

**TESTIMONY**

**BEFORE THE HEALTH SUBCOMMITTEE  
OF THE  
HOUSE COMMITTEE ON ENERGY AND COMMERCE**

**ON**

**"PROTECTING INFANTS: ENDING TAXPAYER FUNDING FOR  
ABORTION PROVIDERS WHO VIOLATE THE LAW"**

**BY**

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**SEPTEMBER 17, 2015**

Despite providing only a limited selection of medical services,<sup>1</sup> Planned Parenthood annually receives over a half billion in taxpayer dollars.<sup>2</sup> Last year alone, the non-profit also reported \$127 million “excess revenue.”<sup>3</sup> Over the last ten years, while its Medicaid funding has increased and it has accumulated approximately \$750 million in “excess revenue,”<sup>4</sup> Planned Parenthood has reduced its cancer screenings by half<sup>5</sup> and increased its abortions, even as the national abortion rate has declined. Planned Parenthood receives taxpayer dollars from multiple revenue streams (*e.g.*, federal funds flow through state and regional health agencies to Planned Parenthood affiliates, primarily through several provisions of the Social Security Act: Temporary Assistance to Needy Families (TANF) (Title IV); Maternal and Child Health Services Grants (Title V); the Federal Family Planning Program (Title X); Medicaid Family Planning (Title XIX) and the Social Security Block Grant Program (Title XX)),<sup>6</sup> but the great majority of Planned Parenthood’s taxpayer funding comes from Medicaid.

Yet, Planned Parenthood is unlike many other Medicaid providers. Not only has it had great financial success as a Medicaid provider, but also it has been able to avoid much of the oversight and/or corrective action that most Medicaid providers would expect and have received.

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<sup>1</sup> See <http://www.plannedparenthood.org/> for a list of the limited services that Planned Parenthood provides (last visited Sept. 15, 2015).

<sup>2</sup> See, *e.g.*, [http://issuu.com/actionfund/docs/annual\\_report\\_final\\_proof\\_12.16.14\\_/0](http://issuu.com/actionfund/docs/annual_report_final_proof_12.16.14_/0) (last visited Sept. 15, 2015).

<sup>3</sup> *Id.*

<sup>4</sup> See Planned Parenthood Federation of America Annual reports 2004 – 2014.

<sup>5</sup> Compare Planned Parenthood Federation of America’s 2004-2005 Annual Report to Planned Parenthood Federation of America’s 2013-2014 Annual Report.

<sup>6</sup> See Alan Guttmacher Institute, *Public Funding for Contraceptive, Sterilization and Abortion Services*, <https://www.guttmacher.org/pubs/Public-Funding-FP-2010.pdf> (last visited Sept. 15, 2015).

Moreover, between local affiliates and the national organization, Planned Parenthood has spent many millions of dollars to support the election of its preferred candidates.<sup>7</sup>

In the wake of the videos released by the Center for Medical Progress (“CMP”), many states are now re-examining Planned Parenthood affiliates and their participation in their state Medicaid programs. The videos appear to show evidence of violations of federal and state laws as well as serious ethical concerns. This only adds to the mounting evidence of waste, abuse and potential fraud, the failure to report suspected statutory rape and sex trafficking, and other violations of state and federal laws.

States considering termination of Medicaid Provider Agreements with Planned Parenthood are well within their rights. Actions being considered by Congress may further clarify that it is the states who are empowered to conduct their own Medicaid programs and that the federal government or the courts may not compel them to qualify providers that violate federal or state law, act unethically, or which the state concludes are otherwise not suitable for participation in its Medicaid program.

To understand the rights and obligations states have when they choose to terminate Planned Parenthood’s participation in their state Medicaid programs, it is necessary to briefly review the structure of the Medicaid program and states’ responsibilities for developing and administering their own programs, including determination of the provider qualifications. I will also address the obstacles states have faced and are facing from the current Administration in choosing to disqualify Planned Parenthood from their state Medicaid programs, as well as the grounds states have to terminate Planned Parenthood from Medicaid.

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<sup>7</sup> Planned Parenthood gave \$18 million to political action committees in 2014 and 2012, according to the Center for Responsive Politics. Most of its nearly \$6 million in direct contributions since 1990 have gone to pro-abortion candidates. See, e.g., <https://www.opensecrets.org/orgs/summary.php?id=D000000591&cycle=2014> (last visited Sept. 15, 2015); <https://www.opensecrets.org/orgs/summary.php?id=D000000591&cycle=2012> (last visited Sept. 15, 2015); <https://www.opensecrets.org/orgs/totals.php?id=D000000591&cycle=2014> (last visited Sept. 15, 2015).

## I. The Role of States in Medicaid

Medicaid is a federal-state cooperative program that subsidizes states' provision of medical services to "families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396-1. The federal government shares the costs of Medicaid with states that elect to participate in the program. In return, participating states agree to comply with requirements imposed by the Medicaid Act.<sup>8</sup>

The states operate their own state Medicaid programs within federal guidelines. On the federal level, Congress has delegated the authority to regulate these state-administered programs to the U.S. Department of Health and Human Services' Centers for Medicare and Medicaid Services ("CMS"). Each state develops its own Medicaid plan to serve the needs of its citizens. CMS then evaluates and approves these state plans, *i.e.*, a "state approved plan" or "SAP," by which a state agency administers the program.<sup>9</sup>

The Medicaid program guarantees states "flexibility in designing plans that meet their individual needs" and "considerable latitude in formulating the terms of their own medical assistance plans." *Addis v. Whitburn*, 153 F.3d 836, 840 (7th Cir. 1998) (citing *Dandridge v. Williams*, 397 U.S. 471, 487 (1970)). States enjoy "considerable autonomy" under Medicaid to "select dramatically different levels of funding and coverage, alter and experiment with different financing and delivery modes, and opt to cover (or not to cover) a range of particular procedures and therapies. States have leveraged this policy discretion to generate a myriad of dramatically different Medicaid programs over the past several decades." *National Federation of Independent Businesses v. Sebelius*, 132 S.Ct. 2566, 2632 (2012) (Ginsburg, J., concurring in part and

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<sup>8</sup> The Medicaid Act is found in Title XIX of the Social Security Act, 42 U.S.C. §§1396–1396v. Regulations relating to the Medicaid Act are contained in Chapter IV, Title 42 and subtitle A, Title 45 Code of Federal Regulations.

<sup>9</sup> See 42 C.F.R. § 431.10.

dissenting in part), quoting Ruger, *Of Icebergs and Glaciers*, 75 LAW & CONTEMP. PROBS. 215, 233 (2012). This flexibility and wide latitude reflects the fact that when a state acts within its core or natural sphere of operation, such as regulating medical care,<sup>10</sup> or expends its own funds as a state does in providing its cooperative share for Medicaid, attention to the principles of federalism is all the more critical.

In keeping with this wide latitude for state authority, Medicaid regulations permit states to establish “reasonable standards relating to the qualifications of providers.” 42 C.F.R. § 431.51(c)(2).

## **II. Disqualification or Exclusion of Medicaid Providers.**

Termination of a provider from the program, or “exclusion” as CMS refers to it (*see* 42 U.S.C. § 1396a(p)(3) (“As used in this subsection, the term ‘exclude’ includes the refusal to enter into or renew a participation agreement or the termination of such an agreement.”)), occurs when a state Medicaid program revokes a Medicaid provider’s billing privileges, and the provider has exhausted all applicable appeal rights or the timeline for appeal has expired. Consistent with the states’ role in determining the qualification of providers in their state Medicaid programs – and regulating the practice of medicine within the state generally, CMS ordinarily defers to state law regarding terminations. In the relatively rare cases in which a provider’s termination from the state Medicaid program has been challenged, courts have also typically deferred to state decisions to terminate Medicaid providers from their state Medicaid programs.

While Medicaid vests the responsibility of determining provider qualification with the states, it also authorizes the federal government to exclude providers in some cases. Federal law

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<sup>10</sup> *Pa. Med. Soc’y v. Marconis*, 942 F.2d 842, 847 (3d Cir. 1991) (“The licensing and regulation of physicians is a state function . . . . Thus, the state regulation is presumed valid. To rebut this presumption, appellants must show that Congress intended to displace the state’s police power function.”).

enumerates circumstances under which the federal Secretary of HHS *must* terminate a Medicaid provider. These include conviction for program-related crimes (42 U.S.C. § 1320a-7(a)(1)); conviction related to patient abuse or neglect (42 U.S.C. § 1320a-7(a)(2)); felony conviction for health care fraud (42 U.S.C. § 1320a-7(a)(3)); and felony conviction relating to controlled substances (42 U.S.C. § 1320a-7(a)(4)).<sup>11</sup>

The Medicaid statute also provides grounds for which the U.S. Department of Health and Human Services, in its discretion, may exclude a provider.<sup>12</sup> These include claims for excessive charges, unnecessary services, or services which fail to meet professionally recognized standards of health care (42 U.S.C. § 1320a-7(b)(6)); fraud, kickbacks, and other prohibited activities (42 U.S.C. § 1320a-7(b)(7)); entities controlled by a sanctioned individual (42 U.S.C. § 1320a-7(b)(8)); failure to disclose required information, supply requested information, or supply payment information (42 U.S.C. § 1320a-7(b)(9)-(11)); sanctioned individuals controlling an entity (42 U.S.C. § 1320a-7(b)(15)); and making false statements or misrepresentations of material fact (42 U.S.C. § 1320a-7(b)(16)). The Secretary may also exclude when a provider has not complied with its obligation to ensure that services or items “will be provided economically and only when, and to the extent, medically necessary;” “will be of a quality which meets professionally recognized standards of health care;” and “will be supported by evidence of medical necessity and quality....” 42 U.S.C. § 1320c-5.

The powers of a state Medicaid program to exclude a provider are broader than those of the federal government. A state Medicaid program may also exclude a health care provider from participation “for any reason for which the Secretary could exclude the [provider] from

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<sup>11</sup> See generally, HHS OIG, Exclusion Authorities, *available at* <http://oig.hhs.gov/exclusions/authorities.asp> (last visited Sept. 15, 2015).

<sup>12</sup> These include 42 U.S.C. §§ 1320a-7(b)(1)(A) and (B); 1320a-7(b)(2)-(8); 1320a-7(b)(8)(A); 1320a-7(b)(9)-(16); and 1320c-5. See HHS OIG, *Exclusion Authorities*, *supra* n13.

participation” (*i.e.*, the grounds for discretionary exclusion enumerated above) “[i]n addition to any other authority.” 42 U.S.C. § 1396a(p)(1) (emphasis added). The phrase “[i]n addition to any other authority” “permit[s] a state to exclude an entity from its Medicaid program *for any reason established by state law.*” *First Med. Health Plan v. Vega-Ramos*, 479 F.3d 46, 53 (1st Cir. 2007) (emphasis added).

The First Circuit observed that the legislative history of the Medicaid Act rejected a narrower view of the state’s power to disqualify providers.

The [Medicaid exclusion] statute expressly grants states the authority to exclude entities from their Medicaid programs for reasons that the Secretary could use to exclude entities from participating in Medicare. But it also preserves the state’s ability to exclude entities from participating in Medicaid under ‘any other authority.’ The legislative history clarifies that this ‘any other authority’ language was intended to permit a state to exclude an entity from its Medicaid program for *any reason established by state law.* The Senate Report states:

The Committee bill clarifies current Medicaid Law by expressly granting states the authority to exclude individuals or entities from participation in their Medicaid programs for any reason that constitutes a basis for an exclusion from Medicare. . . . *This provision is not intended to preclude a state from establishing, under state law, any other bases for excluding individuals or entities from its Medicaid program.*

*Id.* (emphasis by the court) (*quoting* S. Rep. 100-109, reprinted in 1987 U.S.C.C.A.N. at 700).

Thus, consistent with principles of federalism and the sovereign right of states to regulate the medical profession within their borders and to expend their own taxpayers’ funds, states have congruent authority with the federal government to terminate providers for reasons that would satisfy the Secretary, as well as their own authority to exclude providers for violations of state law.

State statutes implementing this authority provide for exclusion based on license revocation by the state licensing agency; refusal to grant access to Medicaid-related records to the state Department or Auditor; provision of goods or services that are unnecessary or of

inferior quality; false claims or statements; or being found liable for neglect of patients resulting in death or injury.<sup>13</sup> Numerous courts have upheld the exercise of this broad authority for many reasons that advance state law and policy, including suspected fraud (*Guzman v. Shewry*, 552 F.3d 941, 950 (9th Cir. 2009)); conflicts of interest (*Vega-Ramos*, 479 F.3d at 49-50); engaging in industrial pollution (*Plaza Health Laboratories, Inc. v. Perales*, 878 F.2d 577, 578-79 (2d Cir. 1989)); and inadequate record-keeping (*Triant v. Perales*, 491 N.Y.S.2d 486, 488 (N.Y. App. Div. 1985)). Medicaid providers are also subject to other state laws regulating medical providers, including health and safety standards, informed consent requirements, mandatory reporting for sexual abuse of minors, and other similar laws. Violations of these state laws may also result in termination of a provider's Medicaid agreement.

### **III. Administration Action to Diminish State Authority Over Their Medicaid Programs**

In 2011, Indiana, concerned that state taxpayer dollars indirectly support abortion when abortionists participate in the state Medicaid program, determined that abortionists would not be qualified as providers under Indiana's Medicaid program.<sup>14</sup> With Planned Parenthood immediately launching litigation against the state, CMS issued a new interpretation of 42 U.S.C. §1396a(a)(23) that purports to limit states' authority to set qualifications of providers on the ground that doing so would deny an individual a "free choice of [] provider." CMS has recently sent letters to some states after they chose to disqualify Planned Parenthood as a provider pursuant to the terms of their Medicaid Provider Agreement. CMS asserts that the actions violate its interpretation of the "free choice of [] provider" provision.

Section 1396a(a)(23) of the Medicaid Act provides that Medicaid patients may obtain medical services "from any institution, agency, community pharmacy, or person, qualified to

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<sup>13</sup> Alice G. Gosfield, *MEDICARE AND MEDICAID FRAUD AND ABUSE* § 4:15 (2015).

<sup>14</sup> Arizona later took a very similar action for the same reasons.

perform the service or services required . . . who undertakes to provide him such services.” This “free choice of qualified provider” provision – inaccurately, but frequently, referred to as the “free choice of [] provider,” provision by the current CMS and Planned Parenthood – gives Medicaid patients “the right to choose among a range of qualified providers, without government interference.” *O’Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980).

In the wake of this CMS interpretation, the Seventh and Ninth Circuits have held on the basis of the Medicaid “free choice of qualified provider” provision that states may not exclude an entire *class* of otherwise qualified family planning service providers from participation in a Medicaid program on the basis that the class of providers performed induced abortions.<sup>15</sup> These circuits held that state Medicaid programs may not disqualify a “class” of providers based on their “scope of service,” namely their participation in providing elective abortion. But both before and even after these decisions, Courts have made clear that when a State disqualifies an individual provider under either federal or state law, or because of concerns about ethics, safety, or professional competency, the termination should be upheld. *Planned Parenthood of Ind. v. Comm’r*, 699 F.3d 962, 968 (7th Cir. 2012), *cert. den.*, 133 S.Ct. 2738 (2013) (“Indiana has **broad authority to exclude unqualified providers** from its Medicaid program,” including whether the state believes they cannot provide services in a “professionally **competent, safe, legal, and ethical** manner.”).

Exclusion of Medicaid providers for a variety of reasons is relatively common and rarely challenged. According to the HHS Office of the Inspector General, over 9,000 providers have been excluded as Medicaid providers over the last two decades.<sup>16</sup> Exclusion of a Medicaid

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<sup>15</sup> *Planned Parenthood of Az., Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013), *cert. den.*, 134 S.Ct. 1283 (2014); *Planned Parenthood of Indiana, Inc. v. Commr., Indiana State Dept. of Health*, 699 F.3d 962 (7th Cir. 2012), *cert. den.*, 133 S.Ct. 2738 (2013).

<sup>16</sup> See <http://oig.hhs.gov/exclusions/index.asp> (last visited Sept. 15, 2015).

provider is thus nothing new. It is a common experience for states to suspend or terminate a Medicaid provider's participation in the program. Medicaid providers cannot usually rely upon the support of the federal government – including reinterpretation of the Medicaid Act – when a state disqualifies them from its state Medicaid program. Planned Parenthood is a unique case.

Where a state has cause, under state or federal law or for ethical reasons, to exclude an individual provider, there should be little doubt that the state may terminate its Medicaid agreement with such a provider. Neither the *Betlach* nor *Planned Parenthood of Ind.* decisions suggest otherwise.

Finally, it should be noted that the disqualification of Planned Parenthood from any state Medicaid program would not deny anyone a meaningful choice of providers. Planned Parenthood represents a very small part of the Medicaid-eligible providers in every state. And in some states like Louisiana, Arkansas and Alabama, which have already terminated their Medicaid Provider Agreements with Planned Parenthood, Planned Parenthood has only two locations in each state. By comparison, there are 294 Federally Qualified Health Center and Rural Health Clinic delivery sites in Louisiana, 234 in Alabama, and 179 in Arkansas. Nationally, there are over 13,000 FQHC sites and RHC sites providing primary care and more comprehensive care overall than Planned Parenthood offers.<sup>17</sup> These maps do not even include the thousands of private physicians who also accept Medicaid. Fewer than 2% of all women actually use Planned Parenthood for any service in any given year.<sup>18</sup> And even those women must also seek care elsewhere for any services beyond those limited services Planned Parenthood

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<sup>17</sup> See <https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/mlnProducts/Downloads/rhclistbyprovidername.pdf> (last visited Sept. 15, 2015) and <http://datawarehouse.hrsa.gov/Data/datadownload/hccDownload.aspx> (last visited Sept. 15, 2015). Federally Qualified Health Clinics (“FQHC”) and “Look Alikes” provide primary and preventive medical care and enabling services. Rural Health Clinics also offer primary and preventive medical services.

<sup>18</sup> See <http://www.politifact.com/truth-o-meter/statements/2015/jul/31/harry-reid/harry-reid-says-30-women-rely-only-planned-parent/> (last visited Sept. 15, 2015).

offers. Termination of Planned Parenthood from any state’s Medicaid program would not meaningfully limit the choice of a wide range of Medicaid providers.

#### **IV. Potential Bases of Termination for Cause.**

States considering termination of Planned Parenthood’s Medicaid agreement may have several bases to do so – stemming from the videos and also from other violations of state and federal laws. As discussed above, states have “broad authority to exclude unqualified providers from [their] Medicaid program[s],” where the state lacks confidence that the provider is “capable of performing the needed medical services in a professionally competent, safe, **legal**, and **ethical** manner.” *Planned Parenthood of Ind.*, 699 F.3d at 978 (emphasis added). A few of those examples are discussed below. Other Medicaid providers in Planned Parenthood’s position, but lacking the active support of the Administration, would not be surprised to find that a state had terminated their Medicaid Provider Agreement.

##### **1. Pending Investigation.**

States may terminate a medical provider during a pending investigation. *Guzman*, 552 F.3d at 949. *Guzman* demonstrates the broad authority which states have to set reasonable standards for participation in Medicaid, and the latitude that states enjoy to exclude providers under state law. In 2006, the California Department of Health Care Services opened an investigation into certain potentially fraudulent claims. *Guzman*, an obstetrician/gynecologist, had submitted for payment claims for large quantities of intrauterine devices (“IUDs”) from Mexico which were not approved by the FDA for use in the United States. *Guzman* argued that federal law prohibited States from suspending providers from a state health care program simply because the provider is “under investigation” for fraud or abuse. The Ninth Circuit, however, disagreed, noting that “[t]he Medicaid statutes contain ‘no explicit preemptive language’ limiting

the grounds upon which a state may suspend a provider from a state health care program” and that “nothing in the federal Medicaid statutes or regulations prevents a state from suspending a provider temporarily from a state health care program on the basis of an ongoing investigation for fraud or abuse.” 552 F.3d at 949-50. The Court concluded that because Medicaid refers to “other authority” to exclude retained by the States, “[t]his provision plainly contemplates that states have the authority to suspend or to exclude providers from state health care programs for reasons other than those upon which the Secretary of HHS has authority to act.” *Id.* “[N]ot only does the applicable federal statute fail to prohibit states from suspending providers from state health care programs for reasons other than those upon which the Secretary of HHS may act, the governing regulation specifically instructs that states have such authority.” *Id.* at 950.

Planned Parenthood affiliates and clinics are, of course, the subject of ongoing investigations in numerous states and by several congressional committees. States may suspend Medicaid payments to Planned Parenthood affiliates during these investigations into violations of state and federal law.

## **2. Fiscal Fraud, Waste and Abuse.**

Alliance Defending Freedom issues an annual report to Congress compiling and detailing the known public government audits of Planned Parenthood waste, abuse, and potential fraud involving taxpayer funds.<sup>19</sup> The report details several dozen known public audits of Planned Parenthood affiliates that have uncovered waste, abuse, and potential financial fraud, and suggests that Planned Parenthood and its affiliates are engaged in a pattern of practices designed

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<sup>19</sup> *Profit. No Matter What. Alliance Defending Freedom's Annual Report on Publicly Available Audits of Planned Parenthood Affiliates and State Family Planning Programs*, July 23, 2014, available at <http://www.adflegal.org/detailspages/press-release-details/adf-congressional-report-exposes-planned-parenthood-s-ongoing-taxpayer-abuse> (last visited Sept. 15, 2015).

to maximize their revenues through billings to these complex programs that rely on the integrity of the provider for program compliance.

Forty-four known but scope-limited public audits of Planned Parenthood affiliates in just nine states have revealed over \$8 million in overpayments to Planned Parenthood from the Medicaid program. Additionally, another fifty-one limited federal audits of state family planning programs have also identified another \$107 million in overbilling. These also demonstrated that in many cases federal taxpayer dollars are paying for abortions despite claims to the contrary. The federal audits detailed “unbundling” billing schemes related to pre-abortion examinations, counseling visits, and other services performed in conjunction with an abortion; and improper billing for the abortions themselves.<sup>20</sup>

In New York, alone, during one four-year audit period, it appeared that hundreds of thousands of abortion-related claims were billed unlawfully to Medicaid. While these federal HHS-OIG audits do not usually identify specific providers, two of these federal audits specifically identified Planned Parenthood as overbilling the state family planning program. Moreover, seven of the federal HHS-OIG audits were of New York State and found federal overpayments in excess of \$32 million to the New York State Medicaid family planning program. These audits likely led to the seven state audits of New York Planned Parenthood affiliates. Thirteen months after the federal audit of New York State that identified “especially Planned Parenthoods” as incorrectly claiming services as family planning, New York State released its first known audit report of a Planned Parenthood affiliate.<sup>21</sup>

Moreover, in *United States ex. rel. Reynolds v. Planned Parenthood Gulf Coast*, No. 9:09-cv-124 (E.D. Tex.), the Planned Parenthood affiliate paid \$4.3 million to settle a False

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<sup>20</sup> *Id.*, Supra n. 19.

<sup>21</sup> *Id.*

Claims Act lawsuit by a former employee alleging Medicaid fraud. The Justice Department intervened in the lawsuit to prosecute the violations. The settlement agreement states:

“The United States contends that PPGC submitted false claims and made false statements to the United States in connection with claims PPGC submitted to the United States” under Medicaid and other programs.<sup>22</sup>

Other Planned Parenthood clinic directors have also filed lawsuits under the False Claims Act alleging many millions more in Medicaid fraud.<sup>23</sup> For example, Sue Thayer is a former Planned Parenthood clinic director who worked for seventeen years in Iowa Planned Parenthood clinics. She alleged over \$20 million dollars in Medicaid fraud by Planned Parenthood of the Heartland. The United States Court of Appeals for the Eighth Circuit held last year that her claims could proceed, holding:

[W]e conclude that Thayer has pled sufficiently particularized facts to support her allegations that Planned Parenthood violated the FCA by filing claims for (1) unnecessary quantities of birth control pills, (2) birth control pills dispensed without examinations or without or prior to a physician’s order, (3) abortion-related services, and (4) the full amount of services that had already been paid, in whole or in part, by ‘donations’ Planned Parenthood coerced from patients.

*U.S. ex. rel. Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914 (8th Cir. 2014).

Confirming that these are not isolated incidents, seven former Planned Parenthood employees informed the House Energy and Commerce Subcommittee on Oversight and Investigations in another investigation that “PPFA failed to properly account for and maintain separation between government funds prohibited from use for elective abortions and [other,

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<sup>22</sup> See Settlement Agreement in *United States ex. rel. Reynolds v. Planned Parenthood Gulf Coast*, available at <http://www.scribd.com/doc/157465464/Planned-Parenthood-Gulf-Coast-4-3-Million-Settlement-Agreement-with-Government> (last visited Sept. 15, 2015).

<sup>23</sup> See, e.g., *United States ex. rel. Susan Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914 (8th Cir. 2014); see also <http://www.adfmedia.org/News/PRDetail/5395> (last visited Sept. 15, 2015).

unrestricted] funds....”<sup>24</sup> Further, “PPFA failed to engage in appropriate financial controls and billing practices to ensure compliance with applicable state and federal laws.”<sup>25</sup>

State Medicaid determinations that a provider committed Medicaid fraud or submitted wasteful claims are a valid basis for disqualifying any provider, including Planned Parenthood, from participation in state Medicaid programs.

### **3. Failure to Make Mandatory Reports of Minor Sexual Abuse.**

All fifty states and U.S. territories and the District of Columbia require reporting of suspected neglect or abuse of children, including sexual abuse.<sup>26</sup> These reporting laws typically include statutory rape.<sup>27</sup> Medical professionals are almost always specifically included in statutory lists of mandatory reporters of suspected abuse or neglect of children.<sup>28</sup>

Despite these state laws, Planned Parenthood affiliates across the country have repeatedly demonstrated a willful refusal to protect children from sexual predators. Alliance Defending Freedom’s report, “How Planned Parenthood ‘Cares’ for Child Victims of Sexual Abuse: A Summary of Planned Parenthood Failing to Report Sexual Abuse,”<sup>29</sup> documents numerous reports of civil and criminal actions in seven states that involve Planned Parenthood apparently covering up or enabling statutory rape. Most recently, a Planned Parenthood location in Mobile, Alabama failed to report the suspected sexual abuse of a 14 year-old, who came to Planned

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<sup>24</sup> Letter from Catherine Adair et al., Former Employees of Planned Parenthood Affiliates, to Fred Upton, Chairman, U.S. House of Representatives Energy and Commerce Committee, & Henry Waxman, Ranking Member, U.S. House of Representatives Energy and Commerce Committee (Dec. 7, 2011), *available at* <http://www.sba-list.org/suzy-b-blog/former-planned-parenthood-employees-speak-out> (last visited Sept. 15, 2015).

<sup>25</sup> *Id.*

<sup>26</sup> See <http://www.ncsl.org/research/human-services/redirect-mandatory-rprt-g-of-child-abuse-and-neglect-2013.aspx> (last visited Sept. 15, 2015).

<sup>27</sup> The Lewin Group, *Statutory Rape: A Guide to State Laws and Reporting Requirements*, prepared for the Office of the Assistant Secretary for Planning and Evaluation, Department of Health and Human Services, Dec. 15, 2004, p.14.

<sup>28</sup> According to the National Conference of State Legislatures, the laws in 48 states, in addition to U.S. territories, list groups of individuals who are required to report include health-care providers; New Jersey and Wyoming do not provide a specific list of professionals required to report. See <http://www.ncsl.org/research/human-services/child-abuse-and-neglect-reporting-statutes.aspx> (last visited Sept. 15, 2015).

<sup>29</sup> See <http://www.adfmedia.org/News/PRDetail/9746>.

Parenthood for two abortions in a 5 month period last year.<sup>30</sup> In Ohio, another 14 year-old girl was impregnated by her adult soccer coach, and Planned Parenthood performed an abortion without the notification or consent of either of her parents. The coach was later found guilty of 7 counts of sexual battery.<sup>31</sup>

Live Action, through its undercover investigations, has repeatedly caught Planned Parenthood employees deliberately ignoring age disparities between young girls and the men who prey on them, advising the girls not to disclose to them the age of the men, or instructing minors how to circumvent parental notification laws.<sup>32</sup> Several years ago, Life Dynamics also conducted undercover calls to Planned Parenthood affiliates with similar shocking results.<sup>33</sup>

Sex trafficking also appears to be a nationwide problem that Planned Parenthood has washed its hands of. Statistics from the Department of Justice indicate that over 100,000 children in the U.S. fall victim to sex-trafficking each year, and 300,000 to 400,000 American children are involved in some form of sex-trafficking annually.<sup>34</sup> Live Action videos documented seven Planned Parenthood clinics in four different states willing to aid and abet the sex-trafficking of minor girls by supplying confidential birth control, STD testing, and secret abortions to underage girls and their traffickers.<sup>35</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See <http://www.lifesitenews.com/news/vindicated-live-action-busted-indy-planned-parenthood-for-covering-up-statu>. Several videos of these undercover operations can be viewed at <http://www.liveaction.org/monalisa/> (last visited Sept. 15, 2015).

<sup>33</sup> Life Dynamics maintains copies of the recorded calls and transcripts from its investigation on its website, as well as an excellent report on this subject, including examples from Planned Parenthood and other abortion businesses. See <http://www.childpredators.com/the-child-predator-report/> (last visited Sept. 15, 2015).

<sup>34</sup> See [http://ojp.gov/newsroom/factsheets/ojpbs\\_humantrafficking.html](http://ojp.gov/newsroom/factsheets/ojpbs_humantrafficking.html) (last visited Sept. 15, 2015).

<sup>35</sup> Live Action, "Trafficking Project," available at <http://liveaction.org/download-live-action-videos/> (last visited Sept. 15, 2015).

#### **4. Violations of Federal Laws Relating to Fetal Tissue Procurement.**

As previously noted, a state’s finding that a Planned Parenthood affiliate has failed to act in an ethical manner may also support a state’s exclusion of that provider. Numerous recent reports of Planned Parenthood affiliates engaged in the practice of post-abortion fetal organ harvesting, the involvement of national Planned Parenthood officials in this practice, and misleading government officials regarding this conduct may provide the basis for exclusion.

42 U.S.C. §289g-2 states “It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration. The law narrowly exempts certain “reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue.” Further, although 42 U.S.C. §289g-1 allows the federal government to “conduct or support research on the transplantation of human fetal tissue for therapeutic purposes,” this statute specifically requires informed consent by the woman for whom the abortion is being performed, as well as all of the researchers who receive the fetal tissue. And it strictly prohibits any “alteration of the timing, method, or procedures used to terminate the pregnancy . . . solely for the purposes of obtaining the tissue.”<sup>36</sup>

While Planned Parenthood claims that it only receives reimbursement for expenses, there is substantial evidence – from the videos and otherwise – that Planned Parenthood was receiving payments that more than compensated any actual expenses. First, Stem Express, the for-profit organ harvesting company with which Planned Parenthood affiliates in California were working, publicly claimed that it was providing “fiscal rewards” and “financial profits” to abortion clinics

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<sup>36</sup> See Hans von Spakovsky, “The Justice Department Needs to Investigate Planned Parenthood, National Review Online, Jul. 31, 2015, *available at* <http://www.nationalreview.com/article/421870/planned-parenthood-videos-criminal-investigation-loretta-lynch> (last visited Sept. 15, 2015).

in its marketing materials endorsed by Planned Parenthood executives.<sup>37</sup> This is a company that had an ongoing contractual relationship with Planned Parenthood in its own words, in a flyer bearing the endorsement of Planned Parenthood.

Moreover, there appears to be no dispute that Planned Parenthood was not transporting organs or storing them for Stem Express. Rather, Stem Express employees came to Planned Parenthood locations, harvested the organs they wanted, and left with them themselves. While Planned Parenthood officials and defenders have continued to repeat that the payments they received only covered costs for “transportation,” “packaging,” and other expenses they have not explained how they would have any expenses for these items given Stem Express’s on site procurement methods. Cecile Richards has conceded that Planned Parenthood was receiving \$60 payments for each harvested organ,<sup>38</sup> but has made no attempt to actually connect this payment to any permissible reimbursable expenses. The CMP videos only confirm these facts. In multiple videos Planned Parenthood officials are negotiating prices for organs. At best they acknowledge a need to find a price they can defend, but not one that actually reimburses them for actual statutorily specified expenses.

Cecile Richards also acknowledged to Congress that its abortionists will “adjust” abortion procedures in order to obtain specimens. Federal law prohibits alteration of the timing or methods of abortion procedures for this purpose. 42 U.S.C. §289g-1. This law protects women from being coerced into more dangerous abortion procedures for the financial benefit of a for-profit harvesting company like Stem Express and even an ostensible non-profit like Planned Parenthood. The CMP videos further confirm the fact that Planned Parenthood is altering abortion procedures through “less crunchy” methods to obtain better and more salesworthy

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<sup>37</sup> See <http://goo.gl/DRBbf2> (last visited Sept. 15, 2015).

<sup>38</sup> See Cecile Richards’ Letter to Congress, dated August 27, 2015.

specimens.<sup>39</sup> Indeed, in one video the method described by Deborah Nucatola, PPFA's Senior Director of Medical Services, seems to imply the use of Partial Birth Abortion to obtain better and more useful samples.<sup>40</sup> Yet, as CMP has also revealed, in apparent recognition of its obligations under federal law, Planned Parenthood's own consent forms expressly tell the woman that "there will be **no changes** to how or when my abortion is done in order to get my blood or the tissue."<sup>41</sup> (emphasis supplied). However, Planned Parenthood's own president, Cecile Richards, admits in her letter to Congress that Planned Parenthood physicians alter abortion procedures in order to "facilitate fetal tissue donation."<sup>42</sup> Not only does the available evidence suggest that Planned Parenthood may be receiving illegal compensation for the organs it is selling and illegally and unethically changing abortion methods to obtain those samples, it appears it has also misled women into consenting for the use of the remains of their unborn child's body parts using false information.

State Medicaid programs are empowered to disqualify providers who violate federal and state laws and ethical norms.

## **5. Violations of the Partial Birth Abortion Ban Act and the Born Alive Infant Protection Act.**

Federal law prohibits partial-birth abortions except where necessary to save the mother's life. 18 U.S.C. § 1531.<sup>43</sup> Comments from Deborah Nucatola, Senior Medical Director of Planned

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<sup>39</sup> See [http://www.centerformedicalprogress.org/wp-content/uploads/2015/05/PPFA020615\\_transcript.pdf](http://www.centerformedicalprogress.org/wp-content/uploads/2015/05/PPFA020615_transcript.pdf) (last visited Sept. 15, 2015).

<sup>40</sup> See [http://www.centerformedicalprogress.org/wp-content/uploads/2015/05/PPFAtranscript072514\\_final.pdf](http://www.centerformedicalprogress.org/wp-content/uploads/2015/05/PPFAtranscript072514_final.pdf) (last visited Sept. 15, 2015).

<sup>41</sup> Planned Parenthood Consent Form for Fetal Tissue, <http://www.centerformedicalprogress.org/wp-content/uploads/2015/05/PP-Mar-Monte-tissue-consent.pdf> (last visited Sept. 15, 2015).

<sup>42</sup> See page 7 of Cecile Richard's Letter to Congress, dated August 27, 2015.

<sup>43</sup> The Partial-Birth Abortion Ban Act contains no health exception. When the Supreme Court considered the constitutionality of the Partial-Birth Abortion Ban Act in 2006, Planned Parenthood and other abortionists argued that approximately 2200 partial-birth abortions per year were *necessary* for health reasons. When the Supreme Court issued its opinion in April 2007, it held that the law was generally constitutional. However, the Court invited any

Parenthood Federation of America, raise serious questions about whether Planned Parenthood is complying with the Partial Birth Abortion Ban Act. She describes altering the presentation of a later term unborn child to perform the abortion in such a way as to permit the delivery of the head intact.<sup>44</sup> Nucatola also says that some abortionists choose to use a drug called digoxin because it gives them plausible deniability if a partial-birth abortion occurs in that they can point to the use of digoxin to show that they did not intend to violate the Partial Birth Abortion Ban Act.

The Federal [Partial Birth] Abortion Ban is a law, and laws are up to interpretation. So there are some people who interpret it [the use of digoxin] as intent. So if I say on Day 1 I do not intend to do this, what ultimately happens doesn't matter. Because I didn't intend to do this on Day 1 so I'm complying with the law.<sup>45</sup>

These comments raise serious questions about Planned Parenthood's compliance with the federal Partial Birth Abortion Ban Act and similar state laws.

Federal law also extends legal protection to a child born after an attempted abortion. 1 U.S.C. §8. Numerous comments captured by CMP illustrate possible violations of the Born Alive Infant Protection Act. In response to the question, "is there still circulation in the heart once you isolate it?," Dr. Ben Van Handel, Executive Director of Novogenix Laboratories said, **"So you know there are times when after the [abortion] procedure is done that the heart**

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abortionist or woman filing a new challenge to show why a partial-birth abortion was necessary in one of those 2200-per-year instances. Planned Parenthood warned of consequences for women's health from the decision, just as Justice Ginsburg wrote in a dissent: "One may anticipate that such a preenforcement challenge will be mounted swiftly, to ward off serious, sometimes irremediable harm, to women whose health would be endangered by the intact D&E prohibition." Eight years later, no such complaint has been filed and thus it appears that there was no basis for the claims that this procedure was necessary for health reasons in any case, much less 2200 such cases per year. One possible explanation for the lack any as applied challenge to the Partial Birth Abortion Ban Act is revealed by Dr. Nucatola's comments – the possibility that abortionists are continuing to perform the prohibited procedures while giving themselves plausible deniability as to "intent" should they be discovered.

<sup>44</sup> See <http://www.centerformedicalprogress.org/cmp/investigative-footage/> (last visited Sept. 15, 2015).

<sup>45</sup> Id.

**actually is still beating.**<sup>46</sup> Former Stem Express employee Holly O'Donnell also testified that she personally witnessed a child delivered after an abortion and whose heart would still beat when prompted by a technician.<sup>47</sup> Other comments captured by the videos describe the delivery of fully intact fetuses, raising the prospect of violations of the Born Alive Infant Protection Act and similar state laws.

## **Conclusion**

The states are ultimately responsible for their state Medicaid programs and the providers they approve to participate in them. Even prior to the release of the videos by the Center for Medical Progress, many states had evidence of violations of state and federal laws that would have called into doubt the continuation of Medicaid Provider Agreements with any provider other than Planned Parenthood. Congress can and should reaffirm that the Administration may not coerce the states to contribute taxpayer monies to ethically and legally challenged organizations like Planned Parenthood.

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<sup>46</sup> “Episode 3: Planned Parenthood’s Custom Abortions for Superior Product, available at <http://www.centerformedicalprogress.org/human-capital/documentary-web-series/> (last visited Sept. 15, 2015).

<sup>47</sup> *Id.*