

REVISED

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

United States Court of Appeals
Fifth Circuit

FILED

November 23, 2020

Lyle W. Cayce
Clerk

No. 17-50282

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

Plaintiffs–Appellees,

v.

SYLVIA HERNANDEZ KAUFFMAN, in her official capacity as Inspector
General of HHSC; CECILE ERWIN YOUNG, in her official capacity as
Executive Commissioner of HHSC,

Defendants–Appellants.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:15-CV-1058

Before OWEN, Chief Judge, and JOLLY, JONES, SMITH, STEWART,
DENNIS, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON,
COSTA, WILLETT, HO, DUNCAN, ENGELHARDT, Circuit Judges.*

* JUDGE OLDHAM is recused and did not participate in the decision. JUDGE WILSON
joined the court after this case was submitted and did not participate in the decision.

PRISCILLA R. OWEN, Chief Judge, joined by JOLLY, JONES, SMITH, ELROD, SOUTHWICK, HAYNES, WILLETT, HO, DUNCAN and ENGELHARDT, Circuit Judges.**

In this interlocutory appeal of a preliminary injunction, the dispositive issue is whether 42 U.S.C. § 1396a(a)(23) gives Medicaid patients a right to challenge, under 42 U.S.C. § 1983, a State’s determination that a health care provider is not “qualified” within the meaning of § 1396a(a)(23). Our decision rests primarily on two independent bases: (1) the Supreme Court’s decision in *O’Bannon v. Town Court Nursing Center*,¹ and (2) the text and structure of § 1396a(a)(23), which does not unambiguously provide that a Medicaid patient may contest a State’s determination that a particular provider is not “qualified”; whether a provider is “qualified” within the meaning of § 1396a(a)(23) is a matter to be resolved between the State (or the federal government) and the provider. We overrule the decision by a panel of this court² that the district court duly followed in the present case. Accordingly, we vacate the preliminary injunction.

I

Five Medicaid providers were among the plaintiffs in the district court and are appellees in this court. They are Planned Parenthood Gulf Coast, Inc. (PP Gulf Coast), headquartered in Houston; Planned Parenthood Greater Texas, Inc., headquartered in Dallas and providing services in parts of north and central Texas; and three providers—Planned Parenthood of Cameron County, Planned Parenthood San Antonio, and Planned Parenthood South

** JUDGE HAYNES concurs in the judgment and joins in the reasoning of Sections I, II, and V.

¹ 447 U.S. 773 (1980).

² *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017), cert. denied, 139 S. Ct. 408 (2018).

Texas Surgical Center—that the district court described as operating “under the umbrella of Planned Parenthood South Texas.” We will refer to the Medicaid providers collectively as the Providers. Seven individuals, to whom we will refer collectively as the Individual Plaintiffs, received or sought services from one or more of the Providers. The two defendants in the district court and the appellants in this court are the Executive Commissioner of the Texas Health and Human Services Commission, and that Commission’s Inspector General (OIG), in their respective official capacities. We will refer to the defendants collectively as HHSC.

The Providers provide family planning and other health services to approximately 12,500 Medicaid patients at thirty health centers each year. Their services include examinations, cancer screenings, testing and treatment for sexually transmitted diseases, as well as basic healthcare for both men and women. Each of the Providers is a member of Planned Parenthood Federation of America (Planned Parenthood); they must adhere to certain medical and organizational standards to operate under the name “Planned Parenthood.”

As participants in the Texas Medicaid program, the Providers entered into Medicaid provider agreements under which they are required to comply with all Texas Medicaid policies and applicable state and federal regulations. The OIG oversees compliance with state Medicaid policies. Texas law authorizes the OIG to conduct investigations and to terminate Medicaid provider agreements for noncompliance.³ The OIG may terminate a Medicaid provider agreement when “prima facie evidence” establishes that a provider has committed a “program violation” or is “affiliated with a person who

³ 1 TEX. ADMIN. CODE §§ 371.3, 371.1703(c) (2020).

commits a program violation.”⁴ A “program violation” includes any violation of federal law, state law, or the Texas Medicaid program policies.

In 2015, the Center for Medical Progress (CMP), a pro-life organization, released video recordings of conversations that occurred at PP Gulf Coast headquarters. The CMP videos depict two individuals posing as representatives from a fetal tissue procurement company discussing the possibility of a research partnership with PP Gulf Coast. The release of these videos prompted congressional investigations. The Senate Judiciary Committee released a report,⁵ as did a House Select Investigative Panel of the Committee on Energy and Commerce.⁶ An alternative report to the House Committee’s report was issued by committee members in the minority.⁷

In October 2015, the OIG sent each Provider a Notice of Termination of its respective Medicaid provider agreement, stating that each was “no longer capable of performing medical services in a professionally competent, safe, legal, and ethical manner.” The Notice listed the bases for termination and stated that, unless the Providers responded within thirty days, a Final Notice of Termination would issue.

The Providers and Individual Plaintiffs sued in federal court to block the terminations. They asserted that the terminations violated rights conferred

⁴ *Id.* §§ 371.1703(c), (c)(6)-(7).

⁵ MAJORITY STAFF OF S. COMM. ON THE JUDICIARY, 114TH CONG., MAJORITY REPORT ON HUMAN FETAL TISSUE RESEARCH: CONTEXT AND CONTROVERSY (Comm. Print 2016), <https://www.grassley.senate.gov/sites/default/files/judiciary/upload/22920%20-%20FTR.pdf>.

⁶ SELECT INVESTIGATIVE PANEL OF THE ENERGY & COM. COMM., 114TH CONG., FINAL REPORT xviii-xix (Comm. Print 2017), <https://www.govinfo.gov/content/pkg/CPRT-114HPRT24553/pdf/CPRT-114HPRT24553.pdf>.

⁷ DEMOCRATIC MEMBERS, SELECT INVESTIGATIVE PANEL OF THE ENERGY & COM. COMM., 114TH CONG., SETTING THE RECORD STRAIGHT: THE UNJUSTIFIABLE ATTACK ON WOMEN’S HEALTH CARE & LIFE-SAVING RESEARCH (Comm. Print 2016), <https://www.stemexpress.com/wp/wp-content/uploads/2018/01/20161228-Full-Dem-Report.pdf>.

by 42 U.S.C. § 1396a(a)(23) and sought relief under § 1983. They also contended that the OIG's actions violated their Fourteenth Amendment Equal Protection rights.

The OIG sought a stay of proceedings, which the district court granted, pending the issuance of a Final Notice of Termination. The OIG then sent the Final Notice. The Final Notice stated that the Inspector General had determined that the Providers were “not qualified to provide medical services in a professionally competent, safe, legal[,] and ethical manner under the relevant provisions of state and federal law pertaining to Medicaid providers.” The OIG based this conclusion on the CMP videos, evidence provided by the United States House of Representatives’ Select Investigative Panel, and the OIG’s consultation with its Chief Medical Officer. The Final Notice stated that “numerous violations of generally accepted standards of medical practice” had occurred and asserted that PP Gulf Coast had engaged in misrepresentations. The Notice also stated that under the OIG’s regulations, affiliates of a terminated entity are subject to termination.⁸ The Providers and Individual Plaintiffs thereafter filed an amended complaint and a new motion for a preliminary injunction.

The district court conducted a three-day evidentiary hearing, during which it reviewed the CMP videos and heard testimony from medical and ethics experts. The OIG introduced evidence that, it asserts, shows PP Gulf Coast violated federal regulations relating to fetal tissue research by altering abortion procedures for research purposes or allowing the researchers themselves to be involved in performing abortions.⁹

⁸ See 1 TEX. ADMIN. CODE § 371.1703(c)(7).

⁹ See 42 U.S.C. § 289g-1(b)(2)(A)(ii) (requiring researchers to certify that “no alteration of the timing, method, or procedures used to terminate the pregnancy was made solely for the purposes of obtaining the tissue”); *id.* § 289g-1(c)(4) (requiring researchers to certify that

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