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United States Court of Appeals
Tenth Circuit

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Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PLANNED PARENTHOOD OF KANSAS AND MID-MISSOURI; PLANNED PARENTHOOD OF ST. LOUIS REGION; JANE DOE #1, on her behalf and on behalf of all others similarly situated; JANE DOE #2, on her behalf and on behalf of all others similarly situated; JANE DOE #3, on her behalf and on behalf of all others similarly situated,

Plaintiffs - Appellees,

v.

JEFF ANDERSEN, Acting Secretary, Kansas Department of Health and Environment, in his official capacity,[*]

Defendant - Appellant.

No. 16-3249

CENTER FOR REPRODUCTIVE RIGHTS; IPAS; NATIONAL CENTER FOR LESBIAN RIGHTS; NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION; NATIONAL HEALTH LAW PROGRAM; NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH; NATIONAL WOMEN'S LAW CENTER; SEXUALITY INFORMATION

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

AND EDUCATION COUNCIL OF THE U.S. (SIECUS); AMERICAN PUBLIC HEALTH ASSOCIATION,

Amici Curiae.

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

Patrick Strawbridge, Consovoy McCarthy Park, PLLC, Boston, Massachusetts (Michael H. Park, Consovoy McCarthy Park, PLLC, New York, New York, Darian P. Dernovish, Kansas Department of Health and Environment, Topeka, Kansas, with him on the briefs), for Defendant-Appellant.

Diana Salgado, Planned Parenthood Federation of America, Washington, D.C. (Erwin Chemerinsky, University of California, Irvine School of Law, Irvine, California, Arthur A. Benson and Jamie Kathryn Lansford, Kansas City, Missouri, and Douglas N. Ghertner, Slagle, Bernard and Gorman, P.C., Kansas City, Missouri, with her on the brief), for Plaintiffs-Appellees.

Martha Jane Perkins, National Health Law Program, Carrboro, North Carolina, filed an amici curiae brief in support of Plaintiffs-Appellees.

Before **BACHARACH**, **PHILLIPS**, and **McHUGH**, Circuit Judges.

PHILLIPS, Circuit Judge.

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

of the St. Louis Region ("PPSLR").[1] The notices cited concerns about the level of PPGP's cooperation in solid-waste inspections, both Providers' billing practices, and an anti-abortion group's allegations that Planned Parenthood of America ("PPFA") executives had been video-recorded negotiating the sale of fetal tissue and body parts. Together, the Providers and three individual Jane Does ("the Patients") immediately sued Susan Mosier, Secretary of the Kansas Department of Health and Environment ("KDHE"), under 42 U.S.C. § 1983, alleging violations of 42 U.S.C. § 1396a(a)(23) and the Equal Protection Clause of the Fourteenth Amendment. The Plaintiffs sought a preliminary injunction enjoining Kansas from terminating the Providers from the state's Medicaid program.

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

[1] Planned Parenthood of Central Oklahoma merged into Planned Parenthood of Kansas and Mid-Missouri ("PPKM"), effective July 1, 2016. As a result, PPKM changed its name to Planned Parenthood Great Plains. In this opinion, we refer to that entity by its new name, PPGP. When we refer to both of these providers collectively, we refer to them as "the Providers."

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

BACKGROUND

I. The Medicaid Act and Kansas Regulations

The Medicaid Act's free-choice-of-provider provision states that "any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide him such services." 42 U.S.C.

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

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

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

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

II. Planned Parenthood's Alleged Wrongdoing

Planned Parenthood affiliates, many of which are located in areas with shortages of primary-care providers, deliver essential services to Medicaid recipients. PPGP has two health centers in Kansas and three in Missouri, and PPSLR has one health center in Missouri that also serves Kansas Medicaid patients. The Providers' services include annual health exams; different types of contraception along with contraceptive counseling; breast- and cervical-cancer screening; cervical-cancer treatment; screening and treatment for sexually transmitted infections; human papillomavirus vaccinations; pregnancy testing and counseling; and other health services.[3] Though some Planned Parenthood clinics also perform abortions, Medicaid seldom pays for abortions. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 302–03 (1980)

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

(explaining that the Hyde Amendment prohibits using federal Medicaid funds to reimburse the cost of abortions except in limited circumstances such as rape or incest). The Patients chose Planned Parenthood for reproductive-healthcare services for many reasons, including the quality and availability of the services and expertise in reproductive healthcare.

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

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

and (5) PPFA's legal counsel represented PPGP and PPSLR in their meeting with the KDHE. *Id.* at 7–8 (quoting Appellant's App. at 479–82).

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

On December 16, 2015, Kansas's Bureau of Waste Management ("BWM") also initiated a solid-waste investigation under Kan. Admin. Regs. § 28-29-16 of a PPGP-operated clinic in Overland Park, Kansas. "[O]ut of concern for clinic and patient privacy and safety," PPGP employees stopped the inspectors from taking photographs but invited the inspectors to finish their inspection visually. *Planned Parenthood of Kan. & Mid-Mo. v. Mosier*, No. 16-2284-JAR-GLR, 2016 WL 3597457, at *5 (D. Kan. July 5, 2016). PPGP employees also refused to turn over waste-disposal-vendor lists—which would have become public information subject to the Kansas Open Records Act had PPGP turned over the lists to the investigators—because the PPGP employees were concerned about "the history of harassment toward companies that work with Planned Parenthood." Appellee's Response Br. at 6. Kansas claims that the inspectors were thus "[u]nable to complete their

inspection," so they left the clinic. Appellant's Opening Br. at 10–11. Kansas alleges that PPGP's conduct hindered the investigation, though BWM never cited PPGP for any violation related to the investigation.

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

Though Kansas never investigated PPSLR, the Missouri Attorney General did. In September 2015, after looking into PPSLR's fetal-tissue practices, the Missouri Attorney General's office announced that it had found no evidence of wrongdoing.

Relevant to this appeal, Kansas also notes that "[a]llegations . . . emerged that Planned Parenthood offices around the country have engaged in questionable billing practices, including in the nearby states of Oklahoma and Texas." *Id.* at 8–9. And it claims that "Planned Parenthood's practices have prompted numerous lawsuits under the False Claims Act ('FCA')." *Id.* at 9.

III. Termination Proceedings & District Court Case

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

The notices also informed the Providers that they could each challenge their proposed terminations in administrative reviews, where they would "have the opportunity to present any relevant evidence" regarding their terminations. *Id.* PPGP's administrative review was scheduled for March 23, 2016, and PPSLR's was scheduled for March 22, 2016. The notices included attachments listing the state's reasons for terminating the Providers—including the CMP videos, PPGP's supposed

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

lack of cooperation during the waste disposal inspections, and the FCA allegations in neighboring states.

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

Instead of requesting a hearing to review the terminations, the Providers, the Patients, and eleven individual PPGP and PPSLR employees (whose charges were later dropped after Kansas reconsidered and reversed its decision to terminate them from its state Medicaid program) sued Kansas under 42 U.S.C. § 1983, alleging violations of the Medicaid Act and the Equal Protection Clause of the Fourteenth Amendment. The Patients each had their own reasons for choosing PPGP for reproductive-health services. Jane Doe #1 chose PPGP as a provider because it was the only provider that would accept her as a patient (because she was not pregnant) and schedule an annual appointment for her within a reasonable time. Jane Doe #2 is a long-time PPGP patient who trusts the provider's expertise in reproductive health care and relies on the PPGP for regularly administered birth-control shots. Jane Doe #3, who was pregnant when the lawsuit was filed, chose PPGP because she

appreciated the continuity of having one reproductive-health-care provider and wanted to obtain birth control after giving birth.

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

In granting the Plaintiffs' request for relief, the district court held that the case was ripe, that the Plaintiffs[5] had standing, and that abstention wasn't necessary under *Younger v. Harris*, 401 U.S. 37 (1971). *Id.* at *8. On the merits, the district court

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

found that the Patients had a private right of action and were likely to succeed on their free-choice-of-provider claim under the Medicaid Act. *Id.* at *14–*22. Specifically, the court concluded that states could not interfere with patients' choice of providers for reasons other than the providers' professional competence or fitness to provide medical services. *Id.* at *18. It also found that the Plaintiffs had met the other requirements for injunctive relief: that the Plaintiffs would suffer irreparable harm absent the requested relief, that the balance of harms favored the Plaintiffs, and that the injunction served the public interest. *Id.* at *22–*25. The district court declined to rule on the Equal Protection claim. *Id.* at *14. Kansas appealed.

ANALYSIS

First, we address Kansas's arguments regarding standing, ripeness, and *Younger* abstention. Then, we move on to address the claim's merits. Specifically, we decide whether the Patients have a private right of action under the Medicaid Act, and whether they have met the requirements necessary to show that they are entitled to injunctive relief.

I. Justiciability

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

A. Standing

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

1. Injury in Fact

For standing, a plaintiff's injury must be "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). "An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a '"substantial risk" that the harm will occur.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 414 n.5 (2013)). Kansas argues that the Plaintiffs failed to show injury in fact because (1) it had issued only a preliminary, not final, decision and (2) the Plaintiffs' injuries are too speculative.

First, Kansas claims that only after the Plaintiffs had an administrative hearing (which took place on April 29), "may [it] then issue a written preliminary decision, setting forth the effective date of the termination and the basic underlying facts supporting the order." Appellant's Opening Br. at 6. And Kansas goes on to argue that the "preliminary decision . . . becomes final only after the time for a formal

administrative hearing has passed." *Id.* (citing Kan. Admin. Regs. §§ 30-7-64–104). But Kansas's use of the term "preliminary" is without support in the statute. The regulations provide that "[i]f the decision is to terminate, a written order of termination shall be issued, setting forth the effective date of the termination and the basic underlying facts supporting the order." Kan. Admin. Regs. § 30-5-60(c). Thus, we reject Kansas's argument that its decision was preliminary rather than final.

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

[6] PPSLR has no such contracts with Kansas, so this thirty-day delay doesn't protect PPSLR's patients. *Mosier*, 2016 WL 3597457, at *24. And the district court found that this additional thirty-day extension for PPGP was questionable. *Id.* PPGP has contracts with three Managed Care Organizations ("MCO") in Kansas. *Id.* at *2. Kansas submitted a sample MCO contract that included the thirty-day extension, but

This argument fails. As did the district court, we read the notices of termination literally. *See Mosier*, 2016 WL 3597457, at *9. The letters' plain language precludes us from treating them as mere warnings of possible future events. The March 10 letters that Kansas sent to the Providers were titled, "Notice of *Intent* to Terminate," and the May 3 letters were titled, "Notice of *Decision* to Terminate." Appellant's App. at 51, 53, 78, 83 (emphasis added). Also, the second letters were final because they stated that "it is the decision of [Kansas] that your participation in [Kansas's Medicaid Program] will be terminated," and that the Providers' terminations would be "effective May 10, 2016." *Id.* at 51, 53. This date was extended to July 7 only because Kansas requested more time to respond to the Plaintiffs' motion for preliminary injunction. Though the Providers' statutory right to appeal the termination may have delayed the date that Kansas cut off the Providers' funding, Kansas doesn't explain how that delay would change the legally effective date of the termination.[7]

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the contract in place between Kansas and PPGP when the Plaintiffs sued did not contain the extension, and instead provided for immediate termination.

[7] After the parties had their evidentiary hearing on April 29, Kansas notified the Providers that they would be terminated effective May 10. It told the Providers that if they disagreed with this decision, they had the right to—but did not have to—request a fair hearing before the OAH within thirty-three days of the date on the notice. That date would have been June 6. So, if the Providers hadn't filed their lawsuit in federal court before May 10, they would have been terminated on May 10, subject to possibly obtaining a reversal of the termination in later proceedings. Nothing in the termination notice states that the termination would toll if the Providers requested a fair hearing before the OAH. Instead, Kansas states without support that the Providers' funding would not have terminated on the effective

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

In light of such conduct, Kansas's claim that it wouldn't cut off funding to the Providers until September 10 is unpersuasive. We agree with the district court that Kansas cannot "have its cake and eat it too" by insisting that the terminations wouldn't be effective until September, yet refusing to agree to delay enforcement by guaranteeing that September effective date. *Id.* at *9. We also agree with the district

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termination date (May 10). But the Providers' termination from Kansas's Medicaid Program would have triggered the loss of Medicaid funding within a few weeks. *See Mosier*, 2016 WL 3597457, at *8. In fact, Kansas's regulations state that even if the Providers had requested a hearing before the OAH, their Medicaid funding would be terminated pending the appeal's resolution because the request would concern "the termination of a provider from program participation." Kan. Admin. Regs. § 30-7-66(a)(1).

court's position that "[t]he fact that [Kansas] is unwilling to put its counsel's representations into a stipulated order that would apply to both providers is entirely inconsistent with its position that this dispute is premature." *Id.*

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

2. Causal Connection

Kansas alternatively argues that the Plaintiffs lack standing because their injuries resulted from their own failure to "use available procedures to remedy an

alleged injury," rather than Kansas's actions, and thus are not traceable to Kansas. Appellant's Opening Br. at 23.

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

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

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

We agree with the district court's decision not to "impose an indirect exhaustion requirement by finding that Plaintiffs caused their own injury by failing to pursue administrative remedies." *Mosier*, 2016 WL 3597457, at *12. The Plaintiffs met their burden of showing that Kansas's actions created a substantial risk of injury, so they had standing to sue the state.

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

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

B. Ripeness

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

1. Fitness for Judicial Resolution

"[T]o determine the fitness of issues for review, we may consider 'whether judicial intervention would inappropriately interfere with further administrative action' and 'whether the courts would benefit from further factual development of the issues presented.'" *Id.* at 1234–35 (quoting *Sierra Club v. Dep't of Energy*, 287 F.3d 1256, 1262–63 (10th Cir. 2002)). Other relevant factors include: "(1) whether the issues involved are purely legal, (2) whether the agency's action is final, (3) whether the action has or will have an immediate impact on the petitioner, and (4) whether resolution of the issue will assist the agency in effective enforcement and administration." *Id.* at 1235 n.3 (quoting *Los Alamos Study Grp. v. Dep't of Energy*, 692 F.3d 1057, 1065 (10th Cir. 2012)). In sum, "[a]n agency's action will be ripe for

review where 'the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him.'" *Mosier*, 2016 WL 3597457, at *9 (quoting *Nat'l Park Hosp. Ass'n v. U.S. Dep't of Interior*, 538 U.S. 803, 807–08 (2003)).

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

The district court disagreed, concluding that the "termination notices represent concrete actions by the KDHE that threatened to harm Plaintiffs by excluding [PPGP] and PPSLR as Medicaid providers, notwithstanding the option of an administrative appeal." *Mosier*, 2016 WL 3597457, at *9. The district court pointed out that if the Providers didn't appeal, their final termination would stand (which, we note, would have deprived the Patients of their provider of choice). *Id.* at *10. Further, the district court noted that "where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *Id.* (quoting *Medimmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 128 & n.8 (2007)). Finally, the district court found that the case involved primarily

legal questions that did not require agency expertise or significant factual development. *Id.* Therefore, it concluded that the Plaintiffs' claims were ripe for judicial review. *Id.* at 11.

Again, we agree with the district court's thoughtful analysis, this time on this case's fitness for judicial resolution. "[B]oth parties have submitted evidence on these issues, and . . . neither party requested an evidentiary hearing on the motion for preliminary injunction." *Id.* at 10. This implies that no substantial factual disputes remained, and that the questions we must now answer are primarily legal questions. Kansas has presented its grounds for terminating the Providers, and it agrees that the propriety of the preliminary injunction rests on "whether the Providers' conduct and corporate affiliations justify the decision to terminate." Appellant's Opening Br. at 29. Though Kansas characterizes these issues[9] as factual rather than legal, the district court found it telling that after the parties had one evidentiary hearing, even if it was informal, neither party later requested an evidentiary hearing on the motion for preliminary injunction. *Mosier*, 2016 WL 3597457, at *10. Kansas presented three grounds for terminating the Providers and supported its reasons with evidence. Further agency action was therefore unnecessary for the district court to determine "whether, as a matter of law, any of those grounds permit [Kansas] to terminate

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

[PPGP's and PPSLR's] Medicaid provider agreement without violating Medicaid's free-choice-of-provider requirement." *Gee*, 862 F.3d at 456.

And, because the Providers had clearly stated that they did "not intend to pursue" further administrative appeal, Appellee's Response Br. at 58, the Patients' injuries are "sufficiently likely to happen to justify judicial intervention," *Gee*, 862 F.3d at 456 (quoting *Pearson v. Holder*, 624 F.3d 682, 684 (5th Cir. 2010)). Again, significantly, the Patients did not participate in the April 29 informal hearing and they had no administrative remedies available to them, so only "through a § 1983 action" in federal court could they "vindicate their federal right" to select the qualified provider of their choice. Appellee's Response Br. at 20; *see Gee*, 862 F.3d at 455. Absent further administrative action by the Providers, the terminations were final for justiciability purposes because they would have become effective as of the dates stated in the termination letters. In other words, because the future held no uncertain events, the termination letters were not "of a merely tentative or interlocutory nature." Appellant's Opening Br. at 25–26 (quoting *Friends of Marolt Park v. U.S. Dep't of Transp.*, 382 F.3d 1088, 1093–94 (10th Cir. 2004)); *see also Gonzales*, 64 F.3d at 1499.

2. Hardship

Kansas also contends that the Plaintiffs failed to show that they would face hardship absent an injunction because possible future injury does not amount to hardship and the Providers' terminations were not final. We reject this argument for the same reason already given. Because the Providers chose not to appeal their

terminations, the terminations were final and would have become effective no later than September 10. If this had happened, the Patients would have likely "suffer[ed] hardship by being denied access to the provider of their choice under 42 U.S.C. § 1396a(a)(23) and to medical services at [the Providers'] facilities." *Gee*, 862 F.3d at 457. Therefore, the Plaintiffs' claims are ripe.

II. *Younger* Abstention

Kansas next claims that the district court erred by declining to abstain under *Younger*. We review de novo the district court's decision on whether to abstain under *Younger*. *Amanatullah v. Colo. Bd. of Med. Exam'rs*, 187 F.3d 1160, 1163 (10th Cir. 1999). We first note that "abstention 'is the exception, not the rule,' and hence should be 'rarely . . . invoked.'" *Brown ex rel. Brown v. Day*, 555 F.3d 882, 888 (10th Cir. 2009) (omission in original) (quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992)).

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

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

A. Administrative Proceeding Not Ongoing

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

Before the Plaintiffs filed their § 1983 lawsuit and motion for preliminary injunction, the following events had taken place: (1) two different Kansas agencies had investigated the Providers to determine whether they had improperly sold or disposed of fetal tissue, and both agencies cleared the Providers of wrongdoing; (2)

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

Kansas had sent the Providers notices of intent to terminate; (3) Kansas and the Providers had participated in one evidentiary hearing; and (4) Kansas had sent the Providers notices of decision to terminate with a termination date of May 10. Kansas argues that these decisions weren't final. But again, had the Providers taken no further action—and nothing required the Providers to take further action—those terminations would have become effective. In other words, neither party would have had anything left to do to execute the terminations; the clock was running on certain termination.

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

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

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

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

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

Finally, but importantly, we also note that though the Providers had the right of appeal, the Patients did not. *See Mosier*, 2016 WL 3597457, at *13; *see Kliebert*, 141 F. Supp. 3d at 633. And the Patients are not subject to an exhaustion requirement

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

under § 1983. *See Gee*, 862 F.3d at 455 ("[T]he Individual Plaintiffs have no administrative appeal rights, and they are not subject to (nor could they be) any administrative exhaustion requirement under 42 U.S.C. § 1983."); *Planned Parenthood Se., Inc. v. Bentley*, 141 F. Supp. 3d 1207, 1215 (M.D. Ala. 2015) ("[T]he Eleventh Circuit, like every other circuit to consider the issue, has concluded that exhaustion is not required for claims under the Medicaid Act."). In sum, the district court did not err in declining to abstain under *Younger* because the administrative proceedings were not ongoing, and were not the type of proceedings meriting *Younger* abstention.

III. Preliminary Injunction

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

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

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

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

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

We are comfortable joining four out of the five circuits that have addressed this issue, and we too hold "that § 1396a(a)(23) affords the [Patients] a private right of action under §1983." *Gee*, 862 F.3d at 457[13]; *see also Planned Parenthood of Ariz. Inc. v. Betlach*, 727 F.3d 960, 966–68 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1283 (2014) (reaching the same conclusion); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 974–75 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2736, 133 S. Ct. 2738 (2013) (same); *Harris v. Olszewski*, 442 F.3d 456, 461–62 (6th Cir. 2006) (same). *But see Does v. Gillespie*, 867 F.3d 1034, 1041–42 (8th Cir. 2017) (holding in a split decision that § 1396a(a)(23) does not grant Medicaid patients an enforceable right). "Medicaid is a cooperative federal-state program that provides federal funding for state medical services to the poor." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 433 (2004). Medicaid "offers the States a bargain: Congress provides federal funds in exchange for the States' agreement to spend them in accordance with congressionally imposed conditions." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1382 (2015). This means that the federal government will share a state's cost of providing medical care to residents who can't

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

afford it, but only if the state complies with the Medicaid Act's requirements, including "federal criteria governing matters such as who receives care and what services are provided at what cost." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 541–42 (2012); *see also Atkins v. Rivera*, 477 U.S. 154, 157 (1986) (explaining the federal-state partnership for implementing Medicaid).

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

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

42 U.S.C. § 1396a(a)(23)(A). This section goes on to state that "an enrollment of an individual eligible for medical assistance in a primary care case-management system . . . , a medicaid managed care organization, or a similar entity shall not restrict the choice of the qualified person from whom the individual may receive services under section 1396d(a)(4)(C) of this title."[14] *Id.* at § 1396a(a)(23)(B). Section 1396d(a)(4)(C) specifically grants Medicaid patients the right to choose their provider for family-planning services. *See Betlach*, 727 F.3d at 964. So, under the

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

free-choice-of-provider provision, "any individual Medicaid recipient is free to choose any provider so long as two criteria are met: (1) the provider is 'qualified to perform the service or services required,' and (2) the provider 'undertakes to provide [the recipient] such services.'" *Id.* at 967 (quoting 42 U.S.C. § 1396a(a)(23)(A)).

1. *Blessing*/*Gonzaga* Requirements

The question here is whether the free-choice-of-provider agreement creates a private right enforceable under 42 U.S.C. § 1983. To do so, (1) "Congress must have intended that the provision in question benefit the plaintiff," (2) the plaintiff must have "demonstrate[d] that the right assertedly protected . . . is not so 'vague and amorphous' that its enforcement would strain judicial competence," and (3) the statute that creates the right must be "couched in mandatory, rather than precatory, terms." *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997) (quoting *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 431 (1987)). If "the text and structure of a statute provide no indication that Congress intends to create new individual rights," then the § 1983 plaintiff cannot proceed further. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002). But if the plaintiff satisfies the three *Blessing* requirements, "the right is presumptively enforceable" under § 1983. *Id.* at 284. Still, defendants can rebut this presumption by showing that Congress either expressly foreclosed private enforcement, or impliedly did so "by creating a comprehensive enforcement scheme that is incompatible with" private enforcement. *Id.* at 284 & n.4 (quoting *Blessing*, 520 U.S. at 341).

a. Congress Intended to Benefit Medicaid Patients

As have the Fifth, Sixth, Seventh, and Ninth Circuits, we conclude that the free-choice-of-provider provision confers on Medicaid patients a private right of action. *See Gee*, 862 F.3d at 457; *Comm'r of Ind.*, 699 F.3d at 974–75; *Betlach*, 727 F.3d at 966–68; *Olszewski*, 442 F.3d at 461–62. *But see Gillespie*, 867 F.3d at 1046. First, we have no trouble concluding that Congress unambiguously intended to confer an individual right on Medicaid-eligible patients. *See Betlach*, 727 F.3d at 966. "The statutory language unambiguously confers such a right," because it mandates that "all state Medicaid plans provide that 'any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required.'" *Id.* (omission in original) (emphasis omitted) (quoting 42 U.S.C. § 1396a(a)(23)). Further, "Section 1396a(a)(23)(B) . . . carves out and insulates family planning services from limits that may otherwise apply under approved state Medicaid plans, assuring covered patients an unfettered choice of provider for family planning services." *Id.* at 964 (citing §§ 1396a(a)(23)(B), 1396d(a)(4)(C)). Congress has therefore clearly intended to grant a specific class of beneficiaries—Medicaid-eligible patients—an enforceable right to obtain medical services from the qualified provider of their choice.

Kansas also claims that *Armstrong* supports its claim that the free-choice-of-provider provision does not confer on the Patients an enforceable right because in it, Justice Scalia opined that Spending Clause legislation does not provide a private right of action. 135 S. Ct. at 1387. But in *Armstrong*, the Supreme Court analyzed an entirely different section of the Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A),

concluding that this specific section did not create a private right of action. *Id.* Section 1396a(a)(30)(A) provides that "[a] State plan for medical assistance must . . . provide such methods and procedures relating to the utilization of, and the payment for" Medicaid services to ensure that Medicaid pays for only necessary, efficient, economic, and high-quality care while still setting reimbursement rates high enough to encourage providers to continue serving Medicaid patients. In his opinion, the last portion of which Justice Breyer declined to join, thus making that portion a plurality, Justice Scalia stated that "Section 30(A) lacks the sort of rights-creating language needed to imply a private right of action." *Id.* But the plaintiffs there did not sue under § 1983 to enforce a right established by the Medicaid Act. *Id.* ("The last possible source of a cause of action for respondents is the Medicaid Act itself. They do not claim that, and rightly so.").

Unlike § 1396a(a)(23), which provides that "any individual eligible for medical assistance . . . may obtain such assistance from any [provider] . . . qualified to perform the service or services required," the Medicaid Act section at issue in *Armstrong* directed states to adopt rate-setting plans in accordance with certain general standards. The free-choice-of-provider provision, "[i]n contrast [to *Armstrong*'s Medicaid Act section,] § 1396a(a)(23) . . . is phrased in individual terms that are specific and judicially administrable, as recognized by the Sixth, Seventh, and Ninth Circuits." *Gee*, 862 F.3d at 462. Justice Scalia also noted in *Armstrong* that the plaintiffs were providers, as opposed to the providers' patients, who are the Medicaid Act's intended beneficiaries. 135 S. Ct. at 1387. As such, he doubted "that

providers are intended beneficiaries (as opposed to mere incidental beneficiaries) of the Medicaid agreement." *Id.* Indeed, the majority speculated that the provider-plaintiffs in *Armstrong* likely chose not to sue under § 1983 because they had no unambiguously conferred right under *Gonzaga*. *Id.* at 1386 n.*. So *Armstrong* does nothing to undermine the Patients' claim that Congress intended to confer on them an enforceable right of action with the free-choice-of-provider provision.

b. Right Not Vague or Amorphous

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

Under the Medicaid Act, plaintiffs need show only that their provider of choice was (1) qualified to perform the medical services, and (2) undertaking to do so. *See* 42 U.S.C. § 1396a(a)(23). These requirements are "'concrete and objective standards for enforcement,' which are 'well within judicial competence to apply.'"

Gee, 862 F.3d at 459 (quoting *Betlach*, 727 F.3d at 967). As the Ninth Circuit held and the Fifth Circuit has reiterated, "courts addressing this provision confront 'a simple factual question no different from those courts decide every day,'" which requires no "balancing of competing concerns or subjective policy judgments." *Id.* (quoting *Betlach*, 727 F.3d at 967).

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

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

the while 'safeguard[ing] against unnecessary utilization of . . . care and services.'" *Armstrong*, 135 S. Ct. at 1385 (alterations in original) (quoting 42 U.S.C. § 1396a(a)(30)(A)).

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

c. Right Stated in Mandatory Terms

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

1041. Rather, it affirmatively requires state plans to allow Medicaid-eligible people to obtain medical services from their willing and qualified provider of choice.

2. Congressional Intent to Foreclose Private Enforcement

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

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

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

But *Armstrong* isn't a § 1983 case. Plus, an earlier Supreme Court case, *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 522 (1990), had previously rejected Kansas's argument. *Wilder* held that "[the Medicaid Act's] administrative scheme cannot be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983. . . . '[G]eneralized powers' . . . to audit and cut off federal funds [are] insufficient to foreclose reliance on § 1983 to vindicate federal rights."[16] 496 U.S. at 522 (quoting *Wright*, 479 U.S. at 428). And

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enforcement actions, especially considering the weight of precedent favoring such individual enforcement.

[16] The Eighth Circuit contends that *Armstrong* effectively overruled *Wilder*. *See Gillespie*, 867 F.3d at 1044–1046. Even if the Supreme Court had done so—and we do not think it did—it would not impact our analysis. We rely on *Wilder* not for

because Justice Kennedy didn't join Justice Scalia's Spending Clause reasoning, it is not binding on us; *Wilder* still is. Moreover, *Armstrong*'s analysis of a state's violation of the Medicaid Act is inapplicable to the Patients' claim that Kansas is attempting to deprive them of their right to receive medical services from their chosen, qualified providers, because the federal Secretary's withholding Medicaid funds would not redress their injuries at all. Unlike the plaintiffs in *Armstrong*, who were providers, the Patients here are individual beneficiaries of the Medicaid Act; and unlike in *Armstrong*, they are not merely contesting reimbursement rates, they are asserting that the state has violated their substantive right to receive medical care from their chosen medical providers. Also importantly, the providers in *Armstrong* asserted a right of action under a Medicaid Act rate-setting provision and the

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

Supremacy Clause, unlike the Patients here, who assert their right under § 1983 and the Medicaid Act's free-choice-of-provider provision.

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

B. Preliminary Injunction Factors

1. Likelihood of Success on the Merits

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

Again, § 1396(a)(23) requires a state plan to provide that "any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide him such services[.]" In evaluating what it means for a provider to be "qualified to provide services," we agree with the district court and "the Seventh and Ninth Circuits, [that] '[t]o be 'qualified' in the relevant sense is to be capable of performing the needed medical services in a professionally competent, safe, legal, and ethical manner." *Gee*, 862 F.3d at 462 (quoting *Comm'r of Ind.*, 699 F.3d at 978); *see also Betlach*, 727 F.3d at 969 (concluding that qualified means "having an officially recognized qualification to practice as a member of a particular profession; fit, competent" (quoting Oxford

English Dictionary (3d ed. 2007)). In the district court, Kansas did not contest this meaning of the term "qualified." *Mosier*, 2016 WL 3597457, at *17.

All agree that states have considerable discretion in establishing provider qualifications. *See* 42 C.F.R. § 431.51(c)(2) (stating that a recipient's right to the services of any provider qualified and willing to perform the services does not prohibit states from "[s]etting reasonable standards relating to the qualifications of providers"). But that authority entitles Kansas to set qualifications only for professional competency and patient care. *See Betlach*, 727 F.3d at 970 (declaring that states are not free to define "qualified" however they wish for their own purposes). We agree with the district court that the Plaintiffs may assert that they were denied their right to receive Medicaid services from the willing and qualified provider of their choice because their provider was wrongfully removed from the pool of providers.[17] *Mosier*, 2016 WL 3597457, at *18.

The Plaintiffs must be allowed to challenge PPGP's termination. After all, if a state wrongly terminates a provider—whether on grounds raised by Kansas under § 1320a-f(b)(5)(B) or f(b)(12)(B) or otherwise—it will have wrongly removed a qualified provider from the available pool. If a state could terminate providers without any challenge by affected patients, the patients' § 1396a(a)(23) right would

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

lose force and be easily eviscerated. We agree with the district court that when Kansas shrinks the pool of qualified providers by terminating them under § 1396a(p)(1), patients must have a § 1396a(a)(23) right to challenge the state's termination decision as improper or wrongful. *Mosier*, 2016 WL 3597457, at *17.

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

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

qualified and willing providers, that is, to protect their guaranteed right expressly given by § 1396a(a)(23). In short, § 1396a(a)(23) confers the right and cabins the state's authority under § 1396a(p)(1), such that patients can challenge the termination decisions.

In support of its view that termination decisions under § 1396a(p)(1) are final and beyond patients' ability to challenge under § 1396a(a)(23), Kansas relies in part on *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980). Kansas argues that "the free-choice-of-provider provision entitles beneficiaries only to 'the right to choose among a range of qualified ***providers***, without government interference.'" Appellant's Opening Br. at 46 (quoting *O'Bannon*, 447 U.S. at 785). But *O'Bannon* addressed a different situation—one where no one contested that the nursing home was unqualified to perform the services. We agree that § 1396a(a)(23) "clearly does not confer a right on a recipient to enter an unqualified home and demand a hearing to certify it, nor does it confer a right on a recipient to continue to receive benefits for care in a home that has been decertified." 447 U.S. at 785. But unlike in *O'Bannon*, the Providers in the case before us remained qualified to perform the medical services.

In addition, we note that the nursing home residents in *O'Bannon* asserted procedural due-process rights, not substantive rights, as the patients do here. *See Gee*,

862 F.3d at 460. *But see Gillespie*, 867 F.3d at 1048 (Shepherd, J., concurring).[18] And in *O'Bannon*, the patients didn't contest that the nursing home's decertification had resulted from the home's failure to provide adequate medical, physical, nursing, and pharmaceutical services, as well as its failure to maintain adequate records and an adequate system of governance. 447 U.S. at 776 n.3. Rather, the elderly Medicaid patients stressed the harm they would suffer if their nursing home closed and they were forced to move. *Id.* at 777. So the Supreme Court's holding concerned whether Medicaid recipients were entitled to a hearing to continue receiving care from an unqualified, decertified provider. *Id.* at 786 ("[W]hile a patient has a right to continued benefits to pay for care in the qualified institution of his choice, he has no enforceable expectation of continued benefits to pay for care in an institution that has been determined to be unqualified."). Here, the Patients are not challenging the right to continue receiving care from an unqualified provider. Instead, they contend Kansas wrongfully terminated the Providers, thereby infringing their choice-of-provider

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

rights. For this reason, we disagree with Kansas that *O'Bannon* controls this case in Kansas's favor.

a. Waste Inspections

The state first claims that PPGP's Overland Park clinic violated Kansas law by hindering the state's investigation of its waste-disposal practices. *See* Kan. Admin. Regs. § 28-29-16(a)(1) (authorizing Kansas BWM employees to enter and inspect premises dealing with solid waste and to gather information about conditions and procedures); Kan. Stat. Ann. §§ 65-3409(a)(6), 65-3401 (declaring it unlawful to refuse to permit or hinder waste-disposal investigations, including examination and copying records).

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

We agree with the district court that the Plaintiffs are likely to succeed in proving "that they did grant immediate access to the inspectors," as well as "that the

solid waste inspection here d[id] not constitute a review bearing on" the quality of care the Providers furnished to Medicaid recipients. *Mosier*, 2016 WL 3597457, at *20. The Providers presented sufficient evidence that PPGP employees at the Overland Park clinic accommodated BWM investigators' unannounced arrival at the clinic by inviting them to conduct their inspection, but asking them not to take photographs while patients were present. The inspectors chose to leave instead. And while initially withholding the list of the clinic's waste-services vendors, PPGP provided that information after assuring its confidentiality would be protected.

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

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

The Dissent

The dissent does not contend that Kansas is entitled to prevail on § 1320a-7(b)(12)(B) or (b)(5)(B). As grounds authorizing termination, the dissent instead relies on a neighboring section unmentioned by Kansas in its brief—42 U.S.C. § 1320a-7(b)(12)(C). Dissent at 19. In fashioning a new argument, the dissent steps beyond our usual practice. *See Modoc Lassen Indian Hous. Auth. v. United*

States Dep't of Hous. & Urban Dev, No. 14-1313, 2017 WL 7369692, at *10 n.9 (10th Cir. Dec. 22, 2017) (declining to consider an argument unraised by the parties). In response to the dissent, we discuss why the dissent's cited statutory provision fails to provide Kansas a basis for termination. We will not decide an argument that Kansas failed to raise in the district court or on appeal.

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

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

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

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

Dissent at 18–19.

The dissent ignores an applicable federal regulation bearing on inspections, which allows OIG immediate access on reasonable request to review "records,

documents and other materials or data . . . necessary to the [performance of the Inspector General's] statutory functions[.]" 42 C.F.R. § 1001.1301(a)(1)(iii). But in defining "failure to grant immediate access," the federal regulation requires that a provider have 24 hours to provide compelling evidence why the records cannot be produced, except on OIG's reasonable belief of imminent alteration or destruction of the records (and Kansas has not alleged that it had such a belief). 42 C.F.R. § 1001.1301(a)(3)(i). And as a "reasonable request" the regulation requires a written request for documents signed by a designated representative of OIG "where there is information to suggest that the [individual or entity] has violated statutory or regulatory requirements under Titles V, XI, XVIII, XIX or XX of the Act." 42 C.F.R. § 1301(a)(3)(ii). Further, the regulation requires that the agency request include these definitions and advise the individual or entity of the length of exclusion for failure to comply with the request. 42 C.F.R. § 1001.1301(a)(3), (b). In short, the federal regulation provides considerably more protections to a provider. In this circumstance, the state regulation is not analogous to federal law.

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

b. CMP Videos of Fetal Tissue Negotiation

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

But, first, all of the termination provisions Kansas relies on require a criminal conviction or related sanction; and no PPFA affiliate, including PPGP and PPSLR, has been convicted or sanctioned for any wrongdoing. And the district court rightly explained that even if PPFA had negotiated the illegal sale of fetal body parts (and this allegation has never been proved), "under [§ 1396a(p)(1)], the 'entity' that a 'State may exclude' must be the same entity that committed the infraction defined in § 1320a-7(b)." *Mosier*, 2016 WL 3597457, at *18. Indeed, the sole provision allowing termination on the basis of affiliation applies exclusively to entities

controlled by a sanctioned individual and mandates that the sanctioned individual must have ownership interest or control over the affiliated entity. 42 U.S.C. § 1320a-7(b)(8). Thus, if the statute allows a state to exclude a provider based on its affiliation with a different provider, the affiliation must involve ownership or control. *See Bentley*, 141 F. Supp. 3d at 1223–24 & n.9.

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

But these factors do nothing to show that PPFA exercises control over its affiliates' daily operations. In fact, because many PPFA affiliates don't offer abortions—and Kansas provides nothing to show that PPFA could or would require them to do so—we cannot attribute PPFA's alleged abortion-related conduct to PPFA affiliates absent evidence that specifically implicates the affiliates.[19] *See Gee*, 862

[19] Nor do we find it significant that PPFA does not offer abortions. Kansas relies on this irrelevant allegation to suggest that any sales of fetal tissue "could have been coordinated only through the abortion-providing 'affiliates' that [PPFA's national medical director] supervises." Appellant's Opening Br. at 53. The state seems to imply that this must mean that PPSLR and PPGP are doing the PFFA director's dirty work. This conclusion is both speculative and conclusory. Kansas presented no evidence showing that PPGP and PPSLR sold fetal tissue for profit, and

F.3d at 450. Kansas discusses when courts treat two corporate entities as one, but it presents no authority to support its argument that "one corporation can be held responsible for the policies of an umbrella organization regarding a practice that other *affiliated* corporations engage in." *Bentley*, 141 F. Supp. 3d at 1224 n.10.

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

c. Medicaid Fraud by PPFA Affiliates

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

First, the only thing this "merger" changed was PPGP's name: the former PPKM now operates under the name "Planned Parenthood Great Plains." Appellant's

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neither of the two Kansas agencies that investigated PPGP and PPSLR found any wrongdoing.

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

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

We therefore conclude that the district court did not abuse its discretion in finding that Plaintiffs are likely to succeed on the merits of their claim, and we move on to the remaining preliminary-injunction factors.

2. Irreparable Harm

We next consider whether the Patients have shown that they would suffer irreparable harm absent injunctive relief.[20] Irreparable harm is "certain, great, actual 'and not theoretical.'" *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). The district court found that the Patients had met their burden because they would lose medical treatment from the qualified providers of their choice if Kansas's terminations of the Providers were allowed to stand. *Mosier*, 2016 WL 3597457, at *23. "A disruption or denial of these patients' health care cannot be undone after a trial on the merits." *Id.*

Kansas argues that the Patients' injuries are speculative for the same reason it contested the Plaintiffs' standing and the case's ripeness: that the administrative appeal is still pending, meaning the state can't terminate the providers until that process is complete or the time period for appeal has expired.[21] *See Greater*

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

[21] Kansas also disputes the district court's reliance on the possibility that if PPGP and PPSLR are terminated in Kansas, other states will terminate their Medicaid contracts as well. *See Mosier*, 2016 WL 3597457, at 24. We need not

Yellowstone Coal. v. Flowers, 321 F.3d 1250, 1260 (10th Cir. 2003). It also reiterates its argument that "[PPGP's] [state Medicaid] contracts are ***not*** subject to immediate termination." Appellant's Opening Br. at 56.

We reject that argument here for the same reason we did above. Only the Providers have a right—not an obligation—to appeal Kansas's decision; the Patients do not. And the Providers have declared that they will not pursue administrative appeal. *Mosier*, 2016 WL 3597457, at *24. Absent injunctive relief, the state would have stopped reimbursing the PPGP for the Patients' care sometime between July 7, 2016 (Kansas's self-proclaimed termination date) and September 10, 2016 (the date that accounts for the allegedly required exhaustion period and the alleged contractual delays that apply only to PPGP). Even if the effective date had been two months away, it would not change our conclusion that the Patients were "likely to suffer irreparable harm before a decision on the merits can be rendered." *Greater Yellowstone Coal.*, 321 F.3d at 1260.

Last, Kansas argues that the Patients would not be injured because the Providers "were conspicuously non-committal about whether termination would even force them to stop seeing the [Patients]," and that the Patients "alleged only that they will not have access to their preferred provider and (at worst) are unsure where else they might receive care." Appellant's Opening Br. at 58–59 & n.13. First, because the Patients all qualify for Medicaid, we cannot disagree with the district court,

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address this concern because we conclude that the Patients have established the risk of irreparable harm based on other grounds.

which "easily [found] that these patients will be unable to afford to pay out of pocket to see the health care provider of their choice without Medicaid assistance." *Mosier*, 2016 WL 3597457, at *23. Second, "[t]his argument misses the mark. That a range of qualified providers remains available is beside the point." *Comm'r of Ind.*, 699 F.3d at 981. Section 1396a(a)(23) gives the Patients the exact right they seek to enforce: to obtain medical care from their *preferred* qualified provider, not to obtain family-planning services from *any* qualified provider. The Patients have given uncontroverted evidence explaining why they prefer PPGP, including quality of care, lack of bias, and scheduling convenience. *Mosier*, 2016 WL 3597457, at *23. At least four of the Providers' clinics are located in areas with shortages of primary-care providers. And the district court also rightly rejected Kansas's claims that Patients had plenty of other family-planning-services providers to choose from, finding that the state's evidence on this point was exaggerated. *See id.*

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

3. Balance of Harms & Public Interest

We address the last two preliminary-injunction factors together. The final steps in assessing a preliminary injunction's propriety require us to ask whether the balance of equities tips in the Plaintiffs' favor, and whether an injunction is in the public interest. *Winter*, 555 U.S. at 20. Based on its findings that the three allegations against the Providers were either unfounded or unrelated to the Providers'

qualifications, the district court found that "the risk of taxpayer harm is quite low as compared to the certain injury to Medicaid patients if the injunction does not issue." *Mosier*, 2016 WL 3597457, at *24. Similarly, because the district court found that there was no ongoing administrative proceeding, it concluded that issuing a preliminary injunction and allowing the Plaintiffs to vindicate their Medicaid-Act rights by pursuing their § 1983 claim in federal court would serve the public interest, despite the availability of state administrative remedies. *Id.* at *25.

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

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

CONCLUSION

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

court to determine whether PPSLR itself has sufficiently alleged standing to proceed and whether it is entitled to a preliminary injunction.

Planned Parenthood of Kansas, et al. v. Andersen, No. 16-3249
BACHARACH, J., concurring in part and dissenting in part.

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

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

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

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

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

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

I. The district court granted a preliminary injunction.

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

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

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

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

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

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

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

[4] Reasoning that the Jane Doe plaintiffs had a cause of action, the district court declined to decide whether PPKM and PPSLR could bring the suit on their own. 2016 WL 3597457, at *17. The majority takes the same approach, as do I.

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

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[5] The other factors are

- whether the plaintiffs would suffer irreparable harm without a preliminary injunction,
- whether the threatened harm outweighs the harm to the adversary from a preliminary injunction, and
- whether the preliminary injunction would harm the public interest.

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

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

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

- it had excluded PPKM based on § 1396a(p)(1) and
- the Jane Doe plaintiffs lacked an unambiguous right allowing them to challenge Kansas's application of § 1396a(p)(1).

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

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

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

This reasoning led the court to consider whether PPKM had violated Kansas law. The court answered "no" and concluded, as a result, that Kansas had likely violated the free-choice-of-provider clause. Because the

other preliminary-injunction factors supported the Jane Doe plaintiffs, the district court granted the motion for a preliminary injunction.

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

1. This case is not justiciable.

2. The district court should have abstained.

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

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

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

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

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

[7] In some of the cases invoked by PPKM, the state Medicaid programs contained exclusions unauthorized by Medicaid or any other federal law. *See, e.g.*, *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 962-63

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

(9th Cir. 2013) (state law that excluded all abortion providers from Medicaid was not authorized by § 1396a(p)(1) or other federal law); *Planned Parenthood of Ind. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 979-80 (7th Cir. 2012) (same).

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

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

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

A. Standard of Review

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

B. Section 1983

This suit is brought under § 1983, not the Medicaid Act. Thus, we must start with the scope of § 1983. This statute creates a private right of action for U.S. citizens denied rights created by federal laws. 42 U.S.C.

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

§ 1983. But § 1983 does not authorize relief for every violation of federal law. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119 (2005).

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

C. Medicaid

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

Medicaid is a cooperative federal-state program in which states obtain federal funds to provide medical care to needy individuals. *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990). State participation is voluntary; but once states opt into the program, they must adhere to statutory requirements and regulations promulgated by the Secretary of Health and Human Services ("HHS"). *Id.* Congress has directed the HHS

Secretary to withhold federal funds from states violating these requirements. 42 U.S.C. § 1396c.

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

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

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

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

With this assumption, we must consider whether the Jane Doe plaintiffs have alleged a conflict between Kansas's Medicaid program and the free-choice-of-provider clause. To answer that question, we must determine the scope of this clause. At first glance, the free-choice-of-provider clause might appear to force a state to allow any qualified provider into the state's Medicaid program. But "Medicaid's freedom of choice provision is not absolute." *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 177 (2d Cir. 1991). Rather, Medicaid allows states to exclude providers from Medicaid, sometimes even when the providers are qualified. *E.g.*, 42 U.S.C. § 1396a(a)(39), (p)(1).

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

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

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

> In addition to any other authority, a State may exclude any individual or entity for purposes of participating under the State plan under this subchapter for any reason for which the Secretary could exclude the individual or entity from participation in a program under subchapter XVIII of this chapter under section 1320a-7, 1320a-7a, or 1395cc(b)(2) of this title.

42 U.S.C. § 1396a(p)(1).

The HHS implements § 1396a(p)(1) through a regulation, which states that the listed exclusion provisions are "[i]n addition to any other authority [a state] may have." 42 C.F.R. § 1002.3(a). This language is to be read broadly: "Nothing contained in this part should be construed to limit a State's own authority to exclude an individual or entity from Medicaid for any reason or period authorized by State law." *Id.* § 1002.3(b).

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

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

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

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

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

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

Kansas terminated PPKM under Kansas Administrative Regulation § 30-5-60(a). This provision authorizes Kansas to terminate a provider that has violated applicable state regulations. Kan. Admin. Regs. § 30-5-60(a)(2). Invoking this authority, Kansas found that PPKM had violated a Kansas solid-waste regulation—§ 28-29-16(a)(1)—by obstructing a solid-waste inspection of PPKM's facility. The resulting issue is whether Congress has authorized Kansas under § 1396a(p)(1) to exclude providers from Medicaid for violating Kansas's solid-waste regulation.

We begin with the statutory text. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). The critical part of the statute is the word "any" in the phrase "any other authority." 42 U.S.C. § 1396a(p)(1). When construing the word "any," we consider its "'ordinary meaning.'" *Moskal v. United States*, 498 U.S. 103, 108 (1990) (quoting *Richards v. United*

States, 369 U.S. 1, 9 (1962)). The word "any" ordinarily means "[o]ne, some, every, or all without specification." *The American Heritage College Dictionary* 61 (3d ed. 1997). Thus, at first glance, § 1396a(p)(1) would appear to provide states with unchecked authority to exclude providers from Medicaid for any reason permitted by state law.

But we have always construed statutory language in context. *United States v. Collins*, 859 F.3d 1207, 1213 (10th Cir. 2017); *see Christopher v. SmithKline Beecham Corp*, 567 U.S. 142, 162 (2012) ("[T]he modifier 'any' can mean 'different things depending upon the setting . . . .'" (quoting *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132 (2004))). The context here comprises Congress's list of permissible reasons for a state to terminate providers. *See* 42 U.S.C. § 1396a(p)(1). If Congress had intended to allow unlimited authority, the listed provisions in § 1396a(p)(1) would have been superfluous. *See McDonnell v. United States*, 136 S. Ct. 2355, 2369 (2016) (recognizing a presumption that statutory language is not superfluous). Thus, the phrase "any other authority" in § 1396a(p)(1) must bear some limitation.

What is that limitation? To answer, we consider the canon of *noscitur a sociis*. Under this canon, an ambiguous term may be "given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008). Thus, we consider the

limitation of "any other authority" based on the surrounding words in the statute. *United States v. Phillips*, 543 F.3d 1197, 1206 (10th Cir. 2008).

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

The three cited statutes include grounds to exclude or terminate providers. *See* 42 U.S.C. §§ 1320a-7, 1320a-7a, 1395cc(b)(2). The Fifth, Seventh, and Ninth Circuits have observed that the grounds for termination involved "various forms of malfeasance," such as "fraud, drug crimes, and failure to disclose necessary information to regulators." *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d

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

962, 979 (7th Cir. 2012); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 469 (5th Cir. 2017); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 972 (9th Cir. 2013). I agree with these courts. Thus, I too conclude that the phrase "any other authority" likely refers to state laws that prohibit acts of "malfeasance."

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

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

The regulations interpret the phrase "any other authority" in § 1396a(p)(1) to mean "any other authority [*that a State*] *may have*." 42 C.F.R. § 1002.3(a) (emphasis added). And the regulations allow a state to exclude a provider "for *any reason* or period authorized by state law." *Id.* § 1002.3(b) (emphasis added). In fact, when promulgating § 1002.3, the HHS Secretary expressly rejected a suggestion to add the words "for cause" into § 1002.3(b). *See* Amendments to OIG Exclusion and CMP

Authorities Resulting from Public Law 100-93, 57 Fed. Reg. 3298, 3322-23 (Jan. 29, 1992). The HHS Secretary explained that Congress had spoken broadly, so it was "up to the various courts and legislative bodies" to consider whether § 1396a(p)(1) had a limitation. *Id.* at 3323.

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

In light of the HHS regulations and the legislative history, the need to provide some limitation does not require us to narrowly read the phrase "any other authority." Doing so "would defeat Congress' intent to define [this phrase] in a broad manner." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 163 (2012). Thus, the term "malfeasance" should be read broadly.

Under a broad reading of "malfeasance," a state would not be able to pass any law and claim that violating the law constitutes an act of

malfeasance. Rather, the state law must "serve[] some Medicaid-related goals." *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 663 (2003) (plurality op.). For this reason, § 1396a(p)(1) authorizes states to enact laws against wrongful conduct affecting Medicaid-related goals. And states may then enact a law, as Kansas did, which excludes a provider for violating these laws.

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

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

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

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

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

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

> [a]ny individual or entity that fails to grant immediate access, upon reasonable request (as defined by the [HHS] Secretary in regulations) to any of the following: . . . .

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[12] Kansas has argued that it could exclude PPKM under Kansas Administrative Regulation § 28-29-16(a)(1) because it had been enacted under § 1396a(p)(1). Appellant's Opening Br. at 48 (quoting *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 972 (9th Cir. 2013)). In making this argument, Kansas did not specifically point to 42 U.S.C. § 1320a-7(b)(12)(C). Instead, Kansas relied on 42 U.S.C. § 1320a-7(b)(12)(B). But to address Kansas's interpretation of § 1396a(p)(1), we must address the Medicaid statute as a whole. *See Samantar v. Yousuf*, 560 U.S. 305, 319 (2010) ("In sum, '[w]e do not . . . construe statutory phrases in isolation; we read statutes as a whole.'" (quoting *United States v. Morton*, 467 U.S. 822, 828 (1984)) (alteration and omission in original)); *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010) ("Courts have a 'duty to construe statues, not isolated provisions.'" (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995))). In construing the statute as a whole, we are not restricted to the sections cited by the parties. *See United States v. Vallery*, 437 F.3d 626, 632-33 (7th Cir. 2006) (considering parts of a statute not relied upon by either side because of the court's obligation to take into account the meaning of the statute as a whole); *see also WWC Holding Co. v. Sopkin*, 488 F.3d 1262, 1276 n.10 (10th Cir. 2007) (stating that the court can interpret a statute differently than both parties because we engage in de novo review when interpreting statutes).

> To the Inspector General of [HHS], for the purpose of reviewing records, documents, and other data necessary to the performance of the statutory functions of the Inspector General.

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

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

providers from Medicaid based on a violation of the state law requiring access for a governmental inspection.

2. The Jane Doe Plaintiffs' Cause of Action

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

The district court allowed the Jane Doe plaintiffs to invoke § 1983 to challenge Kansas's action as a violation of the free-choice-of-provider clause. The problem is that Kansas's action was of a type authorized by a separate Medicaid provision: § 1396a(p)(1). The district court acknowledged this authorization, but feared that the inability to use § 1983 in these circumstances could allow states to evade judicial review of Medicaid-related decisions, rendering the free-choice-of-provider clause a hollow right. *See Planned Parenthood of Kan. & Mid-Mo. v. Mosier*, No. 16-2284-JAR-GLR, 2016 WL 3597457, at *17 (D. Kan. July 5, 2016).

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

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

Unlike in those cases, Kansas argues that its actions under Kansas Administrative Regulation § 28-29-16(a)(1) were justified under the provisions listed in § 1396a(p)(1). That difference matters, as the Ninth Circuit explained in *Planned Parenthood Arizona*:

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

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

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

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

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

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

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

First, even with the absence of a private right of action to litigate the application of state laws authorized by § 1396a(p)(1), plaintiffs could still challenge a state Medicaid program that expressly limited the choice of qualified providers without any separate statutory authority. *E.g.*, *Planned Parenthood Ariz.*, 727 F.3d at 964 (state program excluded all abortion providers from Medicaid); *Planned Parenthood of Ind.*, 699 F.3d at 967 (same); *Harris*, 442 F.3d at 460 (state program limited the sale of incontinence products to a single provider). Thus, even if the Jane Doe

plaintiffs were forbidden from bringing the present suit, their right under the free-choice-of-provider clause would not be a hollow one.

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

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

clause, the scope of that right remains ambiguous when the state terminates a provider under § 1396a(p)(1).

* * *

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

To claim an enforceable right to obtain medical care from any provider, it is not enough to show that Congress generally intended for the free-choice-of-provider clause to protect the Jane Doe plaintiffs' choice of providers. *See Gonzaga*, 536 U.S. at 283; *see also Planned Parenthood of Gulf Coast*, 862 F.3d at 474 (Owen, J., dissenting) ("[The free-choice-of-provider clause] does not give a patient the right to contest a State's determination that a provider . . . has not otherwise met state or federal statutory requirements."). Instead, the Jane Doe plaintiffs could succeed on the merits only if Congress had unambiguously extended the right under the free-choice-of-provider clause to allow challenges to a state's application of its laws adopted under § 1396a(p)(1). *See Gonzaga*, 536 U.S. at 283. In my view, the applicability of this right is, at best, ambiguous.

The ambiguity prevents an applicable right, which in turn prevents the Jane Doe plaintiffs from establishing likelihood of success in their challenge to PPKM's termination. And the inability to establish likelihood

of success prevents a preliminary injunction. *Diné Citizens Against Ruining our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016).

III. Conclusion

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

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