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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

PLANNED PARENTHOOD GULF COAST,
INC. , ET AL : CIVIL ACTION
VERSUS : NO. 15-565
KATHY KLIBERT : HON. JOHN W. DEGRAVELLES
: SEPTEMBER 02, 2015

=====

MOTION HEARING

=====

A P P E A R A N C E S

FOR PLANNED PARENTHOOD GULF COAST INC. :

MS. CARRIE Y. FLAXMAN
PLANNED PARENTHOOD FEDERATION OF AMERICA
1110 VERMONT AVENUE, NW
SUITE 300
WASHINGTON, DC 20005

FOR KATHY KLIBERT:

MR. STEPHEN R. RUSSO
LOUISIANA DEPARTMENT OF HEALTH & HOSPITALS
POST OFFICE BOX 3836
BATON ROUGE, LOUISIANA 70821-3836

REPORTED BY: GINA DELATTE-RICHARD, CCR

UNITED STATES COURTHOUSE
BATON ROUGE, LOUISIANA 70801
(225) 389-3564

1 PLANNED PARENTHOOD V. KLIBERT #15-565 09/02/15

2 THE COURT: HELLO, EVERYONE. YOU MAY BE SEATED.
3 WE ARE HERE THIS AFTERNOON IN PLANNED PARENTHOOD GULF COAST,
4 INCORPORATED AND OTHERS VERSUS KATHY KLIBERT, NUMBER
5 15-CV-565.

6 WILL COUNSEL ENTER AN APPEARANCE FOR THE RECORD?

7 MR. RITTENBERG: GOOD AFTERNOON, JUDGE. I'M BILL
8 RITTENBERG AND I'M REPRESENTING PLAINTIFFS AND I'D LIKE TO
9 TAKE PLEASURE IN INTRODUCING TO THE COURT, CARRIE FLAXMAN AND
10 MELISSA COHEN, WHO ADMITTED PRO HAC VICE AND ARE ATTORNEYS
11 FROM PLANNED PARENTHOOD. MS. FLAXMAN WILL MAKE THE ORAL
12 ARGUMENT.

13 THE COURT: ALL RIGHT. THANK YOU. WELCOME.

14 MR. RUSSO: JUDGE, STEPHEN RUSSO, EXECUTIVE COUNSEL
15 FOR THE DEPARTMENT OF HEALTH AND HOSPITALS. WITH ME I HAVE
16 KIMBERLY HUMBLER, WHO'S THE GENERAL COUNSEL AND KIMBERLY
17 SULLIVAN, WHO IS THE DEPUTY GENERAL COUNSEL AND I'LL BE MAKING
18 THE ORAL ARGUMENT TODAY.

19 THE COURT: ALL RIGHT. THANK YOU, MR. RUSSO.

20 JUST A PRELIMINARY MATTER OR TWO, WE'RE HERE OF
21 COURSE ON A TEMPORARY RESTRAINING ORDER MOTION FILED BY THE
22 PLAINTIFFS IN THIS CASE. WE HAD A TELEPHONE STATUS CONFERENCE
23 YESTERDAY IN WHICH I INDICATED THAT BECAUSE THE UNITED STATES
24 HAD FILED ITS STATEMENT OF INTEREST LATE, I SAY LATE, TWO DAYS
25 AGO, THAT I WOULD GIVE THE DEPARTMENT OF HEALTH AND HOSPITALS,

1 ACTUALLY SECRETARY KLIBERT, AND OPPORTUNITY TO RESPOND TO
2 THAT AND SHE WOULD HAVE UNTIL FRIDAY TO DO THAT. AND THEN
3 BECAUSE OF THAT I SUGGESTED AND MR. RUSSO AGREED THAT THE
4 EFFECTIVE DATE OF THE TERMINATION WOULD BE SEPTEMBER THE 15TH,
5 END OF BUSINESS, IN ORDER TO GIVE THE COURT AN OPPORTUNITY TO
6 REVIEW THE ADDITIONAL BRIEFS AND THE ARGUMENT THAT WE WILL
7 HEAR TODAY.

8 AND I RECEIVED YOUR LETTER, MR. RUSSO, AND I WILL
9 MAKE THAT A PART OF THE RECORD. I'VE READ ALL OF THE
10 SUBMISSIONS THAT HAVE BEEN SUBMITTED TO DATE AND SO YOU
11 DON'T -- OBVIOUSLY, I WANT YOU TO ARGUE WHATEVER YOU WANT TO
12 ARGUE, BUT YOU CAN ASSUME THAT I HAVE READ EVERYTHING.

13 AND SO ARE THE PARTIES READY TO PROCEED?

14 **MS. FLAXMAN:** YES, YOUR HONOR.

15 **THE COURT:** MS. FLAXMAN, YOU WANT TO START? AND
16 BEFORE YOU BEGIN, I HAVE SORT OF A PRELIMINARY QUESTION WHICH
17 IS THIS: IN CONNECTION WITH THIS EFFORT TO TERMINATE THESE
18 FOUR CONTRACTS FOR TWO FACILITIES THAT ARE OPERATED BY YOUR
19 CLIENT, HAS DHH RAISED ANY SUGGESTION OR MADE ANY SUGGESTION
20 THAT THE REASON FOR TERMINATING THE CONTRACT HAS ANYTHING TO
21 DO WITH COMPETENCY OR THE ADEQUACY OF THE CARE THAT IS GIVEN
22 BY YOUR CLIENTS TO THE PATIENTS WHO GET THEIR CARE AT THOSE
23 FACILITIES?

24 **MS. FLAXMAN:** NO, YOUR HONOR. ABSOLUTELY NOT.

25 **THE COURT:** OKAY. ALL RIGHT. THEN GO AHEAD AND

1 PROCEED.

2 MS. FLAXMAN: YOUR HONOR, AS EVERY COURT TO LOOK AT
3 THIS ISSUE HAS RULED, IT VIOLATES FEDERAL LAW TO BAR PLANNED
4 PARENTHOOD FROM PROVIDING MEDICAID SERVICES TO ITS PATIENTS.
5 DESPITE PLANNED PARENTHOOD'S CRITICAL ROLE IN PROVIDING
6 SERVICES TO LOW INCOME RESIDENTS IN NEW ORLEANS AND BATON
7 ROUGE, DEFENDANT HERE IS SEEKING TO TERMINATE THEIR PROVIDER
8 AGREEMENTS WITHOUT A REASON. PLAINTIFFS HERE NEED IMMEDIATE
9 RELIEF TO PREVENT THAT FROM HAPPENING.

10 WE'RE HERE BECAUSE THE TERMINATION VIOLATES THE JANE
11 DOE PLAINTIFFS IN THIS CASE, THEIR RIGHT TO FREE CHOICE OF
12 PROVIDER UNDER SECTION AA23 OF THE MEDICAID ACT WHICH
13 GUARANTEES MEDICAID BENEFICIARIES THE RIGHT TO CHOOSE AMONG
14 WILLING PROVIDERS SO LONG AS THE PROVIDERS ARE, QUOTE,
15 "QUALIFIED TO PROVIDE THE SERVICES REQUIRED. "

16 AS I JUST MENTIONED IN RESPONSE TO YOUR QUESTION,
17 THERE'S BEEN NO SUGGESTION HERE THAT PLANNED PARENTHOOD IS NOT
18 QUALIFIED TO RENDER SERVICES IN THE MEDICAID PROGRAM TO ITS
19 PATIENTS. IT'S BEEN A GOOD PROVIDER FOR YEARS, PROVIDED GOOD
20 QUALITY CARE TO ITS PATIENTS, NO COMPLAINTS ABOUT THAT CARE
21 FROM THE STATE. AND, IN FACT, IN 2013 THERE WAS A POLITICALLY
22 MOTIVATED REQUEST BY THE LEGISLATURE TO AUDIT PLANNED
23 PARENTHOOD OF THE GULF COAST AND THE LEGISLATOR -- LEGISLATIVE
24 AUDITOR RETURNED A REPORT SAYING THAT HE HAD REVIEWED PLANNED
25 PARENTHOOD'S BILLINGS AND THERE WAS NOTHING IRREGULAR ABOUT

1 THEM AND THAT AUDIT IS ATTACHED TO MS. LINTON'S DECLARATION
2 THAT'S BEFORE THE COURT.

3 AS COURTS TO HAVE CONSIDERED THIS ISSUE HAVE HELD,
4 THE SEVENTH CIRCUIT AND THE NINTH CIRCUIT, IN RULING FOR
5 PLANNED PARENTHOOD, IN SIMILAR CASES QUALIFIED MEANS THE
6 ORDINARY SENSE OF FIT OR COMPETENT TO PROVIDE THE SERVICES
7 WITHIN THE MEDICAID PROGRAM AND TO PROPERLY BILL FOR THEM.

8 AND AS YOUR HONOR KNOWS, GIVEN THE POSITION OF CMS
9 AND THE DEPARTMENT OF HEALTH AND HUMAN SERVICES IN THE BRIEF
10 FILED MONDAY, CMS HAS REPEATEDLY AGREED THAT A STATE CAN NOT
11 EXCLUDE AN OTHERWISE QUALIFIED PROVIDER FROM PROVIDING
12 SERVICES IN THE MEDICAID PROGRAM.

13 IN ADDITION TO DISAPPROVING THE STATE PLANNED THAT
14 INDIANA SUBMITTED A FEW YEARS BACK TO EXCLUDE ABORTION
15 PROVIDERS FROM MEDICAID, IT ALSO HAS REGULARLY ISSUED GUIDANCE
16 AND FILED SIMILAR STATEMENTS OF INTEREST AS IT HAS FILED HERE
17 EXPRESSING THAT AS BEING ITS VIEW OF FEDERAL LAW.

18 **THE COURT:** IN THE STATEMENT OF INTEREST THE COUNSEL
19 FOR THE UNITED STATES TAKES THE POSITION THAT THE LONGSTANDING
20 UNDERSTANDING OF THE WORD "QUALIFIED" ESSENTIALLY MEANS
21 COMPETENT TO PROVIDE THE SERVICES. IS THAT THE POSITION OF
22 THE PLAINTIFFS IN THIS CASE AS WELL?

23 **MS. FLAXMAN:** YES, IT IS.

24 **THE COURT:** OKAY. DO WE HAVE THE UNITED STATES HERE
25 TODAY? I KNOW THEY FILED THE STATEMENT OF INTEREST, BUT IS

1 THE ATTORNEY FOR THE UNITED STATES HERE AND GOING TO
2 PARTICIPATE OR DO YOU KNOW?

3 MS. FLAXMAN: I DON'T BELIEVE SO.

4 THE COURT: OKAY. NOBODY MADE AN APPEARANCE SO I
5 WAS JUST ASKING. OKAY. GO AHEAD.

6 MS. FLAXMAN: SURE. AND TO RESPOND TO A POINT THAT
7 DEFENDANT HAS RAISED IN HER BRIEF, NOT ONLY IS IT CLEAR THAT
8 THE ACTION VIOLATES FEDERAL LAW, BUT IT IS CLEAR THAT THE
9 PATIENT PLAINTIFFS HERE IN THIS CASE HAVE A RIGHT OF ACTION TO
10 CHALLENGE THAT VIOLATION OF FEDERAL LAW UNDER SECTION 1983.

11 AS THIS COURT HAS ALREADY HELD IN THE TOWNSEND CASE
12 AND AS THE SIXTH, SEVENTH, AND NINTH CIRCUITS HAVE ALREADY
13 HELD, THE -- THE SECTION OF THE MEDICAID ACT AA23 CLEARLY
14 FULFILLS THE STANDARD SET FORTH BY THE SUPREME COURT IN
15 *BLESSING* AND THEN IN THE *GONZAGA* CASE CASES. IT HAS RIGHTS
16 CREATING LANGUAGE THAT UNAMBIGUOUSLY CONFERS A RIGHT ON
17 MEDICAID PATIENTS. THE STANDARDS ARE NOT SO VAGUE AND
18 AMORPHOUS, THAT IS STRAINED JUDICIAL COMPETENCE TO ENFORCE AND
19 THE REQUIREMENT IS COUCHED IN MANDATORY TERMS.

20 THE COURT: DHH TAKES THE POSITION THAT *ARMSTRONG*
21 HAS CHANGED ALL OF THAT. NOW, WHY DON'T YOU ADDRESS THAT
22 ARGUMENT.

23 MS. FLAXMAN: SURE. NOTHING IN *ARMSTRONG* CHANGES
24 THAT, YOUR HONOR. *ARMSTRONG* WAS ABOUT A COMPLETELY DIFFERENT
25 SECTION OF THE MEDICAID ACT. MOST IMPORTANTLY, HOWEVER,

1 *ARMSTRONG* -- THERE WAS NO SECTION 1983 CLAIM IN *ARMSTRONG*,
2 PERHAPS BECAUSE OF PROVIDERS THERE REALIZED THAT WE DIDN' T
3 HAVE THE ARGUMENTS WE HAD HERE, THAT THE SECTION OF THE
4 MEDICAID ACT AT ISSUE --

5 THE COURT: WELL, THE PLAINTIFFS IN *ARMSTRONG* WERE
6 TWO PROVIDERS; RIGHT?

7 MS. FLAXMAN: CORRECT. AND IT WAS A DIFFERENT
8 SECTION OF THE MEDICAID STATUTE WITHOUT THE SAME KIND OF
9 RIGHTS CREATING LANGUAGE. THE ISSUE IN *ARMSTRONG* WAS WHETHER
10 THEY HAD IMPLIED RIGHTS OF ACTION UNDER THE SUPREMACY CLAUSE
11 OR UNDER EQUITY PRINCIPLES TO ARGUE THAT THE RATES AT ISSUE
12 THERE WERE ILLEGAL UNDER FEDERAL -- FEDERAL LAW AND THE
13 SUPREME COURT SAID THAT THEY COULD NOT BRING THEIR CASE. BUT,
14 AGAIN, THERE WAS NOTHING ABOUT SECTION 1983 IN THAT CASE AND
15 NOTHING THAT SUGGESTS AT ALL THAT THE COURT --

16 THE COURT: WELL, WITH JUSTICE SCALIA IT DOES
17 DISCUSS 1983, DOES IT NOT?

18 MS. FLAXMAN: JUSTICE SCALIA DOES, BUT HIS DECISION
19 IS NOT THE OPINION OF THE COURT. IT IS THAT PART OF THE --

20 THE COURT: THAT WAS SECTION FOUR OF THE OPINION
21 THAT JUSTICE BRIAR DID NOT JOIN IN?

22 MS. FLAXMAN: THAT'S CORRECT, YOUR HONOR.

23 THE COURT: OKAY.

24 MS. FLAXMAN: FINALLY, AND THIS IS ADDRESSED IN
25 FURTHER DETAIL IN OUR BRIEF, BUT THE OTHER INJUNCTIVE FACTOR

1 CLEARLY WEIGH IN FAVOR OF RELIEF HERE IN THIS CASE CLAIMING
2 THAT THERE WAS IRREPARABLE HARM BOTH TO THE PATIENTS AND TO
3 PLANNED PARENTHOOD WHO PROVIDES CRITICALLY NEEDED FAMILY
4 PLANNING AND OTHER PREVENTIVE SERVICES SUCH AS CANCER
5 SCREENINGS TO MORE THAN 5,000 PATIENTS ANNUALLY IN BATON ROUGE
6 AND NEW ORLEANS AND THERE ARE HUGE NEEDS IN THE STATE FOR
7 SERVICES, YOUR HONOR. THE BALANCE OF HARMS CLEARLY ALSO WEIGH
8 IN FAVOR OF PLAINTIFFS. THE DEFENDANT -- IF THE PLAINTIFF --
9 IF THE PATIENTS COULD FIND OTHER PROVIDERS TO PROVIDE THE CARE
10 THE DEFENDANT WILL BE PAYING FOR THOSE SERVICES UNDER ITS
11 OBLIGATIONS ANYWAY UNDER MEDICAID.

12 **THE COURT:** WELL, HOW DO YOU RESPOND TO THE
13 DEFENDANT'S ARGUMENT THAT THERE ARE 2,010 OTHER PROVIDERS WHO
14 PROVIDE THE SAME SERVICES THAT YOUR CLIENTS PROVIDE AND
15 THEREFORE, WHAT'S THE BIG DEAL?

16 **MS. FLAXMAN:** WELL THE -- THE LIST THE DEFENDANT
17 PROVIDED APPEARS TO BE A LIST OF ALL ENROLLED MEDICAID
18 PROVIDERS IN BOTH REGIONS. THERE ARE NUMEROUS EXAMPLES OF ON
19 THEIR FACE PROVIDERS THAT WOULD NOT PROVIDE THE CARE THAT
20 PLANNED PARENTHOOD PROVIDES, INCLUDING DENTISTS, RADIOLOGISTS,
21 NURSING HOMES, PLACES THAT ARE NOT GOING TO DO BREAST CANCER
22 SCREENINGS OR GIVE OUT BIRTH CONTROL.

23 AND THE DEFENDANT HAS NOT AT ALL RESPONDED TO THE
24 DECLARATION TESTIMONY THAT WE HAVE PUT IN BY MS. LINTON THAT
25 MAKES CLEAR THAT EVEN IF THERE ARE OTHER PROVIDERS WHO PROVIDE

1 THE SAME SERVICES THE WAITS ARE LONGER, IT'S DIFFICULT FOR OUR
2 PATIENTS TO GET CARE THERE AND THERE'S NO WAY THAT -- THAT
3 OTHER ALTERNATIVE PROVIDERS HAVE THE CAPACITY TO ABSORB OUR
4 PATIENTS. AND DEFENDANT HAS SUPPLIED THIS LIST, BUT HAS NOT
5 AT ALL TAKEN ISSUE WITH THOSE STATEMENTS NOR OF THE STATEMENTS
6 OF THE JANE DOE PLAINTIFFS WHO SAY THEY PREFER PLANNED
7 PARENTHOOD AND IN SOME CASES SAID THEY DON'T KNOW WHERE ELSE
8 THEY WILL GO IF PLANNED PARENTHOOD CAN'T PROVIDE CARE IN THE
9 PROGRAM.

10 I'LL ALSO ADD THAT AT LEAST FOR PURPOSES OF THE
11 MEDICAID ACT CLAIM, IT DOESN'T MATTER AT ALL IF THERE ARE
12 OTHER PROVIDERS, AND WE THINK THERE AREN'T, BUT THE ANY
13 WILLING PROVIDER PROVISION GUARANTEES PATIENTS THE RIGHT TO
14 CHOOSE ANY PROVIDER. SO EVEN IF THERE WERE OTHER PROVIDERS
15 WILLING AND ABLE THAT WOULD NOT SATISFY --

16 THE COURT: IT DOESN'T REALLY ADDRESS THE MANDATE OF
17 THE SECTION WE'RE TALKING ABOUT IS WHAT YOU'RE SAYING?

18 MS. FLAXMAN: THE MANDATE OF THE SECTION REQUIRES
19 ANY WILLING PROVIDER. AND SO EVEN IF THERE WERE PROVIDERS,
20 AND WE SUBMIT THERE AREN'T, WHO ARE ABLE TO ABSORB THIS
21 CAPACITY OF PATIENTS --

22 THE COURT: AND HOW MANY PATIENTS ARE THERE?

23 MS. FLAXMAN: IT IS -- IN 2014 -- FISCAL YEAR 2014,
24 IT WAS OVER 5200 PATIENTS SERVED THAT YEAR.

25 THE COURT: ALL RIGHT.

1 **MS. FLAXMAN:** AND IF YOUR HONOR DOESN'T HAVE ANY
2 FURTHER QUESTIONS?

3 **THE COURT:** I MAY, ACTUALLY. I THINK ONE OF THE
4 ARGUMENTS DHH -- I KEEP SAYING DHH, SECRETARY KLIBERT. ONE
5 OF THE ARGUMENTS SECRETARY KLIBERT MAKES IS THAT YOU HAVE A
6 REMEDY, THAT IS TO SAY YOUR CLIENTS HAVE A REMEDY, THROUGH THE
7 ADMINISTRATION -- ADMINISTRATIVE PROCEDURES OF DOING AN
8 ADMINISTRATIVE APPEAL. I GUESS THE FIRST QUESTION I HAVE ON
9 THAT IS, CAN YOU TAKE AN APPEAL UNTIL THE TERMINATION IS
10 EFFECTIVE? WOULD IT BE PREMATURE?

11 **MS. FLAXMAN:** THAT IS NOT SOMETHING WE'VE DISCUSSED
12 WITH THE STATE WHETHER THE AGREEMENT SO FAR TO EXTEND TO THE
13 15TH HAS ALSO TOLLED THE 30 DAYS THAT -- THAT PLANNED
14 PARENTHOOD WAS GIVEN TO APPEAL. SO I DON'T KNOW THE ANSWER TO
15 THAT, YOUR HONOR. I WILL SAY THAT THE PATIENTS WHO ARE HERE,
16 THE JANE DOE PATIENTS, HAVE NO ADMINISTRATIVE RIGHT IN -- IN
17 THE STATE ADMINISTRATIVE SYSTEM OR OTHERWISE. AND THE CLAIM
18 THAT IS CURRENTLY BEFORE THE COURT TODAY ON THIS MOTION IS
19 THAT OF THE PATIENTS UNDER THE FEDERAL MEDICAID ACT.

20 **THE COURT:** OKAY. HOW MANY -- THE FACILITIES THAT
21 PLANNED PARENTHOOD HAS THAT -- WHERE THESE JANE DOES AND
22 OTHERS, 5200 OR SO, GO FOR THEIR CARE, HOW MANY FACILITIES ARE
23 THERE? AND I DON'T WANT ADDRESSES OR ANYTHING, BUT JUST GIVE
24 ME THEIR LOCATIONS.

25 **MS. FLAXMAN:** SURE. THERE'S TWO HEALTH CENTERS IN

1 LOUISIANA; ONE IS IN BATON ROUGE OR ONE IS IN NEW ORLEANS. I
2 CAN GIVE THE ADDRESSES --

3 THE COURT: OKAY.

4 MS. FLAXMAN: -- AS WELL IF YOU'D LIKE THEM. THE
5 BATON ROUGE HEALTH CENTER IS AT 3955 GOVERNMENT STREET AND IN
6 NEW ORLEANS IT'S 4018 MAGAZINE STREET.

7 THE COURT: ALL RIGHT. THANK YOU. I DON'T HAVE ANY
8 OTHER QUESTIONS.

9 MS. FLAXMAN: THANK YOU.

10 THE COURT: AND LET ME START WITH THE SAME QUESTION
11 THAT I STARTED WITH MS. FLAXMAN. THERE IS NO QUESTION, I TAKE
12 IT, ABOUT THE COMPETENCY OF THESE TWO FACILITIES TO PROVIDE
13 MEDICAID SERVICES AND ADEQUATE CARE FOR THE PATIENTS THAT THEY
14 SERVE, WOULD YOU AGREE WITH THAT?

15 MR. RUSSO: AT THIS TIME I WOULD AGREE WITH THAT,
16 YES, YOUR HONOR.

17 THE COURT: OKAY. GO FORWARD THEN.

18 MR. RUSSO: YOUR HONOR --

19 THE COURT: WAIT, IN FACT, LET ME STOP YOU AGAIN. I
20 WANTED TO -- BECAUSE THIS SEEMS TO BE ESSENTIAL TO THE ISSUES
21 IN THIS CASE. MS. KLIBERT IN HER AFFIDAVIT SAYS, "THAT THE
22 SOLE REASON FOR THE DECISION TO TERMINATE THESE CONTRACTS IS
23 THE, QUOTE, "UTILIZATION OF THE STATUTORY PROVISIONS OF LARS
24 437.11(D)1." WHAT DOES THAT MEAN?

25 MR. RUSSO: BASICALLY WHAT THAT MEANS, YOUR HONOR,

1 IS THERE'S A STATE STATUTE THAT ALLOWS DHH WHEN DEALING WITH
2 MEDICAID PROVIDER CONTRACTS THAT CLEARLY STATES THAT ALL
3 CONTRACTS SHALL BE TERMINABLE AT WILL WITH 30 DAYS WRITTEN
4 NOTICE. THAT HAS BEEN IN OUR CONTRACT SINCE I'VE BEEN AT DHH
5 FOR 19 YEARS AND SO THAT IS THE STANCE OF THE SECRETARY.

6 THE COURT: IT IS THE SOLE REASON THESE CONTRACTS
7 WERE TERMINATED?

8 MR. RUSSO: EXACTLY, JUDGE. THERE IS A MECHANISM.
9 THERE IS A CURRENT MOTIVE, I THINK, THAT -- THAT IS OUT THERE,
10 THAT WE ALL KNOW IS OUT THERE. WE'VE GOT SOME VIDEO TAPES
11 THAT HAVE BEEN -- THAT HAVE BEEN PORTRAYED --

12 THE COURT: WELL, IS THAT THE REASON?

13 MR. RUSSO: THAT IS, YOUR HONOR -- THAT IS THE
14 MOTIVE LEADING UP TO IT, BUT IT IS NOT THE REASON THIS TIME.
15 THE REASON THIS TIME IS THE STATUTE THAT SAYS WE HAVE 30
16 DAYS --

17 THE COURT: ALL RIGHT. SO THE REASON IS UNRELATED
18 TO THE ABILITY OF THESE TWO FACILITIES TO PROVIDE ADEQUATE
19 CARE TO THEIR PATIENTS; IS THAT TRUE?

20 MR. RUSSO: THAT I WOULD AGREE WITH, YES, SIR.

21 THE COURT: SO MS. KLIBERT'S POSITION IS THAT THESE
22 ARE TERMINATED WITHOUT RELATIONSHIP OF ANY KIND TO THE
23 ADEQUACY OF CARE; CORRECT?

24 MR. RUSSO: CORRECT, AT THIS TIME, YOUR HONOR,
25 EXACTLY.

1 THE COURT: SO YOU HAVE 5200 WOMEN WHO ARE GETTING
2 THEIR CARE AT THESE FACILITIES AND YOU WOULD AGREE THAT IF
3 THESE CONTRACTS ARE TERMINATED THAT CARE IS GOING TO BE
4 DISRUPTED; CORRECT?

5 MR. RUSSO: I WOULD NOT AGREE WITH THAT, YOUR HONOR.

6 THE COURT: THEY'RE GOING TO HAVE TO GET OTHER
7 DOCTORS, THEY'RE GOING TO HAVE TO SEEK OUT OTHER PLACES TO GET
8 THEIR HEALTH CARE; CORRECT?

9 MR. RUSSO: THEY WILL HAVE TO DO THAT, CORRECT.

10 THE COURT: AND YOU WOULD AGREE THAT THAT IS A
11 DISRUPTION OF SOME KIND?

12 MR. RUSSO: YES.

13 THE COURT: ARE YOU SAYING IT'S AN INSIGNIFICANT
14 THING TO HAVE A RELATIONSHIP WITH A HEALTHCARE --

15 MR. RUSSO: I'M NOT SAYING --

16 THE COURT: LET ME FINISH -- A HEALTHCARE PROVIDER
17 AND FOR NO REASON RELATED TO THE HEALTHCARE THEY'RE GETTING
18 THAT CONTRACT OR THAT RELATIONSHIP IS TERMINATED AND THEY HAVE
19 TO GO SOMEPLACE ELSE TIMES 5200?

20 MR. RUSSO: FIRST, I'M NOT SURE OF THE 5200
21 NUMBER --

22 THE COURT: WELL, LET'S ASSUME THAT THAT NUMBER IS
23 CORRECT. YOU'RE NOT CHALLENGING THAT NUMBER?

24 MR. RUSSO: I'M JUST NOT SURE. I'M NOT CHALLENGING
25 IT. I'M JUST --

1 THE COURT: OKAY. SO ASSUME IT'S 5200. YOU'VE GOT
2 5200 WOMEN WHOSE CARE IS INTERRUPTED WITH THE HEALTHCARE
3 PROVIDERS TO WHOM THEY CHOOSE TO GO AND YOU'RE TELLING ME
4 SECRETARY KLIBERT'S REASON FOR DOING THAT IS THERE IS NO
5 REASON; WE CAN'T DO IT?

6 MR. RUSSO: THE REASON IS THE CONTRACT IS TERMINABLE
7 AT WILL AND IT'S -- AND IT'S A CONTRACT PROVISION THAT NO ONE
8 HAS CHALLENGED AND SHE HAS CHOSEN TO TERMINATE THAT CONTRACT.

9 THE COURT: OKAY. GO FORWARD.

10 MR. RUSSO: THE SEMINAL ISSUE OR THE FOUNDATION,
11 JUDGE, OF US EVEN BEING HERE IS THE *ARMSTRONG* CASE IN
12 SECRETARY KLIBERT'S VIEW.

13 THE COURT: *ARMSTRONG* DIDN'T INVOLVE 1983, DID IT?

14 MR. RUSSO: IT DID NOT DIRECTLY INVOLVE 1983.
15 HOWEVER, JUDGE, IT INVOLVED CLEARLY A WALK-THROUGH TO
16 DETERMINE WHETHER OR NOT THERE WAS, NUMBER ONE, A RIGHT TO
17 BRING A CASE ASKING FOR RATES UNDER A30(A,) AND BY THE WAY,
18 THE CASES THAT THE PLAINTIFFS HAVE MENTIONED, THOSE ARE CASES
19 THAT I HANDLED, SO I'M FAMILIAR WITH THE A33 HISTORY FROM
20 BEGINNING ALL THE WAY UP TO WHERE IT IS NOW.

21 BASICALLY, JUDGE SCALIA WALKED THROUGH -- JUSTICE
22 SCALIA WALKED THROUGH CLEARLY SUPREMACY CLAUSE FIRST, HE
23 WALKED THROUGH THEN EQUITY, HE THEN FINALLY ENDED UP AND SAID,
24 HEY, LET'S GO AHEAD AND LOOK AT THE MEDICAID ACT ITSELF. NOW,
25 HE WAS LOOKING AT A30. A23 FALLS UP SEVEN PREVIOUS TO THAT

1 AND IT FALLS UNDER THE DEAL OF TRADITIONAL SPENDING CLAUSE.
2 IT'S SAYS, "STATE PLAN SHALL PROVIDE," AND IT STARTS GOING
3 FREEDOM OF CHOICE, QUALIFIED PROVIDER. IT'S IN THE SAME SPOT.
4 IT'S A CONTRACT BETWEEN DHH AND CMS IN ORDER TO GET FEDERAL
5 DOLLARS. AND JUSTICE SCALIA MADE IT CLEAR THAT IN THAT
6 SITUATION YOUR MODERN JURISPRUDENCE OF BENEFICIARIES HAVING A
7 RIGHT OF ACTION, PROVIDERS HAVING A RIGHT OF ACTION, DOESN'T
8 APPLY.

9 THE COURT: IT DIDN'T OVERRULE GONZAGA, RIGHT?

10 MR. RUSSO: NO, IT DID NOT.

11 THE COURT: IT DIDN'T OVERRULE WILDER?

12 MR. RUSSO: IT DID NOT TO MY KNOWLEDGE, NO, JUDGE.

13 THE COURT: OKAY.

14 MR. RUSSO: IT DID NOT. AND SO WE GET TO THAT
15 POINT, SO OF COURSE THE COURT, HE ADDRESSED THE RIGHTS OF THE
16 RECIPIENTS. THE RECIPIENTS' RIGHTS ARE TO PROCEED THROUGH THE
17 SECRETARY OF CMS. THE SECRETARY OF CMS CAN WITHHOLD FUNDS.
18 SHE COULD POTENTIALLY TRY TO BRING INJUNCTIVE RELIEF. THAT IS
19 THEIR RIGHT OF ACTION. THAT'S HOW THEY PRECEDE THEIR DUE
20 PROCESS IS PROTECTED. THE PROCESS RIGHT NOW IS WORKING, YOUR
21 HONOR. WE'VE HAD TWO CONVERSATIONS WITH CMS ALREADY.

22 THE COURT: BUT I HEARD MS. FLAXMAN SAY THAT WITH
23 RESPECT TO THE PATIENTS, JANE DOE, ONE, TWO AND THREE, THEY
24 DON'T HAVE ANY ADMINISTRATIVE REMEDY.

25 MR. RUSSO: NO, THEY DO NOT, YOUR HONOR.

1 THE COURT: WELL, THAT'S WHAT WE'RE HERE ABOUT
2 TODAY. SO IF THEY DON'T HAVE AN ADMINISTRATIVE REMEDY WHAT IS
3 THEIR REMEDY?

4 MR. RUSSO: THEIR REMEDY IS THROUGH AS, *ARMSTRONG*
5 CLEARLY MADE, THEIR REMEDY IS THROUGH THE SECRETARY OF HEALTH
6 AND HUMAN SERVICES AS A CONTRACT BETWEEN TWO GOVERNMENTAL
7 AGENCIES TO BRING US, IF THEY FIND AFTER WE DISCUSS THIS THAT
8 WE ARE NOT IN COMPLIANCE, THAT THEY START TO WITHHOLD FUNDS
9 UNTIL WE COME INTO COMPLIANCE. *ARMSTRONG* WAS CLEAR ON THAT, I
10 BELIEVE, YOUR HONOR. GOING TO --

11 THE COURT: BUT THE FACT THAT THAT IS A REMEDY, THAT
12 DOESN'T MEAN IT'S THE ONLY REMEDY; CORRECT?

13 MR. RUSSO: I THINK JUSTICE SCALIA CLEARLY CLOSED
14 THAT OUT AND SAID IT IS THE SOLE REMEDY IN *ARMSTRONG*.

15 THE COURT: IN *ARMSTRONG* FOR THAT PARTICULAR
16 SECTION.

17 MR. RUSSO: FOR THAT PARTICULAR SECTION, BUT I
18 BELIEVE, YOUR HONOR, IF YOU USE THE EXACT SAME RATIONALE OF
19 THE A30(A) LITIGATION YOU BRING IN -- IT'S THE EXACT SAME
20 RIGHTS CREATING TYPE OF LANGUAGE. A23 AND A30 BOTH SAY WHAT
21 THE STATE PLAN SHOULD PROVIDE. WE BOTH HAVE SOME VAGUE
22 MEANINGS OF WHAT DOES QUALIFIED MEAN, YOUR HONOR.

23 THE COURT: WELL, WHY IS THAT VAGUE?

24 MR. RUSSO: YOUR HONOR, LET ME TELL YOU WHY IT'S
25 VAGUE. WE'VE HAD -- THE VERY FIRST CONVERSATION WE HAD WITH

1 CMS, AND YOU'RE GOING TO SEE THIS FLESHED OUT IN OUR RESPONSE
2 TO THEIR STATEMENT OF INTEREST. THE VERY FIRST COMMENT WE HAD
3 TO CMS -- THE CONVERSATION, I WAS LEADING THE CONVERSATION,
4 AND I ASKED CMS, SO QUALIFIED -- MOST OF THE DOCTORS THAT
5 WE'VE KICKED OUT DURING MY 19 YEARS, THE LSBME HAS NEVER
6 PULLED THE LICENSE OR MAYBE ONLY PULLED THE LICENSE OF A FEW
7 OF THEM. WE DON'T HAVE THAT JURISDICTION. SO ARE YOU TELLING
8 ME THAT'S QUALIFIED? THEY HAVE THEIR LICENSE. THEY CAN
9 SURELY GO AND STILL PROVIDE MEDICINE. WELL, NO, WE UNDERSTAND
10 THAT THAT'S -- YOU KNOW, THAT'S NOT REALLY LIKE DISPOSITIVE --

11 THE COURT: OKAY. THAT'S IN A CONVERSATION YOU HAD
12 WITH WHO?

13 MR. RUSSO: WITH THE HEAD OF CMS AND THE GENERAL
14 COUNSEL'S OFFICE OF CMS.

15 THE COURT: ALL RIGHT. WELL, THIS IS WHAT THEY'VE
16 WRITTEN IN THEIR FILING IN THIS CASE: AND THAT IS THAT,
17 "THERE IS A LONGSTANDING INTERPRETATION OF THE STATUTORY
18 LANGUAGE, QUOTE, "QUALIFIED TO PROVIDE THE SERVICE, WHICH
19 MEANS COMPETENT TO PROVIDE THE SERVICE AND BILL FOR IT." NOW,
20 ASSUME FOR THE MOMENT THAT THAT IS IN FACT THE -- WELL, FIRST
21 OF ALL, DO YOU DISAGREE THAT THAT IS THE LONGSTANDING
22 INTERPRETATION GIVEN BY CMS?

23 MR. RUSSO: YES, I DO.

24 THE COURT: OKAY. DO YOU AGREE THAT THIS IS A
25 REASONABLE INTERPRETATION?

1 **MR. RUSSO:** NO, YOUR HONOR, I DON'T AGREE. I THINK
2 IT IS A VERY VAGUE STANDARD AS WHAT'S FLESHED OUT IN MY
3 CONVERSATIONS WITH CMS AS TO REALLY WHAT IS QUALIFIED.
4 THEY -- THEIR -- THEIR FINAL CONVERSATION WITH US WAS WELL,
5 YOU NEED TO GIVE US SOME REASONS. WE UNDERSTAND THAT YOU ALL
6 HAVE -- AND I POINTED OUT THAT WE HAVE IN OUR -- IN OUR
7 STATUTES PROBABLY, IN ADDITION TO THE AT-WILL, WE PROBABLY
8 HAVE 23 OR SO REASONS BY WHICH WE CAN KICK SOMEBODY OUT OF THE
9 PROGRAM. WAY BROADER --

10 **THE COURT:** LET ME ASK YOU THIS THOUGH, THIS IS
11 ANOTHER POSITION THAT THE UNITED STATES SAYS, THAT REGARDLESS
12 OF THE SPECIFIC DEFINITION OF QUALIFIED, "QUALIFIED HAS TO BE
13 RELATED TO THE ABILITY OF THE PROVIDER TO PROVIDE SERVICES,
14 NOT JUST BECAUSE WE SAY IT IS." DO YOU AGREE WITH THAT?

15 **MR. RUSSO:** I AGREE THAT IS WHAT THEY HAVE SAID.
16 NOW, I AGREE WE HAVE SOME CONTRACT LAW PROVISIONS THAT ALLOW
17 US TO TERMINATE WITH 30 DAYS NOTICE.

18 **THE COURT:** WITHOUT RELATION TO THE QUALITY OF THE
19 CARE THAT THE PEOPLE GIVE?

20 **MR. RUSSO:** OH, DEFINITELY, YOUR HONOR. I THINK DHH
21 IS WITHIN THEIR RIGHTS UNDER LOUISIANA CONTRACT LAW AND A
22 STATUTE THAT IS OUT THERE, A STATE STATUTE THAT HAS NEVER BEEN
23 CHALLENGED, THAT IS CONSTITUTIONAL, THAT IS ON THE BOOKS, THAT
24 IS PART OF OUR CONTRACT WITH PLANNED PARENTHOOD, THAT WE WERE
25 CERTAINLY WITHIN OUR RIGHTS WITHOUT QUESTION.

1 THE COURT: OKAY.

2 MR. RUSSO: SO, JUDGE, THAT'S MY -- YOU KNOW, THAT'S
3 MY POINT WITH THE *ARMSTRONG* CASE IS -- IS QUALIFIED. THERE'S
4 BEEN ALMOST, AND I KNOW YOU POINTED OUT THE STATEMENT OF
5 INTEREST, BUT WE HAVE SOME CONTENDING VIEWS DIRECTLY FROM THE
6 GENERAL COUNSEL OF CMS AS TO WHAT DOES QUALIFIED MEAN. SO I
7 THINK WHEN YOU WALK THROUGH THAT WHAT WE HAVE IS, AND AS
8 JUSTICE SCALIA POINTED OUT, WE HAVE A PROCESS THAT WE ARE IN
9 THE MIDST OF.

10 AS FAR AS I KNOW, WE WILL HAVE FOLLOW-UP
11 CONVERSATIONS WITH CMS TO DETERMINE WHAT THEY BELIEVE
12 COMPLIANCE IS GOING TO BE, AND ONCE WE GET THERE, YOU KNOW,
13 WE'RE GOING TO -- WE'RE GOING TO FLESH IT OUT WITH THEM AND
14 HANDLE IT WITH THEM. I DON'T KNOW WHETHER THEY WILL WITHHOLD
15 FUNDS TO TRY TO BRING US IN COMPLIANCE, I'M NOT REALLY SURE
16 WHAT THEIR PLANS ARE. THEY HAVE MENTIONED WITHHOLDING OF
17 FUNDS TO TRY TO BRING US INTO WHAT THEY CONSIDER TO BE
18 COMPLIANCE.

19 THE RELIANCE, YOUR HONOR, I KNOW THEY MADE A BIG
20 DEAL ABOUT PLAINTIFFS OUT OF THE SEVENTH AND THE NINTH
21 CIRCUIT. IN MY MIND THE SEVENTH AND NINTH CIRCUIT CLEARLY ARE
22 PRE *ARMSTRONG*. SO I BELIEVE THAT *ARMSTRONG* AND THE RATIONALE
23 LAID OUT IN *ARMSTRONG*, THE SECRETARY BELIEVES, THAT SHOULD
24 CONTROL. IN THE SEVENTH AND THE NINTH CIRCUIT WHAT YOU ALSO
25 SAW IS, YOU SAW A TERMINATION OF A CLASS OF PROVIDERS. THEY

1 HAD A STATUTE PASSED AND THEY HAD A STATE PLAN THAT HAD TO BE
2 PUT BEFORE CMS. WE DO NOT HAVE A STATE PLAN THAT NEEDS TO BE
3 CHANGED HERE.

4 THE COURT: YEAH, BUT HERE THE STATUTE THAT WE'RE
5 TALKING ABOUT SAYS THAT A PERSON WHO IS MEDICAID ELIGIBLE HAS
6 THE RIGHT TO GO TO ANY PROVIDER, AND IF YOU TAKE AWAY THE
7 PROVIDER THAT SHE WANTS TO GO TO AND THAT PROVIDER IS
8 COMPETENT AND ADEQUATE TO GIVE SERVICE AND THAT CONTRACT IS
9 BEING TERMINATED BECAUSE OF, I CAN DO IT, DON'T YOU THINK THAT
10 IS SOMETHING FUNDAMENTALLY WRONG ABOUT THAT?

11 MR. RUSSO: WELL, JUDGE, FIRST OF ALL, I TAKE AN
12 ISSUE OR THE SECRETARY TAKES AN ISSUE AS TO THAT BEING THE
13 LONGSTANDING DEAL. I BELIEVE THE *O'BANNON* CASE POINTS OUT
14 PRETTY CLEARLY, AND WE HAVE ALWAYS GONE BY THE ASSUMPTION THAT
15 AS LONG AS THERE IS A VARIETY OF PROVIDERS OF WHICH YOU CAN
16 CHOOSE FROM, THAT THE *O'BANNON* CASE MADE IT PRETTY CLEAR YOU
17 DO NOT HAVE A PARTICULAR RIGHT TO, I WANT TO GO TO THAT
18 PROVIDER. YOU HAVE A CHOICE TO PICK PROVIDERS WHO ARE
19 QUALIFIED, PART OF BEING QUALIFIED IS HAVING THIS PE 50. BUT
20 *O'BANNON* SEEMS TO POINT OUT THAT.

21 AND AS A MATTER OF FACT, WHEN YOU LOOK AT THE
22 HISTORICAL DEAL OF FREEDOM OF CHOICE, FREEDOM OF CHOICE WAS
23 PUT IN THERE, I CONTEND, YOUR HONOR, AND THE SECRETARY
24 CONTENDS, TO PREVENT STATES FROM LOCKING RECIPIENTS IN, WHICH
25 IS A PRACTICE YOU CAN DO WITH A WAIVER FROM CMS. A WAIVER --

1 WHAT THEY CALL A WAIVER OF FREEDOM OF CHOICE. YOU CAN LOCK
2 THEM IN AND SAY YOU MUST GO SEE PROVIDER A AND YOU HAVE TO
3 HAVE THAT WAIVER. BUT *O'BANWON* I THINK MADE CLEAR, YOUR
4 HONOR, THAT YOU DON'T HAVE A PARTICULAR RIGHT TO PICK A
5 PARTICULAR PROVIDER. AND IF YOU GO TOWARDS THAT, ANYWAY WE
6 HAD THE CONTRACT THAT PLANNED PARENTHOOD SIGNED THAT SAID WE
7 COULD TERMINATE WITH 30 DAYS NOTICE AT WILL. SO THEY'RE NO
8 LONGER IN THE SECRETARY'S MIND GOING TO BE A QUALIFIED
9 PROVIDER. AND IF YOU LET THERE BE SOME SORT --

10 THE COURT: THEY -- THEY'RE NOT QUALIFIED BECAUSE
11 YOU'RE TERMINATING THEIR CONTRACT?

12 MR. RUSSO: EXACTLY. AND I ADMIT THAT THAT'S
13 CIRCULAR, YOUR HONOR, BUT --

14 THE COURT: IT IS CIRCULAR.

15 MR. RUSSO: -- BUT WHEN YOU TAKE IT OUT OF THE REALM
16 OF MEDICAID YOU'VE GOT OTHER STATUTES. YOU'VE GOT THE FIRST
17 CIRCUIT CASE OF *VAGA-ROMOS*, YOU'VE GOT 1396A(P,) YOU'VE GOT 42
18 CFR 1002.100 WHICH CLEARLY LAYS OUT THAT IF A STATE HAS
19 STATUTORY POWER AND AUTHORITY TO TAKE ACTION THEY CAN TAKE
20 ACTION UNDER THAT. NO ONE HAS -- NO PROVIDER HAS CHALLENGED
21 THAT PROVISION.

22 THE COURT: WELL, THIS HAS NEVER BEEN -- THIS HAS
23 NEVER -- THIS PARTICULAR PROVISION HAS NEVER BEEN USED IN THIS
24 WAY, HAS IT?

25 MR. RUSSO: IT HAS NOT, YOUR HONOR. IT HAS BEEN --

1 THE COURT: WELL, THEN HOW COULD IT BE CHALLENGED
2 BEFORE IF IT'S NEVER BEEN USED IN THIS WAY?

3 MR. RUSSO: BECAUSE IT'S ON THE BOOKS, JUDGE. THEY
4 KNEW WHEN THEY SIGNED THIS CONTRACT --

5 THE COURT: PEOPLE DON'T CHALLENGE STATUES IN THE
6 ABSTRACT, MR. RUSSO. THERE'S GOT TO BE A REASON TO DO IT.
7 AND IF IT'S NEVER -- IF IT'S NEVER BEEN USED IN THE WAY THAT
8 YOUR CLIENT IS USING IT IN THIS CASE HOW DO YOU EXPECT IT TO
9 BE CHALLENGED? GOOD POINT?

10 MR. RUSSO: IT'S A FAIR POINT, JUDGE. I BELIEVE WE
11 HAVE NOT UTILIZED THE STATUTE BECAUSE A SITUATION THAT WE'RE
12 FACED WITH WE'VE NEVER FACED WITH BEFORE. SO I THINK THIS IS
13 A VERY UNIQUE -- UNIQUE SITUATION.

14 THE COURT: I AGREE WITH THAT.

15 MR. RUSSO: JUDGE, YOU KNOW, MY POINT WITH THE
16 RECIPIENTS IS, LIKE I SAID, THEY HAVE A CHOICE OF A VARIETY OF
17 PROVIDERS AND IF YOU TRIED -- I KNOW ONE OF YOUR QUESTIONS
18 WAS, ARE THEY THIRD PARTY BENEFICIARIES? YOU BROUGHT UP THE
19 STIPULATION POUR AUTURI. IF YOU GO DOWN THAT ROUTE, JUDGE,
20 AND YOU ALLOW THE PROVIDERS OR THE RECIPIENTS AND SAY THEY
21 HAVE A PARTICULAR RIGHT TO CHOOSE A SPECIFIC PROVIDER, WELL,
22 THEN YOU COULD LET THOSE RECIPIENTS THEN -- THEY COULD SOMEHOW
23 ENTRAP AND LOCK IN PLANNED PARENTHOOD FROM EVER LEAVING THE
24 MEDICAID PROGRAM. I THINK *ARMSTRONG* MADE IT CLEAR --

25 THE COURT: THEY COULD -- IF PLANNED PARENTHOOD

1 CAN -- LIKE ANY OTHER PROVIDER IS NOT PROVIDING ADEQUATE
2 SERVICE AND THERE IS A LEGITIMATE REASON TO TERMINATE THEIR
3 CONTRACT, THEN THE MEDICAID RECIPIENT CAN'T SAY, OH, I WANT
4 THAT PROVIDER EVEN THOUGH FOR LEGITIMATE REASONS THAT PROVIDER
5 HAS BEEN -- HAS BEEN REMOVED FROM -- FROM THE PROGRAM. BUT
6 HERE THESE PEOPLE WANT TO USE THIS PROVIDER AND THERE HAS BEEN
7 NO REASON GIVEN TO TERMINATE THE CONTRACT. DON'T YOU SEE
8 THERE IS A FUNDAMENTAL DIFFERENCE?

9 MR. RUSSO: I SEE THERE'S DEFINITELY A FUNDAMENTAL
10 DIFFERENCE, JUDGE. NOW, DO I THINK WE VIOLATED ANY STATUTES
11 OR DO I THINK THAT -- THAT THE PLAINTIFFS -- EITHER THE
12 PROVIDERS OR THE RECIPIENTS HAVE A RIGHT TO BRING THIS ACTION
13 AND GIVE JURISDICTION TO THIS COURT? NO, I DON'T, UNDER
14 *ARMSTRONG* CLEARLY.

15 THE COURT: OKAY. YOU CAN PROCEED.

16 MR. RUSSO: THAT IS IT, JUDGE. I'M UP HERE NOW TO
17 ANSWER ANY OTHER QUESTIONS YOU HAVE.

18 THE COURT: I DO HAVE SOME QUESTIONS. IN THE
19 AFFIDAVIT WHICH IS ATTACHED -- OR THE DECLARATION WHICH IS
20 ATTACHED TO YOUR OPPOSITION, AND I DON'T HAVE THE LADY'S NAME,
21 SHE SAYS, "THERE ARE 1,146 ACTIVELY ENROLLED MEDICAID
22 PROVIDERS IN REGION ONE COVERING THE GREATER NEW ORLEANS AREA
23 AND 864 ACTIVELY ENROLLED MEDICAID PROVIDERS IN REGION TWO
24 COVERING THE GREATER BATON ROUGE AREA THAT CAN PROVIDE FAMILY
25 PLANNING AND RELATED SERVICES." IS THAT TRUE?

1 MR. RUSSO: I WANT TO POINT SOMETHING OUT --

2 THE COURT: WOULD YOU JUST ANSWER MY QUESTION.

3 THAT'S NOT TRUE, IS IT, SIR?

4 MR. RUSSO: THAT -- THEY PULLED A CODE RUN, SO THOSE
5 PROVIDERS CAN PROVIDE FAMILY PLANNING SERVICES BECAUSE THEY
6 HAVE BILLED FOR THEM BEFORE. HOWEVER, --

7 THE COURT: WE HAVE DENTISTS ON THERE, SIR. THERE
8 ARE DENTISTS LISTED ON -- AMONG THOSE.

9 MR. RUSSO: YES, THAT IS TRUE. BECAUSE A DENTIST --

10 THE COURT: YOU'RE TELLING ME THAT THEY -- LET ME
11 FINISH MY QUESTION, MR. RUSSO. YOU'RE TELLING ME THAT THEY
12 CAN PROVIDE FAMILY PLANNING AND RELATED SERVICES?

13 MR. RUSSO: THEY HAVE, THAT'S WHAT I'M TELLING YOU,
14 JUDGE.

15 THE COURT: AND THE OPHTHALMOLOGISTS HAVE THAT ARE
16 LISTED?

17 MR. RUSSO: YES, THEY HAVE.

18 THE COURT: AND THE DERMATOLOGISTS?

19 MR. RUSSO: TO MY KNOWLEDGE THEY HAVE.

20 THE COURT: AND AUDIOLOGISTS?

21 MR. RUSSO: TO MY KNOWLEDGE THEY HAVE BILLED CODES
22 FOR FAMILY --

23 THE COURT: COSMETIC SURGEONS?

24 MR. RUSSO: YES, SIR.

25 THE COURT: EAR, NOSE AND THROAT?

1 **MR. RUSSO:** THAT'S MY UNDERSTANDING FROM THE CLIENT,
2 YES, SIR.

3 NOW, IF I COULD EXPLAIN BECAUSE I DO -- I, STEVE
4 RUSSO, DO NOT WANT TO MISLEAD THE COURT, JUDGE. THAT WAS --
5 WHAT THEY DID WAS PULL A CODE RUN AND THEY MATCHED THE CODES
6 THAT ARE TYPICALLY BILLED -- OR MY UNDERSTANDING OF WHAT THEY
7 DID, WAS TYPICALLY -- CODES THAT WERE TYPICALLY FAMILY
8 PLANNING CODES, THEY RAN THOSE CODES AND THEN THAT'S HOW THEY
9 DETERMINED THAT NUMBER. SO --

10 **THE COURT:** IT STRIKES ME AS EXTREMELY ODD THAT YOU
11 HAVE A DERMATOLOGIST, AN AUDIO -- AN AUDIOLOGIST, A DENTIST
12 WHO ARE BILLING FOR FAMILY PLANNING SERVICES, BUT THAT'S WHAT
13 YOU'RE REPRESENTING TO THE COURT?

14 **MR. RUSSO:** THAT IS WHAT MY CLIENT HAS TOLD ME,
15 JUDGE, YES.

16 **THE COURT:** OKAY. I HAVE NO FURTHER QUESTIONS.
17 YOU WANT ANY REBUTTAL, MS. FLAXMAN?

18 **MS. FLAXMAN:** NOTHING SUBSTANTIVE. I HAD A
19 HOUSEKEEPING MATTER.

20 **THE COURT:** ALL RIGHT. WHAT IS IT?

21 **MS. FLAXMAN:** YOUR HONOR, JUST ON THE BRIEFING
22 SCHEDULE GOING FORWARD, I DON'T KNOW WHAT MR. RUSSO'S BRIEF IS
23 GOING TO SAY, BUT HE HAS MENTIONED SEVERAL TIMES ADDITIONAL
24 DECLARATIONS AND SO I JUST WANTED --

25 **THE COURT:** YOU WILL BE GIVEN -- LET'S SEE, THE 15TH

1 OF SEPTEMBER IS WHAT? THAT'S A WEEK FROM --

2 MS. FLAXMAN: I BELIEVE IT'S TUESDAY.

3 THE COURT: OKAY. SO YOU HAVE UNTIL WEDNESDAY TO
4 REPLY TO ANY BRIEF THAT IS FILED BY MS. KLIBERT.

5 MS. FLAXMAN: THANK YOU, YOUR HONOR.

6 THE COURT: ALL RIGHT.

7 ANYTHING ELSE?

8 ALL RIGHT. WE STAND ADJOURNED.

9 (WHEREUPON COURT WAS ADJOURNED.)

10
11 C E R T I F I C A T E

12 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
13 FROM THE RECORD OF THE PROCEEDINGS IN THE ABOVE-ENTITLED
14 NUMBERED MATTER.

15 S: /GINA DELATTE-RICHARD

16 GINA DELATTE-RICHARD, CCR

17 OFFICIAL COURT REPORTER
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