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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

PLANNED PARENTHOOD OF  
KANSAS AND MID-MISSOURI,  
et al.,

Docket No. 16-2284-JAR  
Kansas City, Kansas  
Date: 06/07/2016

Plaintiffs,

v.

SUSAN MOSIER, Secretary  
Kansas Department of Health  
and Environment, in her  
official capacity,

Defendant.

.....

TRANSCRIPT OF  
MOTION FOR TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION (Doc. #12)  
BEFORE THE HONORABLE JULIE A. ROBINSON  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: Mr. Arthur A. Benson, II  
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Kansas City, Missouri 64111  
  
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APPEARANCES:  
(Continued)

For the Defendant: Mr. Darian P. Dernovish  
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Official Court Reporter  
259 U.S. Courthouse  
500 State Avenue  
Kansas City, Kansas 66101

1 (12:58 p.m., hearing commenced.)

2 THE COURT: All right. You can be seated.  
3 All right. So we'll call the case, it's Planned  
4 Parenthood of Kansas, et al., versus Susan Mosier,  
5 Secretary, Kansas Department of Health and Environment.  
6 The case number is 16-2284. And appearing on behalf of  
7 plaintiffs, please.

8 MR. BENSON: Your Honor, I am Arthur Benson.  
9 And I moved the admission of Diana Salgado and I'll  
10 introduce her to the Court. She's a member of the bars  
11 of Wisconsin, New York, the District of Columbia, the  
12 District of Columbia District Court and the Fourth  
13 Circuit. Also appearing are Doug Ghertner and Robert  
14 Eye, who are members of the court.

15 I am in a jury trial with Judge Vratil down  
16 the hall, so with the Court's indulgence, I'm going to  
17 return to that.

18 THE COURT: Leave to withdraw. That's fine.

19 MR. BENSON: Thank you very much.

20 THE COURT: All right. And so Ms. Salgado  
21 and Mr. Eye and Mr.--

22 MR. GHERTNER: Ghertner.

23 THE COURT: Ghertner. Mr. Ghertner.

24 MR. GHERTNER: Douglas.

25 THE COURT: All right. And then appearing

1 on behalf of the State of Kansas?

2 MR. DERNOVISH: Good afternoon, Your Honor.  
3 Darian Dernovish, Deputy Chief Counsel of Kansas  
4 Department of Health and Environment representing Doctor  
5 Mosier, KDHE. I also have two pending pro hac vice  
6 motions before Your Honor. I have Mr. Park and Mr.  
7 Strawbridge, both members in good standing in their  
8 respective bars and I ask that that be granted.

9 THE COURT: All right. And I understand,  
10 Mr. Strawbridge and Mr. Park, you've now submitted your  
11 wet signatures on the applications, and so that's all we  
12 were waiting for. So those two motions for admission  
13 pro hac vice for Mr. Strawbridge and Mr. Park will be  
14 granted.

15 MR. DERNOVISH: Thank you, Your Honor.

16 MR. PARK: Thank you, Your Honor.

17 THE COURT: All right. Thank you.

18 All right. So we are here on a preliminary  
19 injunction hearing on plaintiff's motions for  
20 preliminary injunction. And I think I indicated to you  
21 all yesterday that I was going to grant a total of 90  
22 minutes per side, however you all wanted to split that  
23 up, for oral argument. And plaintiff, if you wanted to  
24 split yours between initial and then reply to  
25 defendant's response, that's fine as well.

1 I do have a few questions, but I think those  
2 can effectively wait until I hear your argument or at  
3 least part of your argument. So whoever would like to  
4 go first on behalf of plaintiff. Ms. Salgado.

5 MS. SALGADO: Good afternoon. May it please  
6 the Court. Diana Salgado on behalf of plaintiff,  
7 Planned Parenthood of Kansas and Mid-Missouri, Planned  
8 Parenthood of St. Louis-- St. Louis Region and Southwest  
9 Missouri, and Jane Doe No. 1, Jane Doe No. 2, and Jane  
10 Doe No. 3.

11 Although I do not represent the other 11  
12 individual providers that are also plaintiffs in this  
13 lawsuit, I will be making remarks on their behalf. But  
14 then Mr. Eye will also speak after me, if that's okay  
15 with you, Your Honor.

16 THE COURT: That's fine.

17 MS. SALGADO: Your Honor, as every court to  
18 look at this issue has ruled, it violates federal law to  
19 bar a Planned Parenthood affiliate from Medicaid  
20 services for reasons that do not relate to whether the  
21 provider is qualified to provide the services. We're  
22 here today, Your Honor, because the Kansas Department of  
23 Health and Environment at the direction of Governor  
24 Brownback is seeking to do just that and more.

25 On May 3rd, the state issued final

1 termination letters to 11 separate providers; Planned  
2 Parenthood of Kansas and Mid-Missouri, which I'll refer  
3 to as PPKM, Planned Parenthood of the St. Louis Region  
4 and Southwest Missouri, which I'll refer to as PPSLR.  
5 And then in an unprecedented move, something no other  
6 state has done, the state also issued termination  
7 letters to 11 individual health care professionals, five  
8 of whom are current employees of PPKM, as well as six  
9 former employees of PPKM, and one former employee of  
10 PPSLR.

11           The state seeks to terminate these providers  
12 for reasons that have nothing to do with their  
13 qualifications to provide critical family planning  
14 services and other preventative care to Kansas Medicaid  
15 patients. In fact, two of the allegations that the  
16 state claims as support for the termination decisions  
17 are not at all about the provider plaintiffs. And the  
18 third allegation, which is only about PPKM, but even so,  
19 Your Honor, the record here demonstrates that this  
20 allegation does not make the defendant's sweeping action  
21 against PPKM or any of the other provider plaintiffs  
22 lawful.

23           We explained more fully in our briefs, Your  
24 Honor, but I'd like to discuss this here some more. The  
25 termination decisions violate the rights of the

1 patients, of the current provider plaintiffs, including  
2 the three Jane Doe plaintiffs. It violates their rights  
3 under what's known as the free choice of provider  
4 requirement of the Medicaid Act. And that's found at  
5 42 U.S.C. 1396(a)(23). The overwhelming case law makes  
6 clear the free choice of provider requirement guarantees  
7 Medicaid beneficiaries the right to choose among the  
8 willing providers who are qualified to provide the  
9 services to them.

10 Defendant's actions also violates the  
11 provider plaintiffs' constitutional rights by denying  
12 them equal protection under the law.

13 Focusing first on the free choice of  
14 provider claim. As the other courts to consider these  
15 issues have held, in particular the Seventh Circuit and  
16 Ninth Circuit Court of Appeals, the free choice of  
17 provider requirement guarantees that Medicaid recipients  
18 are allowed to seek Medicaid services from a provider  
19 that is qualified to perform the services required. And  
20 that means that the provider is fit or competent to  
21 provide the services.

22 Here, the plaintiff providers have a history  
23 of providing high-quality care in Kansas. PPKM has been  
24 a Medicaid provider for decades. There have been no  
25 complaints about the quality of care that the provider

1 plaintiffs have provided to Medicaid patients. And  
2 certainly the state doesn't appear to claim here that  
3 there's a problem with the quality of care provided to  
4 Medicaid patients by the current provider plaintiffs.

5           The Center for Medicare and Medicaid  
6 Services, the agency within the U.S. Department of  
7 Health & Human Services that administers Medicaid agrees  
8 with us on what it means to be a qualified provider.  
9 CMS has consistently cautioned states against  
10 eliminating or terminating Medicaid providers for  
11 reasons that are unrelated to their ability to perform  
12 Medicaid-covered services or to properly bill for those  
13 services.

14           CMS made this clear in the most recent spate  
15 of cases in the amicus that were-- that have been filed  
16 challenging other states that have also sought to  
17 terminate Planned Parenthood affiliates from Medicaid.  
18 They made that clear in an amicus brief that was filed  
19 in a case identical to this one, challenging Louisiana's  
20 decision to terminate the Planned Parenthood affiliates  
21 there. And that amicus brief, Your Honor, is found at--  
22 it's Exhibit 5 attached to the plaintiff's opening  
23 brief.

24           In that brief, CMS states that a state  
25 Medicaid agency may only terminate providers for reasons



1 bearing on the providers' fitness to provide the needed  
2 service or to bill properly for those services. And  
3 just weeks before the state here issued its final  
4 termination letters on May 3rd, CMS issued guidance to  
5 all state Medicaid directors reiterating this position.  
6 We've also filed that as an exhibit to plaintiff's  
7 brief. That's Exhibit 6.

8 Now, defendant claims that it-- that the  
9 termination decisions are justified based on three  
10 allegations. First, that there's extensive video  
11 evidence about other Planned Parenthood affiliates and  
12 Planned Parenthood Federation of America that these  
13 organizations possibly violated the law. Second,  
14 allegations that the Planned Parenthood clinic in  
15 Overland Park failed to cooperate with a solid waste  
16 disposal inspection, which caused KDHE concern that  
17 future inspections might lead to violations of solid  
18 waste disposal regulations. And the third allegation is  
19 about concerns identified by government officials in  
20 other states involving other Planned Parenthood  
21 affiliates in those states, about potentially false  
22 Medicaid claims.

23 Your Honor, none of these allegations, and  
24 that's all they are, allegations, none of these  
25 allegations demonstrate that the provider plaintiffs are

1 not qualified or fit to provide Medicaid services. I'd  
2 like to go through each-- each of those allegations more  
3 fully.

4 So taking first the YouTube videos the  
5 defendant is referring to, which were released last  
6 summer. Those YouTube videos are not about PPKM or  
7 PPSLR or any of the individual provider plaintiffs in  
8 this case. Setting aside the veracity of those videos  
9 for a moment, none of the plaintiffs or their employees  
10 appear in those videos. PPKM and PPSLR do not  
11 participate in fetal tissue donation, which is the  
12 subject of the accusations of the YouTube videos.

13 Many of the individual provider plaintiffs  
14 are not even involved in the provision of abortion  
15 services. And both PPKM and PPSLR were investigated by  
16 state agencies after those videos were released last  
17 summer. PPKM by KDHE and by the Board of Healing Arts,  
18 and PPSLR by the Missouri Attorney General. And both  
19 PPKM and PPSLR were cleared of any wrongdoing.

20 Moreover, Your Honor, as plaintiffs  
21 explained in a motion to strike the transcripts of those  
22 videos this morning, those videos were created by an  
23 extremist anti-abortion organization and the transcripts  
24 of those videos are highly deceptive, along with the  
25 videos, and lack any indicia of reliability.

1           But even if there was some evidence of  
2 wrongdoing in those videos - which to be clear, Your  
3 Honor, we do not believe has ever been established and  
4 certainly not by the defendant - the district court in  
5 Alabama held it's beside the point. And we ask that  
6 this Court find the same, because the entities being  
7 terminated here are not the same entities in those  
8 videos.

9           Turning to the second allegation, which is  
10 about the claim submission concerns. This allegation,  
11 the defendant says, is about the fact that other  
12 government officials in other states have made  
13 allegations that the affiliates in those states may have  
14 submitted false Medicaid claims years ago. But again,  
15 Your Honor, these accusations by other government  
16 officials against other Planned Parenthood affiliates,  
17 they do not-- does not prove that the provider  
18 plaintiffs here are not qualified to provide Medicaid  
19 services to Kansas Medicaid patients.

20           And it's worth noting, Your Honor, that the  
21 defendant has not alleged that any of those providers in  
22 other states that defendant has mentioned as having  
23 potentially admitted false claims have been excluded  
24 from the Medicaid program. It's also worth noting, Your  
25 Honor, the district court in Louisiana, faced again

1 with-- in a case over the termination of the Louisiana  
2 Planned Parenthood affiliate, when confronted with these  
3 same arguments that is a settled qui tam suit and  
4 another open qui tam suit that actually involve the  
5 Planned Parenthood affiliate that was being terminated,  
6 when faced with an argument that that was a legitimate  
7 reason to terminate that affiliate, the District Court  
8 of Louisiana rejected that as a legitimate basis to  
9 terminate the affiliate. Because as the Court noted  
10 there, no liability or fraud or a violation of the  
11 Medicaid Act has actually been found by a single  
12 fact-finder. The same result is clearly warranted here  
13 when these qui tam suits do not relate to the provider  
14 plaintiffs. And they certainly don't relate to any of  
15 the former employee-- employees of PPKM and PPSLR or any  
16 of the other individual providers.

17 The third allegation relates-- that the  
18 state claims in support for the termination decision is  
19 about a solid waste disposal inspection that KDHE  
20 conducted in December of last year and completed in  
21 January of this year. The undisputed evidence in the  
22 record here demonstrates that this is not a credible or  
23 a valid basis to terminate PPKM or any of the other  
24 providers, of course, because they were not involved at  
25 all with that solid waste disposal inspection.

1 KDHE provided PPKM with a form of compliance  
2 after the inspections were over, indicating that no  
3 solid waste disposal violations were identified. That  
4 form is an exhibit to plaintiff's opening brief. It's  
5 Exhibit 3.

6 Importantly, there also has been no  
7 determination that PPKM actually hindered the solid  
8 waste disposal inspection. PPKM was never cited for  
9 hindering the inspection. No enforcement action was  
10 taken against PPKM after the inspections occurred.  
11 Despite that KDHE has clear authority to penalize  
12 providers that hinder an inspection, they have a penalty  
13 matrix that allows KDHE to impose monetary penalties on  
14 providers that actually hinder an inspection, that did  
15 not occur here. In fact, the inspections were completed  
16 in early January and it wasn't until defendant issued  
17 the notices of intent to terminate two months later in  
18 March that PPKM was told it hindered the inspection,  
19 which it did not.

20 There simply is no credible basis, Your  
21 Honor, for defendant to argue that the events  
22 surrounding KDHE's solid waste disposal inspection  
23 somehow deemed, nearly two months after those  
24 inspections were over, that PPKM or any of the other  
25 additional providers that had nothing to do with that

1 inspection are unqualified to provide Medicaid services.

2 I think it's important also to mention, Your  
3 Honor, that the CMS guidance that was issued to state  
4 Medicaid directors prior to the final termination  
5 letters being issued here, in that guidance it explains  
6 a state's action against a provider affecting  
7 beneficiary access to the provider must be supported by  
8 evidence of fraud or criminal action, material  
9 non-compliance with relevant requirements, or material  
10 issues concerning the fitness of the provider to perform  
11 covered services or properly bill for them. And that  
12 taking such action against a provider without such  
13 evidence would not be in compliance with the free choice  
14 of provider requirement.

15 But that's exactly what happened here, Your  
16 Honor. There is no evidence of material compliance  
17 with-- of material non-compliance with relevant  
18 requirements, or any of the other provisions laid out  
19 there.

20 THE COURT: How long before the-- the  
21 termination letter did this guidance go out from CMS?

22 MS. SALGADO: I believe it was in late  
23 April. April-- around the week of April 20th. We  
24 provided it to KDHE's counsel at that time as well. But  
25 it was one or two weeks prior to the final termination

1 decisions being issued.

2           The state's position that the termination  
3 decisions are justified depends on trying to blur the  
4 line between Planned Parenthood Federation of America  
5 and PPKM and PPSLR and between PPKM and PPSLR and all of  
6 the other affiliates, Planned Parenthood affiliates. In  
7 other words, that somehow they are guilty by  
8 association. This is both factually wrong, Your Honor,  
9 and legally irrelevant, which CMS has stated and other  
10 courts have found.

11           First, these are independent organizations.  
12 PPFA and PPKM and PPSLR all have separate boards,  
13 separate finances, separate operation, separate  
14 decision-making.

15           THE COURT: And there's differences in terms  
16 of the services provided.

17           MS. SALGADO: Between the affiliates, yes.  
18 PPFA, Your Honor, does not provide any medical services  
19 or operate any health centers.

20           If it was not 100 percent clear in the  
21 initial declarations that were-- that were filed with--  
22 with our opening brief, it was made 100 percent clear in  
23 the rebuttal declarations that were filed yesterday.  
24 These are entirely separate organizations. And, of  
25 course, for the individual providers who work for

1 Planned Parenthood, there is no relationship between  
2 them and other Planned Parenthood affiliates. And those  
3 individual providers who no longer work for PPKM and  
4 PPSLR, there is no relationship between them or any  
5 Planned Parenthood, any of the Planned Parenthood  
6 affiliates, or between PPFA.

7 THE COURT: What's the effect on their  
8 licensing and is there irreparable harm to them in being  
9 terminated as a Medicaid provider? I'm speaking to the  
10 individual health care practitioners.

11 MS. SALGADO: Right. Your Honor, there is.  
12 That will be one of the most devastating consequences if  
13 the final termination decisions take effect. As for the  
14 individual providers, they will be-- you know, become  
15 terminated providers, put on a publicly-available list,  
16 reported to HHS Office of Inspector General and  
17 investigated. And they may also have to report-- well,  
18 they will have to report to their employers that they  
19 have been terminated from Medicaid for cause. And also,  
20 it may need to be reported to state licensing agencies  
21 in their re-application for their professional license.  
22 And for those providers who are seeking employment,  
23 again, it would be difficult for them to find employment  
24 when they have been a terminated provider from a federal  
25 health care program.



1           Your Honor, the state's theory seems to be  
2 that if the conduct of one affiliate in any state  
3 entitled the state to disqualify that affiliate as a  
4 Medicaid provider, then that would mean that any state  
5 could disqualify any of the other 59 affiliates. And  
6 that would be an absurd result.

7           The theory actually goes farther than that--  
8 further than that, because where here the state is  
9 trying to terminate former employees of Planned  
10 Parenthood entities and current employees of Planned  
11 Parenthood entities, which would mean that if any state  
12 terminated a Planned Parenthood-- a separate Planned  
13 Parenthood affiliate that a former employee or current  
14 employee does not work for, has never worked for,  
15 somehow that employee-- that somehow there is  
16 justifiable grounds to terminate those employees, which,  
17 again, would be an absurd result.

18           It's also important to note that HHS has  
19 rejected this-- this theory. In the amicus brief filed  
20 in the Louisiana case, HHS stated that the Medicaid Act  
21 does not treat affiliated entities as a single entity.  
22 And that's on Page 6 of the amicus brief, which is  
23 Exhibit 5 to plaintiffs' opening brief.

24           I'd also like to note that other courts have  
25 rejected this guilty-by-association argument. The

1 district court in Alabama held, when confronted with  
2 this same question, that the federal for cause  
3 provisions that give a state authority to exclude a  
4 provider based on its relationship with another provider  
5 are very limited. They apply only to entities that are  
6 owned or controlled by individuals, individuals who have  
7 been sanctioned, and only where that sanctioned  
8 individual maintains certain types of ownership and  
9 control interests. The district court in Alabama also  
10 rejected this theory.

11           Moreover, Your Honor, the state can't show  
12 that that-- that this type of relationship exists here.  
13 As I previously stated, it's laid out very clear in our  
14 reply declarations. These are separate organizations.  
15 And second, PPFA, as I mentioned earlier, doesn't  
16 operate any health centers or provide health services.  
17 And it's never been sanctioned or excluded from the  
18 Medicaid program, nor have any of the other Planned  
19 Parenthood affiliates.

20           So even if somehow the federal for cause  
21 provision that allows one entity to be excluded based on  
22 the actions of another entity where there is direct or  
23 indirect ownership or control interests, that's still  
24 when the entity-- when there is a sanctioned individual  
25 who controls that entity. And that just doesn't exist

1 here, Your Honor.

2           There's simply no basis in federal law for  
3 defendant-- for the defendant to do what she is trying  
4 to do here. Other courts have held the same and they've  
5 stopped Planned Parenthood Medicaid providers from being  
6 terminated on allegations. And that's all these are,  
7 it's allegations about other entities.

8           The result for the individual providers is  
9 even clearer here since, again, Your Honor, these  
10 providers have even less of a relationship with PPFA and  
11 other affiliates. And some have no existing  
12 relationship.

13           I want to briefly address whether there is a  
14 private right of action. The state spends a lot of time  
15 in their brief discussing whether Medicaid patients like  
16 Jane Doe No. 1, No. 2, and No. 3 have a private right of  
17 action to enforce the free choice of provider provision.  
18 The overwhelming case law makes clear that they do. The  
19 overwhelming weight of authority states that the free  
20 choice of provider provisions are enforceable through  
21 Section 1983 because it satisfies a three-part test that  
22 was laid out in *Gonzaga University versus Doe*. I just  
23 want to briefly go through that.

24           Under this test, the first question is  
25 whether the free choice of provider provision confers

1 rights to a particular class of person. It does. The  
2 provision says that the state must provide that any  
3 individual eligible for medical assistance may obtain  
4 such assistance from any institution, agency, community  
5 pharmacy, or person qualified to perform the service.  
6 This is classic rights conferring language, creating a  
7 clear right for patients eligible for Medicaid.

8 The second question is whether the  
9 requirement is so vague and amorphous that its-- its  
10 enforcement would strain judicial competence. It's not.  
11 The Ninth, the Seventh, and the Sixth Circuits have all  
12 held whether a provider is qualified to perform the  
13 services is a legal question of the type that courts  
14 frequently resolve. And indeed, several district courts  
15 in the recent cases that have been filed challenging the  
16 terminations of other Planned Parenthood affiliates have  
17 also-- also been able to answer this legal question.

18 The third question of the three-part test is  
19 whether the requirement is couched in mandatory--  
20 mandatory terms. It is mandatory, Your Honor. Any  
21 state participating in Medicaid is required to give  
22 recipients a free choice of qualified providers.  
23 Congress has spoken with a clear voice. The state can't  
24 evade the mandatory nature of this requirement by saying  
25 that it's not required to participate in Medicaid.

1 For all these reasons, Your Honor,  
2 plaintiffs believe they have demonstrated that they are  
3 likely to succeed on the merits that the defendant has  
4 violated the Medicaid Act.

5 I want to turn to the equal protection  
6 claim. Defendant has made clear in their response brief  
7 and the evidentiary submission that they have singled  
8 out the plaintiff providers and taken action against  
9 them based solely on the association with other Planned  
10 Parenthood entities in other states. Governor  
11 Brownback's numerous statements leading up to the  
12 notices of intent to terminate, which were issued in  
13 March, and then after plaintiffs filed suit, have made  
14 this abundantly clear as well.

15 Plaintiffs are likely to succeed on this  
16 claim because Supreme Court case law is clear that a  
17 desire to harm a-- a politically unpopular group cannot  
18 constitute a legitimate government interest.

19 The defendant barely bothered to contest the  
20 plaintiff's equal protection claim. In fact, the  
21 defendant did not try to offer any support for the  
22 state's unprecedented decision to terminate the  
23 individual current and former employee plaintiffs,  
24 essentially admitting that her justification for  
25 terminations have nothing to do with the employee

1 plaintiffs.

2 As the state described it, this case  
3 concerns the State of Kansas' decision to terminate from  
4 the state's Medicaid program PPKM and PPSLR. But, of  
5 course, that's not what's happening here. The state's--  
6 the state has issued termination letters to PPKM, PPSLR  
7 and the 11 individual employees.

8 I'd also like to note that CMS has stated in  
9 the guidance that it issued weeks before the state  
10 issued final termination letters that proper reasons for  
11 termination actions may not include a desire to target a  
12 provider or set of providers for reasons that are  
13 unrelated to their fitness to perform covered services  
14 or the adequacy of their billing practices. But that's  
15 precisely what has occurred here.

16 The only argument that defendant makes  
17 really to contest the equal protection claim is that the  
18 plaintiffs are somehow distinguishable or that they are  
19 distinguishable from other providers because they have  
20 all been terminated from Kansas Medicaid. But under the  
21 defendant's theory, a terminated provider could never  
22 bring an equal protection claim because of their  
23 distinguishing characteristic of being terminated.  
24 There's no support for that in the law.

25 I'd like to spend some time on the remaining

1 preliminary injunction factors and, in particular,  
2 irreparable harm. The defendants have tried to downplay  
3 what it means for a provider to be terminated for cause  
4 from a health care program, but it is very serious and  
5 has very devastating consequences. The plaintiffs have  
6 established that they face imminent and irreparable harm  
7 if the defendant is successful in terminating the  
8 plaintiff providers.

9 Starting at July 7th, the hundreds of  
10 patients who rely on PPKM and PPSLR for family planning  
11 and other preventative health care are at risk of being  
12 turned away from services through the Medicaid program.  
13 This includes the three Jane Doe plaintiffs. The Jane  
14 Doe declarations make very clear that they're afraid of  
15 losing access to Medicaid services from the provider of  
16 their choice, a provider that they feel comfortable with  
17 who provides non-judgmental care. And they are  
18 concerned that their care will be disrupted.

19 Now, the state tries to suggest that there  
20 are over 9,000 providers available to provide the  
21 services that the current plaintiff providers offer, but  
22 this is factually wrong and legally irrelevant. We did  
23 just a quick review of the list of providers that was  
24 filed with the state's response brief, and it  
25 drastically exaggerates the number of family planning

1 providers that are available. That list had the same  
2 provider multiple times. For example, there were 20  
3 entries for Kearny County hospitals and 15 entries for  
4 Greenwood County Hospital. In fact, nearly every  
5 provider is on that list more than once because the way  
6 the state runs the report, it's separated-- it had a  
7 separate entry for each of the four CPT codes, the  
8 billing codes that were ran.

9 THE COURT: And this list included providers  
10 that provide services that Planned Parenthood doesn't  
11 provide, such as podiatrists and other services? In  
12 other words, it wasn't just a list of primary care  
13 physicians that provide family care, gynecological care,  
14 anything like that?

15 MS. SALGADO: That's correct, Your Honor.  
16 The list contained several cancer centers, sleep  
17 centers, dermatology, podiatry, allergy, and other  
18 specialty clinics, and even a hospice center. And I-- I  
19 think the reason that this occurred is because the  
20 report ran two CPT codes or billing codes that are not  
21 specific to gynecological care or family planning care.  
22 So, yes, Your Honor, the list contains numerous  
23 providers that by no stretch of the imagination could  
24 actually provide services to the patients of provider  
25 plaintiffs.



1           The list also had-- in fact, the vast  
2 majority of the providers on that list, thousands and  
3 thousands were not located in the cities where PPKM and  
4 PPSLR operate the health centers that their patients--  
5 operate the health centers where they provide services  
6 to Kansas Medicaid patients. And many of the cities--  
7 the cities that are in Kansas, many of those cities--  
8 I'm sorry, many of the providers in cities in Kansas are  
9 more than 100 miles away. For example, the Kearny  
10 County Hospital, which is on that list 20 times, it's  
11 hours away from the health centers that Planned  
12 Parenthood operates. Some of the providers on that list  
13 were also located in other-- in states other than Kansas  
14 and its bordering states. For example, there were  
15 providers in California, Georgia, Hawaii, Michigan,  
16 Washington.

17           So, Your Honor, the report doesn't come  
18 close to capturing the providers that offer also the  
19 wide range of family planning services that current  
20 provider plaintiffs offer. In other words, even by  
21 running just the four billing codes, the plaintiff  
22 providers offer many more services that wouldn't be  
23 captured by those four billing codes.

24           THE COURT: Such as?

25           MS. SALGADO: For example, the list I think

1 had a CPT code for one form of birth control, but on  
2 there there wasn't a CPT code for IUDs or other  
3 long-acting reversible contraception, which is the most  
4 effective form of contraception that plaintiff providers  
5 do offer and other providers don't.

6 The undisputed evidence here, including the  
7 declarations by the Jane Doe plaintiffs, shows that  
8 patients actually do often experience difficulty getting  
9 appointments strictly for gynecological care or  
10 appointments with providers that offer the wide range of  
11 birth control options that Planned Parenthood health  
12 centers offer.

13 The health centers that PPKM and PPSLR  
14 operate and provide services to Kansas Medicaid  
15 patients, they're also in areas with provider shortages,  
16 including PPKM's clinic in Wichita and Independence, and  
17 PPSLR's Joplin Health Center, which is on the border and  
18 serves Kansas Medicaid patients. That center is  
19 directly across the border from Cherokee County which  
20 has also been designated an area with a provider  
21 shortage and a medically underserved population area.

22 But I think it's important, Your Honor, that  
23 even if there were other providers available, it's  
24 beside the point. The free choice of provider  
25 requirement guarantees that Medicaid beneficiaries have

1 access to the provider of their choice. And the  
2 patients of the current providers here, including the  
3 Jane Doe plaintiffs, have chosen the current providers  
4 to be their family planning provider.

5 Other courts, including the Seventh Circuit,  
6 and more recently district courts faced with the same  
7 argument that defendant is trying to make here with the  
8 list of supposedly alternative family providers, those  
9 courts have also rejected this argument because it's  
10 beside the point. That's not what the free choice of  
11 provider requirement guarantees. It guarantees access  
12 to the provider of your choice.

13 I also want to move on to the impact that a  
14 medication [sic] termination would have on the Planned  
15 Parenthood entities. As was explained in the rebuttal  
16 declarations that were filed yesterday, Your Honor, a  
17 termination from the Kansas Medicaid program puts PPKM  
18 and PPSLR at risk, not only of losing their ability to  
19 provide Medicaid services to Kansas Medicaid patients,  
20 but also to Medicaid patients in the other states where  
21 they have health centers. PPKM has health centers--  
22 sorry, where they have centers and provide services to  
23 Medicaid patients of other states.

24 For example, PPKM provides services to  
25 Missouri Medicaid patients and soon to Oklahoma Medicaid

1 patients. PPSLR also provides Medicaid services to  
2 Missouri Medicaid patients and Illinois Medicaid  
3 patients.

4 But PPKM and PPSLR would be at risk of  
5 losing their ability to provide Medicaid services not  
6 only in Kansas, but in these other states as well. And  
7 that's because other states have the ability to  
8 terminate or suspend contracts with the provider that  
9 has been terminated and excluded in another state. A  
10 termination from Medicaid-- from the Medicaid program  
11 could also impact the contracts that PPKM and PPSLR have  
12 with private insurers, because those contracts have  
13 similar provisions. If you are deemed a terminated  
14 provider from a federal health care program for cause,  
15 other states and private insurers are also going to  
16 consider to do the same.

17 And if PPKM and PPSLR would be-- were left  
18 unable to provide services to all of these medication  
19 patients, it would severely threaten their ability to  
20 continue operating in the same manner that they have  
21 been. They could be forced to lay off staff and even  
22 close health centers. Specifically, if PPSLR were  
23 terminated from Kansas Medicaid and, as a result,  
24 Missouri Medicaid, they would likely have to close their  
25 Joplin health center.

1 I also want to spent a few minutes on  
2 reputational harm, which I addressed earlier. But I  
3 think it's worth just reiterating, Your Honor, that--  
4 that while defendant has overlooked this, this is the  
5 harm to the reputation of a provider who has been deemed  
6 a terminated provider for cause is sweeping. And here,  
7 the defendant is seeking to terminate the providers on  
8 the basis that they have committed unethical or  
9 unprofessional conduct. The defendants saying that  
10 they've also failed to comply with terms of their  
11 provider agreement, they failed to comply with  
12 applicable state laws.

13 These are serious accusations. And if the  
14 defendant is successful in terminating the providers on  
15 those grounds, not only would these providers be  
16 terminated providers, they would be terminated providers  
17 because they have, quote, committed unethical or  
18 unprofessional conduct. And that's what would trigger,  
19 Your Honor, what you asked me earlier, which is  
20 potentially having to report it to a professional  
21 licensing agency or another employer with respect to the  
22 employees who don't work for PPKM.

23 For PPKM and PPSLR, it would also  
24 potentially sever their relationships not only with  
25 other patients that they have but also their business

1 relationships. Let's be honest, this whole ordeal has  
2 received a significant amount of attention. So if  
3 defendant is-- of media attention. So if defendant is  
4 successful in terminating the providers, many of the  
5 providers' patients will be left wondering whether they  
6 can still go and get their services at Planned  
7 Parenthood health centers, and some will assume they  
8 won't. And some may not want to because, again, they  
9 will have been terminated for cause on grounds such as  
10 unprofessional or unethical conduct.

11 So for these additional reasons, Your Honor,  
12 we believe that plaintiffs have established that they  
13 face irreparable harm if the terminations are allowed to  
14 take effect on July 7.

15 I just want to spend a brief moment on the  
16 remaining prongs of the preliminary injunction standard.  
17 Here, the balance of harm clearly favors plaintiffs.  
18 The state will merely have to continue reimbursing PPKM  
19 and PPSLR and all of its affiliated providers as it has  
20 for years for services that the state is obligated to  
21 cover.

22 And the only arguments for why the state may  
23 be harmed do not really hold up. The defendant has  
24 argued that a preliminary injunction should not be  
25 entered because it would require taxpayer money to

1 continue to flow to Planned Parenthood. But this  
2 argument is at best curious, because the defendant has  
3 also told this Court that there will be no harm to the  
4 plaintiff providers and that they will continue to be  
5 able to provide services.

6 Moreover, Your Honor, the defendant has  
7 already extended the effective date of the terminations  
8 twice. It may actually have been three times. And so  
9 now they're set to take effect, absent an injunction,  
10 two months after the original date that the termination  
11 letters went out. So there's clearly no threat to  
12 public safety or harm here.

13 And as for the individual providers who no  
14 longer work for PPKM and PPSLR, what harm could there  
15 possibly be to the state to not terminate them for cause  
16 when the state is not actually reimbursing those  
17 providers for any services provided to Planned  
18 Parenthood?

19 And the final prong addresses whether the  
20 preliminary injunction would be in the public's  
21 interest. Here, there is a strong public interest in  
22 ensuring medication patients who are economically  
23 disadvantaged and who seek services from providers where  
24 there are provider shortages and there's-- and there  
25 are-- they're in communities where there is a desperate

1 need, you know, there's an underserved population.  
2 Here, an injunction would serve the public's interest  
3 because it would allow Planned Parenthood to continue  
4 providing services.

5 For all these reasons, Your Honor,  
6 plaintiffs request that this Court enter an injunction  
7 preventing the state's termination decisions from taking  
8 effect prior to July 7.

9 THE COURT: A couple of questions. I-- you  
10 may have just answered it in that last statement. But  
11 the scope of the injunctive relief that you're seeking,  
12 is it limited to requiring the state to reimburse  
13 services for the Jane Doe plaintiffs or does it also  
14 include reinstating the provider agreements as to  
15 everyone?

16 MS. SALGADO: Your Honor, what we have  
17 requested is that this Court enjoin the state-- enjoin  
18 the state's termination decisions from taking effect.  
19 So in other words, that these providers would not be  
20 terminated from the Medicaid program whatsoever.

21 THE COURT: All right. In your view, is  
22 there-- is a class certification motion necessary in  
23 order to provide class-wide relief to patients, as well  
24 as providers?

25 MS. SALGADO: We do not-- we do not believe



1 it would be necessary for a couple of reasons. First,  
2 certainly for the individual providers who no longer  
3 work for Planned Parenthood, there is-- we are not  
4 bringing a free choice of provider claim on behalf of  
5 those providers. So whether there is a-- there is no  
6 class of patients seeking services or-- there's no class  
7 of patients that are bringing a claim on behalf of the  
8 former individual providers.

9 But as to the current providers, we do not  
10 believe it's necessary because, Your Honor, if-- if the  
11 Court enters a preliminary injunction that prevents the  
12 termination decisions from taking effect for the Jane  
13 Doe plaintiffs, that would for all intents and purposes  
14 provide all of the relief that PPK-- that we are  
15 requesting here. In other words, PPKM and PPSLR would  
16 remain providers for all of their patients.

17 THE COURT: All right.

18 MS. SALGADO: Thank you.

19 THE COURT: I think that's all the questions  
20 I have at this time. Mr. Eye.

21 MR. EYE: Thank you, Your Honor. May it  
22 please the Court. Your Honor, I-- I will attempt to be  
23 brief and not go over territory that my colleague, Diana  
24 Salgado, has already covered. There may be some overlap  
25 out of necessity, however. As the Court knows, I

1 represent the individual providers here, the 11  
2 individuals that have got their termination-- or their--  
3 their provider numbers in the cross hairs.

4 Your Honor, there's no evidence to support a  
5 termination of these 11 individual providers. There's  
6 no evidence - substantial, competent, or anything else -  
7 that would support it.

8 The CMS guidance that Your Honor asked about  
9 the timing of came out April 19 of this year. And it--  
10 it actually has the guidance that's consistent with the  
11 interpretation of the law. But it also is a good  
12 illustration of what these providers are facing if their  
13 Medicaid privileges or their-- their Medicaid numbers  
14 are terminated for cause. That particular language in  
15 the guidance says, quote, "A state's action against a  
16 provider affecting beneficiary access to the provider  
17 must be supported by evidence of fraud or criminal  
18 action, material non-compliance with the relevant  
19 requirements or material issues concerning the fitness  
20 of the provider to perform covered services or  
21 appropriately bill for them."

22 There's no evidence that that's happened.  
23 And if we want to get down to the specifics of the three  
24 grounds that have been advanced, the defendant makes no  
25 attempt in her brief to tie the 11 providers to any of

1 the grounds. In fact, it's-- it's interesting, because  
2 in the defendant's response brief and the statement of  
3 facts in the first paragraph, the Court will note that  
4 the defendant claims that this case is about the  
5 providers PPKM and PPSLR. Doesn't even mention the  
6 individual providers. The individual providers are  
7 mentioned in a later paragraph, almost as an  
8 afterthought. And why wouldn't they be a mere  
9 afterthought, considering the absence of any evidence  
10 that tie them to any wrongdoing.

11 The defendant seems to suggest that the  
12 employment relationship with PPKM and PPSLR apparently  
13 is enough. But, of course, that casts that net far too  
14 broadly. Factually, because there's no evidence to tie  
15 them to any wrongdoing. And legally, because there is a  
16 requirement that there be evidence. So they have it  
17 wrong on both parameters.

18 There are significant impacts that these  
19 providers can anticipate. Your Honor, as-- as recently  
20 as yesterday, I received a message from one of the  
21 individual providers indicating that an MCO with whom  
22 she is signed up to provide care now wants to inquire  
23 about the proposed termination that KDHE has made. So  
24 it's already beginning to have the sort of adverse  
25 ripple effects. And this is a provider, again, that had

1 nothing to do with any of the evidence-- or with any of  
2 the bases that the defendant advances. Imputed  
3 misconduct isn't enough. And yet that seems to be all  
4 the defendant has to do.

5 Your Honor, one other point that's-- that I  
6 think that the defendants attempt to-- to use to somehow  
7 persuade this Court not to enter any relief is that they  
8 claim, and I think in a-- in a rather misleading way,  
9 that there's not a final KDHE order. And that if it's  
10 not a final order, then *Younger* abstention ought to  
11 apply.

12 Your Honor, there was a final order in this  
13 case. And there's case law from Kansas that would  
14 support that. The primary attribute of finality is that  
15 the order must decide and dispose of all merits of the  
16 case while not reserving issues or questions for  
17 disposition at a later time. And that's from *Honeycutt*  
18 *against the City of Wichita*, 251 Kansas 451. And it's  
19 in Syllabus 1.

20 This is a final order. This is a notice to  
21 terminate. There's nothing in that notice of  
22 termination that says, oh, and by the way, KDHE is still  
23 considering the merits of this case. Oh, by the way,  
24 even though you got this notice to terminate, KDHE may  
25 change its mind. There's nothing in that notice to

1 terminate to indicate that. And, in fact, in the--  
2 after the informal review that occurred at the end of  
3 April, KDHE made it clear that they had made their  
4 decision about what to do with these providers.

5 THE COURT: What did that informal review  
6 process entail?

7 MR. EYE: It entailed Mr. Ghertner, Ms.  
8 Salgado, and I appearing before individuals from the  
9 Department of Health and Environment, some program staff  
10 and some counsel. We were given an opportunity to  
11 present the reasons why we thought these terminations  
12 should not go forward. We did. There was very little  
13 interaction between the participants. It was mostly  
14 just a monologue from the lawyers representing the  
15 providers.

16 THE COURT: It wasn't an evidentiary hearing  
17 of any sort?

18 MR. EYE: It was not, Your Honor. In fact,  
19 as I understood the-- or as I understand the KDHE  
20 process, they don't really anticipate an evidentiary  
21 presentation. It's-- in fact, they call it an informal  
22 administrative review. Informal though it may be, it  
23 triggered final agency action.

24 THE COURT: The only step-- only potential  
25 step now would be if plaintiffs chose to file an appeal,

1 and that's not a mandatory step of this administrative  
2 process. The process is over unless plaintiffs choose  
3 to appeal; is that correct?

4 MR. EYE: That is absolutely correct, Your  
5 Honor. And while it is the case that there is a  
6 provision in the Administrative-- in the Administrative  
7 Procedures Act that once a-- an administrative hearing  
8 is requested that's-- that's administered by the  
9 Department of Administration, the agency is obligated to  
10 revisit its decision.

11 But in my experience, having represented a  
12 number of clients in those kinds of proceedings, I've  
13 never had an agency backtrack between the time that they  
14 make the decision and between-- and the time that the  
15 agency-- or that the administrative evidentiary hearing  
16 actually begins.

17 THE COURT: Well, is there an evidentiary  
18 hearing in that scenario?

19 MR. EYE: Well, there is, Your Honor. The--  
20 the Department of Administration has hearing officers  
21 that get assigned to these administrative appeals. And  
22 sometimes they don't require evidentiary hearings, of  
23 course, but sometimes they do.

24 THE COURT: And again, it's only triggered  
25 if plaintiff chooses that option of pursuing an appeal?

1 MR. EYE: Your Honor is exactly right.  
2 Without that decision to invoke the state administrative  
3 appeal process, there's no requirement that the KDHE go  
4 back and do anything with this case except what they've  
5 done so far.

6 THE COURT: And in the state administrative  
7 process, would plaintiffs have the ability to raise the  
8 claims they raise in this-- could they raise the  
9 constitutional claim? Could they raise a freedom of  
10 choice claim under the Medicaid Act?

11 MR. EYE: Not as we read the restrictions on  
12 what these administrative hearings can cover. And  
13 they-- they exclude the-- the federal kind of claims and  
14 constitutional claims. So we're-- at best, it would be  
15 a limited means by which to attack these revocations--  
16 or these proposed terminations rather. And it certainly  
17 would not provide a basis to protect the Jane Doe  
18 plaintiffs, for instance. And so we would find-- in our  
19 view, the state administrative appeal process is both  
20 unsatisfactory and incomplete in its scope to protect  
21 all the parties that we are attempting to protect here.

22 Your Honor, I-- I don't want to belabor the  
23 record, but I-- I do want to note that these individual  
24 providers really are hanging in limbo at this point.  
25 And while I'm not discounting the effect on the

1 organizational entities, because they too are hanging in  
2 limbo, but in a very real sense these individual  
3 providers are feeling a bit more besieged perhaps than  
4 their institutional and organizational counterparts.  
5 And I think that makes sense.

6 I mean, they are individuals. They are out  
7 here trying to do things that are consistent with their  
8 professional responsibilities and to do things that are  
9 consistent with receiving-- or being able to maintain  
10 their participation in the Medicaid program. And when  
11 these providers inquire about what they have done wrong,  
12 what they have done to justify this outcome, I-- I have  
13 to tell you that's a difficult conversation with which  
14 to have with a client.

15 And I think that the fact that that inquiry  
16 comes up and there's no satisfactory response is  
17 indicative of the reason that we are here today seeking  
18 the relief-- seeking injunctive relief, Your Honor.

19 And if the Court has no other questions, I  
20 would rest at this time.

21 THE COURT: All right. Thank you.

22 MR. EYE: Thank you, Your Honor.

23 THE COURT: I have no questions.

24 All right. Mr. Dernovish or Mr. Park.

25 MR. PARK: Thank you, Your Honor. May it



1 please the Court. Michael Park, along with my  
2 colleague, Patrick Strawbridge, from the Consovoy,  
3 McCarthy & Park law firm, along with Mr. Dernovish from  
4 the State Office of Legal Services, on behalf of  
5 defendant Doctor Mosier.

6 Your Honor, we are here because of a claimed  
7 need for urgent relief. Plaintiffs' argument, primarily  
8 what you heard, was resting on merits arguments. But  
9 what they've sought in a preliminary injunction motion  
10 is premature and unnecessary. There is--

11 THE COURT: Mr. Park, before you and Mr.  
12 Strawbridge entered your appearance in this case back  
13 when this case was first filed and I had the first  
14 conference with the lawyers and-- about the temporary  
15 restraining order, et cetera, I suggested that perhaps  
16 what ought to happen from a case management standpoint  
17 is that we skip the preliminary injunction stage, enter  
18 into a temporary agreed injunction by consent, and tee  
19 this up for a full trial on the merits this-- this fall  
20 sometime. And that's what I suggested.

21 And at that point, what I heard from the  
22 defendant was that there was a sense of urgency in the  
23 sense that that wouldn't work, that the deadline was  
24 going to run, that this Court needed to decide this at  
25 the preliminary injunction stage. So with the late--

1 this latest filing from the defendant, I was intrigued  
2 by now the-- the timeline seems to have shifted from  
3 what the defendant represented to me then, because now  
4 the-- your papers say that the earliest date the  
5 provider agreements would terminate would be  
6 September 10th.

7 And I wanted to ask you, I mean, how-- how  
8 do you get to that date? And, I mean, what are the  
9 steps, et cetera. Because it's contrary to what I was  
10 told, you know, a month or so ago. And frankly, I was  
11 trying to avoid a preliminary injunction hearing,  
12 encourage the parties to do expedited discovery and get  
13 this case ready for trial in September or October. So  
14 that's why I'm asking. How-- how do you get to the--  
15 the effective date of September 10th?

16 MR. PARK: Well, I can certainly speak to  
17 that as for the timing. I think the concern by  
18 defendant is that a preliminary injunction would bypass  
19 and short-circuit the administrative appeal remedy that  
20 is available. But the-- the September date comes from,  
21 first of all, the July 7 effective date in the notice.  
22 And then on top of that, there's a 33-day appeal period,  
23 which is pursuant to the regs and in the notice. And  
24 then after that, there's a 30-day period of when it  
25 becomes final under the second -- 22nd amendment to the

1 contract between KanCare and the MCOs, which is  
2 Exhibit 1-J to defendant's opposition brief.

3 THE COURT: All right. So even if the  
4 plaintiffs did not file an appeal, effectively they  
5 would have 63 days after July 7th before this could  
6 truly become effective? Or is that additional 30 days  
7 only-- is it only triggered if they file an appeal?

8 MR. PARK: Our view is that it is not  
9 contingent on the filing of an appeal. And we can get  
10 to that.

11 THE COURT: Okay. So it's 60-- essentially  
12 so it's 63 days after the effective date as announced in  
13 the termination notice?

14 MR. PARK: After July 7, which by my count  
15 puts us at about September 10. And that's a  
16 combination, as I said, of the notice, the regs, and the  
17 contract.

18 THE COURT: All right. I understand.

19 MR. PARK: So in that meantime, though, Your  
20 Honor, that-- that gets to the sort of lack of an  
21 urgency here for the Court to intervene in what is still  
22 a very fact-laden controversy.

23 As the Court saw this morning from the  
24 plaintiffs' motion to strike, it just further  
25 illustrates that a preliminary injunction is unripe at

1 this point and highlights the need for further factual  
2 development to determine whether Planned Parenthood is a  
3 qualified provider of Medicaid services.

4 THE COURT: Well, from my-- from my  
5 understanding, there is no pending administrative action  
6 at this point. There's been a final decision of KDHE,  
7 there's been a termination letter issued that gives a  
8 termination effective date of July 7th. And now the  
9 plaintiffs have the discretion to seek an appeal, but  
10 they don't have to. So at this point, it would be  
11 contingent, would it not, on the plaintiffs seeking an  
12 appeal? But unless they do that, there's no  
13 administrative action for purposes of *Younger* abstention  
14 or any of the other related reasons that you raise.

15 MR. PARK: I think there's two questions  
16 there. One going to the September 10th date is not  
17 contingent on plaintiffs pursuing an administrative  
18 appeal in OAH.

19 THE COURT: Okay.

20 MR. PARK: The second issue is, if they  
21 choose to do so, which it sounds like they've elected  
22 not to, but if they were to change their mind and to do  
23 so, then that clock, the-- the days that we described  
24 earlier, would be pushed out until the resolution of any  
25 appeal process. So that would push out even further

1 the-- the date before which any final harms which they  
2 have talked about would actually come to fruition.

3 THE COURT: And do you agree with Mr. Eye's  
4 characterization of what that process is like? So there  
5 was this informal review or at least there was this  
6 hearing before the KDHE. And then there was the  
7 termination letter or the final decision. And then if  
8 there is an appeal, it would be a de novo sort of  
9 hearing that may or may not be evidentiary.

10 MR. PARK: Yes. I-- I think for the Office  
11 of Administrative Hearing process, which is ongoing and  
12 I'd like to get back to it on the abstention issue. But  
13 Planned Parenthood currently has until August 8th,  
14 that's the 33 days, to request a hearing from the OAH.  
15 And those proceedings are similar to-- to a court  
16 proceeding in that they have discovery, there is motions  
17 practice, there are professional hearing officers. And  
18 the statutory framework for that is set forth in the  
19 Kansas Administrative Procedure Act. But it includes  
20 the type of fact finding that is essential to test the  
21 veracity of the claims plaintiffs have made in their  
22 self-serving declarations and papers.

23 But that process is one that is robust, that  
24 would permit precisely the type of fact finding that we  
25 need before we can decide the preliminary injunction in

1 this case. And, you know, it is a robust and fair  
2 process. It sometimes results in settlements,  
3 reversals, different outcomes that are independent of  
4 the initial agency conclusions. And so I don't think it  
5 is a-- an accurate conclusion to say that that would be  
6 not a worthwhile endeavor. It seems that plaintiffs  
7 have chosen not-- or appear not to want to pursue that  
8 route, because they would prefer to be in federal court.

9 THE COURT: And there's no exhaustion  
10 requirement, there's nothing that precludes them from  
11 filing this case. It's strictly up to them whether they  
12 want to pursue the process on appeal, administrative  
13 appeal. It sounds like they haven't. That doesn't  
14 block them from filing this lawsuit obviously.

15 MR. PARK: That's correct. And there is  
16 the-- subject to the time limits. But on the *Younger*  
17 abstention issue; the law is fairly clear that for  
18 purposes of *Younger* abstention, it is sufficient that  
19 the availability of appeal-- an appeal exists, even if  
20 plaintiffs have not yet chosen to exercise it. I'd  
21 refer to the Court to the *Wright v. McClaskey* case from  
22 this Court, as well as the *Hudson* case in the Eighth  
23 Circuit, which say, quote, "As long as plaintiff has the  
24 opportunity to appeal or, for that matter, chooses to  
25 appeal the most recent decision of the Kansas Department

1 of Agriculture..." a slightly different context, "he is  
2 engaged in 'ongoing state proceeding'." So it's fairly  
3 clear as a legal matter that the existence of the  
4 opportunity to appeal is sufficient for *Younger* purposes  
5 for this Court to exercise abstention.

6 THE COURT: So your *Younger* abstention  
7 argument, if it's good, would only be good until  
8 August 9th if the plaintiffs don't appeal?

9 MR. PARK: September 10th, Your Honor. That  
10 would be the 30 days following--

11 THE COURT: Well, I thought that-- but their  
12 deadline for filing an appeal triggering the process  
13 you're talking about is August 8th. If-- if they don't  
14 file on August 8th, on August 9th you know there will  
15 not be an appellate process. Correct?

16 MR. PARK: And then the-- the 22nd amendment  
17 to the KanCare MCO agreement provides that it's 30 days  
18 after that date. So that's how we get to the  
19 September 10th.

20 THE COURT: I understand that. But you're  
21 relying upon some language in a case that says as long  
22 as there's an opportunity for an appeal, then *Younger*  
23 abstention applies. But there will not be an  
24 opportunity for an appeal come August 9th. They have  
25 missed their filing deadline.

1 MR. PARK: I see what Your Honor is saying.  
2 Yeah, I think that's right then.

3 THE COURT: Okay.

4 MR. PARK: I'd like to address three  
5 categories of topics, some of which we've already  
6 touched on. The first is what I'll call prudential  
7 concerns, and that includes timing which I've sort of  
8 already gotten into, a potential mootness issue which is  
9 mentioned in the briefs but I think not fleshed out and  
10 requires further inquiry, and lastly abstention, which,  
11 again, we've touched on.

12 Second, I'd like to address the likelihood  
13 of success on the merits briefly, some of those issues  
14 which plaintiffs' counsel has addressed. And then  
15 lastly, my colleague, Mr. Strawbridge, will address the  
16 irreparable injury prong and the balance of the equities  
17 prong.

18 But in short, this Court should deny  
19 plaintiffs' motion in light of the administrative  
20 proceedings and allow the case to move forward on the  
21 merits. In particular, if plaintiffs do not intend to  
22 pursue an administrative appeal, then defendant would  
23 request that this Court deny the preliminary injunction  
24 today without prejudice. And following further  
25 development of the factual record over the next few



1 months, the parties could return on a renewed  
2 preliminary injunction motion, if necessary, see where  
3 the administrative process goes, if that's the route  
4 they chose, or possibly move towards resolution of the  
5 case on the merits. But at this point plaintiffs'  
6 request for a preliminary injunction motion is  
7 unnecessary and premature.

8 First of all, with respect to timing, as  
9 we've discussed, Kansas' unique Medicaid program  
10 provides that providers who are faced with the  
11 termination have this administrative remedy. And that's  
12 according to prescriptive-- a prescribed time frame,  
13 which would push out until September at the earliest any  
14 change in funding that-- that the plaintiffs have  
15 discussed in their papers. For even more time, all  
16 plaintiffs would have to do is to pursue an  
17 administrative appeal, which is available to them. And  
18 it's difficult to see how harm would be irreparable and  
19 a PI necessary when the plaintiffs themselves can remedy  
20 the situation by simply filing this administrative  
21 appeal and pursuing that process. Excuse me.

22 In the reply papers, plaintiffs challenge  
23 this timing. They point to the MCO provider agreements  
24 that are appended to their reply briefs on Page 12. And  
25 they argue that under at least one of those agreements,

1 to which I'll note the state is not a party, that PPKM  
2 would be terminated automatically and immediately. But  
3 this appears to misread their own contract. So first of  
4 all, the 22nd amendment which I mentioned post-dates the  
5 provider agreement - excuse me. Thank you. I apologize  
6 - suggesting that it supersedes that agreement. And  
7 that is the state's view.

8           Second, the 22nd amendment uses compulsory  
9 language stating that contracts between MCOs and  
10 providers shall be effective 30 calendar days after  
11 notification from the state that the providers' state  
12 fair hearing rights have expired or the state fair  
13 hearing has been completed related to Medicaid  
14 termination. And that was the 30-day period we were  
15 discussing earlier.

16           And lastly, plaintiffs' own agreement  
17 appended to their reply brief has a provision,  
18 Section 10.16, this is of the Amerigroup contract, their  
19 Appendix A-1 on Page 27, that in the event of a conflict  
20 between the MCO state contract and the-- and the  
21 plaintiffs' contract with the MCOs, that the state  
22 contract shall have priority and control. And so that's  
23 how you get to those-- to the September date.

24           So for-- for all of those reasons, this--  
25 this timing is important and mitigates the urgency that

1 the plaintiffs present on this motion.

2 THE COURT: Given that the effective date  
3 has passed July 7th, and what Mr. Eye described were  
4 already some adverse consequences occurring to  
5 individual providers, how does that not factor into the  
6 irreparable harm analysis?

7 MR. PARK: Well, my colleague, Mr.  
8 Strawbridge, will address-- excuse me.

9 THE COURT: Okay. That's fine.

10 MR. PARK: -- the irreparable harm points.

11 THE COURT: That's fine.

12 MR. PARK: So we will address that shortly.  
13 The second prudential point I'd like to make  
14 is that PPKM recently announced its plans to merge with  
15 Planned Parenthood of Central Oklahoma and to form a new  
16 entity called Planned Parenthood Great Plains. This is  
17 noted in the McQuade declaration as well as in a news  
18 article that was submitted with defendant's brief at  
19 Exhibit 1-P.

20 Now, this merger it seems would have  
21 potentially significant regulatory implications, such as  
22 requiring a new identification number, a new provider  
23 agreement. And presumably, a new entity would have to  
24 re-apply for approval from the state. And so this  
25 raises important questions for this case about mootness.

1 For example, if the Planned Parenthood  
2 plaintiffs, PPKM and PPSLR, no longer exist in a few  
3 weeks, then what happens to the lawsuit that they  
4 brought? What harm would they have suffered? What  
5 happens to the notices of-- of termination? These are  
6 all questions that seem premature to try to preserve a  
7 status quo when we don't know what the status quo is  
8 going to be.

9 That merger is supposed to be effective  
10 July 1. And so, you know, all of these uncertainties, I  
11 think, counsel against a preliminary injunction at this  
12 point in favor of abstention and further fact finding.  
13 It just wouldn't make sense to grant this extraordinary  
14 relief of an injunction to preserve a status quo that is  
15 uncertain at best right now.

16 THE COURT: I-- maybe I shouldn't assume, I  
17 should just ask. But if PPKM is subject to a final  
18 termination that was effective July 7th, on or around  
19 the time of the proposed effective date of the merger,  
20 would that not have an effect on their ability to get  
21 whatever regulatory approval they need to-- to get for  
22 this new merged entity?

23 MR. PARK: I don't know--

24 THE COURT: In other words, wouldn't it sort  
25 of stand to reason that if they're under that status,

1 any application might be denied?

2 MR. PARK: That certainly sounds possible,  
3 Your Honor. I don't know whether they've submitted an  
4 application, when that would happen, or what the  
5 implications would be. But I think all of those  
6 questions counsel in favor of-- and counsel against  
7 entering an injunction.

8 THE COURT: I only ask because in terms of  
9 mootness or just sort of being in this limbo status,  
10 if-- if this action is still undecided, I would think it  
11 would make sense that that merger is not going to be  
12 approved. Or at least that, you know, the regulation of  
13 that new entity is not going to be approved as long as  
14 this matter is still pending.

15 MR. PARK: That makes sense. I-- I think we  
16 would have to wait until July 1 and see what happens.  
17 I-- I just don't know what the-- the structure of the  
18 merger would be, whether there would be a change in  
19 ownership that would require new applications. These  
20 are all uncertainties. And I'm going based on, you  
21 know, a few acknowledgements in the declarations and--  
22 and some publicly available news sources.

23 THE COURT: All right. I understand.

24 MR. PARK: The last prudential issue I'd  
25 like to touch on is the *Younger* abstention doctrine

1 which we addressed briefly. *Younger* abstention applies  
2 when there's a state proceeding, state enforcement  
3 proceeding under three conditions. If that--

4 THE COURT: Okay. If I can stop you.

5 MR. PARK: Sure.

6 THE COURT: I'm getting a little bit warmed  
7 up now. I started with Mr. Eye and now you in terms of  
8 asking questions. But state enforcement proceeding, how  
9 is there a pending state enforcement proceeding at this  
10 point? I mean, there's the possibility of an appeal,  
11 but there's not a state enforcement proceeding pending  
12 at this point.

13 MR. PARK: Well, this is an administrative  
14 proceeding in which plaintiffs' qualifications are at  
15 issue. And so it's between the administrative arm of  
16 the state and the provider and to determine whether  
17 their qualifications are valid to continue in their  
18 status as a provider. So I think under the-- the case  
19 law of *Younger*, such administrative proceedings do  
20 qualify for *Younger* abstention.

21 The second prong is that the state  
22 proceeding implicates an important state interest in  
23 ensuring compliance by Medicaid providers with  
24 applicable laws. And here again, I'd refer the Court to  
25 the *Hudson* case, which found that there was such an

1 important state interest in administering its Medicaid  
2 program.

3 Plaintiffs argue that OAH proceedings  
4 available to them in their reply brief should not count  
5 as a civil enforcement action because they're not akin  
6 to a criminal proceeding, which is what the original  
7 *Younger* case was. But this is respectfully the wrong  
8 test.

9 Under the *Sprint* case, the defining  
10 characteristics of a civil enforcement action are:  
11 They're meant to sanction - this is I guess what I was  
12 getting at before - the federal plaintiff for some  
13 wrongful act, which here there were several as laid out  
14 in the termination notices. Second, a state actor,  
15 which would be the-- the department here. And third,  
16 investigations involved, as there were here. And  
17 fourth, investigation typically culminates in the filing  
18 of a formal complaint or charges. And that's the *Sprint*  
19 *Communications versus Jacobs* case in the Supreme Court  
20 from 2013. So in other words, plaintiffs in simply  
21 characterizing it as a criminal case have applied the  
22 wrong test in order to try to avoid the implications of  
23 *Younger*.

24 THE COURT: So how does that-- so the fourth  
25 prong of that test that may culminate or will culminate

1 in the filing of formal charges or a complaint, that's  
2 not a possible outcome with the KDHE matter involving  
3 these entities, is it? I mean, they can be terminated,  
4 there's been a termination letter. But filing of a  
5 formal complaint or charges is not a possibility in the  
6 context of the current--

7 MR. PARK: Well, I think an administrative  
8 termination would qualify as a formal complaint. I  
9 don't know what the definition of charges would be in  
10 that context. But the termination of provider from  
11 providing Medicaid's services would seem to qualify  
12 under that prong.

13 Plaintiffs also argue in their reply that an  
14 order terminating a beneficiary's Medicaid benefits is  
15 not an ongoing proceeding, relying on a case *Brown-- ex*  
16 *rel. Brown versus Day* from the Tenth Circuit in 2009.  
17 The *Brown* case, however, did not conclude that there  
18 wasn't an ongoing proceeding. It stated, quote,  
19 "Because we decide this case on the basis of the type of  
20 proceeding at issue, we do not reach the open question  
21 whether the *Younger* doctrine compels a federal court to  
22 decline jurisdiction over a federal cause of action  
23 initiated to challenge a state administrative agency's  
24 final decision when an appeal to state court was  
25 possible."



1           In addition, *Brown* involved the beneficiary  
2 and not a provider who was caught up in the alleged  
3 wrongdoing. So the claims of beneficiaries here are  
4 intertwined, however, with the providers and so should  
5 not change that abstention analysis.

6           Lastly, plaintiffs rely pretty heavily on  
7 the *Kliebert* case from Louisiana from last October. But  
8 this case was-- *Kliebert* was different for the important  
9 reason that the federal action in that case actually  
10 pre-dated the state proceeding, making the abstention  
11 principles less applicable.

12           Lastly, I don't think there's a serious  
13 question that plaintiffs could raise any constitutional  
14 challenges as part of a state proceeding. They argue  
15 that an administrative proceeding is not an adequate  
16 forum, because it doesn't afford an adequate opportunity  
17 to raise federal constitutional claims, but they provide  
18 no reason why plaintiffs couldn't raise such federal  
19 claims in the administrative hearing. Our understanding  
20 is that they could, in fact, do so.

21           And in addition to that, there would be the  
22 availability of state court review of the administrative  
23 proceeding itself. And that is a Supreme Court case  
24 from 1986, *Ohio Civil Rights Commission versus Dayton*  
25 *Christian Schools*, which stated, quote, "In any event,

1 it is sufficient under *Middlesex* that the constitutional  
2 claims may be raised in the state court judicial review  
3 of the administrative proceeding," end quote. So the  
4 subsequent opportunity to raise constitutional  
5 challenges itself satisfies the third prong of the  
6 *Younger* abstention.

7 THE COURT: So were those constitutional  
8 challenges concerning the state administrative process  
9 itself or were those independent constitutional claims,  
10 such as we have in this case?

11 MR. PARK: I'm not sure, Your Honor.

12 THE COURT: Okay.

13 MR. PARK: In summary, on the issue of the--  
14 the three prudential issues that we've discussed, I  
15 think it's important to-- to note that this case here is  
16 critically different from other recent Planned  
17 Parenthood funding cases in which courts have granted  
18 preliminary injunctions.

19 First, the ongoing administrative process  
20 and the opportunities that plaintiffs have for a robust  
21 hearing there in that context is unique to the Kansas  
22 Medicaid system.

23 Second, the uncertain implications of the  
24 impending merger of the Planned Parenthood plaintiffs to  
25 form this new entity I think counsel again for

1 abstention.

2           And lastly, the unique timing that the  
3 Kansas Medicare-- Medicaid managed care system provides  
4 ensures that no injury would occur to any beneficiaries  
5 until September at the earliest and beyond that if  
6 plaintiffs simply exercise their right to administrative  
7 appeal. So all of these factors counsel in favor of  
8 denying plaintiffs' motion. And at a minimum, they  
9 highlight the need for additional factual development.

10           Next, I'd like to turn to the likelihood of  
11 success on the merits. Plaintiffs' motion for  
12 preliminary injunction fails a traditional test for  
13 injunctive relief because they're unlikely to succeed on  
14 the merits. First, Kansas lawfully terminated  
15 plaintiffs' provider agreements based on their  
16 interference with a state inspection, as well as billing  
17 irregularities by affiliates, soon which may become part  
18 of the same corporate entity, as well as their  
19 affiliation with the Planned Parenthood Federation of  
20 America and the videos that were described earlier. So  
21 there were lawful bases for those determinations, which  
22 I'll get into.

23           And then second, on the legal claim,  
24 Section 1396a(a)(23) of the Medicaid statute does not  
25 provide a private cause of action under the Supreme

1 Court's recent decision in *Armstrong*. Most of the cases  
2 that plaintiffs have cited in support of their argument  
3 to the contrary predated *Armstrong*.

4 THE COURT: *Armstrong* wasn't construing that  
5 particular provision in the statute. It wasn't  
6 construing the freedom of choice provision, it was  
7 construing a different provision. And I don't see how  
8 it is particularly enlightening when it's very different  
9 language and there's language that arguably in the  
10 freedom of choice provision that is rights creating and  
11 is individual focused.

12 MR. PARK: That's correct, Your Honor. The  
13 *Armstrong* case addressed a different provision. And it  
14 said that the Medicaid Act implicitly precludes private  
15 enforcement of Section 30(A), which was the equal access  
16 provision.

17 But I think that the reasoning would still  
18 apply to this analogous provision. And it goes to the  
19 test that Your Honor just described, which is an  
20 analysis of the rights creating language and then,  
21 second, whether it's judicially administrable. And I  
22 think the-- the language is no clearer-- the rights  
23 language here is no clearer-- or less clearer, I should  
24 say, by comparison to the equal access provision. The  
25 equal access provision states, "A state must provide

1 such methods and procedures as may be necessary to  
2 enlist enough providers so that care and services are  
3 available under the plan, at least to the extent that  
4 such care and services are available to the general  
5 population in the geographic area."

6 And so the-- the purpose of the equal access  
7 provision, as the language suggests, is to provide a  
8 certain uniform level of care to the beneficiaries,  
9 and-- and it compels the state to do so. And the Court  
10 struck that down. I think that reason could be applied  
11 by analogy to the free choice of provider requirement.

12 But Your Honor is correct, it is a different  
13 provision. But that recent Supreme Court decision in  
14 holding that-- in finding no implied private cause of  
15 action I think is analysis that should be applied  
16 rigorously in examining the same legal issue here. At a  
17 minimum, I think it is an open question that requires an  
18 interpretation and application of *Armstrong* and not  
19 necessarily an issue on which plaintiffs I would say are  
20 likely to succeed.

21 So the-- the other likelihood of success  
22 issue has to do with the lawfulness of the state's  
23 termination of plaintiffs' provider agreements. And in  
24 light of the conduct at issue, the plaintiffs-- in  
25 particular, the plaintiffs refused to grant full access

1 to inspectors. And they were-- they have an affiliation  
2 with the Planned Parenthood Federation of America, which  
3 needs to be examined further, which engaged in  
4 potentially unethical and illegal behavior. And then  
5 there's a submission of false Medicaid claims out of one  
6 of the affiliates.

7 And so these-- all of these bases were  
8 spelled out in the notices and I think provide a strong  
9 basis for likelihood of success on the merits for  
10 defendant. They also set this case apart from the  
11 others-- from the other funding cases that are relied on  
12 in plaintiffs' briefs.

13 THE COURT: Plaintiffs argue that based on  
14 your analysis of-- of imputing conduct or liability  
15 because of affiliates under this Planned Parenthood  
16 Federation, that essentially every Planned Parenthood  
17 organization in the country could be terminated from the  
18 Medicaid program and everyone who works for them and  
19 anyone who ever worked for them. Do you agree?

20 MR. PARK: My understanding was of-- of that  
21 was-- well, as to the billing questions in-- in  
22 Oklahoma, there was a settlement in a False Claims Act  
23 case, and I think there's a particular wrinkle here,  
24 which goes to the merger point earlier, that that  
25 Oklahoma office will - I understand - now be merged with

1 the plaintiffs in this case. So I think there is a  
2 particular relationship in this situation that doesn't  
3 apply nationwide to all PPFA affiliates.

4 THE COURT: But what about the other bases,  
5 the videos?

6 MR. PARK: So for the video, I think that is  
7 a possibility. I think it-- it needs to be better  
8 understood from a-- the Court would benefit from a  
9 fuller factual record. You know, what exactly is the  
10 relationship between PPFA and their setting of policies,  
11 medical standards, ethics conduct guidelines for the  
12 affiliate branches. And I think there is-- that's an  
13 issue that-- on which discovery is needed. It may be  
14 that all affiliates are, in fact, brought into that or--  
15 or not. But I think at this point on this record, all  
16 we have really are the declarations of plaintiffs, which  
17 is simply not enough to make a determination and grant  
18 extraordinary relief.

19 And then lastly, there is the issue of the  
20 lack of cooperation with inspectors, which is, again,  
21 unique to this case and specific to these plaintiffs.  
22 And--

23 THE COURT: All right. Well, let's just  
24 assume that all I have are the declarations on your  
25 side. I've got, you know, competing versions obviously

1 and I'm sure if we go to trial we'll have competing  
2 versions. But let's just assume for purposes of  
3 argument that there was a lack of cooperation. How does  
4 that justify a termination under the Medicaid statute  
5 that gives very discrete and very concrete grounds for  
6 termination, having to do with someone's qualifications  
7 to practice medicine?

8 MR. PARK: Yeah. The bases for the  
9 terminations included a number of violations of state  
10 law. One is non-compliance with applicable state laws,  
11 administrative regulations, and program issuances  
12 concerning medical providers. Two is non-compliance  
13 with the terms of a provider agreement. Three is  
14 unethical or unprofessional conduct. And four is other  
15 good cause.

16 And-- and I would say that it's certainly  
17 arguable that obstruction with an inspection could  
18 qualify as a violation of state law, unprofessional  
19 conduct, failure to comply with the provider agreement.  
20 I think there's a number of different hooks legally that  
21 would justify a termination based on these allegations.

22 THE COURT: Well, of course, the body of law  
23 is very much against you on that point. But you're  
24 asking me to essentially disagree with a number of  
25 Circuit decisions and district court decisions that have



1 all gone the other way in terms of what it means to be  
2 qualified under the Medicare Act, Section 23, and in  
3 terms of how wide a scope of violative conduct-- how  
4 wide the scope is that can trigger a termination under  
5 that statute.

6 MR. PARK: Well, not necessarily, Your  
7 Honor. I think it would depend on what-- well, on the  
8 basis of a fuller record, I think the extent of a  
9 state's determination whether there was a violation of  
10 its statutes, whether there was unprofessional and  
11 ethical conduct would-- would be easier to discern.  
12 Now, states certainly do have latitude in determining  
13 the meaning of "qualified." And then, yes, there is a  
14 legal question whether-- you know, whether that  
15 qualification would go to the provision of medical  
16 services or simply compliance with laws. But I think  
17 there is enough overlap that further fact finding is  
18 necessary to see whether these alleged violations rise  
19 to that level.

20 THE COURT: How does the KDHE interpret the  
21 term "qualified" under the statute?

22 MR. PARK: I don't know the answer to that  
23 question. Hold on one second, Your Honor.

24 (Counsel confer).

25 MR. PARK: Your Honor, my understanding is

1 that qualified is-- is defined as the ability to provide  
2 treatment, and it's not really well-defined under the  
3 circumstances. So it would-- there would be some fact  
4 finding that would be necessary I think, but we can  
5 certainly--

6 THE COURT: But it is professional  
7 competence. Correct? I mean, the ability to practice  
8 medicine in a competent way.

9 MR. PARK: Yes, Your Honor. But I think  
10 legality certainly can go to competence. I think, you  
11 know, ethics and professionalism can go to that. So,  
12 you know, we can follow up with additional information  
13 on that, but I guess the larger point here is, if you  
14 have a-- a provider that is obstructing inspectors who  
15 are trying to assess whether you are in compliance with  
16 the relevant regulations, that I-- I think certainly can  
17 go within the state's discretion to your qualifications  
18 to provide medical services.

19 THE COURT: So that's really mostly what  
20 you're hanging your hat on. Because apparently the  
21 finding was that they were in compliance with the state  
22 solid waste disposal requirements. But your finding of  
23 violative conduct hangs on obstruction of the  
24 investigative process. That's it.

25 MR. Park: I-- I think the Court would

1 benefit from a fuller record to understand what happened  
2 there. Why there was a delay in responding to requests  
3 for information about providers.

4 THE COURT: Well, I understand that. But  
5 I'm just saying what is the argument, I mean, what are  
6 you relying upon? You're relying upon what you say was  
7 an obstruction to that process. That's it. Because  
8 the-- what the process determined within a matter of a  
9 week or so was that they weren't in violation. So  
10 you're not claiming that they weren't in violation and  
11 that's the problem. You're claiming that they  
12 obstructed the investigation that ultimately determined  
13 that they were.

14 MR. PARK: Well, that's what we know. I  
15 guess what I'm saying, Your Honor, is that there is--  
16 what we don't know, that it appears that there is-- that  
17 there may have been behind that reasons that are  
18 inappropriate for delay or why there was hindrance in  
19 the investigation, whether evidence was lost that the  
20 inspection would've turned up. And so I think there  
21 are-- there are-- I guess I would go back to the need  
22 for additional factual development.

23 I'd like to address briefly the-- the issue  
24 of the individual terminations and just note that they  
25 were terminated because their provider numbers were

1 bundled with the PPKM tax identification number. And so  
2 if they were not terminated, then they could continue to  
3 work at Planned Parenthood, provide services, and bill  
4 directly for their work. And so it was necessary to  
5 give notice of the termination to them as well simply  
6 because of the structure that they were-- that they had  
7 the same tax IDs as the Planned Parenthood entities.

8 THE COURT: And was that the case with the  
9 ones that had already left?

10 MR. PARK: The ones that were former  
11 employees had not notified PPKM of their disaffiliation,  
12 so I-- I don't know.

13 THE COURT: So in KDHE's records or...

14 MR. PARK: So they still had active numbers  
15 at the time.

16 THE COURT: So that's the only-- I mean, so  
17 then, in other words, that's why these particular 11  
18 providers were terminated. It was simply because of a  
19 matter of coding in the system, their numbers were  
20 bundled with the Planned Parenthood organization's  
21 provider number?

22 MR. PARK: Well, that and the reason  
23 provided in the notice of the-- the three different  
24 issues relating to--

25 THE COURT: Okay.

1 MR. PARK: -- the videos, the billing  
2 issues, and the inspection.

3 THE COURT: I understand.

4 MR. PARK: Lastly, Your Honor, the equal  
5 protection claim. That one should be dismissed. I  
6 think it's fairly clear that the states have satisfied  
7 rationale basis-- or have provided a rationale basis for  
8 terminating plaintiffs based on the issues that we just  
9 discussed. That there was a failure to comply, it  
10 appears, with state laws, the terms of the provider  
11 agreement, potentially unethical and unprofessional  
12 conduct by plaintiffs, as well as their affiliated  
13 entities. That's well beyond what's required for a  
14 rationale basis.

15 And-- and in addition, this claim falls on  
16 its face, because plaintiffs present no comparators for  
17 equal protection purposes, which is necessary to show  
18 that they were treated differently. So this is really I  
19 think a meritless claim.

20 If there are no further questions, I'll turn  
21 it over.

22 THE COURT: Let me just double-check. And  
23 then I think we'll take a break before we get to Mr.  
24 Strawbridge. I'll see if there was anything else I  
25 wanted to ask you.

1 MR. PARK: Sure.

2 THE COURT: I asked Ms. Salgado this  
3 question, and it had to do with what-- if I granted  
4 injunctive relief, what the appropriate scope would be.  
5 And, of course, I'm understanding your argument is that  
6 injunctive relief is not appropriate. But the-- what  
7 I-- where I was drawing the line was requiring-- or  
8 reinstating the provider agreements as to everyone that  
9 received a termination notice or simply requiring the  
10 state to reimburse services provided to the Jane Doe  
11 plaintiffs.

12 And the reason I asked that is one of  
13 these-- you know, as you know, there's a-- a defined  
14 body of cases that have addressed these same issues in  
15 virtually the same factual scenario. The-- one of the  
16 cases, there was some discussion about whether it was  
17 possible to grant the latter, to grant relief, the  
18 reimbursement of services to particular Jane Doe  
19 plaintiffs because of the way the system functions, the  
20 billing system. So I wanted to get your take on that.

21 MR. PARK: My understanding is that it would  
22 but if I could, Your Honor, defer to Mr. Strawbridge on  
23 that.

24 THE COURT: Okay. That's fine. All right.  
25 Why don't we take a 10-minute break and reconvene at

1 2:45.

2 (Recess).

3 THE COURT: All right. You can be seated.  
4 Mr. Strawbridge.

5 MR. STRAWBRIDGE: Thank you. And may it  
6 please the Court. I wanted to just start with a couple  
7 of clarifying notes that-- you know, we were able to  
8 confer with our client during the break, and I just  
9 wanted to make sure the Court has got a good  
10 understanding of a couple of issues.

11 The first thing, and I know that Your Honor  
12 asked the question about, you know, speculating what  
13 could happen if there was a new application for the new  
14 merged entity and what effect that might have. I think,  
15 as Mr. Park said, the answer is we don't know what  
16 effect that might have, and we don't know whether an  
17 additional new application would be required and we  
18 don't know what's going to happen with this case or  
19 whether there would even be any unpaid claims or the  
20 threat of unpaid claims from entities that don't-- no  
21 longer exist.

22 But what we do know is, is I don't think the  
23 Court can enter an injunction certainly based on  
24 assumptions about what might happen. If there is a new  
25 regulatory proceeding and there are new regulatory

1 reasons as to why an action is taken or not taken, those  
2 will have to be litigated in their own right. I think  
3 Mr. Park is right to suggest that it-- it certainly  
4 weighs against the need for emergency relief today.

5           The only other thing that I wanted to make  
6 sure that the Court was clear, Your Honor, with respect  
7 to the reasons for termination. With respect to the  
8 individual providers who had filed-- at the time that  
9 they filed for their Medicaid ID numbers, they were  
10 affiliated with Planned Parenthood's taxpayer ID.  
11 There's an obvious concern there of evasion. If you're  
12 going to be effective as to Planned Parenthood, it's  
13 necessary to terminate those providers who are  
14 affiliated with Planned Parenthood.

15           If they are no longer affiliated and they  
16 wish to present that evidence in an appellate  
17 proceeding, that's why there is an OAH proceeding. And  
18 if they were not affiliated at the time of any alleged  
19 actions that justify termination of Planned Parenthood,  
20 it very well may bear on whether or not the-- the  
21 termination that is proposed now will remain in effect  
22 or whether it would be changed in the appellate process.  
23 It's why we have an appellate process, it's why the  
24 Court should wait for that to play out.

25           The third point that I wanted to-- to just



1 briefly make is that--

2 THE COURT: Just so I understand. In terms  
3 of the providers that no longer are at Planned  
4 Parenthood, your position is they should use the  
5 appellate process, even though it's not mandatory, it's  
6 discretionary? That's your position.

7 MR. STRAWBRIDGE: I think-- I think there  
8 needs to be a basis by which-- I think the state is  
9 entitled to have some assurance that-- that providers  
10 who are affiliated with an entity that is being  
11 terminated on grounds that we certainly believe are  
12 justified are not going to be able to continue to  
13 provide services for that entity. That's the point.  
14 And there is opportunities to present evidence on that  
15 through the OAH process that should be taken up.

16 THE COURT: So if someone can show that  
17 they're-- they're no longer at Planned Parenthood and  
18 that their number shouldn't be associated with that  
19 Planned Parenthood provider number, does that end? I  
20 mean, are you just-- I guess rescind the termination of  
21 that person?

22 MR. STRAWBRIDGE: I think it very well  
23 could. My caveat on that and why I think that it's a  
24 mistake not to take advantage of the OAH process if-- if  
25 you're the plaintiffs and it has a bearing on

1 irreparable harm, which I'll get to in a second, but my  
2 caveat there is, of course, if you were affiliated with  
3 a provider at the time that the provider was adjudged to  
4 have violated some other provision that justifies their  
5 termination, the fact that you are no longer affiliated,  
6 it may still bear on your qualification to provide those  
7 services. And I do just want to make that additional  
8 point on that.

9           Even under the CMS guidance, I don't think  
10 there's any suggestion that the disqualifying event,  
11 whether that's the violation of state law, whether it's  
12 the violation of some kind of criminal conduct, whether  
13 it's irregularities in billing processes or the-- or the  
14 engaging in ethical [sic] conduct. I don't read the CMS  
15 guidance as simply saying that-- that you cannot  
16 terminate them for, you know, family planning services  
17 unless each of those acts was specific to family  
18 planning services.

19           We can all think of ethical lapses or  
20 misconduct that a doctor's office might make in some  
21 realm, that even though it wasn't specific to a family  
22 planning service, it is serious enough, it is  
23 significant enough, and it calls into question their  
24 qualifications, that the state would certainly be  
25 justified in adjudging them no longer qualified to

1 provide those services. And I think that that's--  
2 that's an important point to keep in mind.

3 But yes, Your Honor, there is an OAH  
4 process. Certainly no one can compel someone to  
5 participate in it, but the order is not final until the  
6 time to participate in it has expired. And if people  
7 are in a process where they can truly demonstrate that  
8 they had no affiliation at the time and they don't have  
9 any affiliation going forward, it very well could change  
10 the result. I don't think that injunctive relief should  
11 issue on a premature basis with respect to that.

12 That sort of brings me into irreparable  
13 harm, which is the main reason that I'm here. I'd like  
14 to start just a little bit with the basic standard,  
15 which I'm sure the Court is familiar with, but will help  
16 frame my discussion. Then I'd like to talk a little bit  
17 about why the plaintiffs-- neither of the three  
18 categories of plaintiffs can make the required showing  
19 for irreparable harm.

20 The Tenth Circuit has made clear that  
21 irreparable harm is not an easy burden to fulfill. That  
22 the plaintiffs must show a significant risk of harm that  
23 is not speculative. That's the *Greater Yellowstone Coal*  
24 case. And more importantly, an injury must be certain,  
25 great, actual, and not theoretical. And it must be more

1 than simply serious or substantial. That's the *Heideman*  
2 *v. South Salt Lake City* case.

3 The party seeking injunctive relief has to  
4 show that the injury complained of is of such imminence  
5 and that there is a clear and present need for equitable  
6 relief to prevent irreparable harm. And under this  
7 standard, none of the plaintiffs can make that requisite  
8 showing.

9 Let's begin with I think, you know, a point  
10 Mr. Park made at the front, a point that I'm not so sure  
11 is even in dispute at this hearing. And that is, what  
12 is the actual date that any harm, you know, that is  
13 alleged to occur is going to take place? We know that  
14 with the termination not taking any effect until  
15 mid-September at the earliest, and that is if the  
16 plaintiffs don't exercise their right to further stay  
17 the effect of that order by pursuing the OAH process,  
18 we've got several months.

19 And if those several months are used in the  
20 OAH process or in the development of a better factual  
21 record here, we can come back for a-- for a renewed  
22 preliminary injunction hearing or perhaps even a  
23 permanent injunction hearing later in the-- later this  
24 summer or early in the fall. But at this point there's  
25 simply no need for irreparable harm, nor is there any

1 basis.

2           And I don't see any cases that support this  
3 in Planned Parenthood's briefs for the suggestion that a  
4 party suffers irreparable harm when they hold in their  
5 hands the ability to delay the implementation of the  
6 alleged harm. It may be their right to forego the-- the  
7 appellate process within the agency. But having elected  
8 to exercise that right, they may well be giving up the  
9 opportunity to obtain the extraordinary relief of a  
10 preliminary injunction.

11           If you have the ability to stop the alleged  
12 harm from-- from taking place for a period of time, that  
13 could be significant, that may lead to a reconsideration  
14 of the position or an alteration of the order, then I  
15 think that the-- the burdens that attend to preliminary  
16 injunctive relief require the plaintiff to exercise that  
17 power. And there's no evidence here that they're going  
18 to. In fact, they've disclaimed the ability to do so.  
19 I don't-- I don't think that that's consistent with the  
20 notion that they have no other relief and that the  
21 extraordinary remedy of irreparable harm is required.

22           Even if they don't exercise that, like I  
23 said, we've got several months. Providers are going to  
24 continue to get paid for claims for services that are  
25 incurred at this time. The Jane Does will still have

1 access to the facilities and will be able to-- to get  
2 the family planning services at Planned Parenthood.  
3 No-- none of the alleged harms are going to take place  
4 until September at the earliest, and really longer if  
5 the plaintiffs just simply exercise their rights.

6 With respect to PPKM and PPSLR, again the  
7 timing point I think is the most key. But even if you  
8 ignore the timing issues, I think it's important to  
9 actually look at the evidence they have submitted. It's  
10 their burden and they have to-- they have to satisfy  
11 that burden with evidence, not without speculation, and  
12 I don't think they can meet that-- that requirement  
13 here.

14 For example, they-- they claim, and this is  
15 in the McQuade declaration, Paragraph 49, that they rely  
16 on the public funding, and the loss of Medicaid funds  
17 will significantly impact the operating budget of PPKM.  
18 It will require to lay off employees, reduce hours, and  
19 close a health center. That is speculative and it is  
20 entirely conclusory. What's absent from any of the  
21 declarations from any of the Planned Parenthood people  
22 is, I don't know, an itemization of how much of the  
23 Medicaid funding that's at issue here constitutes their  
24 entire budget. An itemization of what operations that  
25 money is used to support.

1           They just simply say if this happens, we  
2 need the money. I don't think that that's sufficient to  
3 meet their burden. We could actually have some dollars  
4 and cents and have a discussion about that. But that's  
5 not in the-- it's not in the affidavits and I don't  
6 think that they can just come in and make a self-serving  
7 assertion that it's going to disrupt the-- the finances  
8 and-- and walk out of here with a preliminary injunction  
9 on those grounds.

10           And, in fact, if you actually look at the  
11 evidence that is in the record, the only evidence that's  
12 available to us at this point in time, there is an  
13 indication that Planned Parenthood has a vast  
14 fundraising network, raises hundreds of millions of  
15 dollars through grants and contributions. And if you  
16 look at the consolidated financial statement, I'll note  
17 that Planned Parenthood releases its financial  
18 statements on a consolidated basis, counting all the  
19 affiliates as one entity as opposed to having a separate  
20 entity.

21           Exhibit 1-H, Page 7 of 24, you're going to  
22 see that at least on that consolidated financial  
23 statement they list \$10 million of revenue from medical  
24 services compared to more than \$200 million in  
25 contributions and grants. Obviously I'm not in a

1 position to say exactly where the Medicaid budget falls  
2 and how that all works out, but it's not my burden to  
3 demonstrate that I'm facing a severe financial crisis,  
4 it's their burden. And I just don't think that-- the  
5 evidence that's here to date refutes rather than  
6 supports the notion that they're going to have to close  
7 clinics or otherwise they're going to have a significant  
8 economic effect.

9 I'll also note that it is no secret that  
10 Planned Parenthood provides a number of other services  
11 to its patients without the benefit of Medicaid support,  
12 including abortion. And the notion that the loss of  
13 some limited Medicaid funding for some services is going  
14 to lead it to close its doors and lay off staff has to  
15 be speculative, especially if we don't actually have  
16 some hard numbers in dollars and cents to support the--  
17 the claim in the affidavit.

18 And it's certainly true, as they note, that  
19 a threat to trade or business viability can constitute  
20 irreparable harm, where is the information that supports  
21 an actual conclusion that their viability is threatened?  
22 I don't think you'll see that in the-- in the  
23 declarations. You certainly don't see it on the  
24 consolidated financial statements.

25 And if it's true that the loss of whatever



1 Medicaid dollars are being paid through the Kansas  
2 program threaten the viability of other services offered  
3 by Planned Parenthood, it may well raise claims about  
4 what Planned Parenthood is using its Medicaid dollars  
5 for. And there are federal restrictions on that  
6 question too. So there's a whole host of issues with  
7 respect to just what is the financial impact. And they  
8 haven't met their burden. And a conclusory allegation  
9 that it's going to affect them I don't think is  
10 sufficient.

11           Likewise in their reply, the Planned  
12 Parenthood claims that there's going to be alleged  
13 collateral consequences in other states. And again, I  
14 think that the supporting documents, if you actually  
15 look at whether they've met their evidentiary burden,  
16 they fall far short of-- of doing so. The affidavits  
17 from both Ms. McQuade and Ms. Kogut are particularly  
18 notable in that the-- the discussion of whether they're  
19 going to be terminated in Oklahoma or in Missouri or any  
20 of the other states are phrased as: It has come to my  
21 attention that other states or private insurers may take  
22 note of the Kansas termination and exercise their own  
23 rights, whatever those rights may be, it's not clear,  
24 under their statutes or their contracts.

25           Saying that-- that "it has come to my

1 attention" that something may happen doesn't meet your  
2 burden. We need evidence. Do we have a citation to a  
3 statute? Do we have a citation to a contract? Do we  
4 have any evidence to actually support this assertion  
5 that there's going to be all those collateral  
6 consequences? If not--

7 THE COURT: Are we talking about  
8 professional licensing consequences? And if we could  
9 analogize that to a lawyer, if you had a disciplinary  
10 matter in this state, would it not be reasonable for you  
11 to think that other states may-- that you're licensed in  
12 may take notice or that you seek licensure in may take  
13 notice?

14 MR. STRAWBRIDGE: Well, you certainly have  
15 the ability to contest any-- any consequences from one  
16 state to the other. But, you know, at a minimum, I  
17 would like to see somebody cite me to the professional  
18 rules of the other jurisdiction that explained exactly  
19 what those consequences are.

20 THE COURT: You don't think there would be  
21 reputational harm?

22 MR. STRAWBRIDGE: Well, I'll talk about  
23 reputational harm. In fact, that's-- that's a good  
24 transition.

25 Black letter law in the Tenth Circuit, I

1 will quote *Hunter versus HIRSIG*, 614 Federal Appendix  
2 960. "As a matter of well-settled law, allegations for  
3 reputational injury do not rise to the level of  
4 irreparable harm that can justify injunctive relief."

5 *Hunter* was a case involving a revocation of  
6 an insurance agent's license, similar to the terms of  
7 the alleged reputational harm here. If an investigation  
8 or if a proceeding to revoke your license is still not  
9 sufficient to justify injunctive relief, preliminary  
10 injunctive relief, then I don't understand how we can  
11 justify it as a basis here.

12 I'd also cite to you *Schrier versus The*  
13 *University of Colorado*, 427 F.3d 1253, which makes the  
14 same point. And I'll give you another quote from a  
15 Supreme Court case, *Sampson versus Murray*, 415 U.S. 61,  
16 91 to 92. "A satisfactory showing that a litigant's  
17 reputation would be damaged as a result of the  
18 challenged agency action falls far short of the type of  
19 irreparable injury which is a necessary predicate to the  
20 issuance of an injunction." So I don't think that they  
21 can get their reputational harm. Separately, I'll note  
22 that the reputational harm injury is also not going to  
23 take place, if at all, before September. There's no  
24 allegations, there's no declarations, and I'll note the  
25 absence of any declarations--

1 THE COURT: As of July 7th, they are  
2 terminated.

3 MR. STRAWBRIDGE: Well--

4 THE COURT: To the world, they're  
5 terminated. That's what the letter says the effective  
6 date is. So nobody-- I had to ask questions about where  
7 does this September 10th date come from. Do you want me  
8 to believe that if one of these providers is going and  
9 applying for a job and they have to disclose, and  
10 they're applying on July 8th, they're not going to have  
11 to disclose that as of July 7th they were terminated  
12 from the Medicaid program?

13 MR. STRAWBRIDGE: Well, first of all, I'm  
14 not sure that we have an evidentiary basis to conclude  
15 that. They will not have to disclose that on July 7th  
16 if they exercise their OAH appellate rights. And even  
17 if they do, I think it's still speculative--

18 THE COURT: What-- you've told me that you--  
19 that we need a record on that. What do you base that  
20 on?

21 MR. STRAWBRIDGE: I'm sorry. What do I base  
22 what on?

23 THE COURT: Well, you've told me that we  
24 need a record. I mean, that there's no record, it's all  
25 speculative. So what do you base that statement on

1 that-- that if they pursue their OAH rights, they don't  
2 have to disclose anything?

3 MR. STRAWBRIDGE: I mean, I-- if they pursue  
4 their-- actually I don't think it's contested that if  
5 they actually invoke their OAH right, the effective  
6 termination date is going to-- is going to be altered.

7 THE COURT: All right. But my question is,  
8 what-- what's your basis for saying there's no harm  
9 because they don't have to disclose that to a potential  
10 employer in the interim?

11 MR. STRAWBRIDGE: Well, I guess-- I guess  
12 what I'm-- what I'm suggesting is I don't-- I don't know  
13 that this Court can assume that those disclosures are  
14 required. And I don't see in the record evidence that  
15 suggests that they are. I certainly don't see any  
16 declarations from the-- from the individual providers.

17 With all due respect to my friend here,  
18 getting up and talking, you know, providing hearsay out  
19 of counsel's mouth at a hearing is not evidence. Where  
20 is the affidavit? The burden is on them to come forward  
21 with that evidence. And this Court has to have the  
22 evidence in the record before it's going to enter the  
23 extraordinary relief. And the reputational harm point  
24 that I made earlier, the Tenth Circuit has already heard  
25 that reputational harm in and of itself does not justify

1 injunctive relief.

2 THE COURT: In and of itself.

3 MR. STRAWBRIDGE: Right.

4 THE COURT: All right.

5 MR. STRAWBRIDGE: The last category of  
6 plaintiffs are the Does. And I don't think the Does'  
7 affidavits are sufficient to establish any irreparable  
8 harm either. As we said, with the timing that is at  
9 issue here, we've got several months at least, more if  
10 the providers exercise their appellate rights.

11 THE COURT: I'm going to come back to ask  
12 you something that I asked Mr. Park initially. And  
13 that-- I'm going to say it much more bluntly. Why are  
14 we here? And I'm not blaming you or Mr. Park because  
15 you weren't here for this conversation a month or so  
16 ago. But my very point was, if it's not going to become  
17 effective for whatever reason, at that point I wasn't  
18 told about September 10th, it was going to be-- well,  
19 actually they were extending the deadline. Initially it  
20 was going to be in May and then June and then July.

21 Why couldn't we have a-- a trial on the  
22 merits this fall? Why couldn't we just enter an  
23 injunction, keep everything status quo until we could  
24 have a trial on the merits? So I'm just surprised that  
25 here we are on-- you know, on June 7th and you're

1 telling me, no, there's nothing imminent. It's going to  
2 be at least September. And, you know, there's no reason  
3 to be here. I mean, I-- we could've avoided this stage  
4 is what I'm suggesting. I'm just surprised that the  
5 state has changed its posture.

6 MR. STRAWBRIDGE: Well, so I certainly  
7 appreciate the Court's frustration and-- and we  
8 certainly do not mean to suggest, you know, or to give  
9 the Court whiplash. That's not the state's intention.  
10 You're right, that was before we were involved in the  
11 case. But my understanding at the time is the state was  
12 feeling a little bit under pressure because of some  
13 issues that it had with its prior representation. It  
14 was concerned about the possibility of agreeing to any  
15 kind of injunctive relief that might include an implicit  
16 finding with respect to the merits. So I certainly do  
17 not challenge Your Honor's recollection of the hearing,  
18 I'm simply trying to explain that the state is not--

19 THE COURT: Well, I can tell you, I-- I've  
20 been doing this a long time. And it's very common as a  
21 matter of case management in cases where someone is  
22 seeking a preliminary injunction that all parties agree,  
23 with my suggestion, to enter a temporary injunction that  
24 does not address the merits. How could it when it's  
25 consensual and it's just tiding us over until we can

1 have a trial on the merits?

2 That, I think, would've been the better way  
3 to go in this case, particularly when I've now heard  
4 extensive argument about how we need a better record,  
5 which is not particularly persuasive to me, because in a  
6 preliminary injunction matter, there's never a full  
7 record.

8 That's why I think as a matter of case  
9 management, when it can be accomplished, you skip the  
10 preliminary injunction and you-- you go forward and you  
11 have a record. But that is not to say that this Court  
12 is not in a position to determine whether or not an  
13 injunction should lie on the basis of the limited record  
14 before it. That is the-- that's the situation courts  
15 are always in. That's why, of course, we have these  
16 very important prongs of the preliminary injunction  
17 test, including a likelihood of success on the merits.  
18 Not success on the merits, but a likelihood,  
19 understanding the record is undeveloped at that point.

20 So I mean, I'm not-- it may sound like I'm  
21 fussing at you. You weren't here, I just-- you know,  
22 I'm a little disappointed that the state has-- is in  
23 this posture now of saying let us have time to discover  
24 and build the record, when we could've accomplished that  
25 with a lot less grief for anybody. But anyway, we're



1 here, let's go forward.

2 MR. STRAWBRIDGE: Just one last point on  
3 that. In fairness to the state, at the time it was also  
4 unclear what effect, if any, might-- might happen  
5 through the OAH process. There were separate interests  
6 with respect to whether or not there's going to be  
7 further developments at the state level. My  
8 understanding is the manifestation of intent not to  
9 invoke the OAH appellate process was made for the first  
10 time in the reply brief here. If that was discussed at  
11 the hearing with Your Honor before, maybe I'm missing  
12 something. But that's--

13 THE COURT: I don't recall that it was  
14 discussed one way or the other, but I could-- maybe my  
15 recollection is not clear either. All right.

16 MR. STRAWBRIDGE: So in any event, to Your  
17 Honor's point, there are ways to handle this. There can  
18 be discovery. There could be an evidentiary hearing.  
19 It may not be what Your Honor wants to hear, but it is  
20 true that-- that it may not be too late for that  
21 process.

22 I certainly-- the state does not want to  
23 suggest that the plaintiffs, you know, are obligated--  
24 the state wants to give them every opportunity to pursue  
25 the OAH relief, if that's what they would like to do.

1 But if they are dead set against it, then there is time  
2 to do discovery and there is time to have a hearing.  
3 And again, I don't want to frustrate Your Honor, but  
4 there is--

5 THE COURT: Now-- but, you know, even if the  
6 plaintiffs were to opt for the OAH process, from what  
7 I've heard thus far there's no guarantee there would be  
8 the type of building of a record as there is going to be  
9 in this proceeding. I mean, it's-- it's discretionary  
10 whether there's even an evidentiary process at all, is  
11 there not?

12 MR. STRAWBRIDGE: Well, there are  
13 procedures. But yes, I believe it's left to the  
14 discretion of the agency. I don't want to prejudge what  
15 the agency may or may not do. But there's every  
16 opportunity to do so. The whole point of abstention is  
17 not that we can predict the outcome or that we know  
18 what's going to happen in the process, but that there's  
19 no need to-- there's no need for the federal court to  
20 get involved before that process is complete, whatever  
21 may or may not happen.

22 THE COURT: Right. All right.

23 MR. STRAWBRIDGE: Just really quick with  
24 respect to the Does, I just wanted to address the Jane  
25 Doe relief. I think if you compare the Jane Doe

1 declarations in this case, the Jane Doe affidavits with  
2 the Jane Doe affidavits in the other cases, you'll find  
3 they're a bit more general, they're a bit more vague.  
4 They do not come to the level of suggesting that they  
5 will actually not be able to obtain the services or even  
6 the services from the provider of their choice. I'll  
7 note, by the way, that I don't think that it is  
8 irreparable harm to not receive services from the  
9 provider of choice. That's the merits question. The  
10 statute gives you this right, is that right violated or  
11 not? But whether or not you've suffered irreparable  
12 harm I don't think is necessarily completely coterminous  
13 with whether or not you're getting it from the provider  
14 of choice. But even if-- and obviously we have evidence  
15 that there are adequate other providers, that-- that we  
16 don't think that there's any evidence that other  
17 providers of services are not available.

18 THE COURT: Well, let me-- let me ask you  
19 about that. So if for just example a-- a plaintiff Jane  
20 Doe was saying, "This particular doctor who I have a  
21 relationship with and who I want to continue to see I  
22 can no longer see, but I can see this doctor and it's  
23 just as convenient," I could understand why you might  
24 argue that that's not irreparable harm, at least in  
25 terms of preliminary injunction.

1           But what we're talking about here is all  
2 providers associated with a particular clinic or a  
3 particular facility. And so if a plaintiff is-- says I  
4 can no longer go to that situs and see any of the  
5 doctors there and I have to drive 100 miles to  
6 Springfield, Missouri, or to Salina, Kansas, or whatever  
7 to see the next-- next available provider, even at the  
8 preliminary injunction stage, would that not be  
9 irreparable harm?

10           MR. STRAWBRIDGE: Well, to-- the answer to  
11 that is no. And I have two points to make on that.  
12 First of all, as I would encourage Your Honor to  
13 actually look at the Jane Doe affidavits and see if they  
14 have that level of detail, because I don't think that  
15 they do. So even accepting the notion that that would  
16 be sufficient, I don't think that's what we have in the  
17 record in this case with respect to how far away they  
18 are and how far they would have to drive.

19           Secondly, the reason I don't think it's  
20 actually-- it actually goes to the question of harm is  
21 because I think the record before the Court does not  
22 establish that these people will not continue to  
23 actually receive services at their provider of choice at  
24 Planned Parenthood. What we're talking about here is  
25 the right to receive reimbursement, the right to receive

1 funding, the provider's right to receive reimbursement.

2 Nothing stops a Medicaid recipient or any  
3 person off the street from going to Planned Parenthood  
4 and receiving services. There are other ways they may  
5 have to pay for it. Whether or not the inability to  
6 get-- have it paid for is irreparable harm I would  
7 suggest is not the case, especially--

8 THE COURT: You're talking impoverished  
9 people. That's why they're on Medicaid.

10 MR. STRAWBRIDGE: Well, certainly. But let  
11 me just-- this is why I think it's important to look  
12 at-- look at the affidavits. The Kogut declaration,  
13 which is with respect to Planned Parenthood St. Louis,  
14 provides-- makes clear in Paragraph 8 that they-- they  
15 provide services without billing the-- the KanCare  
16 programs. They say we don't have contracts with the  
17 KanCare programs. Obviously if they don't have  
18 contracts with the KanCare programs when people come  
19 across the border in Joplin, they can't bill the KanCare  
20 programs for it. Right?

21 We also have an affidavit from Ms. Engel,  
22 which is Exhibit 4 to the opposition, that makes it  
23 clear that PPSLR has not - nor any of the providers -  
24 have submitted any direct claims for service to Kansas  
25 directly for 18 months. So if, as their declaration

1 says, they are providing services right now to Kansas  
2 Medicaid recipients and they're not billing the MCOs and  
3 they're not billing Kansas directly, I'm not sure what  
4 the harm is.

5 But the inference that seems obvious to me  
6 is that they're providing those services and not billing  
7 Medicaid for them. So those people are getting their  
8 services from their provider of choice without it being  
9 paid by Medicaid.

10 And we mentioned, Planned Parenthood  
11 provides a suite of services, they have a lot of sources  
12 of funding for those services. And if you read the  
13 Planned Parenthood declarations very closely, I think  
14 you will not find any suggestion that they're actually  
15 prepared to turn away people who want their services if  
16 they do not have the ability to submit their claims to  
17 Medicaid. And that distinguishes this case from some of  
18 the other cases, and particularly the Alabama case where  
19 there were-- I believe were-- was an actual allegation  
20 in the affidavit that people were being turned away  
21 because of the termination.

22 I think Planned Parenthood is being very  
23 careful not to say that, because I don't know that it's  
24 true that they will actually deny these people coverage  
25 from the provider of their choice if they don't have the

1 ability to get reimbursed through Medicaid. If-- if  
2 there's a paragraph where they actually say that plainly  
3 in the declaration, I'm sure that my colleague or my  
4 adversary will make that clear.

5 I think that that-- I think that that  
6 basically closes the points that I wanted to make.  
7 Irreparable harm is their burden. It is not an easy one  
8 to meet. It requires more than speculation, it requires  
9 evidence. And although Your Honor is certainly right  
10 that at a preliminary injunction hearing, the burden of  
11 that evidence may be different than it would be at a  
12 full hearing, it's not completely illusory. You need  
13 something more than just speculative, self-serving  
14 conclusory declarations. Unfortunately, I submit that's  
15 all that we have here. It differs from the other cases  
16 and I think it's a basis to deny preliminary injunctive  
17 relief without prejudice at this point in time.

18 Unless Your Honor has further questions.

19 THE COURT: Let me just make sure I've  
20 covered the gamut here.

21 Okay. I think so. Thank you.

22 MR. STRAWBRIDGE: Thank you, Your Honor.

23 THE COURT: Ms. Salgado. I think you all  
24 have about 30, 35 minutes left.

25 MS. SALGADO: Okay. Thank you, Your Honor.

1 So I thought I'd start with just clearing up some  
2 factual points. My colleague, I will call him my  
3 colleague, just made some points about the billing of  
4 Planned Parenthood of the St. Louis Region. The issue  
5 there is, it is correct both that PPSLR does not bill  
6 the state directly for fee-for-service claims and that  
7 PPSLR does not have a contract with the managed care  
8 organizations. PPSLR, my understanding, has billed the  
9 managed care organizations as an out-of-network  
10 provider. However, to do so, you still need to have a  
11 Kansas Medicaid agreement.

12 The other thing that I just thought it would  
13 be worth noting is that the federal-- the limits to be  
14 eligible for Medicaid in the state of Kansas, a family  
15 of four has to-- can make no more than \$768 a month.  
16 The notion that our Medicaid patients can simply pay for  
17 their services at a-- they can pay for their services at  
18 Planned Parenthood is not credible.

19 Then I want to clear up, Your Honor, the  
20 issue about when the termination takes effect. As the  
21 termination letters say-- well, they originally said,  
22 but then as we know the date got changed multiple times.  
23 But, you know, what it says is that, you know, the-- the  
24 provider will be terminated effective... and originally  
25 it said May 10th, but the new one says July 7th. So it



1 is not true that the termination will not take effect  
2 until September. On July 7th, absent an injunction, the  
3 terminations will take effect.

4 The second issue is-- the second problem  
5 with using this-- the September 7th date as sort of the  
6 trigger date is that in filing an appeal with the Office  
7 of Administrative Hearings does not make-- does not  
8 suspend automatically the termination. That has been  
9 the case in other states, but that is not the case in  
10 Kansas.

11 In order to have the-- the decision  
12 suspended, plaintiffs would then have to seek-- my  
13 understanding is they would have to seek a stay from the  
14 Office of Administrative Hearings. So it's not that the  
15 termination will take effect-- it will not take effect  
16 on July 7th or that-- you know, that it-- or that it  
17 won't take effect until September, because at that point  
18 plaintiffs can file an appeal. And, in fact, the  
19 deadline to file an appeal with the Office of  
20 Administrative Hearings is not September, it's August.  
21 All right?

22 So the trigger date is July 7th. And the  
23 trigger date to file an appeal would be August 7th. But  
24 between July and August, the termination would be  
25 effective. And even-- even if plaintiffs chose to file

1 an administrative appeal, that would not suspend the  
2 termination.

3 Then that brings me to the point that  
4 plaintiffs are able to avoid irreparable harm because  
5 they can appeal it administratively. So not only is  
6 that not correct in the sense that the termination is  
7 not suspensive, but second, plaintiffs are not required  
8 to file an appeal prior to bringing a Section 1983  
9 claim. The case law on that is overwhelmingly clear.

10 THE COURT: What is your understanding about  
11 the appeal process itself? Could essentially a 1983  
12 claim be raised, could an equal protection claim be  
13 raised?

14 MS. SALGADO: That was my next point, Your  
15 Honor. We-- in our brief, we cited two cases on Page 7.  
16 "Under Kansas law, administrative boards and agencies  
17 may not rule on constitutional questions." A decision  
18 from 1991 and one from 2013. So what this means is that  
19 plaintiffs would not have an opportunity to bring their  
20 federal constitutional claims in a state administrative  
21 proceeding.

22 The related point to that is also that the  
23 only party that can bring an appeal to the state  
24 administrative office or the Office of Administrative  
25 Hearings is the terminated provider. In other words,

1 the Jane Doe plaintiffs cannot bring their free choice  
2 of provider claim in the-- in the administrative hearing  
3 process.

4 And it is that-- while we can dispute on,  
5 you know, whether this-- this is-- the administrative  
6 hearing process is akin to a criminal enforcement  
7 proceeding that falls under the *Sprint* decision, what  
8 the *Sprint* decision is clear about is that the-- the  
9 party must be able-- the proceeding has to provide an  
10 adequate opportunity to raise federal challenges. And,  
11 again, that's not the case here. It's an additional  
12 reason why *Younger* abstention isn't appropriate here,  
13 Your Honor.

14 The-- in addition, counsel for the defendant  
15 has argued both in their brief and today that the cases  
16 on which we rely where other district courts have  
17 entered preliminary injunctions where there have been  
18 Medicaid terminations of Planned Parenthood affiliates,  
19 that those cases were different. But they are not, Your  
20 Honor.

21 We cited in our brief, and there's a  
22 footnote we addressed this, Footnote 8 on Page 9. As  
23 the district court's decision in *Kliebert* said, all  
24 right, "The defendant argues that because Planned  
25 Parenthood of the Gulf Coast may appeal this termination

1 during which the agreements will remain in force, this  
2 suspensive review process leaves all plaintiffs without  
3 cognizable injury."

4 So actually in that case, the appeal-- had  
5 the Planned Parenthood entity filed an appeal, it would  
6 have suspended the decision. But even under those  
7 circumstances, the district court ruled that *Younger*  
8 abstention was not appropriate-- sorry, that filing an  
9 administrative appeal was not necessary because, again,  
10 the case law is overwhelmingly clear that a party does  
11 not have to exhaust administrative remedies prior to  
12 seeking relief in federal court and bringing federal  
13 claims under Section 1983.

14 I'd also like to address just briefly,  
15 because it appears to be the-- the main allegation that  
16 defendant is relying on, the events that occurred around  
17 the-- with the solid waste disposal inspection of  
18 Planned Parenthood of Kansas and Mid-Missouri, their  
19 Overland Park health center.

20 First, I think it's worth noting that the  
21 only entity involved in that allegation was PPKM.  
22 Second, it seems that there are dueling declarations  
23 about some of what occurred on the day of those  
24 inspections. But what-- what is not disputed is that  
25 PPKM did provide the KDHE inspectors on that day an

1 opportunity to conduct a full visual inspection. The  
2 dispute was over whether photos could be taken. So  
3 there was the opportunity to find whatever it was that  
4 the inspectors were looking for had they conducted an  
5 actual visual inspection, but they declined to do so.

6 THE COURT: They were given access to all  
7 the areas that they wanted to inspect?

8 MS. SALGADO: They were-- they were, yes.  
9 So long as they would not enter a room with a patient,  
10 but that was not a dispute. But yes, they were given--

11 THE COURT: So photographs I think of a  
12 couple of disposal units, dumpsters or something, before  
13 they were stopped?

14 MS. SALGADO: That's right. Yes.

15 THE COURT: But other than-- and there--  
16 they were given access to two treatment rooms?

17 MS. SALGADO: They were allowed-- they were  
18 allowed to begin conducting their inspection. When they  
19 began to take photos, that is when they were asked to  
20 stop. They were taking photos of all receptacles,  
21 including solid waste receptacles, so the concern was  
22 patient privacy concerns. And there were patients in  
23 the health center at that time.

24 But what is-- what is still not disputed is  
25 that-- well, it's not disputed that they were given

1 access to conduct a visual inspection. Second, that  
2 PPKM was never cited for hindering inspection, despite  
3 the agency's clear authority to do so. And third, that  
4 at the completion of the inspection in January, they  
5 were given a notice of compliance form which identified  
6 that no violations were identified-- sorry, which stated  
7 that no violations were identified and did not at that  
8 time, either, cite them for hindering an inspection.

9 And finally with respect to the BWM  
10 inspection, the Bureau of Waste Management inspection,  
11 it-- I don't think it has been made clear at all how  
12 their denial of taking photographs of waste receptacles  
13 at all deems the plaintiff providers-- let's just talk  
14 about PPKM, because it can't possibly relate to the  
15 other providers, but how that could deem PPKM not a fit  
16 or qualified provider to provide the Medicaid services.

17 The final point I just want to address is a  
18 factual issue, the question about the merger, Your  
19 Honor. As you noted, Your Honor, the-- my understanding  
20 is that the merger would create a name change, but that  
21 does not change that the entity, that PPKM is still an  
22 entity that would be merging with another provider and,  
23 therefore, the regulatory history, i.e., that it has  
24 been deemed a-- you know, it has been a terminated  
25 provider for unprofessional and unethical conduct, I

1 don't see how that could possibly not have an impact on  
2 PPKM-- on the new entity's ability to obtain a new  
3 license. And it's not at all clear that that would be  
4 necessary.

5 THE COURT: That what would be necessary?

6 MS. SALGADO: That the new entity would be  
7 required to apply for a new Medicaid agreement.

8 THE COURT: So it's unclear whether they  
9 would-- the merged entity would have to apply for a new  
10 Medicaid agreement or whether the merged entity would  
11 just be operating under the two pre-existing Medicaid  
12 agreements?

13 MS. SALGADO: Well, my understanding is that  
14 it-- it's just a name change, so the entity-- the  
15 Medicaid agreement with PPK-- the Medicaid agreement  
16 that PPKM has still carries over. But I'm saying even  
17 if, as defendant is saying, you know, even if somehow  
18 PPKM were required to apply for a new Medicaid agreement  
19 because of a name change, I don't see how the regulatory  
20 history of PPKM, the fact that it is a-- a terminated  
21 provider for unprofessional and unethical conduct, that  
22 it has been, you know, found to have violated state  
23 laws, how that provider-- how the state would allow that  
24 provider to continue to operate just because it changed  
25 the name.

1           And the-- sorry, Your Honor, I lied. I have  
2 one more point, which is I do apologize for not  
3 providing the citations to the Missouri and Oklahoma  
4 statutes that say that the agencies there can sanction a  
5 provider if it's been sanctioned elsewhere. I actually  
6 brought copies of those statutes because I realized in  
7 preparing for oral argument today that those were left  
8 off the brief. So I can provide those citations or  
9 copies of those statutes, if the Court would like.

10           THE COURT: I'll take both.

11           MS. SALGADO: Okay.

12           THE COURT: And you can tell us the  
13 citations now and-- for purposes of the defendants. And  
14 then I would take copies of those as part of the record.

15           MS. SALGADO: So for Oklahoma, that's  
16 Oklahoma Administrative Code 317:30-3-19.1. And I  
17 apologize, Your Honor. I'm truly embarrassed, Your  
18 Honor, but it appears that they were not printed. So I  
19 will sit down on my computer and pull that up for you.

20           THE COURT: Do you have the citation-- do  
21 you have the citation to the other state? It's a  
22 Missouri statute or Missouri--

23           MS. SALGADO: I don't, because I thought  
24 they were printed and that I would be able to read it  
25 off of the printout.



1 THE COURT: Okay.

2 MS. SALGADO: But I have it at my computer  
3 where I can get it right now.

4 THE COURT: Oh, okay.

5 MS. SALGADO: Would you like me to do that?

6 THE COURT: Or you can just submit it by  
7 e-mail to us after and copy the defendants on the  
8 e-mail.

9 MS. SALGADO: Okay.

10 THE COURT: That would be fine. Because I'm  
11 not going to rule, I'm going to take this under  
12 advisement and issue a written decision.

13 MS. SALGADO: Okay. If there are no further  
14 questions, Your Honor, I could hand it over to Mr. Eye.

15 THE COURT: Okay. That's fine.

16 MR. EYE: Your Honor, I'll be brief. There  
17 are just a couple of points that I want to bring to the  
18 Court's attention.

19 The ostensible reason for including the  
20 former providers' termination notices appears to be the  
21 assertion by the defendant that the relationship status  
22 alone was adequate. And there's really no legal  
23 authority that's advanced by the defendant to support  
24 that particular contention. And I would suggest that  
25 the reason that there's no legal authority that

1 accompanies that assertion is because that would be a  
2 rule of law that would certainly run counter to the  
3 general rule that one has to have some personal  
4 connection, some personal relationship to wrongdoing, to  
5 misconduct, in order to be held responsible for it.

6           The second point that I want to make in that  
7 regard, Your Honor. There was a suggestion that KDHE  
8 was unaware that some of the providers were in a former  
9 provider status and some were in a present provider  
10 status. Your Honor, that's just not the case. KDHE  
11 asked for the addresses of the former providers so that  
12 they could send them termination letters to their home  
13 addresses, rather than sending them to their residential  
14 addresses-- or I'm sorry, they were going to send them  
15 to their residential addresses, to the former providers,  
16 rather than to their employers, since they were no  
17 longer employed by Planned Parenthood.

18           The agency knew that there were-- there was  
19 a status difference between these individual providers.  
20 Some were still with Planned Parenthood and some had  
21 departed. But what's key here is that irrespective of  
22 the current or former employment status is the absence  
23 of any evidence to tie them to any wrongdoing on any of  
24 the three grounds.

25           The waste-- the Bureau of Waste Management's

1 inspection at PPKM in Overland Park was well documented.  
2 And the Court has a fair amount of that documentation.  
3 There was no mention of any individual provider  
4 anywhere. When we challenged that in the course of our  
5 proceedings in front of this Court, the defendant had an  
6 opportunity to develop in its response brief some  
7 evidence or argument that there was an evidentiary link,  
8 a factual nexus between the individual providers and the  
9 grounds that are advanced to support the termination.  
10 That wasn't done.

11 So we're here today, Your Honor, and the  
12 posture of this case is as it was the day that we began  
13 it. I actually thought that there could be evidence  
14 that was developed by the defendant that would immerge  
15 during the course of these initial proceedings. And it  
16 didn't happen. So we have 11 individual providers who  
17 are stigmatized within the community, who are impaired  
18 in terms of their capability to find other employment  
19 because of this baggage that has now been thrust upon  
20 them.

21 Your Honor, this is really, I think,  
22 indicative of the lack of a record that was-- failed to  
23 be developed during the investigation phase of KDHE's  
24 proceedings. Now, it appears when they couldn't develop  
25 that record when they should have, in the run-up to

1 issuing the termination notices, they seem to want to do  
2 it now.

3 Well, Your Honor, that's not how these cases  
4 should be litigated. They had a burden, they had a duty  
5 before they served these termination notices on the 11  
6 clients that I represent to make sure that there was a  
7 basis for it. And they didn't do that. They get a  
8 second chance when we file the motion for preliminary  
9 injunction, we file our complaint and the motion for  
10 preliminary injunction. A second chance to do that.  
11 Strike two.

12 They come in here today with another  
13 opportunity to at least give the Court some hint, some  
14 scintilla of evidence of a relationship between the  
15 three grounds advanced for termination and any of the 11  
16 providers. Strike three. Didn't happen.

17 Your Honor, the injunctive relief that the  
18 parties have asked for should go to all of the  
19 providers, PPKM, PPSLR, and individual providers. I  
20 represent only the individual providers. But in our  
21 view, they have been wrongfully targeted and for no good  
22 reason. And for that reason, Your Honor, we would  
23 respectfully ask that the Court enter a preliminary  
24 injunction on behalf of the individual providers in this  
25 matter.

1 THE COURT: All right. Thank you.

2 MR. EYE: Thank you, Your Honor.

3 THE COURT: All right. I consider this  
4 matter under advisement. I'm well aware of the timeline  
5 now as to how these matters proceed. So I will be  
6 issuing a written decision before anything can become  
7 effective by the terms of the Kansas statutes and  
8 regulations.

9 So you're going to provide me with those two  
10 citations.

11 MS. SALGADO: I actually have the Missouri  
12 citation now.

13 THE COURT: Oh, okay. Well, if you do that,  
14 I don't need actual copies. If you can just tell us  
15 what the citations are, that's fine.

16 MS. SALGADO: Your Honor, it's 13 CSR  
17 70-3.030.

18 THE COURT: All right. That's the Missouri  
19 statute. All right. I thank you. This argument has  
20 been very helpful and--

21 MS. SALGADO: Your Honor?

22 THE COURT: Was there something else? Yes.

23 MS. SALGADO: Yes, if I may just address  
24 whether we'll be needing a hearing on the motion for  
25 class certification.

1 THE COURT: Yes, we'll get back with you on  
2 that.

3 MS. SALGADO: Okay.

4 THE COURT: We will float some available  
5 dates and go from there.

6 MS. SALGADO: I-- as I indicated in an  
7 e-mail that I think defense counsel was cc'd on, as you  
8 know, our position, Your Honor, is that class motion--  
9 or class certification is not necessary. However, if  
10 the Court feels that it-- that it is, we would-- you  
11 know, and the Court feels that there needs to be a  
12 hearing, oral argument on that, we do respectfully  
13 request that that occur prior to the July 7th date so  
14 that we can have that resolved prior to-- or at least so  
15 that you can consider that while you're considering  
16 whether to enter a preliminary injunction.

17 THE COURT: I think that will be a difficult  
18 deadline to meet, but we'll consider it.

19 Mr. Park, did you have something?

20 MR. PARK: Thank you, Your Honor. One  
21 additional point on the motion to strike that was filed  
22 by plaintiffs this morning. Defendant would appreciate  
23 an opportunity to review and respond, if necessary, on  
24 an expedited basis. On first glance, it appears to be  
25 untimely under Rule 12(f), but we'd like an opportunity

1 to-- to review and to respond, if necessary.

2 THE COURT: How much time would you like to  
3 respond?

4 MR. PARK: The end of the week?

5 THE COURT: That's fine.

6 MR. PARK: Thank you, Your Honor.

7 THE COURT: All right. Thank you all.

8 We'll be in recess.

9 (3:42 p.m., proceedings recessed).

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## C E R T I F I C A T E

I, Kelli Stewart, a Certified Shorthand Reporter and the regularly appointed, qualified and acting official reporter of the United States District Court for the District of Kansas, do hereby certify that as such official reporter, I was present at and reported in machine shorthand the above and foregoing proceedings.

I further certify that the foregoing transcript, consisting of 111 pages, is a full, true, and correct reproduction of my shorthand notes as reflected by this transcript.

SIGNED September 15, 2016.

/s/ Kelli Stewart

Kelli Stewart, CSR, RPR, CCR, RMR