., v. Gee*, 837 F.3d 477, 489 (5th Cir. 2016), quoting *Planned Parenthood of Ariz., Inc. v. Betlach*, 727 F.3d 960, 969 (9th Cir. 2013), *cert. denied*, 136 S. Ct. 1283 (2014) (quoting 42 U.S.C. § 1396a(a)(23); *accord Planned Parenthood of Ind., Inc. v. Comm'r of Ind.*, 699 F.3d at 962; 42 C.F.R. § 431.51(b)(1).[16] Excluding "Planned Parenthood from Medicaid for a reason unrelated to its fitness to provide medical services[]

[15] This right is enforceable in a § 1983 action. *See Gee*, 837 F.3d at 489 ("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."); *Planned Parenthood of Betlach*, 727 F.3d at 963; *Comm'r of Ind.*, 699 F.3d at 968 968; *Harris v. Olszewski*, 442 F.3d 456, 459 (6th Cir. 2006); *Planned Parenthood Se., Inc. v. Bentley*, 141 F. Supp. 3d 1207, 1217 (M.D. Ala. 2015); *Planned Parenthood Ark. & E. Okla. v. Selig*, No. 4:15-cv-00566-KGB (E.D. Ark. Oct. 5, 2015) at 13–14; *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F. Supp. 3d 604, 637 (M. D. La. 2015); *Women's Hosp. Found. v. Townsend*, No. 07-711-JJB-DLD, 2008 WL 2743284, at *8 (M.D. La. July 10, 2008).

[16] Indeed, Congress has singled out family planning services for special protections: although HHS is generally permitted to waive § 1396a(a)(23)(A) when allowing states to implement a primary care case-management system, *see* 42 U.S.C. § 1396n(b)(1), it may not do so for family planning services. 42 U.S.C. § 1396a(a)(23)(B) (mandating that "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 [family planning] services") (emphasis added). Congress also signaled its particular interest in maximizing access to family planning services by providing 90% of the cost of these services, 42 U.S.C. § 1396b(a)(5), a higher percentage than many other services.

violat[es] its patients' statutory right to obtain medical care from the qualified provider of their choice." *Comm'r of Ind.*, 699 F.3d 962, 968 (7th Cir. 2012); *Gee*, 837 F.3d at 493.

In *Gee*, the Fifth Circuit recently considered the Free Choice of Provider requirement in the context of facts remarkably similar to those here: Louisiana's attempt to terminate PPGC (the only Provider Plaintiff Texas even claims has done anything wrong) from its Medicaid program based on the same CMP video Texas is relying on. *Gee*, 837 F.3d at 482. In affirming the district court's grant of a preliminary injunction preventing termination, the Fifth Circuit noted that:

> These cases [*Comm'r of Ind.* and *Betlach*] 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.'" . . . 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.'"

Id. at 495 (quoting *Indiana Comm'r*, 699 F.3d at 978); *accord Betlach*, 727 F.3d at 969.

Applying this analysis, the Fifth Circuit resoundingly rejected the State's asserted bases for terminating PPGC, noting that neither "unspecified misrepresentations," nor a pending investigation, nor settled *qui tam* cases, could render PPGC "unqualified" within the meaning of the Free Choice of Provider requirement. *Gee*,837 F.3d at 495. Indeed, the Fifth Circuit noted, it appeared that the State "has simply pasted the labels of 'fraud' and 'misrepresentations' on PPGC's conduct," despite their being "devoid of any factual support or linkage," *id.* at 499, and that such efforts "cannot insulate its actions from a §1396a(a)(23) [Free Choice of Provider] challenge. If it were otherwise, states could terminate Medicaid providers with impunity and avoid §1396a(a)(23)'s mandate altogether." *Id.*

Similarly, district courts in Arkansas, Alabama, Kansas, and Mississippi all recently entered injunctions in other Planned Parenthood affiliates' favor in cases involving termination

of their provider agreements based on the same misleading and irrelevant videos at issue here. *Planned Parenthood Se., Inc. v. Bentley*, 141 F. Supp. 3d 1207 (M.D. Ala. 2015) (preliminarily enjoining termination of Planned Parenthood affiliate); Order, ECF No. 70 (Nov. 30, 2015) (entering permanent injunction); *Planned Parenthood Ark. & E. Okla. v. Selig*, No. 4:15-cv-00566-KGB (E.D. Ark. Oct. 5, 2015) (hereinafter, "Ark. PI Order") (preliminarily enjoining termination of Planned Parenthood affiliate) (App. II); *Planned Parenthood of Kansas & Mid-Missouri v. Mosier*, No. 16-2284-JAR-GLR, 2016 WL 3597457 (D. Kan. July 5, 2016) (same); *Planned Parenthood Se. v. Dzielak*, No. 3:16cv454-DPJFKB (S.D. Miss. Oct. 20, 2016) (permanently enjoining Mississippi statute disqualifying abortion providers from Medicaid participation) (App. III). And as noted above, Indiana and Arizona also tried to terminate Planned Parenthood organizations several years ago, and those efforts were rejected by the Seventh and Ninth Circuit Courts of Appeal, respectively. *See Comm'r of Ind.*, 699 F.3d 962; *Betlach*, 727 F.3d. These courts have unanimously held that states may exclude a provider from Medicaid only upon a valid determination that the provider is not "qualified to perform the service or services required." 42 U.S.C. § 1396a(a)(23).

B. Defendants Have Not Made A Factually Supported Determination That Any Provider Plaintiff Is "Unqualified"

Faced with this clear and binding precedent, Defendants have scraped the bottom of the barrel to try to come up with a plausible reason why any Provider Plaintiff is not a qualified Medicaid provider. This effort is unsuccessful, as none of the proffered justifications for the termination withstand scrutiny. Despite fourteen months of nonstop "investigations" by multiple state and federal entities, Defendants are left with allegations against PPGC that are factually unsupported, legally inadequate, blatantly political, on all fours with those rejected in *Gee*, and at any rate wholly irrelevant to the qualifications of PPST and PPGT.

1. Defendants' Allegations Against PPGC Are Baseless.

As explained in detail above, *see* Section II.A of the Statement of Facts, *supra*, none of the claimed grounds for termination does anything to call into question the competence of PPGC or any other Provider Plaintiff to provide services in the Medicaid program.

There is simply no support in the Medicaid Act for the idea that a Medicaid provider can be terminated based on a YouTube video created by anti-abortion activists and purporting to show a "policy of agreeing" to procure fetal tissue by altering the timing or method of an abortion, "potentially for valuable consideration," when it is not even clear whether Defendants claim that PPCFC (much less PPGC) ever actually altered the timing or method of an abortion for this purpose, or accepted improper reimbursement for doing so. And this justification for termination is especially inadequate when this video – the supposedly unedited version of which the Attorney General has yet to provide to Plaintiffs – is the only "evidence" of wrongdoing Defendants can come up with after fourteen months of exhaustive investigation, and when PPGC has been cleared by the Harris County District Attorney of exactly the conduct they are accused of here. As the Fifth Circuit recognized in *Gee*, the State may not "paste the labels" of a basis for disqualification on PPGC, "devoid of any factual support or linkage," and be "insulate[d] from a [Free Choice of Provider] challenge. If it were otherwise, states could terminate Medicaid providers with impunity and avoid § 1396a(a)(23)'s mandate altogether." 837 F.3d at 499.

Nor is there support in the Medicaid Act for the idea that a provider can be terminated based on unspecified "evidence" of unidentified "misrepresentations." Indeed, the Fifth Circuit has already expressly rejected this basis for termination. *Id*. at 497-98 ("[The State's] strategy to terminate PPGC's provider agreements before it can even identify a single misrepresentation does not pass muster.").

Taking a step back from the (wholly inadequate) specifics of HHSC's proffered bases for termination, it also bears noting that in *Gee* the Fifth Circuit found it significant that Louisiana's "course of conduct" leading up to the challenged termination – including an initial, abortive attempt to terminate PPGC at-will, as well as anti-abortion, anti-Planned Parenthood statements by public officials – made clear that the termination decision "had nothing to do with PPGC's qualifications." *Id*. at 498-99. The same is true here, as set forth at Section II.A *supra;* if anything, the course of conduct leading up to Texas's Final Notice (including the 14-month hiatus in Texas's attempt to terminate the Provider Plaintiffs, as well as its abandonment of three out of four of its original bases for termination) is even more plainly political and results-driven.

In short, as the Fifth Circuit recognized in *Gee*, and as district courts across the country have recognized in blocking similar attempts to terminate Planned Parenthood entities from Medicaid in the wake of the CMP videos, if such transparently trumped-up justifications for termination were sufficient, the Free Choice of Provider provision would be meaningless.

2. Even if True, Defendants' Allegations Would Not Provide a Valid Basis for Terminating PPGT and PPST

With respect to PPGT and PPST, Defendants' actions are unlawful for an additional, independent reason: they are based solely on allegations against PPGC, an organization that is wholly separate from PPGT and PPST, with no overlap whatsoever in ownership or control.

Defendants assert that PPGT and PPST may be terminated based on allegations about PPGC simply because of alleged "indicia of affiliation." *See* Final Notice at 3. But Federal Medicaid law does not permit a provider to be excluded from a state Medicaid program due to actions of an entirely separate entity. This is clear from the text of 42 U.S.C. § 1320a-7(b)(6)(B), which allows for termination of "*any individual or entity* that the Secretary determines . . . has furnished or caused to be furnished items or services to patients . . . of a quality which fails to

meet professionally recognized standards of health care." (emphasis added). Similarly, 42 U.S.C. § 1396a(p)(1) allows a state to terminate "any individual or entity . . . for any reason for which the Secretary could exclude *the* individual or entity." (emphasis added). By the plain language of these provisions, the entity being terminated must be the same entity that furnished or caused to be furnished the services that violate professionally recognized standards. As a district court recently held rejecting a similar attempt to exclude a Planned Parenthood affiliate from the Medicaid program, federal law permits no such guilt by association. *See Bentley*, 141 F. Supp. 3d at 1223.

This plain language reading of the federal for-cause provisions is reinforced by the narrow federal provision permitting exclusion of a participant based on its relationship with another participant subject to exclusion. *See* 42 U.S.C. § 1320a-7(b)(8) (allowing discretionary exclusion of "[e]ntities controlled by a sanctioned individual" in the sense that that individual "has a direct or indirect ownership or control interest," or "is an officer, director, agent, or managing employee" of the entity); *see also Bentley*, 141 F. Supp. 3d at 1223 (discussing same).

Not only is the federal "relationship" provision extremely narrow, applying only to entities that are owned or controlled by sanctioned individuals, but Congress and HHS were very specific about the types of ownership and control interests that support termination under 42 U.S.C. § 1320a-7(b)(8), none of which could remotely apply here. *See* 42 U.S.C. § 1320a-7(b)(8)(A)(i)–(iii); 42 C.F.R. §1001.1001(a). As HHS explained, "[t]he purpose of this provision is to ensure that the programs do not indirectly reimburse excluded individuals," not to punish organizations for their associations, as Defendants attempt to do here. Health Care Programs: Fraud and Abuse; Amendments to OIG Exclusion and CMP Authorities Resulting From Public Law 100-93, 57 Fed. Reg. 3298, 3308-10 (Jan. 29, 1992).

Based on the Final Notice, Defendants appear to take the position that Texas law, unlike federal law, provides for termination of any organization that shares a name or other "indicia of affiliation" with an at-fault provider, without any need for a showing of ownership or control.[17] The provisions on which HHSC relies, recently written into Texas law by HHSC during the same period it was trying to exclude Planned Parenthood from other federally funded programs, allow the Office of the Inspector General ("OIG") to terminate the Medicaid provider agreement of a person, when the "OIG establishes . . . by prima facie evidence" that the person is "affiliated with a person who commits a program violation," 1 Tex. Admin. Code § 371.1703(c)(7), and defines "affiliate" as (among other factors) a person who "shares any identifying information with a person, including . . . corporate or franchise name." 1 Tex. Admin Code § 371.1(3)(I).[18] HHSC also relies on a general provision that states that "[a] Medicaid...provider is responsible for...the actions and omissions of the provider's affiliates, employees, contractors, vendors, and agents." *Id.* § 371.1605(a)(2).

This sweeping new ground for excluding providers, which to Plaintiffs' knowledge HHSC has never applied until now, cannot support PPGT's and PPST's termination because it is

[17] The claimed "indicia" in no way demonstrate common ownership or control. For instance, the allegations that PPFA affiliates, such as PPGT and PPST, must follow certain PPFA protocols and procedures—including registration and review of research projects and completing required trainings—as a condition of affiliation and accreditation, does not suggest that PPGC, PPST, or PPGT exert any control over *each other's* operations. *See* Lambrect Decl. ¶ 28; Hons Decl. ¶ 20. Further, neither PPGT nor PPST employs any person who also works for PPGC—let alone any person who exercises managerial or other control. *See* Lambrect Decl. ¶ 31; Hons Decl. ¶ 22.

[18] Prior to Oct. 14, 2012, the regulations defined "affiliate relationship" in the generally understood sense, as referring to providers who "share any of the following: e.g. tax identification numbers, social security numbers, bank accounts, telephone number, business location. (This is not an all inclusive list)." 1 Tex. Admin. Code § 371.1643(e)(1)(H) (as of Jan. 9, 2005; repealed Oct. 14, 2012). The rules also contained a matching general definition of "affiliates": "Persons associated with one another so that any one of them directly or indirectly controls or has the power to control another in whole or in part or meets any portion of the definition for 'Affiliate Relationship.'" 1 Tex. Admin. Code § 371.1601(2) (as of Jan. 9, 2005; repealed Oct. 14, 2012). The Provider Plaintiffs clearly do not meet these definitions.

squarely at odds with the federal free choice protection. As explained above, the free choice provision is stated in absolute and mandatory terms, and "exceptions . . . are narrow and specific," *Betlach*, 899 F. Supp. 2d at 883. As the Fifth Circuit recently explained, Defendants' "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.'" *Gee*, 837 F.3d at 494 (5th Cir. 2016) (quoting *Comm'r of Ind.*, 699 F.3d at 978); *see also Betlach*, 727 F.3d at 971 (rejecting Defendants' proposition that free choice provision "permits states self-referentially to impose for Medicaid purposes whatever standards for provider participation [they] wish[]").[19] Therefore, HHSC's application of its state regulation would violate the Free Choice of Provider requirement because, absent some overlap in ownership or control, whether PPGC has violated any Medicaid standards has no bearing whatsoever on the fitness of other Planned Parenthood affiliates to treat Medicaid patients—as they have done without issue for decades.

Indeed, remarkably, the majority of the supposed "indicia of affiliation" HHSC relies on do not even relate to Texas's own definition of "affiliate" – which (in addition to common identifying information) looks to such factors as having "a direct or indirect ownership interest . . . ."; holding a "mortgage, deed of trust . . . or other [secured] obligation;"; being able to "control or be controlled by" the entity; and being a "managing employee" or having "financial, managerial, or administrative influence." 1 Tex. Admin. Code § 371.1(3). None of the supposed "indicia of affiliation" on which HHSC relies – such as a requirement that affiliates follow PPFA

[19] Texas's attempt to reach organizations that are wholly separate from any alleged wrongdoer goes far beyond even the Arizona restriction struck down in *Betlach*, which was narrowly defined *not* to reach related entities (but nonetheless was found to violate the free choice requirement). *See Betlach*, 727 F.3d at 974.

protocols and procedures, or register research projects, or that PPFA requires training for affiliates, Final Notice at 3 – fall into any of these categories.

It is noteworthy that at the time HHSC promulgated this new language, it claimed that it was intended only to track the narrow federal affiliation provision set forth above, which prohibits termination based solely on similarities between corporate names. 37 Tex. Reg. 7991, 7993 (Oct. 5, 2012), https://texashistory.unt.edu/ark:/67531/metapth288982/m1/176/.[20] Indeed, HHSC has taken this position more recently, stating: "An 'affiliate' is not a stranger to the provider but includes a person with a direct or indirect ownership interest, an officer, director, partner, manager or other person who controls the provider." Appellees' Br., *Harlingen Family Dentistry, P.C. v. Tex. Health & Human Servs. Comm'n*, No. 03-14-00069-CV, 2014 WL 4408008, at *48 (Tex. Ct. App. Aug. 22, 2014) (citing 1 Tex. Admin. Code § 371.1607)).

HHSC should, therefore, be taken at its word that the 2012 definition of affiliate does not "expand OIG's current and longstanding authority" or create any "substantive change." *Id.*[21] It should not be allowed to use its new language to do what it likely intended to do in the first

[20] HHSC made these assurances in response to the Texas Medical Association's concern that the rule could be read "to allow payment holds and other sanctions and penalties to be imposed on a person based solely on the actions of another," *id*. at 7991, and that, for the sake of fairness, "an affiliate should be under the control of a person for that person to be responsible," *id*. at 7993. This stated concern by the leading medical organization in Texas underscores how inappropriate it is for HHSC to exclude PPST and PPGT "based solely on" allegations against PPGC, an organization over which they have no control.

[21] HHSC's 2012 rule also should be read narrowly—so as not to sweep in PPGT and PPST—because HHSC has no statutory *authority* to redefine affiliate-based exclusion to extend beyond situations involving common control or ownership. *See* Tex. Hum. Res. Code § 32.047(b)(2) (authorizing HHSC only to adopt rules "prohibiting a person from participating in the medical assistance program as a health care provider . . . if the person . . . owns, controls, manages, or is otherwise affiliated with and has financial, managerial, or administrative influence over a provider who has been suspended or prohibited from participating in the program"). Indeed, this more limited concept of affiliate is the standard one, found in all other areas of Texas law (other than those involving Texas's zealous efforts to defund organizations associated with abortion). *See, e.g.*, Tex. Bus. Orgs. Code Ann. § 1.002(1); Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(1); *id*. § 74.001(a)(3).

place: terminate all Planned Parenthood providers from Medicaid—regardless of their actual conduct. Such as application would be in violation of federal law, which protects the Provider Plaintiffs' Medicaid patients' free choice of qualified provider. There can, therefore, be no question that HHSC's attempt to bootstrap its wrongful termination of PPGC onto the totally independent PPGT and PPST must fail.

* * *

For all of the foregoing reasons, the Plaintiffs are likely to prevail on their claim that HHSC's termination of all three Provider Plaintiffs' violates federal law.

II. Plaintiffs Face Irreparable Harm for Which There Is No Adequate Remedy at Law

As is explained in Section III of the Statement of Facts, *supra*, if Defendants' termination is allowed to take effect (which without order from this Court it will on January 21), the Provider and Doe Plaintiffs will be irreparably harmed, along with all of the Provider Plaintiffs' other Medicaid patients. Not only will Defendants' actions violate the statutory right to free choice of family planning provider, but patients will have their care disrupted and face reduced access to family planning services.

These constitute irreparable injuries sufficient for an injunction. *See, e.g.*, *Gee*, 837 F.3d at 501 ("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 . . ."); *Mosier*, 2016 WL 3597457, at *23 ("A disruption or denial of these patients' health care cannot be undone after a trial on the merits. The Court finds that Plaintiffs has [sic] shown irreparable harm to Medicaid patients who have chosen PPKM and PPSLR . . ."); *Bentley*, 141 F. Supp. 3d at 1225 ("Without the injunction, Doe would be forced to stop seeking services from a provider with whom she is comfortable, and she

might well not be able to identify another provider with whom she could forge such a relationship. Such an injury is clearly not susceptible to monetary relief."); *Kliebert*, 141 F. Supp. 3d at 649-650 (same); Ark. PI Order at 22 (same); *Comm'r of Ind.*, 794 F. Supp. 2d 912-913 (S.D. Ind. 2011) (same), *aff'd in part and rev'd in part on other grounds*, 699 F.3d 962 (7th Cir. 2012). [22]

In addition, the Provider Plaintiffs will suffer irreparable harm. As nonprofit healthcare provider dedicated to serving low-income communities, they rely on public funding, and loss of Medicaid funds will significantly impact their operating budgets, potentially requiring them to lay off employees, reduce hours, and close health centers. Loss of funding will also undermine their mission to provide care for underserved Texans. *See* Section III of the Statement of Facts, *supra*. These effects constitute irreparable harm. *Comm'r of Ind.*, 794 F. Supp. 2d at 912-13; *Planned Parenthood Ariz., Inc. v. Betlach*, 899 F. Supp. 2d 868, 886. [23]

III. The Balance of Harm Favors the Plaintiffs

While all of the Plaintiffs, as well as the Provider Plaintiffs' other patients, will suffer serious irreparable harm in the absence of an injunction, the state will suffer no injury at all. *Gee*, 837 F.3d at 501 ("LDHH simply does not have a legitimate interest in administering the state's Medicaid program in a manner that violates federal law."); *Mosier*, 2016 WL 3597457 at *24 ("[T]he 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

[22] Indeed, as these cases also make clear, patients are irreparably injured when denied their chosen qualified provider regardless of whether adequate other family planning providers were available (which, as set forth above in Section IV of the Statement of Facts, *supra*, they are not). *See Comm'r of Ind.*, 699 F.3d at 981.

[23] Furthermore, because the Eleventh Amendment bars the Provider Plaintiffs from recovering lost Medicaid funds after the fact, *see Green v. Mansour*, 474 U.S. 64, 68 (1985), their financial losses cannot be compensated by money damages and would therefore be irreparable, *Allied Mktg. Grp., Inc. v. CDL Mktg., Inc.*, 878 F.2d 806, 810 n. 1 (5th Cir. 1989).

choice."); *see also* Ark. PI Order at 30. An injunction would simply require the state "to maintain the funding [it] ha[s] provided to Plaintiffs for years." *Marlo M. ex rel. Parris v. Cansler*, 679 F. Supp. 2d 635, 638 (E.D.N.C. 2010).

IV. The Public Interest Is Served by the Issuance of an Injunction

Finally, preliminary injunctive relief should be granted because of the strong public interest in ensuring continued access to crucial health services, especially for the many underserved and low-income patients the Provider Plaintiffs serve. *Gee*, 837 F.3d at 502 ("[T]he 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."); *Mosier*, 2016 WL 3597457 at *25 ("The Court further finds that it is in the public's interest to ensure that the goals of Medicaid are served . . . Medicaid patients have the explicit right to seek family planning services from the qualified provider of their choice."); *New Orleans Home for Incurables, Inc. v. Greenstein ("NOHI")*, 911 F. Supp. 2d 386, 412; *Betlach*, 899 F. Supp. 2d at 887; *Kliebert*, 141 F. Supp. 3d at 650-651; *Bentley*, 141 F. Supp. 3d at 1226. Not only does the public have a strong interest in protecting access to health care, but that interest is particularly acute with respect to the neediest of its members who depend on publicly-funded programs. *See Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 659 (9th Cir. 2009), *vacated and remanded on other grounds*, 132 S. Ct. 1204 (2012).

V. The Injunction Should Issue Without Bond

Defendants will suffer no monetary injury if preliminary relief is issued. Texas already has undertaken to cover its share of the costs of family planning services for those individuals who meet the income requirements for Medicaid. Whether these individuals obtain these services at the Planned Parenthood Plaintiffs (their provider of choice) or elsewhere will have no effect

on Texas's budget. *See Mosier*, 2016 WL 3597457 at *25 ("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."); *NOHI*, 911 F. Supp. 2d at 413 ("DHH would have to pay the same amount for benefits of these patients regardless of who their Medicaid provider happens to be."). In the absence of monetary injuries, no bond should be required. *See Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996) (holding that the court "may elect to require no security at all") (internal quotations omitted); *Kliebert*, 141 F. Supp. 3d at 652 ("this Court sees no credible reason to force a bond's execution").

VI. The Court Should Enter Relief Permitting the Provider Plaintiffs to Remain in the Medicaid Program as to All of Their Patients, and Need Not Reach Class Certification to Do So

Finally, Plaintiffs are entitled to an injunction barring Defendants from terminating the Planned Parenthood Plaintiffs' provider agreements, which will permit them to remain in Medicaid and serve all Medicaid-enrolled patients who seek care at their 30 health centers, while the litigation proceeds. *See Gee*, 837 F.3d at 502; *Comm'r of Ind.*, 699 F.3d 962; *Betlach*, 727 F.3d 960; *Mosier*, 2016 WL 3597457, at *26 ("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 [Planned Parenthood]"); *Bentley*, 141 F. Supp. 3d at 1229 (reinstating provider agreements such that provider plaintiffs may be reimbursed for any eligible patient's care); *see also Planned Parenthood Se., Inc. v. Dzielak*, No. 3:16CV454-DPJ-FKB, 2016 WL 6127980, at *1 (S.D. Miss. Oct. 20, 2016) (entering declaratory judgment invalidating Mississippi statute excluding abortion providers from Medicaid); *but see* Ark. PI Order at 16–17 (requiring Plaintiffs to seek class certification as a condition of broad relief). This

is the appropriate remedy in light of the nature of the Medicaid program, in which any enrolled provider is reimbursed for covered services to *any* patient insured through Medicaid.[24]

Plaintiffs are entitled to an injunction barring termination of the Provider Plaintiffs' provider agreements and permitting them to continue serving all Medicaid patients for the additional reason that it is the only way to give meaningful relief to the Doe Plaintiffs. Absent such relief, there is a significant risk that lost revenue will force the Provider Plaintiffs to reduce hours and services, and potentially close clinics. This Court should enter injunctive relief as to the Planned Parenthood Plaintiffs' provider agreements in their entirety in order to give the Plaintiff Does the relief to which they are entitled. *See Kliebert*, 141 F. Supp. 3d at 652-53 ("If the Agreements are terminated, this facility would suffer significant financial loss and might have no choice but to close. In order the insure that meaningful relief is given to the Jane Doe Plaintiffs . . . the Court's preliminary injunction will extend to all [provider] agreements applicable to all Medicaid-enrolled patients."); *see also Hernandez v. Reno*, 91 F.3d 776, 781 (5th Cir. 1996) ("Class-wide relief may be appropriate in an individual action if such is necessary to give the prevailing party the relief to which he or she is entitled.").[25]

CONCLUSION

For the foregoing reasons, Plaintiffs' application for a temporary restraining order and/or preliminary injunction should be granted.

[24] Indeed, in granting an injunction reinstating the provider agreements as to all Medicaid patients, the *Bentley* court noted the state's concern that restricting reimbursements to the named patient plaintiff would violate federal Medicaid law. *Bentley*, 141 F. Supp. 3d at n.12.

[25] Plaintiffs have moved for class certification out of an abundance of caution, to make certain that any relief entered will ensure that *all* of Provider Plaintiffs' existing and future Medicaid patients can continue to receive health care services from their provider of choice. But as the cases cited above make clear, class certification is not necessary as the appropriate relief to make the Doe Plaintiffs whole is to keep the Provider Plaintiffs in the Medicaid program.

Respectfully submitted the 30th day of December, 2015.

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CERTIFICATE OF SERVICE

I certify that on this 30th day of December, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to the following:

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