

COMMENTS

PROTECTING PLANNED PARENTHOOD: IS PLANNED PARENTHOOD FUNDING A JUSTICIABLE RIGHT UNDER THE MEDICAID FREEDOM-OF-CHOICE PROVISION?

Allison Gilley*

“There’s a sorry situation in the United States, which is essentially that poor women don’t have choice. Women of means do. They will, always. Let’s assume Roe v. Wade were overruled and we were going back to each state for itself, well, any woman who could travel from her home state to a state that provides access to abortion, . . . So if you can afford a plane ticket, a train ticket or even a bus ticket you can control your own destiny but if you’re locked into your native state then maybe you can’t. That we have one law for women of means and another for poor women is not a satisfactory situation.”²

Abstract

The Freedom-of-Choice provision included in the Medicaid Act guarantees Medicaid beneficiaries the right to obtain medical care from a qualified and willing medical provider of their choice. While there is little question of whether Planned Parenthood is a qualified provider of primary, family, and reproductive care, there is a question of whether the Medicaid Freedom-of-Choice provision provides a justiciable right for beneficiaries to access care from Planned Parenthood. In *Blessing v. Freestone*, the Supreme Court established a three-factor test to determine whether a statutory provision gives beneficiaries a justiciable right. These three factors are: (1) Congress must intend the provision to benefit the plaintiff; (2) the plaintiff must demonstrate that the right asserted

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2. Samantha Lachman, *Ruth Bader Ginsburg Calls ‘Choice’ an Empty Concept for Poor Women*, HUFFINGTON POST (July 30, 2015, 1:45 PM), https://www.huffingtonpost.com/entry/ruth-bader-ginsburg-reproductive-rights_us_55ba42c9e4b095423d0e0716 [<https://perma.cc/B434-FZF6>] (quoting Supreme Court Justice Ruth Bader Ginsburg).

is not so vague or amorphous that its enforcement would strain judicial competence; and (3) the statute must impose a binding obligation on the state. Applying this test to the question of whether the Medicaid Freedom-of-Choice provision grants Medicaid beneficiaries a justiciable right to choose a provider of their choice, the Fifth, Sixth, Seventh, and Ninth Circuit have held that the provision does in fact create a justiciable right for Medicaid beneficiaries. However, in 2017, the Eighth Circuit found contrary to the position of other circuits. In *Doe v. Gillespie*, the Eighth Circuit rejected a request for a preliminary injunction preventing the Arkansas Department of Human Services from suspending Medicaid payments for services provided by Planned Parenthood. The injunction was denied based on the Eighth Circuit’s finding that the plaintiffs were not likely to succeed on the merits of their case, because the Medicaid Act does not grant an unenumerated right. Unlike the other circuits, the Eighth Circuit, did not use the *Blessing Test* to reach its’ holding. As reproductive healthcare continues to be debated in the political sphere, it is essential for the Supreme Court to resolve this circuit split and determine whether the Medicaid Act provides beneficiaries a justiciable right to seek services from a provider of their choice.

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INTRODUCTION

The American legal and political system has a complicated history regarding women’s ability to access reproductive care. As our nation continues to debate whether reproductive care is simply a “women’s issue” or an important part of a comprehensive national healthcare policy, it is important to recognize that access to reproductive care is often dependent on a woman’s economic resources. Today, more than seventy million Americans depend on Medicaid or the Children’s Health Insurance Program (CHIP) for essential medical services.³ Therefore, it is essential to consider the laws that govern the ability for Medicaid beneficiaries to access a provider of their choosing.

3. Kimberly Leonard, *Medicaid Enrollment Surges across the U.S.*, U.S. NEWS. (Feb. 24, 2015), <https://www.usnews.com/news/articles/2015/02/24/medicaid-enrollment-surges-across-the-us> [<https://perma.cc/3ECK-XYWH>].

The Medicaid Freedom-of-Choice (FOC) provision plays an essential role in not only helping Medicaid beneficiaries access care, but also empowering individuals to make personal healthcare decisions. The Medicaid FOC provision states that Medicaid beneficiaries may obtain medical services “from any institution, agency, community pharmacy, or person qualified to perform the service or services required . . . who undertakes to provide . . . such services.”⁴ Specifically, it requires state plans to allow a Medicaid beneficiary to obtain services from any institution, agency, pharmacy, person, or organization that is: (1) qualified to furnish services; and (2) willing to furnish them to that particular beneficiary.⁵ While states may set “reasonable standards relating to the qualifications of providers,” “they may not unfairly target a specific provider or a set of providers for reasons unrelated to their ability to perform covered services or the adequacy of their billing practices.”⁶

The FOC provision extends to family planning and reproductive care providers, such as Planned Parenthood.⁷ The question addressed in this article is whether the Medicaid FOC provision grants Medicaid beneficiaries a justiciable right under which a beneficiary may seek redress for a state’s unwillingness to fund medical services from specific providers, including Planned Parenthood. This note will discuss the role of Planned Parenthood as an essential healthcare provider, provide a history of Medicaid and detailed information about the Medicaid FOC provision, and an analysis of the assertion that the Medicaid’s FOC provision provides a justiciable right for Medicaid beneficiaries to challenge states’ defunding Planned Parenthood programs. This note will conclude by considering the implications of the Eighth Circuit’s decision in *Does v. Gillespie*.

AMERICA’S COMPLEX HISTORY WITH REPRODUCTIVE CARE AND PLANNED PARENTHOOD AS AN ESSENTIAL HEALTHCARE PROVIDER

Out of “developed nations,” the United States’ healthcare system ranks the lowest in healthcare efficiency, equity, and health outcomes.⁸ Medicaid, as a federally funded government program, helps address some of the greatest gaps in the American healthcare system by providing care to some of the most vulnerable in our society. The Medicaid FOC addresses multiple goals, including ensuring that providers are willing to provide services to Medicaid beneficiaries. It also empowers beneficiaries to take control of their health by giving them an

4. Social Security Act § 1902(a)(23), 42 U.S.C. § 423(e) (2018).

5. 42 C.F.R. § 431.51(b)(1) (2018).

6. See 42 C.F.R. § 431.51(c)(2) (2018).

7. See Free Choice of Providers, 42 C.F.R. § 431.51(a)(3)-(b)(2) (2012); *accord About Planned Parenthood Action Fund*, PLANNED PARENTHOOD (2018), <https://www.plannedparenthoodaction.org/about-us> [<https://perma.cc/PC9L-3D3K>].

8. See Karen Davis et al., *Mirror Mirror on the Wall, 2014 Update: How the Performance of the U.S. Health Care System Compares Internationally*, THE COMMONWEALTH FUND 1, 7, 12 (June 2014), http://www.commonwealthfund.org/~media/files/publications/fund-report/2014/jun/1755_davis_mirror_mirror_2014.pdf [<https://perma.cc/82ZG-WGTK>].

active role in choosing their care, in comparison to limiting beneficiaries to providers chosen by the government.⁹ As some Medicaid beneficiaries have chosen to receive services from a Planned Parenthood provider, it is important to look at the role of Planned Parenthood in the American healthcare system and consider whether the current law allows payments for services to be made to such a provider.

Hyde Amendment

Whether it be for health or personal reasons, women seeking reproductive healthcare have always faced stigma and prejudice. The Supreme Court has routinely held that persons have a right to access reproductive care, under the right to privacy read into the Constitution.¹⁰ However, this right has frequently been tempered by Congressional action with many of these actions focusing on both the services provided by and the organization Planned Parenthood itself. Following *Roe v. Wade*, the Supreme Court decision in 1973 which granted women the right to have an abortion, Congress blocked federal funds from being used to pay for an abortion except in cases of rape, incest, or danger to the woman's life.¹¹ Codifying additional restrictions for low-income women, in September 1976, Representative Henry Hyde pushed abortion care out from government insurance plans by attaching a rider to an appropriations bill that prevented Medicaid from covering abortion. Representative Hyde stated, "I certainly would like to prevent, if I could legally, anybody having an abortion, a rich woman, a middle-class woman, or a poor woman. Unfortunately, the vehicle available is the . . . Medicaid Bill."¹²

Today, the Hyde Amendment is not only a violation of women's right to access healthcare, but it also entrenches the belief that low-income women do not deserve the same healthcare opportunities and dignity in decision-making as women with more economic means. For over forty years, the Hyde Amendment has not only been renewed on an annual basis by Congress, but it has also been extended to additional government programs and agencies, preventing these organizations from providing funding for certain reproductive services and disproportionately affecting low-income individuals, women of color,

9. Lara Cartwright-Smith & Sara Rosenbaum, *Medicaid's Free-Choice-of-Provider Protections in a Family Planning Context: Planned Parenthood Federation of Indiana v. Commissioner of the Indiana State Department of Health*, PUBLIC HEALTH REPORT; 127(1): 119-122, (Jan.-Feb. 2012) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3234390/> [<https://perma.cc/7Y6M-PNB8>].

10. See *Griswold v. Connecticut*, 381 U.S. 479 (1965)(holding that while the Constitution does not specifically grant a right to privacy, the amendments together create a penumbra establishing a right to marital privacy).

11. Alina Salganicoff, Caroline Rosenzweig & Laurie Sobel, *The Hyde Amendment and Coverage for Abortion Services*, THE HENRY J KAISER FAM. FOUND. (Oct.16, 2017), <https://www.kff.org/womens-health-policy/perspective/the-hyde-amendment-and-coverage-for-abortion-services/> [<https://perma.cc/WK4W-UN5R>].

12. *Democrats Seek Repeal of Ban on Federal Funding of Abortions*, CHICAGO TRIBUNE (Aug. 16, 2016), <http://www.chicagotribune.com/news/nationworld/ct-abortion-federal-funding-ban-20160816-story.html> [<https://perma.cc/SZN9-BBPZ>].

immigrants, and LGBTQ individuals.¹³ These additional government programs include: Indian Health Services, women in federal prisons, the Peace Corps, the Federal Employees Health Benefit Program, Veterans Administration.¹⁴

In the landmark case, *Harris v. McRae*, the Supreme Court upheld such restrictions. In 1980, the federal government sought review by the Supreme Court after the Eastern District of New York invalidated the Hyde Amendment, finding that it contravened equal protection guarantees under the Due Process Clause of the Fifth Amendment and the Establishment Clause of the First Amendment by denying public funding for medically necessary abortions.¹⁵ The Supreme Court reversed the finding of the Eastern District of New York holding that the funding restrictions of the Hyde Amendment did not violate the First or Fifth Amendment.¹⁶ Furthermore, the Court held that the Due Process Clause did not confer an entitlement to funds to obtain an abortion and the fact that the funding restrictions coincided with the religious tenets of the Roman Catholic Church and other religions, did not make it contravene the Establishment Clause.¹⁷ Specifically the Court stated, “a woman’s freedom of choice [does not carry] with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.”¹⁸ Recognizing the specific impact of this policy on certain persons, in his dissent in *Harris*, Justice Marshall stated, “The Court’s opinion studiously avoids recognizing the undeniable fact that for women, eligible for Medicaid—poor women—denial of a Medicaid-funded abortion is equivalent to denial of legal abortion altogether.”¹⁹ And as he feared, the results of the Hyde Amendment are visible. Following the prevention of Medicaid funding, studies have found that “18-35% of women who would have had an abortion continued their pregnancies after Medicaid funding” became unavailable.²⁰

Following *Harris v. McRae*, Congress has prevented federal funds from being abortions outside of the limited “exceptions for rape, incest, or if the pregnancy is determined to endanger the woman’s life.”²¹ However, Congress has severely struggled to define what these terms mean and whether they should be written broadly or narrowly. Life endangerment has been a limited exception meaning “physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself.” While Congressional records show that this definition did not come without

13. Salganicoff, *supra* note 10.

14. *Id.*

15. *See generally* *Harris v. McRae*, 448 U.S. 297 (1980).

16. *Id.* at 298.

17. *Id.* at 298-99.

18. *Harris*, 448 U.S. at 298; *see also* Boonstra, *supra* note 14, at 2.

19. *Harris v. McRae*, 448 U.S. 297, 338 (1980) (Marshall, J., dissenting).

20. Heather Boonstra, *The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States*, GUTTMACHER POLICY REVIEW (Mar. 5, 2007), <https://www.guttmacher.org/gpr/2007/03/heart-matter-public-funding-abortion-poor-women-united-states> [<https://perma.cc/MZJ4-JB48>].

21. Salganicoff, *supra* note 10, at 1.

consideration, discussion, and opposition,²² it does not address important questions that can only be considered on an individual level. For example, can mental health be considered? This is currently a debated question. Many Congressional members feel that under the current regulations, women and their medical provider(s) could not consider mental health factors, demonstrating the importance of allowing a woman and her medical provider to account for factors as important as mental health.²³

Services provided by Planned Parenthood

Planned Parenthood addresses a hole in the American healthcare system. As Planned Parenthood provides medical services to Medicaid beneficiaries and all others who walk through their door, millions of women and men rely on Planned Parenthood for primary and reproductive healthcare. For nearly four-in-ten Planned Parenthood patients, Planned Parenthood is their sole health care provider.²⁴ While known for their reproductive services, Planned Parenthood provides a comprehensive range of services including well-woman exams, breast and cervical cancer screenings, vaccinations, and birth control.²⁵ They also provide services to men, including cancer and reproductive screenings.²⁶ Each year Planned Parenthood provides approximately 400,000 pap tests and 500,000 breast exams, which are essential services to detect cancer.²⁷ Planned Parenthood clinics complete more than “4.2 million tests and treatments for sexually transmitted infections, including more than 650,000 HIV tests.”²⁸

The majority of patients that Planned Parenthood treats are low-income and come from underserved communities. “In 2013, 78[%] of Planned Parenthood patients had incomes at or below 150[%] of the federal poverty level” and “[h]alf of Planned Parenthood patients are covered through Medicaid.”²⁹ Furthermore, “more than half of Planned Parenthood health centers are in rural or medically

22. 144 CONG. REC 27177 (1988) (statement of Sen. Nickles).

23. *Id.*

24. Emily Willingham, *Why We All Need Planned Parenthood*, FORBES (Nov. 29 2015), <https://www.forbes.com/sites/emilywillingham/2015/11/29/why-we-all-need-planned-parenthood/#7ff110ae5ae9> [<https://perma.cc/PW36-SQNZ>].

25. *FAQ*, PLANNED PARENTHOOD GULF COAST, INC. (2018), <https://www.plannedparenthood.org/planned-parenthood-gulf-coast/who-we-are/faq> [<https://perma.cc/9T2G-RNBN>].

26. Willingham, *supra* note 23.

27. *Planned Parenthood: Creating a Nation of Well Women*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/files/8614/2178/0677/CREATING_A_Nation_of_Well_Women.pdf [<https://perma.cc/8HRQ-M7EW>] (last visited Apr. 3, 2019).

28. Jessica Corbett, *Texas Study Shows How Defunding Planned Parenthood Actually Increased Abortion Rates*, COMMON DREAMS (July 14, 2017), <https://www.commondreams.org/news/2017/07/14/texas-study-shows-how-defunding-planned-parenthood-actually-increased-abortion-rates> [<https://perma.cc/9YVN-T825>].

29. Lydia Mitts & Shannon Attanasio, *Four Reasons Planned Parenthood is an Essential Health Care Provider*, FAMILIES USA (Jan. 13, 2017), <https://familiesusa.org/blog/2017/01/four-reasons-planned-parenthood-essential-health-care-provider> [<https://perma.cc/C55B-CG7H>].

underserved areas,” specifically providing essential services to Latinx and African American communities who often face health disparities as a community.³⁰ In 2013, “22[%] of the patients served by Planned Parenthood were Latino and 14[%] of Planned Parenthood patients were African American.”³¹ “Latinas and African American women are much more likely to die from cervical cancer than white women,” and ensuring that women of color have access to preventative screening that can detect cancer and other conditions early is critical to reducing these disparities.³² Planned Parenthood helps ensure timely access to care in areas where other care options may not be available geographically or financially. Access to Planned Parenthood services is especially dire given the healthcare shortage and limited capacity of other providers’ reach to provide patients that are currently served by Planned Parenthood.

THE MEDICAID FREEDOM OF CHOICE PROVISION.

The Medicaid FOC provision gives Medicaid beneficiaries the right to obtain medical care from a qualified and willing medical provider of their choosing. The question facing courts today is whether this provision provides a justiciable right under which a Medicaid beneficiary can seek redress in a court of law if their provider choice is either denied or not properly compensated for services rendered.

42 U.S.C. § 1983

As of August 2017, there is a circuit split over whether the Medicaid FOC provision creates a justiciable right under which a Medicaid beneficiary can judicially force a state to comply with the FOC provision.³³ This type of judicial claim would be initiated through 42 U.S.C. § 1983, which states:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act

30. *Id.*

31. *Id.*

32. *Id.*

33. *Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017).

of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.”³⁴

In general, 42 U.S.C. § 1983 gives remedial action under law to those that have been deprived of their constitutional rights, privileges, and immunities by an official’s abuse of his position. It is under this statute that Medicaid beneficiaries may bring claims against officials who prevent them from exercising their right to select a medical provider of their choice.³⁵ It is a method for vindicating federal rights elsewhere conferred by the United States Constitution and federal statute. However, 42 U.S.C. § 1983 section itself does not create substantive rights.³⁶

In order for an individual to state a claim for deprivation of rights under 42 USC § 1983, the plaintiff must show that: (1) the conduct complained of was committed by a person acting under color of law; (2) defendant’s conduct in fact deprived them of rights, privileges, or immunities secured by the Constitution or the laws of the United States; (3) defendant’s conduct caused deprivation of federal constitutional rights; and (4) defendant’s conduct must have been intentional, grossly negligent, or must have amounted to reckless or callous indifference to constitutional rights of others.³⁷ While these requirements are rigid, 42 USCS § 1983 should generally be construed liberally, and can encompass claims based on pure statutory violations of federal law, not only federal laws dealing with civil rights or equal protection.³⁸

Blessing test

While the Medicaid FOC provision states that Medicaid recipients have the right to choose a qualified provider of their choice, there must be consideration of whether this provision creates a right under which Medicaid recipients can adjudicate their right. In *Blessing v. Freestone*, the court held that three factors determine whether a statutory provision gives rise to a federal right.³⁹ First, Congress must have intended the provision to benefit the plaintiff.⁴⁰ Second, the plaintiff must demonstrate that the right asserted protected by the statute “is not so vague and amorphous that its enforcement would strain judicial competence.”⁴¹ Third, the statute must impose a binding obligation on the state.⁴²

34. 42 U.S.C. § 1983 (2018).

35. *Greenwood v. Peacock*, 384 US 808, 829 (1966).

36. *Baker v. McCollan* 443 US 137, 144 (1979).

37. *Neris v. Vivoni*, 249 F. Supp. 2d 146, 149 (D. P.R. 2003).

38. *Lake Country Estates, Inc. v Tahoe Reg’l Planning Agency*, 440 U.S. 391, 399-400 (1979); *Maine v. Thiboutot*, 448 U.S. 1, 24 (1980).

39. *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1970).

40. *Id.*

41. *Id.*

42. *Id.*

This is also explained as the provision giving rise to the asserted right must be couched in mandatory, rather than permissive terms.⁴³

If the plaintiff can show that a federal statute creates an individual right, this creates a rebuttable presumption that the right is enforceable, under 42 U.S.C. § 1983. 42 U.S.C. § 1983 provides civil action for a deprivation of rights by opening the judicial system's doors for adjudication of the claim and possible declaratory or injunctive relief. A court's inquiry will focus primarily on congressional intent. The court will dismiss the case if Congress foreclosed § 1983 as a remedy or created a different remedy structure or comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983. It is by this test that the circuits have considered whether the Medicaid FOC provision creates a justiciable right for Medicaid beneficiaries.⁴⁴

The Fifth, Sixth, Seventh, and Ninth Circuits holdings and analysis

Several appellate courts have considered whether Planned Parenthood is a qualified provider and therefore federal funding can be used to support the organization.⁴⁵ Employing substantially similar analyses, the Fifth, Sixth, Seventh, and Ninth Circuits have held that the Medicaid FOC provision not only creates a justiciable right for beneficiaries, but also that beneficiaries are substantially likely to succeed on the merits of their claims. In particular, the Fifth, Seventh, and Ninth Circuits have each considered statutes that go beyond the Hyde Amendment, preventing any federal or state funds from being given to any institution that performs elective abortions.

Each appellate court first considered whether plaintiffs have the right to sue under 42 U.S.C. § 1983. To establish a private right of action for a federal statutory right, a plaintiff must first establish that Congress intended the statute to create an enforceable right.⁴⁶ Congress enacted the Medicaid Act under its spending power. When Congress legislates pursuant to its spending power, it may only create mandatory federal requirements that are binding on states if it speaks with a "clear voice" and manifests an "unambiguous" intent to confer individual rights.⁴⁷ Therefore, a plaintiff seeking to enforce a provision of the Medicaid Act bears the burden to show that the provision unambiguously confers a right. Under the *Blessing* test, this requires that: (1) Congress intended the provision in question to benefit the plaintiff; (2) the right allegedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence; and (3) the statute "unambiguously imposes a binding obligation on the state by using mandatory, rather than precatory terms."⁴⁸

43. *Id.* at 329-30.

44. *Id.* at 341.

45. *Planned Parenthood Ariz., Inc. v. Betlach*, 727 F.3d 960, 963 (9th Cir. 2013); *Planned Parenthood of Ind., Inc. et al. v. Comm'r of the Ind. State Dep't of Health, et al.*, 699 F.3d 962, 968 (7th Cir. 2012); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 458-59 (5th Cir. 2017); *Harris v. Olszewski*, 442 F.3d 456, 460 (6th Cir. 2006).

46. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-84 (2002).

47. *Id.* at 280.

48. *Blessing v. Freestone*, 520 U.S. 329, 340 (1970).

Congress intended the Medicaid FOC provision to benefit individuals. This is evidenced by the fact that Congress used “rights-creating terms.” The FOC provision includes language that focuses on an individual’s eligibility for Medicaid and provides clear instructions for what states must do to ensure that beneficiaries receive services to which they are entitled.⁴⁹ Second, the FOC is not vague or amorphous in a way that makes it difficult for the court to enforce. Clear instructions regarding an individual’s right to choose a qualified provider are provided in the Act.⁵⁰ The appellate courts found that there is nothing ambiguous about the ordinary meaning of the term, “qualified provider.”⁵¹ Black’s Law Dictionary defines “qualified” as, one “possessing the necessary qualifications; capable or competent.”⁵² “A court can readily determine whether a state is fulfilling these statutory obligations by looking to sources such as a state’s Medicaid plan, agency records and documents, and the testimony of Medicaid recipients and providers.”⁵³ Thus the plaintiffs were determined to have met their burden in demonstrating that the FOC provision satisfies the second prong of the *Blessing* Test.⁵⁴

The third prong of the *Blessing* Test questions whether the “statute unambiguously imposes a binding obligation on the states.”⁵⁵ The appellate courts in this case found that the statute did this. By using the language “a State plan. . . must provide” and “shall not restrict the choice,” Congress has framed the rights it created in § 1396(a)(23) in mandatory terms.⁵⁶ Although a state does not have to participate in Medicaid, once it elects to participate, it must comply with requirements imposed by the Medicaid Act and regulations promulgated by the Secretary of Health and Human Services (Secretary).⁵⁷ However, since the Secretary may reject plans that do not comply with the FOC provision, the FOC provision is mandatory and unambiguously imposes a binding obligation on the state.⁵⁸

The Fifth, Sixth, Seventh, and Ninth Circuits not only found that Medicaid beneficiaries had a justiciable right, but also that these beneficiaries were likely to succeed in their claims. In *Planned Parenthood Ariz., Inc.*, the court held that Medicaid beneficiaries are likely to succeed on their claim that the Arizona Act violated the FOC provision.⁵⁹ The government’s determination of whether a provider is qualified must only relate to the provider’s ability to deliver Medicaid

49. 42 U.S.C. §§ 1396a(a)(23) (2018).

50. *Betlach*, 922 F. Supp. 2d at 862.

51. *Id.* at 863.

52. *Qualified*, BLACK’S LAW DICTIONARY (10th ed. 2014).

53. *Ball v. Rodgers*, 492 F.3d 1094, 1115 (9th Cir. 2007).

54. *Planned Parenthood Ariz., Inc. v. Betlach*, 899 F. Supp. 2d 868, 879 (D. Ariz. 2012).

55. *Blessing v. Freestone*, 520 U.S. 328, 347 (1997).

56. *Planned Parenthood Ariz., Inc. v. Betlach*, 899 F. Supp. 2d 868, 879 (D. Ariz. 2012).

57. *Id.* at 874 (quoting *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 502 (1990)).

58. *Id.* at 879.

59. *Id.* at 884. *See also* *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 465 (5th Cir. 2017); *Harris v. Olszewski*, 442 F.3d 456, 459-60 (6th Cir. 2006); *Planned Parenthood of Ind., Inc. v. Comm’r of the Ind. State Dep’t of Health*, 699 F.3d 962, 968 (7th Cir. 2012); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 962-63 (9th Cir. 2013).

services.⁶⁰ Black's Law Dictionary describes the plain meaning of the phrase "qualified provider" as "[providers that are] qualified to perform the service or services required," thus limiting freedom of choice to those providers that are competent to provide the needed services. The states' power to implement regulations allows them to "[s]et reasonable standards relating to the qualifications of the providers."⁶¹ So while the states unquestionably retain the authority to set reasonable standards related to the ability to provide competent service, qualifications are only allowed regarding the person's ability to provide adequate services.⁶² Therefore four appellate courts have found it likely for beneficiaries to succeed on the merits of their claim when their choice of a qualified provider is denied.

Eighth Circuit holdings and analysis

In 2015, receiving direction from the Governor of Arkansas, the Arkansas Department of Human Services terminated its Medicaid provider agreements with Planned Parenthood of Arkansas & Eastern Oklahoma following the release of illegally obtained video recordings edited to accuse Planned Parenthood doctors of selling fetal tissue.⁶³ In response, Planned Parenthood and three patients sued the Director of the Arkansas Department of Human Services "seeking a temporary restraining order and preliminary injunction to prevent the Department from terminating its Planned Parenthood's contract."⁶⁴

The district court approved the injunction preventing the Department from suspending payments for Medicaid beneficiaries, stating that Planned Parenthood, "provides[s] family planning services to men and women, including contraception and contraceptive counseling, screening for breast and cervical cancer, pregnancy testing and counseling, and early medication abortion."⁶⁵ The district court granted the preliminary injunction on the basis that the Medicaid FOC provision creates an enforceable private right for individual's under § 1983 and that the plaintiffs were likely to succeed in their claim.⁶⁶ However, on appeal, the Eighth Circuit denied the preliminary injunction to prevent the Arkansas Department of Human Services from suspending payments to Planned Parenthood of Arkansas & Eastern Oklahoma.⁶⁷ Breaking with circuits who have previously considered similar cases, the Eighth Circuit denied the injunction on

60. *Betlach*, 899 F. Supp. 2d at 883.

61. 42 C.F.R. § 431.51(c)(2) (2018).

62. *Betlach*, 899 F. Supp. 2d at 883-84.

63. *Does v. Gillespie*, 867 F.3d 1034, 1038 (8th Cir. 2017); Matt Hamilton, *Two Antiabortion Activists Behind Undercover Planned Parenthood Videos Charged with 15 Felonies*, LOS ANGELES TIMES (Mar. 28, 2017), <http://www.latimes.com/local/lanow/la-me-ln-planned-parenthood-charges-activists-20170328-story.html> [<https://perma.cc/2XM7-C44Q>].

64. *Gillespie*, 867 F.3d at 1038.

65. *Id.* at 1037.

66. *Id.* at 1038-39.

67. *Gillespie*, 867 F.3d at 1041-42 (holding in a split decision that § 1396a(a)(23) does not grant Medicaid patients an enforceable right).

the basis that patients receiving services from Planned Parenthood were unlikely to succeed on the merits of their § 1983 claim against the Arkansas Department of Human Services because the FOC provision of the Medicaid Act does not confer an unambiguous federal right.⁶⁸

In its consideration of the preliminary injunction, the Eighth Circuit applied the following process. The Eighth Circuit starts with the premise that, “a party seeking a preliminary injunction must demonstrate, among other things, a likelihood of success on the merits.”⁶⁹ It therefore first considers whether under a § 1983 analysis the plaintiff has established that Congress intended to create an enforceable federal right.⁷⁰ This forces the Eighth Circuit to acknowledge that previous decisions have indicated that the Medicaid Act was created to provide an enforceable rights to beneficiaries.⁷¹ For example, in *Wilder v. Virginia Hosp. Ass’n*, the Supreme Court held that the Boren Amendment to §13(A) of the Medicaid Act created a federal right for providers that was enforceable under § 1983. Despite this, the Eighth Circuit considers later decisions to have created a more “rigorous bar” for spending statutes, like the Medicaid Act.⁷² “It is now settled that nothing “short of an unambiguously conferred right” will support a cause of action under § 1983.”⁷³

The language of § 23(A) of the Medicaid Act requires a state Medicaid plan to “provide that . . . any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required... who undertakes to provide him such services.”⁷⁴ The Eighth Circuit disagrees that the FOC provision unambiguously creates an enforceable federal right for three reasons. First, it finds that the language of the Medicaid Act is “phrased as a directive to the federal agency charged with approving state Medicaid plans, not as a conferral of the right to sue upon the beneficiaries of the State’s decision to participate in Medicaid.”⁷⁵ As a directive to a federal agency, the Eighth Circuit

68. *Id.* at 1046 (holding in a split decision that § 1396a(a)(23) does not grant Medicaid patients an enforceable right). *See e.g.*, *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 457 (5th Cir. 2017) (1396a(a)(23) affords patients a private right of action under §1983). *See also*, *Harris v. Olszewski*, 442 F.3d 456, 461-62 (6th Cir. 2006); *Planned Parenthood of Ind., Inc. v. Comm’r of the Ind. State Dep’t of Health*, 699 F.3d 962, 974 (7th Cir. 2012); *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 963 (9th Cir. 2013); *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 182 (3d Cir. 2004).

69. *Munaf v. Geren*, 553 U.S. 674, 690 (2008).

70. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002).

71. *See Gillespie*, 867 F.3d at 1040 (referencing *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498 (1990) to note that when this case was decided the Eighth Circuit believed that the Medicaid Act created a justiciable right).

72. *See id.* *See also* *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1386-87 (2015) (finding that the Boren Amendment did not “clear[ly] and unambiguous[ly] intend enforceability under § 1983.”).

73. *Gonzaga Univ.*, 536 U.S. at 283.

74. 42 U.S.C. §1396(a)(23)(A) (2018).

75. *Gillespie*, 867 F.3d at 1045 (quoting *Armstrong*, 135 S. Ct. at 1387).

finds it unlikely that the Medicaid FOC provision was intended to create a justiciable right.⁷⁶

Second, the Eighth Circuit finds that because Congress provided other mechanisms to enforce the State's obligations to the Medicaid program, withholding federal funds from the state, it is reasonable to conclude that Congress did not intend to create an enforceable right for individual patients under § 1983.⁷⁷ Additionally, the Secretary has been authorized by Congress to implement regulations necessary for the management of state plans and develop an administrative appeals process to object to exclusion from the Medicaid program.⁷⁸ The court found that these provisions would lead to a parallel evaluation system and inconsistent results, contrary to their perceived intent of Congress.⁷⁹

Third, the Eighth Circuit reasons that “statutes with an ‘aggregate’ focus do not give rise to individual rights.”⁸⁰ The court adhered to its previous reasoning in *Midwest Foster Care & Adoption Ass’n v. Kincade*, “[where] a statute links funding to substantial compliance with its conditions—including forming and adhering to a state plan with specified features—this counsels against the creation of individually enforceable rights.”⁸¹ The court found the FOC provision to be a substantial compliance regime, because the Secretary is directed to discontinue payments to a State if he finds a substantial failure to comply with Medicaid program requirements.⁸²

The plaintiffs in *Doe v. Gillespie*, brought similar claims to those presented in other circuits. They alleged that the FOC provision refers to “any individual eligible for medical assistance” and that it speaks in mandatory language by saying that the state “must” allow a beneficiary to obtain assistance from a qualified provider.⁸³ Other circuits found that this “rights-creating language” supports an action under § 1983.⁸⁴ However, the Eighth Circuit in requiring a higher burden of “unambiguous intent,” believing that *Wilder* has been repudiated, does not find sufficient evidence to conclude that the plaintiffs were likely to succeed in their claim.⁸⁵

CONCLUSION

The issue of access to care and provider choice for Medicaid beneficiaries goes to the heart of who has access to adequate and essential reproductive care

76. *Id.* at 1041. *See also* *Univ. Research Ass’n, Inc. v. Coutu*, 450 U.S. 754, 756, 767-69 (1981); *Gonzaga*, 536 U.S. at 287; *Blessing v. Freestone*, 520 U.S. 328, 343 (1997).

77. *Gillespie*, 867 F.3d at 1041 (citing 42 U.S.C. § 1396c (2018)).

78. *Id.* (citing 42 U.S.C. § 1396a(a)(4) (2018)); 42 C.F.R. § 1002.213 (2018).

79. *Gillespie*, 867 F.3d at 1041.

80. *Id.* at 1042 (quoting *Gonzaga Univ. v. Does*, 536 U.S. 273, 288 (2002)).

81. *Midwest Foster Care & Adoption Ass’n v. Kincade*, 712 F.3d 1190, 1200 (8th Cir. 2013).

82. *Gillespie*, 867 F.3d at 1042.

83. *Id.* at 1040 (citing 42 U.S.C. § 1396a(a)).

84. *Id.* at 1042.

85. *Id.* at 1042, 1044.

and under what circumstances. Recent political momentum has targeted Planned Parenthood, despite its importance as an essential healthcare provider of primary and reproductive care.⁸⁶ From *Griswold v. Connecticut* to *Roe v. Wade*, the Supreme Court has upheld a woman's right to access reproductive healthcare. Now with the circuit split decision of the Eighth Circuit and its fundamentally different analysis of state action to end funding to Planned Parenthood, the Supreme Court must weigh in to establish whether all persons have a right to access healthcare from a provider of their choosing, or if this right is only extended to those of economic means.

86. Kinsey Hasstedt, *Beyond the Rhetoric: The Real-World Impact of Attacks on Planned Parenthood and Title X*, GUTTMACHER INSTITUTE (Aug. 3, 2017), <https://www.guttmacher.org/gpr/2017/08/beyond-rhetoric-real-world-impact-attacks-planned-parenthood-and-title-x> [<https://perma.cc/9YCT-ZNU6>].