No. 17-50282

In the United States Court of Appeals for the Fifth Circuit

PLANNED PARENTHOOD OF GREATER TEXAS FAMILY PLANNING AND PREVENTATIVE HEALTH SERVICES, INC.; PLANNED PARENTHOOD SAN ANTONIO; PLANNED PARENTHOOD CAMERON COUNTY; PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER; PLANNED PARENTHOOD GULF COAST, INC.; JANE DOE #1; JANE DOE #2; JANE DOE #4; JANE DOE #7; JANE DOE #9; JANE DOE #10; AND JANE DOE #11;

Plaintiffs-Appellees,

v.

CHARLES SMITH, IN HIS OFFICIAL CAPACITY AS EXECUTIVE COMMISSIONER OF HHSC; AND SYLVIA KAUFFMAN, IN HER OFFICIAL CAPACITY AS ACTING INSPECTOR GENERAL OF HHSC,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division,
No. 1:15-cv-01058

BRIEF FOR APPELLANTS (REDACTED)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellees	**Former or present counsel**
• Planned Parenthood of Greater Texas Family Planning and Preventative Health Services, Inc. • Planned Parenthood San Antonio • Planned Parenthood Cameron County • Planned Parenthood South Texas Surgical Center • Planned Parenthood Gulf Coast, Inc. • Jane Does #1, 2, 4, 7, 9, 10, and 11	• Jennifer Sandman • Maithreyi Ratakonda • Roger Evans • Alice Clapman • Richard Muniz • Thomas H. Watkins • Helene Krasnoff
Defendants-Appellants	**Former or present counsel**
• Charles Smith, in his official capacity as Executive Commissioner of HHSC • Sylvia Kauffman, in her official capacity as acting Inspector General of HHSC	• Ken Paxton • Jeffrey C. Mateer • Brantley D. Starr • Scott A. Keller • James E. Davis • Heather Gebelin Hacker • Angela V. Colmenero • Andrew B. Stephens • Amanda J. Cochran-McCall • Adam A. Biggs • Marc E. Rietvelt • Patrick K. Sweeten • Shelley Dahlberg

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Statement Regarding Oral Argument

Appellants request oral argument. This case involves significant issues related to the "qualified-provider" provision of the Medicaid Act, the standard of review that applies to state-agency decisions implementing the Medicaid program, and a lengthy factual record. Given this complexity, Appellants believe that oral argument will benefit the Court.

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INTRODUCTION

Planned Parenthood Gulf Coast staff members admitted in undercover video footage that they allowed some doctors to perform abortions to obtain fetal tissue for their own research—despite the obvious conflict of interest—and even allowed one doctor to take the specimen "home with her in her cooler." ROA.6180. They also admitted multiple times that their doctors would modify abortion procedures to obtain more desirable fetal-tissue specimens, and a Planned Parenthood Gulf Coast official made a false statement to state law-enforcement officials about their fetal-tissue activities.

Federal laws generally prohibit researchers from taking part in abortions to secure fetal tissue and prohibit modifying abortion procedures for research purposes; state law forbids making false statements to state officials during an investigation. Thus, these practices constitute serious breaches of accepted medical and ethical standards. They provide ample justification for a Texas state agency's reasonable decision to terminate Texas Planned Parenthood affiliates' Medicaid agreements, on the basis that these entities are not "qualified" providers under the Medicaid Act. 42 U.S.C. § 1396a(a)(23).

Texas's interpretation of the Medicaid Act to find providers not "qualified," *id.*, if they transgress accepted medical or ethical standards is permissible, particularly when Congress must provide a clear statement in conditional-funding statutes (such as Medicaid) to prohibit an otherwise reasonable interpretation. *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17 (1981).

Jurisdictional Statement

On February 21, 2017, the district court entered a preliminary injunction against the Texas Health and Human Services Commission Office of the Inspector General's termination of the State's Medicaid provider agreements with Texas affiliates of Planned Parenthood. ROA.3776-3819. The district court granted the parties' joint motion to amend the injunction order on March 24, 2017. ROA.3934. Appellants filed a timely Notice of Appeal on March 30, 2017. ROA.3938; *see* Fed. R. App. P. 4(a)(4)(A). This Court has appellate jurisdiction under 28 U.S.C. § 1292.

Issues Presented

1. Do the Individual Plaintiffs have a private right of action under the "qualified-provider" provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(23), to challenge a state agency's determination that a service provider is not "qualified" under that statute?

2.a. Is Texas's interpretation of the Medicaid "qualified-provider" provision—to find providers not "qualified" if they transgress accepted medical or ethical standards—a permissible standard, given that Congress must provide States with a clear statement in conditional-funding statutes (such as Medicaid) if it wants to prohibit an otherwise reasonable interpretation of a conditional-funding statutory standard?

2.b. Did the district court err in applying de novo review—rather than arbitrary-and-capricious review, as required by this Court's precedent—to a

state-agency finding made in the context of jointly administering the federal Medicaid program? And under arbitrary-and-capricious review, was the state agency's determination here reasonable?

2.c. Did the district court err, even if de novo review applies, in concluding that the state agency could not find that the Provider Plaintiffs are not "qualified" providers, when evidence shows that Plaintiff Planned Parenthood Gulf Coast violated accepted medical and ethical standards?

3. Did the district court err in finding that the Individual Plaintiffs established irreparable harm and satisfied the other preliminary-injunction requirements?

4. Did the district court err in enjoining the termination of all the Provider Plaintiffs' Medicaid agreements, where the Individual Plaintiffs receive care at only a few of the over 50 Planned-Parenthood-affiliated clinics in Texas and no class was certified?

STATEMENT OF THE CASE

A. The Texas Medicaid Program and Planned Parenthood

1. The federal Medicaid Act is a conditional-funding statute that created a program to give States federal money, and in return States use those funds, as well as their own, to reimburse providers' costs in providing medical care to certain categories of individuals. *See NFIB v. Sebelius*, 567 U.S. 519, 575 (2012).

Texas spends approximately $29 billion dollars (or 28% of the State's annual budget) on the federal Medicaid program, which covers approximately 4.3 million people in Texas. ROA.4510. In Texas, there are 141,000 providers enrolled in the Medicaid program, including 29,000 primary-care physicians and over 3,300 obstetrician/gynecologists. ROA.4511, 4515.

2. In Texas, Planned Parenthood Federation of America has three affiliates (the "Provider Plaintiffs") that receive Medicaid reimbursements: Planned Parenthood of Greater Texas (PPGT), Planned Parenthood South Texas (PPST),[1] and Planned Parenthood Gulf Coast (PPGC). ROA.1512-13. Together, these providers serve only 0.3% of all Texas Medicaid patients. ROA.4518. In 2016, Texas paid approximately $3.4 million in total Medicaid reimbursements to the Provider Plaintiffs. ROA.4315.

[1] Named Plaintiffs Planned Parenthood San Antonio, Planned Parenthood Cameron County, and Planned Parenthood South Texas Surgical Center are subsidiaries of PPST. ROA.3231. This brief will refer to these related entities collectively as PPST.

By contrast, the Provider Plaintiffs have annual budgets that far exceed the amounts they receive in annual Medicaid reimbursements. In 2013, PPGT had total revenue of $33,922,566 and net assets of $41,839,154. ROA.8688. PPGT received $950,000 in reimbursements from Texas Medicaid in 2016. ROA.4123-24.

In 2013, PPST had total revenue of $4,252,525 and net assets of $3,749,103. ROA.8295. PPST received $350,000 in reimbursements from Texas Medicaid in 2016. ROA.4289.

In 2013, PPGC had total revenue of $19,667,024 and net assets of $43,548,729. ROA.7966. In 2016, the total revenue for PPGC's research department alone was $2.5 million dollars—more than the $2.2 million that they received that year in reimbursements from Texas Medicaid. ROA.4236, 4135.

3. Besides the Medicaid program, Texas spends an additional $210 million annually on women's-health programs that cover family-planning services for individuals between the ages of 15 and 64, depending on the program. ROA.4442, 4446. These programs serve lower-income individuals who do not qualify for Medicaid, but Medicaid recipients are also eligible to participate in these programs. ROA.4443-44. In 2016, Texas women's-health programs served approximately 363,000 women. ROA.4446. They provide the same services as Planned Parenthood clinics, including pelvic exams, contraceptives, sexually-transmitted-infection screenings, and breast- and cervical-can-

cer screenings and diagnostic tests. ROA.4443-44. These programs also provide additional services to care for conditions found to affect reproductive health and not provided by Planned Parenthood, such as the screening, diagnosis, and treatment of hypertension, cholesterol, and diabetes. ROA.4444.

B. The Texas Office of the Inspector General (OIG)'s Decision to Terminate the Provider Plaintiffs' Medicaid Agreements

1. The mission of the Texas Health and Human Services Commission Office of the Inspector General (OIG) is the prevention of fraud, waste, and abuse through the use of audits, inspections, and investigations of all funds—state or federal—appropriated for the delivery of health and human services in Texas. ROA.4314-15.

OIG may take enforcement action and terminate a Texas Medicaid provider's agreement when OIG establishes "by prima facie evidence" that a provider has committed a "program violation"; is "affiliated" with a provider that commits a program violation; or commits "an act for which sanctions, damages, penalties, or liability could be assessed by the OIG." 1 Tex. Admin. Code § 371.1703(c), (c)(6)-(8). Sanctions can be imposed, in turn, where the 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, including statutes *and standards* that govern occupations." *Id.* § 371.1659(2) (emphases added). Ethical behavior and truthfulness are also

defined by state law to relate to a provider's qualifications: Multiple state regulations allow for the termination of providers who are dishonest in their dealings with the State. *See id.* §§ 371.1651(15), 371.1655(7), (24).

All Texas Medicaid providers, including providers affiliated with Planned Parenthood, are required to execute a Medicaid-provider agreement, which describes the responsibilities, duties, and obligations of providers. *See* ROA.6544-48. The agreements state that providers must comply with all requirements in the State's provider manual plus state and federal Medicaid rules, and that providers are responsible for ensuring that all their employees and agents comply with these requirements. ROA.6553. Section 6.1 of the Texas Medicaid provider agreement states that it may be terminated for any circumstances resulting in ineligibility to participate in Texas Medicaid, any failure to comply with the provisions of the provider agreement or any applicable Medicaid rules, or "any circumstances indicating that the health or safety of clients is or may be at risk." ROA.6555. These bases for termination are known as "program violations." ROA.4318. Section 1 of the Texas Medicaid Provider Procedures Manual states that a provider violates Texas Medicaid rules when it fails to provide healthcare services or items to Medicaid clients in accordance with "*accepted medical community standards.*" ROA.6273 (emphasis added).

Texas law therefore establishes that Medicaid providers must adhere to accepted medical and ethical standards, and that such standards directly implicate a provider's qualifications to provide Medicaid services.

2. On April 9, 2015, over eight hours of undercover video was filmed at Plaintiff PPGC's facility in Houston, Texas. ROA.5846-6208 (video transcript); [redacted] Two individuals posing as employees of a fictitious tissue-procurement company wore hidden cameras and met with PPGC's employees to discuss PPGC's fetal-tissue activities; they discussed the possibility of entering into a business arrangement with the fictitious company for the purpose of procuring liver, thymus, and neural tissue from fetuses aborted in the second trimester of pregnancy. *See* ROA.5846-6208 (video transcript); [redacted]

The unedited video footage was provided to OIG. ROA.4323. OIG conducted a review of the Texas Planned Parenthood affiliates, and based on an initial assessment of the video and other information, OIG sent a Notice of Termination to the Provider Plaintiffs that began the process of terminating their Medicaid provider agreements. ROA.1202-06, 1239-43, 1310-14. That letter gave the Provider Plaintiffs notice that they could (1) request an informal

[redacted]

resolution meeting to address the initial findings in the Notice, and/or (2) submit evidence and argument to OIG regarding whether the Notice was warranted. ROA.1205-06, 1242-43, 1313-14.

They did neither. Instead, the Provider Plaintiffs and ten anonymous patients receiving services at one of the Provider Plaintiffs' clinics (Jane Doe Plaintiffs) filed a complaint in the district court on November 23, 2015. ROA.31-59. The Plaintiffs moved for a stay of the proceedings until a Final Notice of Termination was received, and the district court granted that motion. ROA.777-781. In the meantime, the termination process continued.

During this process, the Texas Inspector General watched the entire unedited video five times, in addition to reviewing a transcript of the video. ROA.4328, 4356. The Inspector General also consulted with OIG's Chief Medical Officer, who reviewed the unedited video footage and informed the Inspector General that, in his opinion, the video demonstrated that PPGC violated accepted medical and ethical standards. ROA.4326.

During this time, there were also investigations of Planned Parenthood entities in both the U.S. House of Representatives and U.S. Senate,[3] which concluded in December 2016. *See* ROA.7328-7798 (U.S. House Select Investigative Panel report); [redacted] OIG received additional evidence attached

[3] *See* Majority Staff of S. Comm. on Judiciary, 114th Cong., Human Fetal Tissue Research: Context and Controversy (Comm. Print 2016), https://www.grassley.senate.gov/sites/default/files/judiciary/upload/22920%20-%20FTR.pdf [https://perma.cc/F9MF-3ZBU] (hereinafter Senate Report).

to a referral letter from the U.S. House Select Investigative Panel. ROA.1210, 4341-42; [redacted]

3. Shortly after receiving the information attached to the U.S. House Panel's referral letter, OIG sent the Provider Plaintiffs a Final Notice of Termination on December 20, 2016. ROA.1209-14. The Final Notices stated that the terminations were based on statements in the video indicating that the Provider Plaintiffs violated accepted medical and ethical standards in numerous ways. ROA.1210-11. The Final Notices explained that the termination was also based on a misrepresentation to Texas law-enforcement officials about PPGC's activity related to fetal-tissue procurement, as documented in the U.S. House Panel's referral letter. ROA.1211 (citing, *e.g.*, 1 Tex. Admin. Code § 371.1661; *id.* § 371.1655(24); Tex. Penal Code § 37.08).

The Final Notice stated:

> These practices violate accepted medical standards, as reflected in federal and state law, and are Medicaid program violations that justify termination. *See* 42 U.S.C. § 289g-1; 42 U.S.C. § 289g-2; 1 Tex. Admin. Code § 371.1659(2) and (6); 1 Tex. Admin Code § 371.1661; 1 Tex. Admin. Code § 371.1703(c)(6); 1 Tex. Admin. Code § 371.1605(a); 1 Tex. Admin. Code § 371.1603(g)(5) and (7). The HHSC-IG's Chief Medical Officer reviewed the video and concluded that your willingness to engage in these practices violates generally accepted medical standards, and thus you are not qualified to provide medical services in a professionally competent, safe, legal and ethical manner.

ROA.1210.

Federal law cited by OIG generally provides that abortion procedures cannot be modified solely for purposes of obtaining fetal tissue. *See* 42 U.S.C. § 289g-1(b)(2)(A)(ii) (human fetal tissue may be used for research only if "no alteration of the timing, method, or procedures used to terminate the pregnancy was made solely for the purposes of obtaining the tissue"). Nor can a researcher take part in "any decisions as to the timing, method, or procedures used to terminate the pregnancy made solely for the purposes of the research." *Id.* § 289g-1(c)(4); *accord* 45 C.F.R. § 46.204(i). If the physician performing the abortion has any interest in the research to be conducted with the fetal tissue, federal law requires this to be fully disclosed to the patient. 42 U.S.C. § 289g-1(b)(2)(C)(i). It is also "unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce."[4] 42 U.S.C. § 289g-2(a); *accord* Tex. Penal Code § 48.02(b).

State law cited by OIG provides that Medicaid providers can be terminated for failing to adhere to "accepted medical community standards or standards required by statute, regulation, or contact, including statutes and standards that govern occupations." 1 Tex. Admin. Code § 371.1659(2); *accord id.* § 371.1659(6) ("fail[ing] to abide by applicable statutes and standards

[4] "[V]aluable consideration" does not include "reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue." 42 U.S.C. § 289g-2(e)(3).

governing providers"); *id.* § 371.1703(c)(6) ("program violation"). Where a provider engages in activity that constitutes a crime, regardless of whether there is a conviction, state law allows for termination on that basis. 1 Tex. Admin. Code § 371.1661; *see, e.g.*, Tex. Penal Code § 37.08(a) (crime to knowingly make a false statement, which is material to a criminal investigation, to law-enforcement investigator). And more severe actions can be taken by OIG where there is "increased potential for harm to the public" or an "intentional, premeditated, knowing, or grossly negligent act constituting a violation." 1 Tex. Admin. Code § 371.1603(g)(5), (7).

OIG then recognized that Texas law permits the termination of *affiliates* of terminated entities. ROA.1211 (citing 1 Tex. Admin. Code §§ 371.1703(c)(7), 371.1605(a) (providers responsible for own actions plus actions of "affiliates, employees, contractors, vendors, and agents")).

The Final Notices stated that the Provider Plaintiffs had the option to ask for an administrative hearing to appeal the termination. ROA.1213. The Notices also stated that if no hearing was requested in writing within 15 days of receipt, the termination would become final and unappealable on the 30th day after receipt of the Notice. ROA.1213. The Provider Plaintiffs failed to request a hearing.

Plaintiffs filed a motion for preliminary injunction in the still-pending case in district court on January 4, 2017, and an amended complaint on January 17, 2017. ROA.1143-79, 3227-48.

C. Preliminary-Injunction Proceedings

1. On January 17, 18, and 19, 2017, the district court held an evidentiary hearing on Plaintiffs' preliminary-injunction motion. ROA.22, 23. During the hearing, Plaintiffs presented the following testifying witnesses: the Provider Plaintiffs' CEOs; Melissa Farrell, PPGC's Research Director (who appears repeatedly throughout the video); Dr. Paul Fine, PPGC's Medical Director; and two rebuttal witnesses. ROA.4093, 4507. Defendants presented testimony from the Inspector General and OIG's Chief Medical Officer. ROA.4310, 4313-48 (Inspector General's direct testimony), 4390-97 (Chief Medical Officer's direct testimony). Defendants further presented an expert in obstetrics/gynecology and a bioethics expert. ROA.4310, 4403-21 (Professor Orlando Snead's direct testimony), 4476-89 (Dr. Mikeal Love's direct testimony). Defendants also presented testimony from state officials regarding the provision of Texas Medicaid services and other Texas women's-health programs. ROA.4310, 4440-47 (Leslie French Henneke's direct testimony), 4507, 4509-20 (Jami Snyder's direct testimony).

During the hearing in open court, portions of the undercover video were played during witness testimony—particularly during the testimony of the Inspector General, where he identified specific portions of the video relied upon to form OIG's conclusions. This evidence will be discussed more fully below. *See infra* Part II.B.2. A few key parts warrant particular attention.

The video showed Farrell—PPGC's Research Director—admitting:

- that "some of our doctors in the past have [had] projects, and they're collecting the specimens" for their own fetal-tissue research projects after performing abortions;
- that these doctors altered the abortion procedure "in a way that they get the best specimen";
- that a particular doctor "would look at the schedule and pick which" specific patients to perform abortions on "[b]ecause she wanted certain gestational age" for her fetal-tissue specimens;
- that this doctor "knows what's involved in modifying what we need to do to get you the specimens that are intact because she's done it";
- and that this doctor would take the specimens she obtained for her own studies "home with her in her cooler."

Specifically, in response to a question about whether PPGC doctors could change the abortion procedure to obtain more intact specimens, Farrell stated that as long as the modification did not affect patient safety or leave tissue inside the patient, the doctors could do it and had in fact already done so:

> [S]ome of our doctors in the past have [had] projects, and they're collecting the specimens *so they do it in a way that they get the best specimen.* So I know it can happen.

ROA.5884 (emphasis added); [redacted] In discussing a particular doctor (Dr. Regan Theiler), Farrell admitted:

> [O]ne of the researchers that I can think about, she was performing the procedures and would look at the schedule and pick which ones

> and let staff know, hey, can we try to enroll these. Because she wanted certain gestational age.

ROA.5976; [redacted] Farrell explained that this doctor was an example of one of their doctors who could "modify[]" abortion procedures to obtain more "intact" specimens "because she's done it":

> So she knows what's involved in modifying what we need to do to get you the specimens that are intact because she's done it. And—I'm surprised I didn't think about her a minute ago. Yeah, Dr. Theiler would be a good one. And she was doing those here.

ROA.5978; [redacted] Farrell added:

> [E]ven then it was either they would collect it and Research would go up and just get this box full of containers or Dr. T[hei]ler would collect her own, *take it home with her in her cooler*.

ROA.6180 (emphasis added); [redacted]

Despite all this, Farrell testified that she never made any statements indicating that PPGC doctors would modify abortion procedures for research purposes; Farrell claimed her statements on the video related to modifications of post-abortion clinical procedures related to the processing of fetal tissue. ROA.4181-86.

During another portion of the video, PPGC staff members and the individuals posing as tissue-procurement-company employees were sifting through fetal body parts to judge whether intact specimens are possible. PPGC staff—including Tram Nguyen, director of PPGC's abortion-performing am-

bulatory surgical center—alluded to abortion doctors obtaining intact fetal tissue samples while circumventing the federal partial-birth-abortion ban, 18 U.S.C. § 1531, by claiming they did not "intend" to remove the fetus intact:

> TR[A]M: Yeah, you can get that. But it's big, yeah. Organs come out really well. [redacted] you never intend to complete the procedure intact. You intend to but—You intend to, but it happens.
>
> ROBERT SARKIS: You just have an intent statement, right?
>
> TR[A]M: That's correct, there's an intent statement [redacted] that you have to document.

ROA.6150-51; [redacted].

Footage was also played during the hearing indicating that PPGC was willing to modify procedures to obtain more intact specimens in ways that could increase pain to patients. In the context of discussing whether PPGC doctors could obtain intact fetal specimens, Nguyen stated:

> [TR[A]M]: Yeah. And, you know, the other, the other thing that plays a tremendous part in this all is the dilation that you've obtained. And also how—lack of a better word, how cooperative the patient is during the procedure.
>
> ROBERT SARKIS: Oh, really. But are they under conscious sedation or what's the—
>
> TR[A]M: Yeah. Conscious sedation, but there's also times where it's just *you've pretty much maxed out and that's their tolerance.*

ROA.6159-60 (emphasis added); [redacted].

2. On January 19, 2017, the district court entered a temporary restraining order against the OIG's termination decision. ROA.3551. On February 21,

2017, the district court issued a preliminary injunction against the termination of all of the Provider Plaintiffs' Medicaid provider agreements. ROA.3776-3819.

SUMMARY OF THE ARGUMENT

I. Plaintiffs lack a private right of action, under the Medicaid Act, to challenge the Texas agency's termination decision.

The Provider Plaintiffs clearly do not have a private right of action. *See Planned Parenthood of Gulf Coast, Inc., v. Gee*, 862 F.3d 445, 460 (5th Cir. 2017).

While this Court recently found a private right of action in a patient challenge to a Louisiana agency's termination of Planned Parenthood Medicaid provider agreements, *see id.* at 459-60, there is a crucial distinction between *Gee* and this case. Unlike in *Gee*, *id.* at 461, the Individual Plaintiffs are challenging the substantive merits of the state agency's finding that the Provider Plaintiffs are not "qualified" providers under the Medicaid Act.

Thus, this case fits squarely within *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 786 (1980), which held that there is no private right of action for Medicaid recipients to challenge the substantive finding terminating their desired provider. Even the *Gee* panel recognized that there is no private right of action to challenge a State's substantive termination finding on the merits. *Gee*, 862 F.3d at 461.

II. Plaintiffs cannot show a likelihood of success on the merits.

A. Texas's interpretation of the Medicaid "qualified-provider" provision—to find providers not "qualified" if they transgress accepted medical or ethical standards—is permissible. 42 U.S.C. § 1396a(a)(23). Congress must provide States with a clear statement in conditional-funding statutes (such as Medicaid) if it wants to prohibit an otherwise reasonable interpretation of a conditional-funding statutory standard. *See, e.g.*, *Pennhurst,* 451 U.S. at 17. Texas could not possibly have known, based on the text of the Medicaid Act, that if it took Medicaid money, then it would be required to fund entities that contravene federal standards regarding fetal-tissue research and make false statements to State law-enforcement officials about their fetal-tissue activities. In light of this statutory ambiguity, Congress provided no clear statement foreclosing Texas's interpretation of "qualified" to require conforming to accepted medical and ethical standards. *See Gee*, 862 F.3d at 465 (interpreting the term "qualified" in the Medicaid Act to mean "capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner").

B. This Court's precedent provides that the "substantive adequacy and reasonableness" of state agency findings in administering the "Medicaid Act" are reviewed by courts "using the *arbitrary and capricious* standard of review." *Abbeville Gen. Hosp. v. Ramsey*, 3 F.3d 797, 803-04 (5th Cir. 1993) (emphasis added). The district court erred in applying de novo review instead.

And under the highly deferential arbitrary-and-capricious standard of review, OIG's termination decision is eminently reasonable in light of the statements made on the video by PPGC staff and the documented misrepresentation PPGC made to Texas law-enforcement officials.

Even if this Court would find the statements on the video to be ambiguous, the State agency's finding can only be overturned if fails to satisfy "minimum standards of rationality." *La. Envt'l Action Network v. U.S. E.P.A.,* 382 F.3d 575, 582 (5th Cir. 2004). And there is nothing irrational about the OIG's finding here.

C. Even under de novo review, the OIG's termination decision is valid in light of the evidence showing that (1) researchers were involved in abortion procedures to secure fetal tissue samples at PPGC, (2) PPGC doctors altered abortion procedures for research purposes and PPGC indicated willingness to do so again, (3) PPGC was willing to accept valuable consideration for fetal tissue, (4) PPGC made a false statement to Texas law-enforcement officials, (5) the Provider Plaintiffs had inadequate informed-consent procedures, and (6) the Provider Plaintiffs have made misleading statements about issues germane to this dispute. If there were any doubt, Defendants' witnesses further confirmed that the Provider Plaintiffs violated accepted medical and ethical standards.

III. Plaintiffs also failed to meet their burden to establish the other preliminary-injunction requirements. The Individual Plaintiffs failed to show

they will suffer irreparable harm absent an injunction, and the balance of equities and the public interest favor Defendants.

IV. The district court's injunction is overly broad and should have applied only to the particular Individual Plaintiffs in this lawsuit—or, at most, the particular clinics that the Individual Plaintiffs seek to use.

STANDARD OF REVIEW

The decision whether to grant a preliminary injunction is reviewed for abuse of discretion, but a decision grounded in erroneous legal principles is reviewed de novo. *Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 419 (5th Cir. 2001). While a district court's findings of fact are reviewed for clear error, *Jordan v. Fisher*, 823 F.3d 805, 809 (5th Cir. 2016), the State agency's finding here is subject to the deferential arbitrary-and-capricious standard of review. *See infra* Part II.B.1.

The party seeking a preliminary injunction bears the burden of persuasion on all four elements. *Jordan*, 823 F.3d at 809. "To be entitled to a preliminary injunction, the applicants must show (1) a substantial likelihood that [they] will prevail on the merits; (2) a substantial threat that [they] will suffer irreparable injury if the injunction is not granted; (3) [their] substantial injury outweighs the threatened harm to the party [to be enjoined]; and (4) granting the preliminary injunction will not disserve the public interest." *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012). This Court has cautioned that "a preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements." *Id.* (quotation marks omitted).

ARGUMENT

I. The Plaintiffs Lack a Private Right of Action Under the Medicaid Act.

Medicaid providers themselves lack a private right of action.[5] Moreover, as the Supreme Court held in *O'Bannon* and this Court recognized in *Gee*, patients also lack a private right of action when they challenge a state agency's determination on the merits that a provider is not "qualified" under the Medicaid Act. 42 U.S.C. § 1396a(a)(23).

A. The Supreme Court, in *O'Bannon v. Town Court Nursing Center*, held that a private right of action does not exist to challenge a state agency's determination that a provider is not "qualified" under the Medicaid Act.

In *O'Bannon v. Town Court Nursing Center*, the Medicaid and Medicare provider agreements of a nursing facility were terminated by a state agency because the facility no longer met statutory and regulatory standards. 447 U.S. 773, 775-76 (1980). The termination notices stated that the facility could re-

[5] Regardless of whether there is a private right of action for the Jane Doe Plaintiffs under 42 U.S.C. § 1396a(a)(23), the Provider Plaintiffs lack rights of action as providers—which are not the intended beneficiaries of the Medicaid program. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1387 (2015). Both the *Gee* majority and dissent agreed that providers lack such a cause of action. *Gee,* 862 F.3d at 460, 486.

Defendants here filed a motion to dismiss the Provider Plaintiffs' claims in the district court, ROA.3733, but consideration of that motion was stayed pending this appeal. ROA.3950. The district court's preliminary-injunction order discusses only the claims of the Jane Doe Plaintiffs. ROA.3796, 3932.

quest reconsideration of the termination decision. *Id.* at 776. The facility requested that the state agency reconsider its decision, but while that request was still pending, the facility and six Medicaid patients filed suit in federal district court. *Id.* at 777. The state agency later denied reconsideration without hearing evidence. *Id.* at 778.

The Supreme Court held that patients lacked a private right of action to challenge the state agency's termination decision, because the Medicaid Act does not confer any right to continued services in the facility of one's choice. *Id.* at 784-85. The Court expressly construed the Medicaid Act's "qualified-provider" provision, 42 U.S.C. § 1396a(a)(23), explaining that it "gives recipients the right to choose among a range of *qualified* providers." 447 U.S. at 785. This provision, the Court held, "clearly does not confer a right on a recipient to enter an unqualified home and demand a hearing to certify it, nor does it confer a right on a recipient to continue to receive benefits for care in a home that has been decertified." *Id. O'Bannon* clarified that a patient "has no enforceable expectation of continued benefits to pay for care in an institution that has been determined to be unqualified." *Id.* at 786. The Court pointed out that, while the patients could have a case against *the service provider* for losing certification, "none would have any claim against the responsible governmental authorities." *Id.* at 787.

O'Bannon's reasoning controls in this case: The Jane Doe Plaintiffs—just like the Medicaid patients in *O'Bannon*—lack a private right of action under the "qualified-provider" provision.

B. This Court's holding in *Gee* does not control in the factual circumstances presented here, as *Gee* itself expressly recognized.

1. In the recent *Gee* panel opinion, the majority held that *O'Bannon* did not apply to the narrow factual scenario presented in that case.[6] The panel itself reiterated how narrow its holding was. *See* 862 F.3d at 468 ("we reiterate for emphasis the unique circumstances of the instant case").

The *Gee* majority interpreted *O'Bannon* to hold that "the plaintiffs had no right to reside in an unqualified facility *when the disqualification decision was connected to the state's enforcement of its health and safety regulations*." *Id.* at 461. The majority distinguished the unique facts presented in *Gee*, where Louisiana "conceded" that PPGC *was* a qualified provider. *Id.* at 465-66; *see id.* at 461 ("When, as here, a state terminates only a Medicaid provider agreement, in-

[6] This Court is still considering whether to grant en banc rehearing in *Gee*. Defendants preserve the argument that *Gee* was incorrectly decided and that the plaintiffs in that case did not have a private right of action—so, *a fortiori*, the Plaintiffs here would also not have a private right of action. *See Gee*, 862 F.3d at 473-86 (Owen, J., dissenting); Amicus Curiae Brief of the States of Arkansas and Texas, et al., in Support of Def.-Appellant's Pet. for Reh'g En Banc, *Planned Parenthood of Gulf Coast, Inc. v. Gee*, No. 15-30987 (July 24, 2017). But the arguments throughout the rest of this brief assume arguendo that *Gee* was correctly decided.

dependent of any action to enforce statutory and regulatory standards, *O'Bannon* is inapposite."). The patients in *Gee* were therefore "*not challenging the merits of the decertification decision*, as did the plaintiffs in *O'Bannon*, because [in *Gee*] there was no decertification decision." *Id.* at 461 (emphasis added; quotation marks omitted).

The panel majority held that Medicaid's "qualified-provider" provision "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." *Id.* at 462. Conversely, the panel would not have permitted a private right of action for patients of providers found to be in violation of the State's standards for Medicaid providers. *See id.* at 461 (patients cannot "freely intervene in state enforcement actions against facilities that violate health and safety standards"). As the Final Notice of Termination here provides, the Texas agency did decertify the Provider Plaintiffs for violating State standards. ROA.1209-14.

2. Thus, under both *Gee*'s reasoning and *O'Bannon*'s holding, the Jane Doe Plaintiffs have no private right of action in this case, and the district court erred in holding that they do. *Gee*'s basis for distinguishing *O'Bannon* is inapplicable to this case, so *O'Bannon* controls.

Unlike the Louisiana agency in *Gee*, the State Defendants here have *never* conceded that the Provider Plaintiffs are qualified Medicaid providers. Quite the opposite: the Texas OIG conducted a factual investigation, considered

substantial evidence, and concluded that the Provider Plaintiffs are *not* qualified because they transgressed accepted medical and ethical standards. ROA.1209-14.

The *Gee* panel majority also reasoned that the Louisiana agency "[did] not even attempt to articulate" how pending qui tam cases, unspecified misrepresentations, and a pending investigation related to qualifications; instead, *Gee* said that the agency seemed "to rely on its bald assertion that it may terminate a provider for *any reason* supplied by state law." 862 F.3d at 466. In stark contrast, OIG has directly articulated how its termination decision is linked to the Provider Plaintiffs' qualifications to provide medical services. It is this genuine finding that the Provider Plaintiffs transgressed accepted medical and ethical standards—and were willing to do so again—that supported OIG's decision. ROA.1209-14, 4329-30, 4334-41.

The *Gee* majority also mentioned that PPGC's medical licenses had not been revoked in Louisiana. 862 F.3d at 470. Here, Defendants are not aware that the Provider Plaintiffs' Texas medical licenses have been revoked, but Texas medical practice is not regulated by OIG. Instead, it is regulated by the Texas Medical Board, which is a separate agency and operates under separate statutory authority. *See* Tex. Occ. Code §§ 151.003(2), 152.001(a), 153.001(3). Nor does OIG license certain medical facilities, whereas the Texas Department of State Health Services licenses abortion clinics. *See* 25 Tex. Admin.

Code § 139.1(a). In any event, the standards for licensure of a facility or a physician are different than the standards for participation in Medicaid. *Cf.* Tex. Hum. Res. Code ch. 32 (Texas Medicaid program); Tex. Health & Safety Code ch. 245 (licensing of abortion facilities); Tex. Occ. Code ch. 155 (license to practice medicine). Thus, the action (or inaction) of state administrative officials not involved in this lawsuit—and not connected with the enforcement of Medicaid standards—is of no import in determining whether the federal Medicaid Act grants a private right of action.

II. The District Court Erred in Concluding that Plaintiffs Were Likely to Succeed on the Merits.

A. Texas's interpretation of the word "qualified" in the Medicaid "qualified-provider" provision is a permissible construction, and Congress did not provide a clear statement foreclosing this interpretation.

1. In a program like Medicaid, where "Congress intends to impose a condition on the grant of federal moneys [to States], it must do so unambiguously." *Pennhurst*, 451 U.S. at 17. *Pennhurst*'s clear-statement requirement directs the Court to ask whether a State had sufficient notice of the conditions being placed upon the State when it accepted federal funds: "In seeking to determine whether the language of a condition is sufficiently clear, courts must view the statute 'from the perspective of a state official who is engaged in the process of deciding whether the state should accept federal funds and the obligations that go with those funds.'" *Hurst v. Tex. Dep't of Assistive &*

Rehabilitative Servs., 482 F.3d 809, 811 (5th Cir. 2007) (quoting *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,* 548 U.S. 291, 296 (2006)). Congress's power to legislate under the Spending Clause, therefore, "'does not include surprising participating States with post-acceptance or "retroactive" conditions.'" *NFIB*, 567 U.S. at 584 (quoting *Pennhurst*, 451 U.S. at 25).

So where a clear-statement requirement (like *Pennhurst*'s) applies, a State's implementation of the Medicaid Act is valid unless the statutory language "plainly prohibit[s]" the State's interpretation. *Detgen ex rel. Detgen v. Janek*, 752 F.3d 627, 631 (5th Cir. 2014). By requiring a plain, clear statement in the federal statute to foreclose a State's implementation of the Act, the Court ensures that Congress provided States with fair notice of the conditional-funding bargain that they were accepting.

2. No clear statement in the Medicaid Act forecloses Texas's interpretation of "qualified,"42 U.S.C. § 1396a(a)(23), as permitting termination for transgressing accepted medical and ethical standards—even if a court has not found a violation of a criminal or civil prohibition. *See supra* pp.6-7, 11-12. This Court in *Gee* even construed this same statute in a very similar manner, interpreting the term "qualified" to mean "capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner." 862 F.3d at 465.

The Medicaid Act does not define "qualified," and although it lists some grounds under which the HHS Secretary and the States must or may terminate providers, that list is not exhaustive. *See* 42 U.S.C. § 1320a-7. Rather, the Act specifically contemplates that States will fill in the blanks in setting the rules for qualifications, as *Gee* acknowledged. *See id.* § 1320a-7(b)(5) (authorizing the Secretary to exclude providers who have been excluded on state law grounds); 42 C.F.R. § 1002.3(b) (State has authority to exclude a Medicaid provider as a state contractor "for any reason or period authorized by State law"); *Gee*, 862 F.3d at 465.

Thus, as this Court has previously observed, "States have broad discretion to implement the Medicaid Act." *Detgen*, 752 F.3d at 631. While *Gee* and the cases it relies upon held that States do not have unfettered discretion to define "qualified" however they wish,[7] 862 F.3d at 466, that holding cannot preclude every interpretation of the term by a State, and it does not preclude Texas's in this case.

[7] *Gee* and none of the cases it cited for this proposition acknowledged *Pennhurst*'s holding that Congress must provide a clear statement in conditional-funding statutes. *See Planned Parenthood Arizona, Inc. v. Betlach,* 727 F.3d 960 (9th Cir. 2013); *Planned Parenthood of Ind. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012). These cases are also factually distinguishable. *Gee*, *Betlach*, and *Planned Parenthood of Indiana* arrived at their conclusions in the context of terminations they viewed to be wholly divorced from qualifications, and those cases acknowledged that, at a minimum, the word "qualified" must bear some relationship to qualifications. *See Gee*, 862 F.3d at 463-65. Here, the termination is entirely based on evidence related to qualifications.

Using the definition of "qualified" from *Gee*—"capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner"—and relying on preexisting Texas law, OIG concluded that Texas Medicaid providers must comply with accepted medical and ethical standards to remain qualified. ROA.1209-14, 4340-41. Nothing about this conclusion conflicts with federal law, and Congress in the Medicaid Act provided nothing close to a clear statement foreclosing this construction.

B. Arbitrary-and-capricious review applies to the state agency's finding here, and OIG's termination decision was reasonable.

1. The district court erred by applying a de novo—rather than the arbitrary-and-capricious—standard of review.

This Court's precedent squarely provides that the "substantive adequacy and reasonableness" of state agency findings in administering the "Medicaid Act" are reviewed by courts "using the *arbitrary and capricious standard of review*." *Abbeville*, 3 F.3d at 803-04 (emphasis added). The district court thus erred by reviewing the state agency's findings here under de novo review. ROA.3798-99.

Abbeville held that while state-agency compliance with any applicable federal "procedural requirements" is reviewed "*de novo*," courts apply "arbitrary and capricious review of the findings" substantively made by the agency. 3 F.3d at 803-04; *see id.* at 803 ("[t]he joint federal-state Medicaid program" evokes "the same policy" of "deferential review" to federal or state agencies'

findings in administering federal programs). Plaintiffs' challenge here is not to "the state's factfinding process," *id.* at 803—that is, for example, an argument that the state agency failed to make *any* findings, *see id.* at 802 (de novo review applied to determine whether state agency "in fact, made the 'findings' stipulated in the Boren Amendment"). The state agency here followed the requisite process, made findings, and those findings invoked the relevant federal and state standards in explaining that the Provider Plaintiffs are not "qualified" providers. ROA.1209-14. Plaintiffs are challenging the substantive correctness of the state agency's conclusion that the Provider Plaintiffs are not "qualified" providers. The "substantive adequacy and reasonableness" of this finding is reviewed "using the arbitrary and capricious standard of review." *Abbeville*, 3 F.3d at 804.

Arbitrary-and-capricious review is a "highly deferential standard of review," under which a "reviewing court has the least latitude in finding grounds for reversal." *Sabine River Auth. v. U.S. Dep't of Interior,* 951 F.2d 669, 678 (5th Cir. 1992) (quotation marks omitted). Under this standard, the Court "limit[s] the scope of [] inquiry to determining if the agency's judgment conforms to minimum standards of rationality—whether the agency action 'bears a rational relationship to the statutory purposes' and is there 'substantial evidence in the record to support it.'" *La. Envt'l*, 382 F.3d at 582 (quoting *Tex. Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 933-34 (5th Cir. 1998); *accord, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513, 515 (2009)

(requiring a "reasoned explanation," and asking if the "agency's reasons" were "rational"). The substantial-evidence standard, too, is quite deferential: "Substantial evidence is that which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion. *It is more than a mere scintilla, and less than a preponderance.*" *El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 656 (5th Cir. 2012).

The Court "may not weigh the evidence in the record pro and con." *Harris v. United States*, 19 F.3d 1090, 1096 (5th Cir. 1994) (quotation marks omitted). "Indeed, the agency's decision need not be ideal, so long as it is not arbitrary or capricious, and so long as the agency gave at least minimal consideration to relevant facts contained in the record." *Id.* For example:

> Where conflicting evidence is before the agency, the agency and not the reviewing court has the discretion to accept or reject from the several sources of evidence. The agency may even rely on the opinions of its own experts, so long as the experts are qualified and express a reasonable opinion. The reviewing court may be inclined to raise an eyebrow under such circumstances, but it must show the proper respect for an agency's reasoned conclusion even if the reviewing court finds the opinions of other experts equally or more persuasive.

Sabine River, 951 F.2d at 678. In sum, "a presumption of regularity and deferential standard" applies to review of OIG's determination here. *Abbeville*, 3 F.3d at 804.

2. OIG's decision was not arbitrary or capricious.

Applying the valid interpretation of "qualified" (*see supra* Part II.A) to the evidence before the agency, OIG concluded that PPGC had breached accepted medical and ethical standards—and that PPGT and PPST should also be excluded based on their affiliation with PPGC (and Planned Parenthood Federation of America). OIG's decision was reasonable and supported with substantial evidence, so it satisfies the arbitrary-and-capricious standard of review.

OIG gave much more than the requisite "minimal consideration to relevant facts contained in the record." *Harris*, 19 F.3d at 1096. OIG investigated and considered the evidence for a year, while congressional investigations also proceeded, before issuing the Final Notice of Termination. ROA.1202-06, 1209-14, 7328-7798; [redacted]; *see also supra* p.9 n.3. Notably, the Provider Plaintiffs elected not to put any evidence whatsoever before the agency.

As detailed below, the evidence that OIG considered before issuing the Final Notice—namely, the unedited undercover video footage and the documents from the U.S. House Select Investigative Panel—was more than enough to establish "prima facie evidence" that the Provider Plaintiffs transgressed accepted medical and ethical standards. ROA.1209-14.

a. Researchers were involved in abortion procedures to secure fetal-tissue samples

The Final Notice stated that OIG relied on evidence contained in the unedited video indicating that researchers had performed abortions at PPGC for the purpose of procuring fetal tissue for their own research. ROA.1210. This contravenes federal law. *See* 42 U.S.C. § 289g-1(c)(4); 45 C.F.R. § 46.204(i).

As indicated in the Final Notice, OIG relied on the unedited video. ROA.1209-14. The undercover video footage demonstrates that PPGC has permitted doctors involved in fetal-tissue research to perform abortions to secure that fetal tissue—as quoted above, *see supra* pp.14-16. For example, in the video, PPGC Research Director Melissa Farrell (Farrell) identified Dr. Regan Theiler as a doctor who performed abortions and collected tissue for her own research. ROA.5976; [redacted]. Farrell admitted that Dr. Theiler would look at the abortion patient schedule and pick those patients she wanted enrolled based upon the gestational age of the fetus and the fetal tissue she sought to procure for her own research. ROA.5976; [redacted]. Farrell explained that Dr. Theiler would collect her own specimens and "take it home with her in her cooler." ROA.6180; [redacted]. Farrell admitted that PPGC abortion doctors have had research projects in the past and in those instances would collect their own specimens. ROA.5883-85; [redacted]. Farrell further confirmed that abortion doctors in the past were performing research with fetal tissue. ROA.5883-85; [redacted].

b. Alteration of abortion procedures for research purposes

Federal law governing fetal-tissue research also informed OIG's conclusion that altering abortion procedures violates accepted medical and ethical standards. ROA.1210. A federal statute provides that human fetal tissue may be used for research only if "no alteration of the timing, method, or procedures used to terminate the pregnancy was made solely for the purposes of obtaining the tissue." 42 U.S.C. § 289g-1(b)(2)(A)(ii).[8]

There were many statements in the video by Farrell and PPGC ambulatory surgical center director Tram Nguyen (Nguyen), which indicated that PPGC doctors had altered abortion procedures to procure fetal tissue in the past and were willing to do so in the future. ROA.1209-14. Some of these statements were quoted above, *see supra* pp.14-16, but there are other statements too:

- Farrell stated that researchers connected to PPGC have targeted specific fetal tissue in the past and that PPGC is willing to alter the abortion procedures to obtain sought after specimens. ROA.5877-80; [redacted]

[redacted] The district court erroneously concluded that the federal statutes governing fetal-tissue research do not apply in this case because the Texas Health and Human Services Commission had no evidence that the Theiler study was federally funded. ROA.3805. But the evidence in the record demonstrates that the study was funded by the National Institutes of Health. ROA.8877.

- Farrell further confirmed that PPGC can get "creative" and alter a procedure to obtain a high volume of intact liver, thymus, and neural (brain) tissue. ROA.5877-80; [redacted]

- Farrell explained that PPGC is willing to explore how it could increase the chances of obtaining intact fetal specimens by altering the abortion procedure and confirmed that when abortion doctors in the past have needed an intact specimen they can "make it happen." ROA.5879-80; [redacted]

- After discussing how changes to the abortion procedure should protect patient safety, Farrell also stated that abortion procedures have been altered in the past when their doctors have been involved in research: "Because some of our doctors in the past have [had] projects, and they're collecting the specimens so they do it in a way that they get the best specimen. So I know it can happen." She also said PPGC can be "flexible to do whatever" in terms of an abortion procedure. ROA.5883-85; [redacted]

- Nguyen, the director of the PPGC abortion facility, confirmed that PPGC can obtain intact liver and thymus. ROA.6150-51; [redacted]

- Nguyen stated, [redacted], that PPGC must aver that it cannot "intend" to complete the abortion intact (that is, with an intact fetus,

due to the federal law against partial-birth abortions), but that PPGC can make it happen nevertheless. ROA.6150-51; [redacted]

- Nguyen further said, [redacted], that abortion doctors must sign an intent statement affirming that they did not "intend" to remove the fetus intact. ROA.6150-51; [redacted].
- During a conversation regarding what factors contribute to obtaining an intact thymus, Nguyen explained that obtaining intact specimens (that is, liver, thymus, and neural tissue) depends upon the amount of cervical dilation PPGC can achieve and the patient's pain tolerance. ROA.6159-60; [redacted].
- Nguyen stated that PPGC has done things that other people are "not necessarily comfortable with" in the context of fetal-tissue procurement. Nguyen also explained that these "other things" create more risk. Nevertheless, Nguyen explained PPGC is willing to take this risk because "it is for a good cause." ROA.6174; [redacted]
- The female in the video asked both Farrell and Nguyen if PPGC's abortion doctors are "experienced enough" that they could adjust an abortion procedure if they were targeting specific intact specimens

for researchers. Both Farrell and Nguyen confirmed that two particular PPGC doctors could alter the procedure to meet the researcher's request. Nguyen stated that these doctors are experienced in this area because they both have research backgrounds and one is actively engaged in research. ROA.6165-67; [redacted]

- Farrell said PPGC has an advantage over other sources of fetal tissue because they have extensive research-related facilities and experience in research. ROA.5891; [redacted]. She stated that PPGC "alter[s] [PPGC's] standard of care" while they are "still maintaining patient safety, still maintaining efficiency in clinic operations, but we integrate research into it." ROA.5891; [redacted]. Farrell discussed "alter[ing]" their "process" to obtain "intact fetal cadavers" that will provide more than one specimen for research—for example, one fetus providing a neural-tissue sample as well as a liver and thymus. ROA.6067; [redacted].

c. Potentially receiving valuable consideration in exchange for fetal tissue

The Final Notice also stated that OIG concluded that the video showed PPGC's willingness to receive payment for fetal tissue in excess of costs incurred, which also supported the conclusion that the Provider Plaintiffs are

not qualified. ROA.1211. Receiving valuable consideration in exchange for fetal tissue violates both federal and state law. *See* 42 U.S.C. § 289g-2(a); Tex. Penal Code § 48.02(a)-(b).

On the video, Farrell asserted that even though PPGC is "already set up" to do the fetal-tissue procurement, "we will definitely need to work out, you know, something in terms of covering additional costs for additional . . . things related to it." ROA.5891-92; [redacted]. Farrell explained how she uses a contract's language to make it seem that payments are going only to "administrative costs" rather than compensation for specimens, which she admits is "touchy" under federal law: "I'm very particular about working with the language of the budget and contract to where the language is specific to covering the administrative costs and not necessarily the per specimen. Because that borders on some language in the federal regs, it's a little touchy." ROA.5892; [redacted]. Farrell discussed how she creates a profit margin in a budget, and how researchers can buy meals for the staff as a bonus for enrolling patients to donate fetal tissue under the nebulous category of "meeting cost." ROA.5987-88, 5991-94; [redacted]

Farrell also made clear that PPGC cares about the financial bottom line in terms of providing the donated tissue:

> Well, I know—that's another thing that is—you know, a lot of folks—I get this mainly from academic institutions. They see Planned Parenthood, oh, they're nonprofit, that means you're nonbudget . . .

> And they will come to us with, you know, budgets that are, quite frankly, insulting. You know, like . . . really? I mean where in the United States can you—a consent form, you know, eight-page consent form for this amount of money . . . and it takes 30 minutes to . . . administer that to a patient. So, you know, again with the understanding that, you know, just because we're nonprofit does not mean we're fiscally unstable.

ROA.5898-99; [redacted].

d. False statement to law enforcement

Where a provider engages in activity that constitutes a crime, regardless of whether there is a conviction, state law allows for termination on that basis. *See* 1 Tex. Admin. Code § 371.1661(8). And it is a crime to "with intent to deceive . . . knowingly make[] a false statement that is material to a criminal investigation and make[] the statement to . . . a peace officer or federal special investigator conducting the investigation; or . . . any employee of a law enforcement agency that is authorized by the agency to conduct the investigation and that the actor knows is conducting the investigation." Tex. Penal Code § 37.08(a).

OIG received and relied on materials provided to the State of Texas by the U.S. House Select Investigative Panel. ROA.1211. These Panel materials were provided to the State on or about December 1, 2016, a few weeks before the Final Notice was sent. ROA.1210; [redacted].

The materials attached to the Panel's referral letter document a visit by the Texas Ranger Division to PPGC and discussions regarding contracting ac-

tivity between PPGC and a Baylor College of Medicine researcher for the procurement of fetal tissue. ROA.4341-45. The documents show that PPGC at that time *had* been informed that the Baylor College of Medicine's Independent Review Board had approved the researcher's fetal-tissue research proposal, but PPGC's General Counsel stated to the Texas Rangers that approval had *not* been obtained. ROA.4341-45; [redacted]. OIG concluded that these documents indicated that this statement was a misrepresentation. ROA.4343. This establishes prima facie evidence supporting termination.

3. The district court erred by relying on post-termination evidence proffered by Plaintiffs.

Arbitrary-and-capricious review "'is limited to the record before the agency at the time of its decision.'" *Luminant Generation Co. v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012) (quoting *Geyen v. Marsh*, 775 F.2d 1303, 1309 (5th Cir. 1985)). The district court therefore erred by considering post-termination evidence submitted by Plaintiffs at the preliminary-injunction hearing—evidence that was not before the state agency when it made its determination, as Plaintiffs did not use the administrative-hearing procedure they had available to them.

The district court acknowledged that it was required to determine "whether the Inspector General had prima facie evidence sufficient to conclude the bases of termination set forth in the Final Notice merited finding the

Plaintiff Providers were not qualified." ROA.3798-99. The court then stated that it was limiting itself to reviewing only the evidence OIG pointed to in its Final Notice—rather than the additional evidence presented by Defendants at the preliminary-injunction hearing. ROA.3798-99. But while the district court refused to consider Defendants' post-termination evidence, the court unfairly did consider *Plaintiffs*' post-termination evidence.

Had the district court correctly applied arbitrary-and-capricious review, then the evidence should have been limited to the record before the agency. *See Luminant*, 675 F.3d at 925. It was an evasion of the arbitrary-and-capricious standard for the district court to consider all the belated, post-termination evidence that *Plaintiffs* proffered at the preliminary-injunction hearing. None of this evidence was before OIG when it made its decision—in large part because the Provider Plaintiffs deliberately chose not to use the agency-review process. Thus, the Provider Plaintiffs forfeited any opportunity to place this evidence in the agency record, and this prevented the agency from having an opportunity to explain why the agency would have disregarded Plaintiffs' implausible post-hoc explanations for the statements made on the video.

The district court claimed to be viewing the evidence "holistically" and "in context." ROA.3802-04. But in reality, the court relied on Plaintiffs' post-termination evidence that was not before the agency at the time it made its decision. That was error under the arbitrary-and-capricious standard.

C. OIG's termination decision was valid even under de novo review.

Even assuming arguendo that de novo review applies, OIG's decision was valid. For all of the reasons just explained, *see supra* Part II.B.2, OIG had prima facie evidence that PPGC had violated accepted medical and ethical standards, thus confirming that PPGC and Planned Parenthood affiliates are not "qualified" providers. The district court never should have considered the post-termination evidence proffered by Plaintiffs. *See supra* Part II.B.3. But if de novo review applies and evidence outside the agency record could be considered, then the additional evidence discussed below—which was referenced by Defendants at the preliminary-injunction hearing—further confirms that OIG's termination decision was valid.

1. Evidence shows that the Provider Plaintiffs' informed consent procedures are inadequate.

Obtaining informed consent is a basic part of ethical medical practice. But the record shows that the Provider Plaintiffs' procedures relating to patients participating in fetal tissue donation are inadequate.

Planned Parenthood Federation of America tells doctors and patients two different things as to whether an abortion procedure can be modified to obtain fetal tissue. The Federation's written policies, which apply to all affiliates including the Provider Plaintiffs, state that no "substantive" alterations to abortion procedures may be made to obtain fetal-tissue samples—thus implying

that some alterations are permissible. ROA.7835, 7837. The same policy requires that affiliates use a specific form with patients donating fetal tissue. ROA.7835, 7837. But in contrast to the policy on fetal-tissue research that allows some alterations, the patient form states that "*no changes* will be made to the abortion procedure." ROA.8866 (emphasis added). Telling patients that no changes in procedures will be allowed, while having a written policy allowing doctors to make some changes to the abortion procedure to obtain fetal-tissue samples, is unethical. ROA.4417-18, 4487-88, 4489.

The testimony of Dr. Paul Fine, Medical Director of PPGC, reinforced this discrepancy. He testified that modifying an abortion procedure for research purposes was acceptable in his view because a patient consented to a generalized procedure (that is, a dilation-and-evacuation abortion); Fine believed that as long as the patient was not at risk, the doctor could make whatever changes he wanted, even for research purposes. ROA.4249-50, 4266, 4268. This blatantly disregards that their patient form says "no changes." ROA.8866. And both doctors and the bioethicist who testified on behalf of Defendants disputed Fine's testimony, stating that making any changes to a medical procedure for any reason other than the patient's good were unethical, unless a patient consented. ROA.4397, 4411, 4413-14, 4418-19, 4483-84.

The consent form mandated by the Federation also claims that fetal tissue has been used to treat and cure illnesses like AIDS, cancer, and Parkinson's disease. ROA.8866. As there are currently no cures for these diseases, this is

misleading. ROA.4484. And Planned Parenthood even admitted to the U.S. House Select Investigative Panel that this was misleading.[9] *See* ROA.2384.

Moreover, the consent forms used during the study involving Dr. Theiler do not appear to inform the patient that Dr. Theiler had an interest in the research and would also be performing the abortion. ROA.8866-80. Such a conflict of interest should be disclosed to a patient, and failing to do so violates ethical principles and federal law. *See* 42 U.S.C. § 289g-1(b)(2)(C)(i).

2. Congressional reports support OIG's conclusion that PPGC accepted, or was willing to accept, potentially valuable consideration in exchange for fetal tissue.

In addition to Farrell's statements on the video and the documents attached to the U.S. House Panel's referral letter, *see supra* pp.38-40, additional evidence shows that PPGC likely received payment in excess of costs for fetal tissue. Testimony before the U.S. House Panel showed that requests for reimbursements were not made based on actual costs expended, but rather "back-of-the-envelope" calculations. ROA.7718 (citing House Report Exhibits at 8.27). When asked to provide an accounting to the Senate, Planned Parenthood affiliates attempted to belatedly justify their costs by "shoehorn[ing] a vast array of indirect or tenuously related costs into [42 U.S.C.]

[9] *See* Select Investigative Panel, U.S. House of Reps. Comm. on Energy and Commerce, "Final Report," at Exh. 8.37 (Dec. 3, 2016), https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/Chapter_VIII_Exhibits.pdf (hereinafter House Report Exhibits).

§ 289g-2's exception, including attributing several thousands of dollars in costs to amorphous 'General Administrative & Medical Overhead.'" ROA.3694; Senate Report at 52. The Senate investigation also provided evidence that Planned Parenthood Federation of America admitted that its affiliates were engaging in fetal-tissue research programs in order "to increase their revenues." ROA.3694; Senate Report at 49. That would violate the federal prohibition against receiving valuable consideration in exchange for fetal tissue and supports OIG's conclusion. *See* 42 U.S.C. § 289g-2(a).

3. Additional witness testimony supports OIG's conclusion that PPGC violated accepted medical and ethical standards.

OIG relied upon the expert opinion of its Chief Medical Officer, Dr. Ted Spears. ROA.4326. Spears watched the entire video recorded at the PPGC facility. ROA.4394. Spears concluded that PPGC had violated accepted medical and ethical standards. ROA.4395-96. Spears explained that PPGC staff stated at least some of their doctors were willing to alter abortion procedures in the future to obtain certain fetal-tissue specimens, and that Farrell had admitted that some PPGC doctors had altered abortion procedures in the past for fetal-tissue research purposes. ROA.4396-97. Spears explained that the statements in the video show that PPGC is willing to place the needs of a researcher above the needs of a patient, which is a violation of accepted medical and ethical standards. ROA.4396-97, 4400-01.

Dr. Mikeal Love, a board-certified Ob/Gyn practicing in Austin, Texas, reviewed the full unedited video, the transcripts associated with the video, the federal law governing fetal tissue donation, and the consent form used by PPGC. ROA.4480-81. After reviewing these materials, Love reached the opinion that PPGC had violated accepted medical and ethical standards. ROA.4483. Love testified that Farrell stated on the video that abortion doctors were willing to alter abortion procedures to target specific tissue for researchers. ROA.4483. Love explained that a willingness to alter a procedure to meet the needs of a researcher violates accepted medical and ethical standards because it places the needs of a researcher over those of the patient. ROA.4484. Love explained that altering a procedure in the way implicated by the video would mean over-dilation of the cervix, which increases the risk for future complications. ROA.4485-87. Love also testified that the statements on the video that abortion doctors at PPGC performed abortions for their own research purposes violate ethical standards because it creates a conflict of interest and undermines the doctor-patient relationship. ROA.4486. Finally, Love testified that PPGC's consent forms were insufficient. ROA.4487-88, 4489.

Professor Orlando Snead, a bioethicist and professor at Notre Dame Law School, also testified. Professor Snead reviewed the unedited video, a transcript of the video, materials created by the U.S. House and Senate, a variety of federal laws and regulations, decisions of different federal bioethics advisory commissions, and other scholarly materials to formulate an opinion in

this case. ROA.4405-06. Professor Snead explained that federal laws related to fetal tissue research reflect accepted ethical principles. ROA.4406-11; *see supra* p.11.

In his expert opinion, the video demonstrated violations of ethical standards: Farrell's statements indicated that PPGC had in the past modified abortion procedures solely for the sake of research; Nguyen's statements—that the ability to obtain more intact specimens for research depends on the dilation of the patient's cervix, the patient's pain tolerance, and the patient's "cooperation" in light of the painful nature of the procedure—show a willingness to modify an abortion procedure even while causing additional pain to the patient solely for the sake of research. ROA.4414-16; *see supra* p.16. Professor Snead also testified that the consent form used by Planned Parenthood Federation of America is insufficient for informed consent. ROA.4417-18, 8866.

4. Plaintiffs failed to establish that the video is unreliable evidence.

Plaintiffs have claimed throughout the proceedings below that the video is fraudulent and deceptively edited. *See*, *e.g.*, ROA.3228, 3598, 3745, 4149-50, 4618. But *none of Plaintiffs' witnesses had even watched the unedited video*, despite offering opinions and testimony on what it purportedly shows; none of that testimony is credible, and it was clearly erroneous for the district court to rely on it. ROA.4144, 4201-02, 4269-70, 4622-24. For instance, Melaney Linton, PPGC's CEO, testified that Farrell was "not appropriately portrayed

on th[e] video" and that the video "was highly edited." ROA.4149-50. She also admitted, however, that she never watched the video offered by the State in this case. ROA.4149-50. Even Plaintiffs' counsel had not watched the video. ROA.4622-24. Additionally, Plaintiffs offered no evidence that this recording had been edited or altered to depict something that had not occurred or to remove a comment from its context. Thus, the only thing supporting the Plaintiffs' assertion that the video is somehow compromised is the *ipse dixit* of the Plaintiffs.

Overlooking these deficiencies in Plaintiffs' charges, the district court implausibly reasoned in its preliminary-injunction order that "the quality and strength of the evidence the CMP video provides is suspect," faulting Defendants for purportedly not providing evidence of its authenticity. ROA.3800-01. But the court's statement is puzzling, because during the preliminary-injunction hearing, the district court *overruled* Plaintiffs' authenticity objection to the video, stating, "I don't think you can dream of a good enough objection to keep it out." ROA.4333.

Importantly, Defendants *did* offer multiple pieces of evidence showing the video's reliability and authenticity. First, Defendants offered a declaration as to authenticity from the individual who filmed the footage. ROA.8863-65. Second, Defendants submitted a report from a reputable forensic firm comparing this raw video footage with a publicly available online YouTube version of the video labeled "full footage":

"https://www.youtube.com/watch?v=MCiD9_ICt44." ROA.1610; *see* ROA.1605, 2390. This firm concluded that both videos were authentic and not deceptively edited (although the district court misconstrued this evidence as pertaining only to the YouTube footage, ROA.3801). ROA.1605, 1610. Third, the Inspector General testified to multiple factors in the footage substantiating that the facility depicted in the footage was in fact PPGC's facility. ROA.4329-30. And, on cross-examination, Farrell admitted that she was depicted in the video. ROA.4203-04.

There is no serious argument that the footage is inauthentic.

5. Plaintiffs' witnesses were not credible.

Plaintiffs' witnesses were not credible, and the district court clearly erred in crediting their testimony.

Despite having not watched the video, Farrell provided post-hoc, implausible explanations of her damaging statements. Farrell claims that she was not discussing the alteration of abortion procedures on the video—instead claiming to reference the "process" of packaging tissue after abortions. ROA.4181-86. Yet the video demonstrates on multiple instances that Farrell and others were discussing the abortion procedure, not packaging. Farrell discusses making changes to the abortion procedure to "make [getting an intact specimen] happen." ROA.5877-80; [redacted]. Farrell again discussed the procedure, saying that the procedure must not leave fetal tissue inside of the patient. ROA.5883-85; [redacted]. Farrell explained that PPGC

is "flexible to do whatever" when asked about converting a pregnancy to the breech position during an abortion. ROA.5883-85; [redacted].

Nguyen's statements also contradict claims that the video discussion did not relate at all to the abortion procedure. Nguyen stated [redacted], that PPGC doctors must aver that they do not "intend" to complete the abortion procedure in a manner resulting in the procurement of an intact fetal cadaver. ROA.6150-51; [redacted]. Nguyen said, [redacted], that cervical dilation, pain tolerance, and patient "cooperation" are critical factors in obtaining intact specimens. ROA.6159-60; [redacted]. Nguyen, [redacted], stated that PPGC is willing to do things that other providers are "not necessarily comfortable with," even if it creates more risk, because "it's for a good cause." ROA.6174; [redacted].

After the discussion with Nguyen, Farrell later explained that the level of sedation influences how much a patient "cooperates" with a doctor "getting creative" because of their "pain tolerance." ROA.6183-85; [redacted]. Farrell explained that the dismemberment of the fetus plays a role in the process. ROA.6182; [redacted].

If all of the discussion on the video about changing procedures related only to post-abortion clinical procedures like processing and packaging of tissue, as Farrell claimed, there would be no reason for Farrell and Nguyen to be

discussing the position of the fetus in the uterus, risk to the patient, pain tolerance, sedation, and patient "cooperation"—all considerations that relate to the abortion procedure itself. The district court clearly erred in giving any credit to these implausible and inconsistent post-hoc explanations.

Plaintiffs also offered the testimony of Dr. Paul Fine, Medical Director of PPGC and a member of Planned Parenthood Federation of America's accreditation committee. ROA.4238, 4240, 5050. Fine claimed that PPGC doctors never know whether a particular patient has consented to donate fetal tissue. ROA.4245-46, 4267. But that is contradicted by statements on the video, namely Farrell's admission that Dr. Theiler would select particular patients from the schedule and ask staff to try to enroll them in her study. ROA.5976; [redacted] The Federation's policies also do not mandate separation between the patient file and the documentation related to the fetal-tissue donation. ROA.7835, 7837.

Plaintiffs offered rebuttal expert testimony, but neither expert was credible. Professor John Robertson, an ethics professor from the University of Texas at Austin, had not seen the video.[10] ROA.4549. Professor Amanda Stevenson, an assistant professor of sociology and faculty affiliate at the Institute of Behavioral Sciences at the University of Colorado, also testified. ROA.4554. But the district court found that Professor Stevenson's testimony

[10] Professor Robertson testified that if a woman wanted to abort a child based on its potential eye color, "it would be something in her right." ROA.4552-53.

was not relevant to the issues in this lawsuit, was unreliable, and that "[n]othing of what this witness is going to say, from now on to eternity, is going to influence me in this case." ROA.4595.

6. Evidence shows that the Provider Plaintiffs have made misleading statements about issues germane to this action.

Plaintiffs told the district court that they did not have a copy of the video in evidence before the preliminary-injunction hearing. ROA.4038-39. But evidence shows PPGC had already possessed the raw video footage for over one year, after its criminal-defense attorney obtained it. ROA.1716-18.

PPGC offered misleading statements in the *Gee* litigation specifically related to its fetal-tissue-procurement activities. Linton stated several times in a declaration and attached exhibits, in *Gee*, that (1) PPGC does not provide abortion services, and (2) that PPGC's abortion subsidiary,[11] Planned Parenthood Center for Choice (PPCFC), "does not currently participate in any fetal tissue donation programs."[12] This Court took that to mean "PPGC does not perform any abortions or operate any fetal tissue donation programs." *Gee*, 862 F.3d at 467, 467-68. But it appears that during this time period, and even to

[11] ROA.4139-43. PPGT and PPST also each have subsidiary, related entities whose sole purpose is to provide abortions. ROA.4116, 4282. All Planned Parenthood affiliates are required by Planned Parenthood Federation of America to provide abortions. ROA.4121.

[12] *See* Decl. of Melaney Linton, *Planned Parenthood Gulf Coast, et al. v. Kliebert*, No.3:15-cv-00565, M.D. La. (Oct. 9, 2015) (ECF No. 46-1) ("Linton Gee Decl.") ¶21, Ex. F at 2, Ex. H at 2.

this day,[13] PPGC advertises on their website that they provide donated fetal tissue for clinical research. ROA.8132-52. Regardless, the evidence shows that PPGC and PPCFC functionally operate as the same entity. The two organizations share an address, building, board members, directors, executive staffs, and President/CEO (Linton). ROA.4137-43; *see also* ROA.8005-51, 8219-52. PPGC and PPCFC also state that they are related entities on Internal Revenue Service forms. ROA.8047, 8248. The abortion-performing ambulatory surgical center director, Nguyen, is a PPGC employee. ROA.4145. And as the video makes clear, PPGC's research department—through Farrell, also a PPGC employee—handles any contracts and payments regarding fetal tissue research that involves PPCFC. *See* ROA.5846-6208; [redacted]

Furthermore, during the Senate Judiciary Committee's investigation, Planned Parenthood Federation of America stated through counsel that only four of its affiliates—all in California—had engaged in fetal-tissue donation between 2010-2015 and received funds in exchange. ROA.3705; Senate Report at Ex. 11-12. Yet PPGC engaged in fetal tissue donation between 2010-2011 during the study Dr. Theiler participated in and received over $21,000 in payments. ROA.2391; [redacted]

[13] Planned Parenthood Gulf Coast, https://www.plannedparenthood.org/planned-parenthood-gulf-coast/who-we-are/clinical-research (last visited Aug. 7, 2017) [https://perma.cc/MN98-ZVET].

III. Plaintiffs Failed to Satisfy the Other Preliminary-Injunction Requirements.

A. Plaintiffs cannot show irreparable harm.

The requisite irreparable injury must be likely—not just possible. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008). There is no evidence in the record that the Jane Doe Plaintiffs will be unable to receive medical care at the facility of their choice if the State ceases to provide Medicaid payments to the Provider Plaintiffs—especially when these providers have not stated that they will refuse to serve these individuals or individuals similarly situated if they do not receive Medicaid reimbursement. Thus, the Jane Doe Plaintiffs have failed to establish irreparable harm.

PPGT CEO Ken Lambrecht stated that their doors will stay open even if they do not get Medicaid funds from Texas. ROA.4124. PPST CEO Jeffrey Hons was asked directly whether PPST will provide care to Medicaid patients even if Medicaid funds are withheld, and he refused to give a yes or no answer:

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

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

ability to show harm also calls into question whether the Jane Doe Plaintiffs have shown that they have Article III concrete injuries for standing purposes.

If the Provider Plaintiffs did not receive Medicaid reimbursements while continuing to provide care to the Jane Doe Plaintiffs (or to the 0.3% of Texas Medicaid patients that they serve), the Provider Plaintiffs might suffer some kind of economic injury. But this cannot prove an irreparable injury to the Jane Doe Plaintiffs—especially given the Provider Plaintiffs' large coffers and the comparatively small amount of Medicaid funds they receive, *see supra* pp.4-5, and their reluctance to articulate any significant concrete effect their termination from Medicaid would have on the treatment of the Jane Doe Plaintiffs.

B. The balance of equities and the public interest both favor Defendants.

It is in the public interest to allow OIG to terminate an unqualified provider that has shown a repeated willingness to engage in behavior that violates accepted medical and ethical standards. *See supra* Part II.B-II.C. The balance of equities and the public interest therefore favor allowing the State to protect the integrity of the Medicaid program. This is especially so given that the Provider Plaintiffs' Medicaid reimbursements are a small fraction of the amount of funds they have, *see supra* pp.4-5, and the Jane Doe Plaintiffs have not established that they will not have access to services, *see supra* Part III.A.

Nor will there be any harm to the public if the injunction is denied. Women's health is generously provided for by several state-funded programs

in addition to Medicaid: the Healthy Texas Women Program, Family Planning Program, and the Breast and Cervical Cancer Screening Program. *See supra* pp.5-6. Also, 99.7% of Medicaid patients in the State are served through non-Planned Parenthood providers, and Medicaid patients are also eligible for other state-funded programs as well. ROA.4518.

IV. The Scope of the Preliminary Injunction is Overly Broad and Should Have Been Limited to the Seven Jane Doe Plaintiffs.

The Individual Plaintiffs are just seven anonymous Jane Does who allegedly have Medicaid coverage and receive medical services at a facility associated with the Provider Plaintiffs. ROA.3232-33. In contrast, there were over 50 provider agreements slated for termination in the Final Notice of Termination. ROA.1214.

Limiting the injunction to require that Defendants continue to reimburse Medicaid claims for services provided only to the Jane Doe Plaintiffs resolves any purported harm they have suffered as a result of the termination of the Provider Plaintiffs' Medicaid agreements. *See, e.g.*, Prelim. Inj. Order at 16-17, *Planned Parenthood of Ark. & E. Okla. v. Selig*, No. 4:15-cv-00566-KGB, (E.D. Ark. Oct. 2, 2015), ECF No. 44 (limiting injunctive relief to named individual plaintiffs in Planned Parenthood Medicaid case). No class has been certified, and the Jane Doe Plaintiffs lack standing to assert claims beyond their own. ROA.3934-37. Any injunction granted must therefore be limited to address only the alleged injuries of the Jane Doe Plaintiffs. *Scott v. Schedler*, 826 F.3d

207, 212 (5th Cir. 2016) (per curiam) (an injunction "is overbroad if it is not 'narrowly tailor[ed] to remedy the specific action which gives rise to the order' as determined by the substantive law at issue" (quoting *John Doe #1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004)).

At an absolute minimum, though, the injunction should only apply to the provider agreements implicating the seven facilities where the seven Jane Doe Plaintiffs would seek services. This is especially true given that the Provider Plaintiffs do not have a private right of action under *Gee*. *See supra* p.22 & n.5.

CONCLUSION

The Court should reverse and vacate the preliminary injunction.

Respectfully submitted.

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Certificate of Service

On August 7, 2017, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,851 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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