**IN THE UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF ARKANSAS**
**WESTERN DIVISION**

**PLANNED PARENTHOOD ARKANSAS & EASTERN OKLAHOMA, JANE DOE #1, JANE DOE #2, AND JANE DOE #3, and all others similarly situated** **PLAINTIFFS**

**v.** **Case No. 4:15-cv-566-KGB**

**CINDY GILLESPIE, DIRECTOR, ARKANSAS DEPARTMENT OF HUMAN SERVICES, IN HER OFFICIAL CAPACITY** **DEFENDANT**

**PRELIMINARY INJUNCTION ORDER**

Plaintiffs Planned Parenthood Arkansas & Eastern Oklahoma d/b/a Planned Parenthood Great Plains ("PPAEO"), Jane Doe #1, Jane Doe #2, and Jane Doe #3, on their behalf and all others similarly situated, filed a motion for preliminary injunction on the constitutional claims on January 19, 2018 (Dkt. No. 144). Plaintiffs move to enjoin defendant Cindy Gillespie, Director of Arkansas Department of Human Services ("ADHS"), her employees, agents, and successors in office from terminating the Medicaid provider agreements of PPAEO (*Id.*, at 1). Defendant responded in opposition to the motion for preliminary injunction (Dkt. No. 175). Plaintiffs filed a reply (Dkt. No. 178). For the reasons discussed below, the Court finds that plaintiffs have not met their burden of proof for a preliminary injunction on their constitutional claims.

## I. Procedural Background

PPAEO and the Jane Does first filed a motion for temporary restraining order and preliminary injunction on September 11, 2015, contending that plaintiffs were likely to succeed on their claim that termination of PPAEO's Medicaid provider agreements violated the right of the Jane Does and all of PPAEO's Medicaid patients to obtain family planning and other preventative

health care services from the qualified provider of their choosing under 42 U.S.C. § 1396a(a)(23) (Dkt. No. 3). PPAEO and the Jane Does alleged that, starting on September 21, 2015, absent an injunction, patients insured through the Medicaid program who choose to get family planning and other health care services at PPAEO would lose access to services, would lose their provider of choice, would find their family planning services interrupted, and would be left with few or no adequate alternative providers (Dkt. No. 12, ¶¶ 8, 34). PPAEO and the Jane Does also contended that, "[i]f [PPAEO] is forced to stop providing care through the Medicaid program, a dire situation will become critical. The remaining providers will be simply unable to absorb [PPAEO]'s patients, leaving those patients without access to crucial medical services." (*Id*., ¶ 43). On September 18, 2015, this Court granted PPAEO and the Jane Does' motion for temporary restraining order (Dkt. No. 21).

On October 2, 2015, the Court then granted a preliminary injunction more limited in scope—limiting the relief granted to just the Jane Doe plaintiffs (Dkt. Nos. 44, 45). The Court subsequently granted PPAEO and the Jane Does leave to file a second amended complaint (Dkt. No. 63). In their second amended complaint, PPAEO and the Jane Does added class allegations (Dkt. No. 64, ¶¶ 50-55). At the same time, PPAEO and the Jane Does moved this Court to certify a class of patients who seek to obtain, or desire to obtain, health care services in Arkansas at PPAEO through the Medicaid program (Dkt. No. 50).

On October 6, 2015, ADHS filed a motion for extension of time to respond to plaintiffs' class certification motion and a motion for leave to notice four depositions (Dkt. Nos. 55, 56). The Court conducted a status hearing on the motions. ADHS requested leave to depose Jane Doe #1, Jane Doe #2, and Jane Doe #3 and to conduct a Federal Rule of Civil Procedure 30(b)(6) deposition of a PPAEO representative before responding to the then-pending motion for class certification.

ADHS claimed that it sought these depositions to test, at least, the typicality and adequacy requirements for class certification (Dkt. No. 55, at 4). For reasons set out in its Order, the Court denied the motion for leave to notice four depositions and for expedited discovery (Dkt. No. 66).

On January 25, 2016, the Court granted the motion to certify a class (referred to in this Order as the "Patient Class") (Dkt. No. 86). The certified class consists of patients who seek to obtain, or desire to obtain, health care services in Arkansas at PPAEO through the Medicaid program. ADHS sought interlocutory review of this Court's class certification Order and denial of the motion for expedited pre-certification discovery decision. *See Planned Parenthood Ark. & E. Okla., d/b/a Planned Parenthood of the Heartland v. Selig*, Case No. 16-8003 (8th Cir. Feb. 5, 2016). The Eighth Circuit Court of Appeals denied ADHS's request for interlocutory review (Dkt. Nos. 96, 97).

PPAEO and the Jane Does then moved for a preliminary injunction extending to the newly-certified Patient Class the same relief already granted the Jane Does (Dkt. No. 98). ADHS subsequently filed a motion seeking expedited discovery before the Court ruled on the motion for preliminary injunction seeking to extend to the newly-certified class the same relief previously granted to the Jane Does (Dkt. No. 113). PPAEO and the Jane Does responded in opposition to the motion for expedited discovery (Dkt. No. 115), and ADHS replied (Dkt. No. 116). The Court then conducted a status conference to discuss the motion for expedited discovery on August 19, 2016, before denying the motion (Dkt. No. 119).

ADHS then filed a sur-reply (Dkt. No. 120) and subsequently informally requested permission from the Court to file a supplemental response to its response in opposition to the motion to expand the preliminary injunction to the Patient Class. The Court granted this request, and ADHS filed a supplemental response (Dkt. No. 121). PPAEO and the Jane Does then filed

supplemental memorandums in support of their motion (Dkt. Nos. 122, 124), to which the Court gave ADHS an opportunity to respond. ADHS filed a further reply in opposition to plaintiffs' preliminary injunction motion and a response to notice of supplemental authority (Dkt. Nos. 125, 126).

On September 29, 2016, this Court entered a preliminary injunction on behalf of the Patient Class granting the motion for preliminary injunction and enjoining ADHS from suspending Medicaid payments to PPAEO for services rendered to Medicaid beneficiaries who are members of the Patient Class (Dkt. No. 127). ADHS filed a notice of appeal to the Eighth Circuit on October 27, 2016, as to this Court's preliminary injunction (Dkt. No. 128). On August 16, 2017, the Eighth Circuit issued an opinion vacating this Court's preliminary injunction order on the grounds that 42 U.S.C. § 1396a(a)(23)(A) does not create an enforceable federal right for individual patients. *Does v. Gillespie*, 867 F.3d 1034, 1046 (8th Cir. 2017). The Eighth Circuit's mandate was entered on November 20, 2017, at which point this Court regained jurisdiction of the case.

While the appeal was pending, PPAEO and the Jane Does sought leave to file a third amended complaint, which this Court granted (Dkt. No. 134). PPAEO and the Jane Does filed their third amended complaint on November 30, 2016 (Dkt. No. 135-1). In this complaint, PPAEO and the Jane Does, on behalf of themselves and all others similarly situated, bring claims against ADHS pursuant to 42 U.S.C. § 1396a(a)(23), alleging that ADHS' actions violate 42 U.S.C. § 1396a(a)(23), penalize plaintiffs for their constitutionally protected right to associate with Planned Parenthood and/or abortion, and unfairly target plaintiffs for unfavorable treatment without adequate justification in violation of the Equal Protection Clause (*Id.*, ¶¶ 54-59). On January 19, 2018, PPAEO and the Jane Does filed a motion for preliminary injunction on their constitutional claims (Dkt. No. 144). ADHS filed motions to stay the preliminary injunction briefing and for a

scheduling order (Dkt. Nos. 150, 151). On February 1, 2018, the Court entered an order staying preliminary injunction briefing (Dkt. No. 152).

PPAEO and the Jane Does filed a motion for limited expedited discovery in support of the latest preliminary injunction motion (Dkt. No. 153-3). ADHS responded, and PPAEO and the Jane Does replied (Dkt. Nos. 155, 156). The Court ordered the parties to file additional briefing, and the Court also asked the parties to inform the Court of their respective positions on the consolidation of the motion for preliminary injunction with the trial on the merits (Dkt. No. 157). ADHS filed another response to PPAEO and the Jane Does' request for limited expedited discovery arguing that it should be denied and arguing that this Court should consolidate the preliminary injunction with the trial on the merits (Dkt. No. 161). PPAEO and the Jane Does filed additional briefings in which they argued that limited expedited discovery was warranted and that the consolidation of the preliminary injunction and the trial on the merits would compound their injuries (Dkt. Nos. 162, 165). On March 20, 2018, the Court entered an order denying PPAEO and the Jane Does' motion for limited expedited discovery, granting ADHS' motion for an initial scheduling order, and lifting the stay on briefing the motion for preliminary injunction (Dkt. No. 170). ADHS then filed a response to the motion for preliminary injunction, and PPAEO and the Jane Does replied (Dkt. Nos. 175, 178).

## II. Findings Of Fact

The Court adopts by reference its findings of fact in its prior Orders entered in this matter, to the extent those findings do not conflict with factual findings recited here (Dkt. Nos. 45, at 3-10; 127, at 6-9). *See* Fed. R. Civ. P. 10(c). The Court also makes the following additional findings of fact. To the extent the findings of fact in this Order contradict the findings of fact made in the Court's prior Orders, the findings of fact in this Order control. Further, the Court will address

these and additional factual matters in the context of its discussion of the legal issues; the Court makes the findings of fact addressed in that context as well. In making the following findings of fact and conclusions of law, the Court has considered the record as a whole. All findings of fact contained herein that are more appropriately considered conclusions of law are to be so deemed. Likewise, any conclusions of law more appropriately considered a finding of fact shall be so classified. The Court has considered and weighed all of the evidence presented in the record at this stage; the Court has resolved any disputes consistent with the statements in this Order.

1. PPAEO is a Planned Parenthood entity providing health care services in Arkansas (Declaration of Aaron Samulcek, Dkt. No. 145-1, ¶ 2 ("Samulcek Decl.")). PPAEO operates health centers in Little Rock, Arkansas, and Fayetteville, Arkansas (*Id.*, ¶ 4).

2. These centers provide family planning services to men and women, including contraception and contraceptive counseling, screening for breast and cervical cancer, pregnancy testing and counseling, and early medication abortion (*Id.*).

3. In Fiscal Year ("FY") 2017, PPAEO provided over 1,000 health care visits for over 750 women, men, and teens insured through Medicaid in Little Rock and Fayetteville (*Id.*, ¶ 5). In FY 2016, PPAEO provided over 1,000 health care visits for over 650 women, men, and teens insured through Medicaid in Little Rock and Fayetteville (*Id.*). Throughout Arkansas, approximately 20% of PPAEO's FY 2017 patients were insured through Medicaid, and those patients were responsible for nearly 20% of PPAEO's total Arkansas health care visits in FY 2017 (*Id.*).

4. According to data compiled by the Guttmacher Institute, in Pulaski County, Arkansas, publicly funded health clinics served 7,680 women who obtained contraceptive services in 2015 (Dkt. No. 145-1, Samulcek Decl., ¶ 6). PPAEO's Little Rock health center served over

40%, or 3,200, of these women (*Id*.). According to the same data, in Washington County, Arkansas, publicly funded health clinics served 4,030 women who obtained contraceptive services, and PPAEO's Fayetteville health center served approximately 35%, or 1,400, of these women (*Id*.).

5. PPAEO does not and has not ever facilitated fetal tissue donation (Dkt. No. 13-2, at 3).

6. At its Arkansas health centers, PPAEO offers only early medication abortions, which is a Federal Drug Administration-approved process in which a patient takes oral medication that causes her to pass the products of conception at a later time, usually away from the health center; as a result, there is no fetal tissue extracted at PPAEO's health centers (*Id*., at 2; Dkt. No. 145-1, Samulcek Decl., ¶ 8).

7. PPAEO and the Jane Does represent that Arkansas Medicaid does not cover medication abortion in virtually all circumstances, and all parties agree that Medicaid payment for abortion is not at issue in this case (Dkt. Nos. 135-1, ¶ 16; 139, ¶ 16).

8. PPAEO also operates a pharmacy that serves Arkansas residents which allows patients to have their birth control prescriptions automatically refilled (Dkt. No. 3, Declaration of Suzanna de Baca, ¶ 7 ("de Baca Decl.")).

9. The Patient Class certified in this matter consists of patients who seek to obtain, or desire to obtain, health care services in Arkansas at PPAEO through the Medicaid program (Dkt. No. 86, at 5).

10. Plaintiffs Jane Does are patients of PPAEO who received their care through the Medicaid program (*Id*.) (*see* Dkt. No. 3, Declaration of Jane Doe # 1 in Support of Plaintiffs' Motion for TRO and/or PI, ¶ 1 ("Decl. Jane Doe #1"); Declaration of Jane Doe # 2 in Support of

Plaintiffs' Motion for TRO and/or PI, ¶ 1 ("Decl. Jane Doe #2"); Declaration of Jane Doe # 3 in Support of Plaintiffs' Motion for TRO and/or PI, ¶ 1 ("Decl. Jane Doe #3")).

11. All three of the Jane Does claim that, for a variety of the following reasons, they choose PPAEO because it is convenient, they are able to obtain appointments quickly, they obtain test results quickly and reliably, they like the atmosphere and staff, they like that they receive the information they need, and they like the services they can receive as a walk-in patient, especially given their time commitments to children, inflexible work schedules, and other responsibilities that make it difficult to schedule appointments at a set time (Dkt. No. 3, at 1-20).

12. Before choosing PPAEO, Jane Doe #1 and Jane Doe #2 tried to obtain healthcare in other ways. With a private provider, Jane Doe #1 found the wait times long for an appointment and recalls being referred to the emergency room or offered an appointment in three to four weeks when she called concerned about symptoms (Dkt. No. 3, Decl. Jane Doe #1, ¶ 6). With a county health clinic, Jane Doe #1 recalls wait times of three or four weeks and bad experiences with unpleasant and unhelpful staff members (*Id.*). Jane Doe #2 recalls long wait times and being required to wait several weeks from calling to get an appointment. Although she acknowledges other providers take patients on a walk-in basis, the wait times were even longer (Dkt. No. 3, Decl. Jane Doe #2, ¶ 5).

13. ADHS' own documents reflect that long wait times and delays in scheduling appointments are commonplace among county health clinics that offer family planning services and other preventative care (Dkt. Nos. 26-5, 26-6).

14. ADHS, through its then-Director John Selig, notified PPAEO on August 14, 2015, that ADHS was terminating its Medicaid provider agreements, effective 30 days from the date of the letter (Dkt. No. 16-1, at 19).

15. Mark White, Deputy Director of ADHS, who supervises the Division of Medical Services which administers Arkansas' Medicaid Program, states that "at Governor Asa Hutchinson's directive, DHS Director John Selig gave written notice that DHS would terminate the three (3) [PPAEO] provider agreements in 30 days, exercising its rights to do so under the 'voluntary' termination provision (Section III.A) of said agreements." (Affidavit of Mark White, Dkt. No. 16-1, ¶ 5 ("White Aff.")).

16. Arkansas Governor Asa Hutchinson issued a press release on August 14, 2015, the day the termination letter was sent to PPAEO.[1] In this press release, Governor Hutchinson states that he directed ADHS to terminate the agreements because "[i]t is apparent that after the recent revelations on the actions of Planned Parenthood, that this organization does not represent the values of the people of our state and Arkansas is better served by terminating any and all existing contracts with them." (Dkt. No. 12, ¶ 35).

17. The August 14, 2015, letter provided directions on how PPAEO could administratively appeal the termination (Dkt. No. 16-1, White Aff., ¶ 6).

18. Mr. White states, "[a]fter the letter was issued, the Governor directed DHS to review the videos released by the Center for Medical Progress." (*Id.*). The Court hereafter refers to these videos as the "CMP videos."

19. Mr. White states that he reviewed the first seven (7) of the eight (8) videos that were available at that time on behalf of ADHS and made several observations (*Id.*, ¶ 10).

[1] *See* Press Release, Ark. Governor Asa Hutchinson, Governor Asa Hutchinson Directs DHS to End Contract with Planned Parenthood (Aug. 14, 2015), https://governor.arkansas.gov/press-releases/detail/governor-asa-hutchinson-directs-dhs-to-end-contract-with-planned-parenthood.

20. Mr. White states that "[t]he videos appear to demonstrate that Planned Parenthood and/or its affiliates have violated American Medical Association Guidelines, as well as the federal ban on partial birth abortions (18 U.S.C. § 1531), the Born-Alive Infants Protection Act of 2002 (1 U.S.C. § 8), the federal ban on transferring human fetal tissue for valuable consideration (42 U.S.C. § 289g-2), and other federal and state laws." (*Id.*, ¶ 13).

21. The transfer of fetal tissue is against Arkansas law. *See* Ark. Code Ann. § 20-17-802.

22. Based on record evidence at this stage of the litigation, the CMP videos do not depict any representatives of PPAEO.

23. Based on record evidence at this stage of the litigation, the CMP videos include no statements from representatives of PPAEO.

24. Based on record evidence at this stage of the litigation, the CMP videos do not discuss any conduct by any PPAEO medical provider.

25. Mr. White states that, on September 1, 2015, he issued a second notice of termination to PPAEO "acting under the 'for cause' termination provision (Section III.C) of the three (3) provider agreements." (Dkt. No. 16-1, White Aff., ¶ 16).

26. Mr. White makes clear that, although he believes his authority would permit him to terminate immediately PPAEO as a provider under the for cause termination provision, ADHS "delayed the effective date to coincide with that of the first letter." (*Id.*).

27. This second letter states that it "is based in part upon the troubling circumstances and activities that have recently come to light regarding the national Planned Parenthood organization, Planned Parenthood of the Heartland, and other affiliated Planned Parenthood entities, all of which are affiliated with [PPAEO]," and that "there is evidence that [PPAEO] and/or

its affiliates are acting in an unethical manner and engaging in what appears to be wrongful conduct." (Dkt. Nos. 12, ¶ 37; 16-1 at 21-26).

28. The letter states that PPAEO is "welcome to submit information or offer comments on the nationally recognized videos that have raised questions on the conduct of Planned Parenthood." (Dkt. Nos. 12, ¶ 37; 16-1 at 21-26).

29. ADHS, through Mr. White, claims that it terminated PPAEO's provider agreements "based on what is in the public domain" and "determined that termination is in the public interest." (Dkt. No. 16-1, White Aff., ¶ 18).

30. Sources in the public domain report that completed governmental investigations in response to the videos in Georgia, South Dakota, Indiana, Pennsylvania, and Massachusetts have found that Planned Parenthood committed no wrongdoing with regard to the CMP videos (Dkt. No. 4, at 6 n. 7 (citing and collecting media sources)).

31. The second termination letter included instructions on how to appeal the termination (Dkt. No. 16-1, White Aff., ¶ 19).

32. PPAEO and the Jane Does sued ADHS' director, Mr. Selig, in his official capacity, only seeking declaratory and injunctive relief (Dkt. No. 12, at 15). As a result, PPAEO and the Jane Does now sue Cindy Gillespie, Director, Arkansas Department of Human Services, in her official capacity.[2]

33. This Court entered a preliminary injunction that prevented ADHS from terminating PPAEO from the Medicaid program. That preliminary injunction has been vacated by the Eighth Circuit.

[2] Pursuant to Federal Rule of Civil Procedure 25(d), Ms. Gillespie, as the successor in office to Mr. Selig, is automatically substituted as a party on these types of claims.

34. On December 13, 2017, in response to inquiries by plaintiffs' counsel to defendant's counsel, defendant's counsel explained that ADHS may not reimburse PPAEO for Medicaid claims made during the pendency of this case if PPAEO prevails on its constitutional claims (Dkt. No. 145-1, at 12-13).

35. On January 5, 2018, counsel for defendant informed plaintiffs' counsel that "it would be improper to reimburse where the referring or proscribing physician has been terminated from the Medicaid program." (*Id*., at 19).

36. Promptly after PPAEO was informed of ADHS' position regarding reimbursement, PPAEO stopped providing services to patients insured through the Medicaid program on an unpaid basis (Dkt. No. 145-1, Samulcek Decl., ¶ 15).

37. PPAEO opted not to provide these services to patients, as PPAEO was aware that there was a risk that its patients would be unable to fill prescriptions or obtain needed follow-up care that would be covered by the Medicaid program (*Id*.).

38. Since January 2018, PPAEO has reached out to its patients insured through Medicaid who had appointments scheduled with PPAEO; PPAEO has informed these patients that PPAEO can no longer provide services to them and has referred these patients to other Medicaid providers (*Id*., ¶ 18).

39. The patients with whom PPAEO has spoken have been upset and dismayed, and many of them have expressed concerns about their ability to be seen elsewhere in a timely way (*Id*.).

40. Since January 2018, Holly Ajanel, the Center Manager of the Little Rock health center at PPAEO, made a series of phone calls to determine the best location to refer PPAEO's

patients who are insured through Medicaid (Dkt. No. 145-2, Declaration of Holly Ajanel, ¶¶ 1-2 ("Ajanel Decl.")).

41. Since January 2018, Rosa Adams, the Front Office Assistant at PPAEO's Fayetteville health center, made several phone calls to determine the best location to refer PPAEO's Medicaid patients (Dkt. No. 145-3, Declaration of Rosa Adams, ¶¶ 1-2 ("Adams Decl.")).

42. As a result of these phone calls, Ms. Ajanel and Ms. Adams aver that the choice of providers for PPAEO's current Medicaid patients is limited because some providers are not accepting new Medicaid patients in certain categories; other providers require a referral before seeing a new Medicaid patient; even with a referral, a new Medicaid patient may have to wait weeks before being seen; and for certain family planning services, more than one appointment may be required for the Medicaid patient to receive the service or care he or she seeks (*see generally* Dkt. Nos. 145-2, Ajanel Decl.; 145-3, Adams Decl.).

## III. Conclusions Of Law

In the light of the change of circumstances since the original complaint and amended complaints were filed, the Court will consider plaintiffs' motion for preliminary injunction on their constitutional claims (Dkt. No. 144). The Court is authorized to take into account "subsequent changes in the facts or the law" when determining whether to modify an injunction or decree. *Movie Sys., Inc. v. MAD Minneapolis Audio Distr., a Div. of Smoliak & Sons, Inc.*, 717 F.2d 427, 430 (8th Cir. 1983); *see McDonald v. Armontrout*, 908 F.2d 388, 390 (8th Cir. 1990) (deferring to district court's decision to modify a consent decree because facts had changed). For example, in 2018, ADHS announced that it may not reimburse PPAEO for Medicaid claims made during the pendency of this case, even if PPAEO prevails on its constitutional claims (Dkt. No. 145-1, at 12-

13). While it is true that this case has been pending for over two years, the Court finds that this factual change, among others, warrants consideration of plaintiffs' present motion.

Whether a preliminary injunction should issue involves consideration of: (1) the probability that the movant will succeed on the merits; (2) the threat of irreparable harm; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties, and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). *Dataphase* unified two tests to determine a moving party's substantial probability of success at trial by rejecting the notion the party seeking relief must show "a greater than fifty per cent likelihood that he will prevail on the merits," and holding that "where the balance of other factors tips decidedly toward plaintiff a preliminary injunction may issue if movant has raised questions so serious and difficult as to call for more deliberate investigation." *Id*. at 114. A moving party is required to show a substantial likelihood of success on the merits to meet the threshold. *Kai v. Ross*, 336 F.3d 650, 656 (8th Cir. 2003).

Defendant contends that the Court should apply the more rigorous standard required when a preliminary injunction is sought to enjoin the implementation of a duly enacted state statute or regulation developed through presumptively reasoned democratic processes. *Planned Parenthood Minn., N.D., S.D v. Rounds*, 530 F.3d 724, 732-33 (8th Cir. 2008). Under these circumstances, the district court is required to apply a "likely to prevail on the merits" or likelihood of success on the merits standard. *Id.* at 732. Otherwise, the district court should "apply the 'fair chance of prevailing' test where a preliminary injunction is sought to enjoin something other than government action based on presumptively reasoned democratic processes." *Id.*

It is not all together clear to this Court whether the more rigorous standard from *Rounds* applies to the type of governmental action involved here. The parties, however, both apply the

more deferential "likely to prevail on the merits" standard in their briefings (Dkt. Nos. 145, at 17 ("Plaintiffs are Likely to Succeed on the Merits of Their Claims"); 175 (applying "likely to prevail on the merits" standard); 178, at 2 ("PPAEO is likely to succeed on its unconstitutional conditions claim . . . ."). Accordingly, the Court will also apply the more deferential "likely to prevail on the merits" standard to plaintiffs' request for a preliminary injunction.

### A. Likely To Prevail On The Merits

The Court will first examine whether plaintiffs have established that they are likely to prevail on the merits of their unconstitutional conditions claim. The Court views plaintiffs as making two arguments in support of this claim—one based on the Fourteenth Amendment and the other based on the First Amendment. As discussed below, the Court concludes that plaintiffs have not met their burden of proof to show that they are likely to prevail on the merits of their unconstitutional conditions claim. The Court also concludes that plaintiffs have not met their burden of proof to show that they are likely to prevail on the merits of their Fourteenth Amendment equal protection claims.

#### 1. Unconstitutional Conditions Claim Based Upon Fourteenth Amendment Right

Plaintiffs assert an unconstitutional conditions claim in their third amended complaint (Dkt. No. 135-1, ¶¶ 56-57).[3] The Court will first analyze PPAEO's claim that ADHS' termination of PPAEO from the Arkansas Medicaid program was intended to penalize PPAEO for advocating for

[3] Plaintiffs in their complaint appear to bring an unconstitutional conditions claim on behalf of all "plaintiffs," meaning PPAEO and the Jane Doe plaintiffs (Dkt. No. 135-1, ¶¶ 56-57). However, as defendant points out, plaintiffs appear to contend that they have not asserted such a claim on behalf of the Jane Doe plaintiffs (Dkt. No. 164, at 9). For purposes of resolving the pending motion for preliminary injunction, the Court will confine its analysis as the parties did in their briefing to PPAEO's unconstitutional conditions claim and PPAEO's and the Jane Does' equal protection claims.

reproductive freedom and/or association with abortion (Dkt. Nos. 135-1, ¶ 57; 145, at 22, 26). For the reasons discussed below, the Court finds that plaintiffs have not established at this point in the litigation that they are likely to succeed on the merits of this argument so as to warrant the entry of a preliminary injunction.

It is settled law that the federal government and the governments of the States may prohibit the use of public funds to provide or support abortions. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 314-17 (1980); *Maher v. Roe*, 432 U.S. 464, 473-74 (1977). On the other hand, the Supreme Court has made clear "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Specifically, the government may not deny governmental benefits in such a way that the denial infringes upon an individual's constitutionally protected interests. *Id.*; *see, e.g.*, *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 59-60 (2006); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983); *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974). "[These] cases reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013).

Generally, "[t]he Supreme Court has applied this doctrine in two distinct contexts." *Planned Parenthood Assoc. of Utah v. Herbert*, 828 F.3d 1245, 1258 (10th Cir. 2016) (internal quotations omitted). The doctrine has been applied "when the *condition acts prospectively* in statutes or regulations that limit a government-provided benefit—typically a subsidy or tax break—to those who refrain from or engage in certain expression or association." *Id.* (internal

quotations omitted) (emphasis added). "[T]he unconstitutional-conditions doctrine [also] has been applied when the *condition acts retrospectively* in a *discretionary* executive action that terminates a government-provided benefit—typically public employment, a government contract, or eligibility for either—in retaliation for prior protected speech or association." *Id.* (internal quotations omitted) (emphasis added in part); *see Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 671 (1996) (examining the doctrine where an independent contractor was terminated by a governmental body in response to his outspoken criticism); *Perry*, 408 U.S. at 597 (examining the doctrine where the board of regents failed to renew a professor's contract with state university in retaliation for his criticism).

For example, in *Rust v. Sullivan*, the Supreme Court upheld a restriction on the use of Title X funds for abortion because that restriction governed only "the scope of the Title X project's activities," but did not restrict an abortion provider's ability "to pursue abortion-related activities when they are not acting under the auspices of the Title X project." 500 U.S. 173, 196, 198 (1991). In *Agency for International Development v. Alliance for Open Society International* ("*AOSI*"), however, the Supreme Court struck down a federal grant program that conditioned receipt of grant money on an organization's pledge to oppose prostitution and sex trafficking. 570 U.S. 205, 221 (2013). The Supreme Court held that, because "[t]he Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program, . . . it violates the First Amendment and cannot be sustained." *Id.* There is a distinction "between conditions that define the limits of government spending programs—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate [activity] outside the contours of the program itself." *Id.* at 214-15.

The Eighth Circuit examined the unconstitutional conditions doctrine in relation to a Missouri funding statute and what plaintiffs alleged was an attempt to prohibit abortion service providers from receiving certain government funds. *Planned Parenthood of Mid-Mo. and E. Kan., Inc. v. Dempsey*, 167 F.3d 458 (8th Cir. 1999). Other federal courts also have examined governmentally-imposed conditions to determine whether those conditions impermissibly attempted to leverage funding to regulate speech and association related to abortion outside the contours of a governmental program. *See, e.g., Planned Parenthood of Sw. and Cent. Fla. v. Philip*, 194 F. Supp. 3d 1213 (N.D. Fla. 2016); *Planned Parenthood of Cent. N.C. v. Cansler*, 877 F. Supp. 2d 310 (M.D. N.C. 2012).

Not all litigants, and not all courts, agree on how these claims should be examined in the abortion context. Some advocate that the unconstitutional conditions doctrine does not apply in the abortion context. Instead, they advocate that, in the abortion context, the only constitutional limit is the *Casey* requirement that the state not impose an undue burden on women's right to abortion. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). This dispute was most recently addressed in a now vacated Sixth Circuit Court of Appeals' panel decision in *Planned Parenthood of Greater Ohio v. Hodges,* 201 F. Supp. 3d 898 (S.D. Ohio 2016), *aff'd* 888 F.3d 224 (6th Cir. 2018), *granting reh'g en banc, vacating opinion* 892 F.3d 1283 (6th Cir. 2018). In *Hodges*, a federal district court struck down Ohio Revised Code § 3701.034, which required the Ohio Department of Health to ensure that federal funds were not distributed to any entity that performs, promotes, or contracts with entities that perform or promote nontherapeutic abortions, on the grounds that Section 3701.034 violates the First Amendment. 201 F. Supp. 3d at 900-01, 908. The district court found that Section 3701.034, which impacted programs that subsidized STD screenings, cancer screenings, HIV testing and education, measures to reduce infant

mortality, education for teens regarding abstinence and contraception, and the prevention of sexual violence, unconstitutionally conditioned the funding of such programs—none of which had any relation to abortion—upon a recipient's exercise of the right to free speech or association outside of those programs. *Id.* at 906 (citing *Dempsey*, 167 F.3d at 462 ("Legislation that simply dictates the proper scope of government-funded programs is constitutional, while legislation that restricts protected grantee activities outside government programs is unconstitutional . . . .")).

Here, to the extent PPAEO argues a Fourteenth Amendment right, the constitutional right at issue—a woman's right to a previability abortion—belongs to the Patient Class. *See Casey*, 505 U.S. at 884-85 (majority opinion); *Dempsey*, 167 F.3d at 464. The Court acknowledges precedent from the Eighth Circuit which addressed this type of unconstitutional conditions claim when upholding a state statute as construed to not impose an unconstitutional condition on women seeking abortion, *Dempsey*, 167 F.3d at 464-65, and the Seventh Circuit which addressed this type of unconstitutional conditions claim when upholding an Indiana law which prohibited abortion providers from receiving any state contracts and grants, including those involving state-administered federal funds, *Planned Parenthood of Indiana v. Commissioner of Indiana State Dep't of Health*, 699 F.3d 962, 987-88 (7th Cir. 2012). Both the Eighth and Seventh Circuits determined that the "undue burden" test from *Casey* applied to unconstitutional conditions claims premised upon the right to a previability abortion and further determined that, because the respective state legislation at issue did not unduly burden a woman's ability to choose to have a previability abortion, that legislation did not impose an unconstitutional condition. *Dempsey*, 167 F.3d at 464-65; *Planned Parenthood of Ind.*, 699 F.3d at 988.

Based on the record evidence before the Court at this stage of the litigation, the Court concludes that, assuming without deciding that the *Casey* undue burden test applies to this type of

claim, plaintiffs have not established a likelihood of succeeding on the merits of their argument that ADHS withdrew funding in retaliation for PPAEO's advocacy for reproductive freedom and/or association with abortion.

Assuming without deciding that the *Casey* undue burden test does not apply to plaintiffs' argument that ADHS has unconstitutionally conditioned funding upon PPAEO's advocating for reproductive freedom and/or association with abortion, it is not clear what alternate test applies under the circumstances. In *Planned Parenthood Association of Utah v. Herbert*, the Tenth Circuit Court of Appeals appeared to examine an unconstitutional conditions argument premised on a Fourteenth Amendment right, but the court did not apply *Casey* to that argument nor did the court articulate a specific test applied to that argument different from the *Umbehr* test the court applied to the First Amendment right examined in that case. 828 F.3d at 1259-63 (examining the Fourteenth Amendment argument). Plaintiffs argue that the facts and legal arguments presented in the Tenth Circuit's decision in *Herbert* are substantively identical to the case at bar.[4] Other courts examining arguments premised on a Fourteenth Amendment right also have forgone the application of *Casey* and applied what appears to be a more straightforward unconstitutional conditions analysis, but those courts admittedly have examined facts more straightforward than those presented here. *See, e.g.*, *Planned Parenthood of Sw. & Cent. Fla.*, 194 F. Supp. 3d at 1216-20; *Planned Parenthood of Cent. N.C.*, 877 F. Supp. 2d at 314-15, 318-21.

Considering all controlling and persuasive precedents and the record facts before the Court, the Court finds that plaintiffs have not met their burden of proving that they are likely to succeed

[4] The Court examines this test, and the Tenth Circuit's application of it, in more detail in section III.A.2. of this Order.

on their unconstitutional conditions claim based on an asserted Fourteenth Amendment right so as to warrant the entry of a preliminary injunction.

**2. Unconstitutional Conditions Claim Based Upon First Amendment Right**

The Court will also analyze PPAEO's claim that ADHS' actions penalize PPAEO for its constitutionally protected association with its Planned Parenthood affiliates (Dkt. No. 135-1, ¶ 57). PPAEO has long affiliated with Planned Parenthood Federation of America ("PPFA") and other Planned Parenthood organizations across the country out of a shared mission to advance reproductive health and freedom (Dkt. No. 145, at 22). PPAEO alleges that the First Amendment, which encompasses the right "to engage in association for the advancement of beliefs and ideas," protects this affiliation (*Id*., at 23). Additionally, PPAEO argues its advocacy for reproductive freedom is similarly protected by the First Amendment (*Id*.).

Plaintiffs argue that the facts and legal arguments presented in the Tenth Circuit's decision in *Herbert* are substantively identical to the case at bar. Following a release of the same videos at issue in this matter, Utah Governor Gary Herbert issued a "Directive" terminating the contractual relationships of Planned Parenthood Association of Utah ("PPAU") with the Utah Department of Health. *Herbert*, 828 F.3d at 1259. In analyzing PPAU's unconstitutional conditions claim based on its First Amendment right, the Tenth Circuit noted that "[plaintiff]'s unconstitutional conditions claims appear to us to fit comfortably within the context exemplified by *Umbehr*," and then it applied the test from *Umbehr*. *Id.* In *Umbehr*, the Supreme Court concluded that "the First Amendment protects independent contractors from the termination of at-will government contracts in retaliation for their exercise of the freedom of speech." 518 U.S. at 670.

Applying this test in *Herbert*, the Tenth Circuit first examined Governor Herbert's Directive. The Directive referred to PPAU as Planned Parenthood and stated that "'[t]he

allegations against Planned Parenthood are deeply troubling,' . . . that '[t]he federal government has provided grants to Planned Parenthood, distributed through the Utah Department of Health,' and ultimately state[d] that [Governor] Herbert 'instructed state agencies to cease acting as an intermediary for pass-through federal funds to Planned Parenthood.'" 828 F.3d at 1261. In his post-Directive statement, Governor Herbert further stated "'it happened in their organization' and 'for coloring outside the lines, Planned Parenthood forfeits some of their benefits.'" *Id.*

The Tenth Circuit specifically noted that, "[i]f [this] were all the evidence we had before us, we would thus be left to conclude that the most reasonable finding a court or jury could make is that the Directive was issued based upon a mistake of fact made by [Governor] Herbert." *Id.* However, the Tenth Circuit determined that PPAU presented additional evidence which, when coupled with the evidence that Governor Herbert failed to distinguish between PPAU and Planned Parenthood (or affiliates in other states), led the Tenth Circuit to conclude plaintiffs were likely to prevail on their unconstitutional conditions claim.

Specifically, the Tenth Circuit relied on record evidence in which Governor Herbert: (1) acknowledged the events depicted in the CMP videos did not happen in Utah; (2) admitted the CMP videos involved affiliates of Planned Parenthood, not PPAU; (3) admitted there was no evidence, or even accusation, that PPAU engaged in misconduct because PPAU does not participate in any program that provides fetal tissue for scientific research; (4) admitted that none of the federal funds that flow through the state to PPAU are "used to provide abortions;" (5) admitted that the accusations made by CMP in the videos regarding Planned Parenthood and its other affiliates had not been proven and were indeed false; (6) agreed the national "political climate . . . [wa]s very hostile to Planned Parenthood;" (7) steadfastly refused to retract the Directive; and (8) participated in a pro-life event held at the Utah State Capitol five days after he issued his

directive where the purpose of the event was "to ask lawmakers to defund [PPAU]" and where he made statements to the crowd regarding abortion. 828 F.3d at 1261-62. Governor Herbert stated at that pro-life event: "I'm here today to add my voice to yours and speak out on the sanctity of life," and "[t]he thing I find most appalling is the casualness, the callousness . . . the lack of respect, the lack of sensitivity to the unborn." *Id.* at 1262. The Tenth Circuit found that a reasonable finder of fact on that record evidence was more likely than not to determine that Governor Herbert issued the Directive to punish PPAU for exercising its First and Fourteenth Amendment rights, thereby reversing the decision reached by the district court. *Id*. at 1261-62.

Assuming without deciding that PPAEO has asserted a valid First Amendment right, the question now is whether PPAEO has succeeded in establishing that it is likely to prevail on the issue of whether its Medicaid contracts were terminated for exercising that right. Based on the record evidence before the Court at this stage of the litigation, the Court concludes that, assuming without deciding that the *Casey* undue burden test applies to this type of claim, plaintiffs have not established a likelihood of succeeding on the merits of their argument that ADHS' termination of PPAEO's Medicaid contracts in retaliation for PPAEO's exercising its First Amendment right creates an undue burden.

Even if the Court applies the test from *Umbehr* to analyze PPAEO's unconstitutional conditions claim based on its First Amendment right, the Court reaches the same conclusion. Under *Umbehr*, to prevail on this claim, PPAEO "must prove that the conduct at issue was constitutionally protected, and that it was a substantial or motivating factor in the termination." *Umbehr*, 518 U.S. at 675. The focus necessarily is on alleged retaliation against the protected conduct; alleged retaliation against non-protected conduct falls outside the unconstitutional conditions doctrine. Even if PPAEO meets that burden, defendant "can escape liability by showing

that [she] would have taken the same action even in the absence of the protected conduct." *Id.*; *see Lyons v. Vaught*, 875 F.3d 1168, 1172 (8th Cir. 2017) (applying test in public employment context). Further, defendant can "also prevail if [she] can persuade [the fact finder] that [her] legitimate interest as contractor, deferentially viewed, outweigh[s] the free speech interests at stake." *Umbehr*, 518 U.S. at 685.

Here, the Court determines the record evidence at this stage of the litigation falls short of that recited and relied upon by the Tenth Circuit in *Herbert*. For this reason, the Court determines that, even if *Umbehr* applies, plaintiffs have not met their burden to demonstrate that they are likely to succeed in showing that PPAEO's termination was in retaliation for its exercising its First Amendment right. Such evidence might or might not be developed in this litigation as discovery proceeds, but it is not a part of the undisputed record presented to this Court at this stage of the litigation.

While reaching this decision, the Court acknowledges the following record evidence. ADHS acknowledged the video evidence used to justify PPAEO's termination was not viewed until after Governor Hutchison's press release and the issuance of the first termination letter (Dkt. No. 16-1, White Aff., ¶ 9). Mr. White's affidavit, which recites the offending portions of the CMP videos, does not indicate that any of the Planned Parenthood staff members who were videotaped were affiliated with PPGP or PPAEO (*Id.*, ¶ 10). Indeed, Governor Hutchinson's press release referenced "the recent revelations on the actions of *Planned Parenthood*" as the basis for PPAEO's termination. *See* Press Release, Ark. Governor Asa Hutchinson (emphasis added).

Further, even if ADHS' termination of PPAEO was initially a mistake, on September 15, 2015, PPAEO informed ADHS *via* letter that it provides only early medication abortions, the fetal products of which are passed away from PPAEO's health centers (Dkt. No. 13-2, at 2). In the

same letter, PPAEO informed ADHS that neither it nor its parent organization have participated in fetal tissue donation or received reimbursement for fetal tissue (*Id.*, at 3). ADHS has offered no other rationale for terminating PPAEO as a Medicaid provider. ADHS' continued refusal to reinstate PPAEO as a Medicaid provider following this clarification—if indeed such clarification was even necessary—troubles the Court.

The record evidence indicates that ADHS has been aware for nearly three years that PPAEO was not, and could not have been, involved in any way with the practices described in the CMP videos. Accordingly, the Court does not discount that ADHS' continued refusal to reinstate PPAEO as a Medicaid provider, along with other record evidence, may tend to support the inference that ADHS has used the CMP videos as a pretext to punish PPAEO for its role as a medication abortion provider and/or for its speech and association with abortion. While this inference gives this Court pause, under the circumstances, the Court finds that plaintiffs have not met their burden of showing that they are likely to prevail on the merits of their unconstitutional conditions claim at this stage of the litigation so as to warrant the entry of a preliminary injunction.

To the extent that ADHS maintains PPAEO should have sought a state administrative remedy before filing this lawsuit, so PPAEO could provide evidence that it was not involved in the widespread misconduct demonstrated by the CMP videos, the Court rejects the argument (Dkt. No. 175, at 20-21). Generally, a plaintiff does not need to exhaust administrative remedies before seeking federal court relief pursuant to 42 U.S.C. § 1983. *Planned Parenthood of Greater Iowa, Inc. v. Atchison*, 126 F.3d 1042, 1047 (8th Cir. 1997) (citing *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516 (1982)). This Court does not understand plaintiffs to be alleging a procedural due process violation. *Cf. Hopkins v. City of Bloomington*, 774 F.3d 490 (8th Cir. 2014) (examining the exhaustion requirement when a litigant asserts the deprivation of procedural due

process under § 1983). Further, based on the record evidence and the briefings, the Court understands defendant has taken the position that there are no available state administrative remedies to address defendant's recent representations regarding reimbursement, as defendant maintains that any administrative appeal by PPAEO is now barred (Dkt. Nos. 145-1, at 12-13; 175, at 26 (arguing that PPAEO's termination is "final and binding" because PPAEO "chose not to appeal it.")).[5] *See Planned Parenthood of Greater Iowa, Inc.*, 126 F.3d at 1046-48 (examining abstention and exhaustion as applied to a § 1983 action filed in federal court). Moreover, requiring all plaintiffs to go through an administrative appeals process when they allege constitutional violations under § 1983 against a state entity undermines the congressional intent to establish federal-court review under § 1983. *Patsy*, 457 U.S. at 503-505. Accordingly, the Court finds that plaintiffs' claims are not barred by an exhaustion requirement.

Considering all of this evidence together, when compared to controlling and persuasive precedents, the Court concludes plaintiffs have failed to demonstrate, on the record currently before the Court, that they are likely to succeed on their unconstitutional conditions claim.

**3. Equal Protection Claims**

Plaintiffs assert a Fourteenth Amendment equal protection claim in their third amended complaint (Dkt. No. 135-1, ¶¶ 58-59). Plaintiffs allege ADHS' termination of PPAEO as a Medicaid provider unconstitutionally singles plaintiffs out for unfavorable treatment without adequate justification (*Id*., ¶ 59). Plaintiffs claim that ADHS' termination of PPAEO "at the direction of an anti-abortion Governor, based on the misleadingly-edited videos claiming bad

[5] The Court notes that PPAEO has filed a state court action challenging ADHS' termination of its status as a Medicaid provider. *See Planned Parenthood of Arkansas & Eastern Oklahoma, Inc. d/b/a Planned Parenthood Great Plains v. Cindy Gillespie*, Case No. 72CV-18-591 (Wash. Cty. Cir. Ct. March 2, 2018). No party briefed the issue of abstention.

conduct by other entities in other states" without clarification or confirmation that PPAEO participated in fetal tissue donation stands in "stark contrast to [ADHS]'s treatment of all other, non-Planned Parenthood Medicaid providers." (Dkt. No. 178, at 9). Plaintiffs assert that they are likely to succeed on the equal protection claim as a "class of one." (Dkt. No. 178, at 9).

To move forward as a "class of one," plaintiffs must allege and prove that they "ha[ve] been intentionally treated differently from other[] similarly situated," non-Planned Parenthood Medicaid providers and "that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The Eighth Circuit limits "class-of-one" actions from applying to "forms of state action . . . which by their nature involve discretionary decisionmaking." *Robbins v. Becker*, 794 F.3d 988, 995 (8th Cir. 2015) (quoting *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 602-4 (2008)).

At issue in *Engquist* was "whether a public employee [could] state a claim under the Equal Protection Clause by alleging that she was arbitrarily treated differently from other similarly situated employees, with no assertion that the different treatment was based on the employee's membership in any particular class." *Engquist*, 533 U.S. at 594. The Supreme Court held "[the] traditional view of the core concern of the Equal Protection Clause as a shield against arbitrary classifications, combined with the unique considerations applicable when the government acts as employer as opposed to sovereign, lead us to conclude that the class-of-one theory of equal protection does not apply in the public employment context." *Id*. at 598. The key distinction for the Court came in differentiating between the government "exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Id*. (quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

ADHS argues that class-of-one claims do not extend to cases where "a state official exercises his discretionary authority based on subjective, individualized determinations." (Dkt. No. 175, at 8-10 (citing and quoting *Higgins Elec., Inc. v. O'Fallon Fire Prot. Dist.*, 813 F.3d 1124, 1129 (8th Cir. 2016) (internal quotation and citation omitted)). In *Higgins*, where an electrical vendor claimed it was singled out for differential treatment in bidding for a construction project, the Eighth Circuit dismissed the vendor's class-of-one claim reasoning that governments have the right to choose "winners and losers" in a bidding process and determining that the vendor did not allege that a similarly situated individual was treated more favorably by the government. 813 F.3d at 1129-30. ADHS argues that, because federal and state Medicaid regulations permit it to establish reasonable standards relating to the qualifications of providers and exclude providers for such reasons, ADHS' termination of PPAEO falls squarely into the type of discretionary decision-making discussed in *Engquist* (Dkt. No. 175, at 10-11).

Plaintiffs assert that the discretion afforded to ADHS in the Medicaid context is not sufficient to bar a class-of-one claim (Dkt. No. 178, at 12). Plaintiffs point out that the federal Medicaid Act's freedom of choice provision limits ADHS' authority to exclude providers from the Arkansas Medicaid program (*Id.*). Plaintiffs also point to this Court's prior preliminary injunction Order, wherein this Court found that the Jane Doe plaintiffs were likely to prevail on their claim that ADHS violated the freedom of choice provision by terminating PPAEO (Dkt. No. 45, at 22-23). In that prior Order, this Court noted that a State, when devising a Medicaid plan, is empowered to establish a "reasonable standard relating to the qualifications of providers . . . ." 42 C.F.R. § 431.51(c)(2). Further, this Court noted that federal law allows a State to "exclude an individual or entity . . . for any reason for which the Secretary could exclude the individual or entity from participation [in a Medicaid plan]." 42 U.S.C. § 1396a(p)(1). This Court also

considered precedent from the Seventh and Ninth Circuit Courts of Appeal where those courts found that, under the federal Medicaid Act, States do not have "unlimited authority to exclude providers for any reason whatsoever." *Planned Parenthood of Ind.*, 699 F.3d at 979; *see Planned Parenthood Ariz., Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013).

The Court is cognizant that neither party has cited precedent for the authority that a provider terminated, perhaps wrongfully, from a state Medicaid program may bring a class-of-one equal protection claim. Further, this Court notes, as it has previously, that it is an open question whether ADHS is entitled to deference in its determination that a provider is "qualified" as that term is used in the Medicaid Act (Dkt. No. 45, at 26-27). Finally, as the Eighth Circuit noted in *Does v. Gillespie*, terminated providers have the option to pursue administrative appeals if they disagree with their termination. 867 F.3d at 1046.

This Court concludes that it need not resolve these issues at this stage of the litigation to resolve the pending motion. Instead, based upon the record evidence before it at this time, the Court concludes that, even if it can maintain such a claim under the circumstances presented here, PPAEO has failed to establish that it is likely to succeed on the merits of its equal protection claim. There is no record evidence indicating how the State of Arkansas determines whether providers are "qualified." It may be that the State of Arkansas has little to no discretion to determine whether providers are qualified or whether to terminate them. While the record evidence does indicate the number of times ADHS has terminated providers (Dkt. No. 145-7), the record is bereft of any evidence indicating the level of discretion afforded to ADHS to terminate or accept providers. Given the lack of evidence indicating the level of discretion ADHS uses to terminate or accept providers, the Court finds that plaintiffs have failed to satisfy their burden of establishing a likelihood of success on PPAEO's equal protection claim.

In addition, on the record before it, at this stage of the litigation, the Court determines that plaintiffs have failed to establish a likelihood of success on the question of whether PPAEO was "arbitrarily treated differently from other similarly situated" Medicaid providers. *Engquist*, 553 U.S. at 594. "To be similarly situated for purposes of a class-of-one equal protection claim, the persons alleged to have been treated more favorably must be identical or directly comparable to the plaintiff in all material respects." *Robbins*, 794 F.3d at 996 (internal quotations omitted). The record contains some evidence that, of the hundreds of providers that have been terminated from Arkansas' Medicaid program, two of those were terminated for "fraud and abuse" and five were terminated for delinquent tax payments (Dkt. No. 145-7). In their latest reply, plaintiffs also cite this Court to internet articles indicating that several other providers who participate in Arkansas' Medicaid program have been investigated in other states yet have not been terminated by ADHS (Dkt. No. 178, at 17-20). Those articles provide few details. Further, the record evidence before the Court does not include any information about ADHS' interaction with or investigation of those providers identified in plaintiffs' reply. Accordingly, this Court is unwilling at this stage of the litigation and on the record before it to compare ADHS' treatment of PPAEO with other putatively similarly-situated providers. Therefore, for these reasons, the Court finds that plaintiffs have failed to establish that they are likely to prevail on the merits of PPAEO's class-of-one equal protection claim at this time.

Finally, the Court also finds that the Patient Class has failed to establish that it is likely to succeed on the merits of its equal protection claim. Assuming without deciding that the Patient Class has standing to bring an equal protection claim due to PPAEO's termination as a Medicaid provider, the record evidence at this time is insufficient for this Court to conclude that plaintiffs are likely to prevail on their claim that the Patient Class is treated differently than any other class

of individuals. Plaintiffs' citation to *June Medical Services LLC v. Gee* does not convince this Court otherwise: that decision was based upon a motion to dismiss, not a motion for preliminary injunction. 280 F. Supp. 3d 849, 859, 867, 870 (M.D. La. 2017). Plaintiffs other citations are to *American Society of Cataract and Refractive Surgery v. Bowen*, 725 F. Supp. 606, 612-14 (D.D.C. 1989), where the district court ultimately decided that the challenged law did not violate the plaintiffs' equal protection rights, and to *Hill v. Evans*, No. CIV. A. 91-A-626-N, 1993 WL 595676, at *16 (M.D. Ala. Oct. 7, 1993), where a district court found that a statute allowing doctors to test certain patients for Human Immunodeficiency Virus without their consent violated the equal protection rights of those patients. The decision in *Hill*, however, was clearly predicated on the existence of a class of individuals who were treated differently from other classes of individuals. At this point, based on the limited record evidence before the Court, the Court concludes that plaintiffs have failed to establish at this time that they are likely to prevail on the Patient Class' equal protection claim.

**B. Remaining *Dataphase* Factors**

Because the Court concludes at this stage of the litigation and on the record evidence before it that plaintiffs have failed to meet their burden to demonstrate that they are likely to prevail on the merits of their constitutional claims, the Court need not consider the remaining *Dataphase* factors. The Eighth Circuit has observed that a determination regarding the merits is a threshold matter, which "simply reflects that the court's consideration of the remaining *Dataphase* factors cannot tip the balance of harms in the movant's favor when the requirement is not satisfied." *Rounds*, 530 F.3d at 737 n. 11.

## IV. Conclusion

For the foregoing reasons, the Court determines that the plaintiffs have not met their burden for the issuance of a preliminary injunction. Therefore, the Court denies plaintiffs' motion for preliminary injunction (Dkt. No. 144).

SO ORDERED this 30th day of July, 2018.

Kristine G. Baker
United States District Judge