No. 18-2133

United States Court of Appeals
for the
Fourth Circuit

PLANNED PARENTHOOD SOUTH ATLANTIC; JULIE EDWARDS,
on her behalf and on behalf of all others similarly situated,

Plaintiffs-Appellees,

– v. –

JOSHUA BAKER, in his official capacity as Director, South Carolina Department of Health and Human Services,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA (COLUMBIA)
DISTRICT COURT CASE NO. 3:18-cv-02078-MGL
(MARY G. LEWIS, U.S. DISTRICT COURT JUDGE)

REPLY BRIEF FOR DEFENDANT-APPELLANT

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INTRODUCTION

Plaintiffs Planned Parenthood South Atlantic ("PPSAT") and Julie Edwards ("Edwards") propose that this Circuit follow the erroneous lead of five of the six federal circuits who have previously reviewed this issue in usurping the state's authority to decide who is qualified to participate as a Medicaid provider in that state. Plaintiffs' arguments all stem from PPSAT's exaggerated sense of its role in serving the needs of South Carolina's Medicaid population and an enthusiastic, but mistaken belief that § 1396a(a)(23) (the "Free Choice Plan Requirement") provides recipients of Medicaid dollars an unfettered right to force states to contract with any licensed and competent provider that recipient prefers, rather than access to a provider of the recipient's choosing from the list of providers the state has deemed "qualified". Plaintiffs, like the District Court, understandably rely in large part on the discussion of § 1396a(a)(23) in the Federal Circuit opinions supporting their position. However, neither *Blessing v. Freestone* nor *Wilder v. Virginia Hospital Association* require the result stated by PPSAT and Edwards. *Blessing v. Freestone*, 520 U.S. 329 (1997); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990). As Congress has not spoken with an unambiguous, clear voice that would put a State on notice in § 1396a(a)(23) that Medicaid recipients are able to compel state action under § 1983, the District Court's grant of a preliminary injunction should be reversed.

Moreover, South Carolina has a legitimate and substantial interest in preserving and promoting fetal life. Although PPSAT and Edwards argue strenuously against South Carolina's right to deem abortion providers "unqualified" to participate in the State's Medicaid program - a position the District Court summarily adopted in granting the motion for TRO and preliminary injunction on appeal here - PPSAT and Edwards have not directly challenged the executive order that deemed PPSAT unqualified to participate in the Medicaid program and there is no question that SCDHHS was required by law to terminate PPSAT upon issuance of Executive Order 2018-21. At best, PPSAT and Edwards have made a showing that § 1396a(a)(23) is vague and amorphous, which requires a reading in favor of State sovereignty and against finding an implied private right of action pursuant to the Medicaid Act.

The District Court's preliminary injunction requires SCDHHS to continue to contract with a provider lawfully deemed "unqualified" under State law. No matter the result in this case, PPSAT is unqualified pursuant to Executive Order 2018-21- to receive Medicaid reimbursement for services[1]. Accordingly, the District Court's preliminary injunction is improper. These errors – along with Edwards's lack of

[1] Executive Orders issued by the South Carolina Governor's office have general application and legal effect and are not subject to General Assembly approval. See S.C. Code Ann. § 1-23-100 (2005), available at http://www.scstatehouse.gov/code/t01c023.php.

actual irreparable harm – constitute abuse of discretion and warrant reversal by this court.

ARGUMENT

I. The *Blessing* test and *Gonzaga* support finding that §1396a(a)(23) did not create a private right of action enforceable by Plaintiffs under § 1983

The District Court's decision erroneously endorses a private right of action under § 1983 to enforce a right that Congress did not confer under § 1396a(a)(23). In *Blessing*, the Supreme Court developed the three-pronged test cited by the District Court decision below and referenced in Plaintiffs' brief for determining whether a statutory provision creates a privately enforceable right of action under 42 U.S.C. § 1983: (1) Congress must have "intended that the provision in question benefit the plaintiff," as evidenced by "rights-creating terms"; (2) the right allegedly protected by the statute must not be "so 'vague and amorphous' that its enforcement would strain judicial competence"; and (3) the provision giving rise to the right must be stated in "mandatory, rather than precatory, terms." *Blessing*, 520 U.S. at 340-41. The Supreme Court clarified the standard for determining whether a statute creates a private right of action in *Gonzaga v. Doe*, 536 U.S. 273 (2002). In *Gonzaga*, the Supreme Court expressly rejected the notion that a plaintiff's inclusion in a class of persons benefitting from a statute is insufficient to support a § 1983 action; "if

Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms." 536 U.S. at 290.

Contrary to Plaintiffs' assertion, and to the District Court's holding below, the *Blessing* test and *Gonzaga* do not support finding that the Free Choice Plan Requirement confers an individual right on Medicaid beneficiaries like Edwards.

A. Congress did not intend § 1396a(a)(23) to so directly benefit Medicaid beneficiaries that Edwards and the purported class she represents are the "unmistakable focus" of the statute.

The Preferred Provider Plan Provision states that a "state plan for medical assistance must provide that any individual eligible for medical assistance . . . 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 . . .". 42 U.S. Code § 1396a(a)(23)(A).

In *Blessing v. Freestone*, 520 U.S. 329 (1997), the Court provided an analytical framework for courts to use when evaluating whether or not a statute creates a right enforceable under § 1983. *Blessing* requires a court to consider three factors: (1) "Congress must have intended that the provision in question benefit the plaintiff," *id*. at 340; (2) "the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence," *id*; and (3) "the statute must unambiguously impose a

binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms." *Id.* at 341.

Blessing examined a federal mandate requiring states that received federal child-welfare funds to "substantially comply" with certain federal requirements intended to compel timely payment of child support. In reviewing the *Blessing* test factors, the Court held that the mandate was not "an individual entitlement to services, … [but] simply a yardstick for the [federal government] to measure the systemwide performance of the State's Title IV-D program." 520 U.S. at 343. The Court held that parents, despite clearly benefitting from the child support collection efforts, were nevertheless unable to enforce the child support statute as a whole. *Id*. at 342. As explained by the Court, the syntax used by Congress in enacting certain state compliance and reporting provisions evidenced a focus on the government's interest in recouping public assistance benefits, rather than ensuring a continued income stream to specific families. *Id*. at 344-345.

Furthermore, in reversing the Ninth Circuit's decision, the U.S. Supreme Court found that the Court of Appeals had failed to specify any specific "rights" it was purporting to recognize but had instead simply found that federal law gave the parent respondents the right to have the State substantially comply with the federal mandate. 520 U.S. at 342. Only when the complaint is broken down into manageable analytic bites can a court ascertain whether each separate claim satisfies the various

criteria the court has set forth for determining whether a federal statute creates rights. *Id*. at 342 (citing *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106, 110 S. Ct. 444, 448 (1989) (asking whether the provision in question was designed to benefit the plaintiff)).

Following *Blessing*, some courts believed that the first prong of the Blessing test allowed indirect beneficiaries to bring private actions under Section 1983 even where no express right was granted by statute. *See e.g*., *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir., 2005) (noting "[s]omewhat confusingly, the first *Blessing* factor addressed whether or not the plaintiff receives an intended 'benefit' from the statute, whereas the second factor referred not to a 'benefit' but to a 'right.'" *Id*. at 1057). This misapprehension was resolved by the Supreme Court in *Gonzaga University v. Doe*, 536 U.S. 273 (2002).

In *Gonzaga*, the Court directly acknowledged that "[s]ome language in our opinions might be read to suggest that something less than an unambiguously conferred right is enforceable by § 1983." *Gonzaga*, 536 U.S. at 282 (referring specifically to the *Blessing* test). However, the Court expressly rejected that interpretation:

> [w]e now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983. Section 1983 provides a remedy only for the deprivation of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. Accordingly, it is rights, not the broader or vaguer "benefits" or "interests," that

> may be enforced under the authority of that section. This being so, we further reject the notion that our implied right of action cases are separate and distinct from our § 1983 cases. To the contrary, our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983.

Id., 536 U.S. at 283.

Gonzaga involved an alleged violation of the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, which prohibits "the federal funding of educational institutions that have a policy or practice of releasing education records to unauthorized persons." 536 U.S. at 276. Gonzaga University disclosed a student's alleged sexual misconduct to the state agency responsible for teacher certification, whereupon the student sued to enforce the privacy provisions of FERPA. The Court held that "such an action [was] foreclosed because the relevant provisions of FERPA create no personal rights to enforce under 42 U.S.C. § 1983." *Id.* The Court further held that for Section 1983 to be invoked, there must be a showing that "an unambiguously conferred right" – as opposed to the broader or vaguer "benefits" or "interests" – exists that is "phrased in terms of the persons benefited". *Id*. at 283-284 (the latter quoting in part *Cannon v. University of Chicago*, 441 U.S. 677, 692 (1979)). In examining the statutory language, the Court dismissed language that seemingly granted individual students protection from institutional invasions of privacy and instead held that the statute was addressed more to the entity regulated than to the students benefited. Similarly,

§ 1396a(a)(23)(A) is also addressed to the entity regulated, rather than to the individuals benefited. In fact, Section 1396a. is titled "State Plans for Medical Assistance", and is couched in terms of the requirements of state plans, not in terms of benefits to individuals seeking Medicaid-covered services.

Furthermore, the Court in *Gonzaga* focused on the fact that the rent ceiling provisions of the United States Housing Act of 1937 construed in *Wright v. Roanoke Redevelopment and Housing Authority*, 479, U.S. 418 (1987) and the reimbursement provisions of the Medicaid Act interpreted in *Wilder* "explicitly conferred specific monetary entitlements to the plaintiffs." 536 U.S. at 280. Based on the ruling in *Gonzaga*, plaintiffs claiming individually enforceable rights through § 1983 must show similar or analogous individual entitlements expressed in the language of a statute, showing that they are the "unmistakable focus" of the statute, in order to demonstrate the statute indeed confers an enforceable right upon them. *Cannon*, 441 U.S. at 691. There is no monetary entitlement in § 1396(a), nor is there a showing that Plaintiffs are the unmistakable focus of § 1396(a). The focus of § 1396(a) is the state Medicaid program. As with other federal programs for low-income people, the Medicaid Act is Spending Clause legislation, which "focuses on the person regulated rather than the individuals protected" and therefore creates "no implication of an intention to confer rights on a particular class of persons." *Gonzaga*, 536 U.S. at 287 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001)).

Repeatedly, the Court in *Gonzaga* emphasized that congressional use of explicit, individually focused, rights-creating language is necessary to indicate congressional intent to create an individually enforceable right in a spending statute. *Gonzaga,* 536 U.S. at 283-84. "The question whether Congress intended to create a private right of action is definitively answered in the negative where a statute by its terms grants no private rights to any identifiable class." *Sanchez*, 416 F.3d at 1057. Contrary to the District Court's holding, the use of the word "individual" alone is insufficient to meet the first prong of the *Blessing* test. The Preferred Provider Plan Provision requires states to provide that "any individual eligible for medical assistance" . . . "may" choose among providers qualified by the state and willing to see the participant. This provision is not analogous to the clear right-producing language found in Title VI of the Civil Rights Act of 1964. *See Gonzaga* at 287.

Moreover, at best, § 23(A) is vague and amorphous, requiring a reading in favor of State sovereignty. Section 1396a(a)(23)(A) does not define the term "qualified," and § 1396a(p)(1) permits a State to exclude providers from its Medicaid program for any reason established by State law. S.C. Code Ann. § 43-5-1185 mandates "State funds appropriated for family planning must not be used to pay for an abortion." Therefore, under *Blessing*, there is no binding obligation on the State to provide funding to entities that subsidize abortions with that funding. Additionally, § 23(A), much like the provision at issue in *Blessing*, is not an

individual entitlement to services with no questions asked, but acts as a yardstick for the Secretary of the USDHHS to measure or otherwise examine a state's plan. By leaving the term "qualified" undefined, states are given leeway to limit Medicaid-covered services. To again differentiate from *Blessing*, the provision here at issue is ambiguous and lacks detailed criteria for measuring compliance. Also, should the Secretary feel a state's non-coverage of a service or services strays too far from the Medicaid Act's bounds, he can deny the plan and/or ask for a plan modification. In other words, Congress leaving the term "qualified" undefined purposely creates a vague or amorphous provision with the idea being that doing so allows the states to tailor their State Plan. Accordingly, PPSAT and Edwards can point to no evidence that Congress intended that they—and not just the federal government—could sue to enforce the statute.

In *Blessing*, the Supreme Court ultimately remanded the case back to District Court upon finding that Title IV-D does not give individuals a federal right to force a state agency to substantially comply with Title IV-D. The *Blessing* factors as applied to this case simply do not support finding an individual cause of action under § 1983. Individuals are free to seek medical assistance from any provider the State deems eligible to partake in the State plan for medical assistance, so long as the provider chooses to undertake the provision of such services.

B. The District Court's reliance on *Wilder* is misplaced.

The District Court's substantial reliance on *Wilder v. Virginia Hospital Association* is misplaced because the analysis focuses on different statutory provisions. In *Wilder*, the court's focus was on the Boren Amendments, which changed Medicaid reimbursement rate calculations to allow for states to come up with a scheme for reimbursement focused on "reasonable and adequate" rates. 496 U.S. 498 (1990). Furthermore, contrary to PPSAT and Edwards's argument, *Wilder* does not set an objective standard applicable in this case. The Court in *Wilder* focused on the interpretation of what is "reasonable and adequate" depending on each state. The same can be said for the term "qualified" in the Free Choice Plan Requirement, as it is not focused on an objective standard, but rather on what each individual state deems to be "qualified" for its specific State Plan.

Wilder also lacks precedential value here. As explained by the Ninth Circuit in *Sanchez*, the anomalous decision in *Wilder* appears to mark a sudden expansion in the Court's § 1983 jurisprudence. 416 F.3d at 1056. "In hindsight, however, it was merely a rare case in which, as the Court explained in *Gonzaga*, a statute 'explicitly conferred specific monetary entitlements upon the plaintiffs . . . [and] Congress left no doubt of its intent for private enforcement . . .'" *Id*. (citing *Gonzaga*, 536 U.S. at 280). Justice Stevens' dissent in *Gonzaga* even suggested the reasoning in *Wilder* is so out of step with that of *Gonzaga* that *Wilder* has effectively been

overruled. *Id*. In that dissent, Justice Stevens wrote: "[I]mposing the implied right of action framework upon the § 1983 inquiry *sub silentio* overrules cases such as *Wright* and *Wilder*. In those cases we concluded that the statutes at issue created rights enforced under § 1983, but the statutes did not 'clearly and unambiguously,' . . . intend *enforceability under § 1983*." *Id*. (emphasis in original) (citing *Gonzaga*, 536 U.S. at 300).

Section 1396a does not "clearly and unambiguously" grant a right to Plaintiffs. If Congress wanted to create a binding obligation on the relevant governmental units, they would have defined "qualified" within Section 1396a. Having refrained from doing so, Congress has allowed states in situations such as this to reasonably implement their State Plan. Where Congress has refrained from legislating, the judiciary should not impose its own provider qualifications.

C. Plaintiffs' limited definition of "qualified" as used in § 1396a(a)(23) renders that word meaningless

Pursuant to the Free Choice Plan Requirement, state Medicaid programs "must provide" that "any individual eligible for medical assistance … 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". § 1396a(a)(23). The District Court found, over argument from Defendant, that the term "qualified" did not render the statute so "vague and

amorphous" that it failed the second prong of the *Blessing* test. Although the word "qualified" is not defined in the statute, the District Court adopted the reasoning of the Seventh Circuit in reading "qualified" in a general sense as "having an officially recognized qualification to practice as a member of a particular profession; fit, competent." *Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 969 (9th Cir. 2013) (quoting from the Oxford English Dictionary 3d ed. 2007)); App. 214. This misinterpretation led the District Court to find § 1396a(a)(23) created a private right of action to enforce a right that does not exist. Specifically, the District Court decided that a Medicaid patient's choice of provider does not mean her choice from the list of state-funded providers deemed eligible to participate in South Carolina's Medicaid program. Instead, the court below construed "qualified" to mean professionally competent to provide a desired Medicaid covered service.

However, this interpretation of the term "qualified", whether by the District Court or one of the Circuits adopting this view, renders the inclusion of the word in the Free Choice Plan Requirement pointless and redundant. If the decision over whether a provider is qualified depends solely on a provider's licensure and competence, then requiring a provider be qualified is nonsensical since a participating state's existing licensure and oversight provisions already limit a Medicaid recipient's choice to "qualified" providers.

Given that general rules of statutory construction disclaim interpretations rendering statutory terms meaningless, "qualified" in this context cannot merely mean that a provider is professionally competent. However, unless "qualified" is defined as meaning "qualified by the state" or simply meeting the state's conditions placed on prospective Medicaid providers, then no real meaning presents itself. Accordingly, the District Court's opinion renders the Free Choice Plan Requirement so vague and amorphous as to defy judicial competence in enforcing it. Because privately enforceable rights cannot rest on vague and amorphous provisions, the Free Choice Plan Requirement cannot support an action under 42 U.S.C. § 1983.

II. The state action deeming PPSAT unqualified to participate in South Carolina's Medicaid program is not a subject of this action

Plaintiffs conflate SCDHHS's termination of PPSAT as a Medicaid provider with the State action that deemed abortion providers like PPSAT unqualified to participate in the Medicaid program. While SCDHHS made the termination decision, the evidence in the record – which was recognized by the District Court – is that SCDHHS terminated PPSAT based on its disqualification imposed by Executive Order 2018-21. App. 205-206. Plaintiffs chose not to directly challenge Executive Order 2018-21 in this action. Plaintiffs have produced no evidence that Defendant acted illegally in terminating PPSAT's agreement aside from arguing that the State violated the Free Choice Plan Requirement in deeming abortion providers

"unqualified" to participate in the state's Medicaid program. Plaintiffs misstate the record—and Governor McMaster—in alleging that "Defendant has simply labeled PPSAT 'unqualified' in an effort to carry out Governor McMaster's campaign promise to punish PPAT and the patients who seek Medicaid services there". The record is clear that Defendant did not make the decision whether or not PPSAT is a qualified provider. Even if Plaintiffs ultimately prevail in this action and the District Court holds that SCDHHS's termination of PPSAT's provider agreements violated an enforceable right by one or both of the Plaintiffs, PPSAT will still be deemed "unqualified" to be a provider pursuant to Executive Order 2018-21, which is not at issue in this case.

"By the plain terms of § 1983, two – and only two – allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). "[G]enerally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *West v. Atkins*, 487 U.S. 42, 50 (1988). This action concerns only SCDHHS's termination of PPSAT's Medicaid provider agreements once PPSAT was no longer qualified to participate due to Governor McMaster's Executive Order 2018-21. Despite PPSAT's and Edwards' numerous

objections in their brief to any attempt by "South Carolina" to limit PPSAT's ability to receive state funds, they have not directly challenged Executive Order 2018-21 in this suit and they have not requested review of South Carolina Code Section 43-5-1185 which sets out the State's mandate that its funds appropriated for family planning not be used indirectly to support abortion services. Therefore, despite Plaintiffs' condemnation of SCDDHS's "illegal" action in terminating its contracts with PPSAT, there is no question that Director Baker was required by law to terminate PPSAT's agreements upon their disqualification – a decision that neither Director Baker nor any party to this litigation made.[2] Accordingly, the District Court overreached in granting a preliminary injunction that requires SCDHHS to continue to contract with a provider deemed by law to be unqualified to participate in the Medicaid program who has failed to appropriately challenge that disqualification.

[2] Plaintiffs' allegation in footnote 9 of their Brief that "South Carolina is directly flouting federal requirements that it cover certain medically necessary abortions" is absurd and incorrect. As set out in Appellant's Brief, South Carolina's Medicaid Program reimburses abortion services if the pregnancy is the result of an act of rape or incest or if the woman suffers from a physical disorder, injury or illness that a physician certifies places the woman in danger of death unless an abortion is performed. See Appellant's Brief p. 10. Executive Order 2018-21 does not prohibit reimbursement for these services. Only abortion clinics are deemed unqualified in the order; hospitals and surgery centers providing abortions were not deemed unqualified.

III. Plaintiffs provide no evidence of irreparable harm

Plaintiffs mistakenly assert that Defendant ignores the District Court's findings of fact regarding the need for indigent access to competent care. No one is more aware than South Carolina's Medicaid Director of the ongoing challenge in addressing the health concerns of the state's Medicaid recipients. However, the District Court's finding of irreparable harm to Edwards, and her purported class,[3] if they cannot receive Medicaid reimbursement for reproductive health services provided by PPSAT is simply in error.

Plaintiffs' characterization of Columbia and Charleston, South Carolina – the two cities where PPSAT maintains clinics – as "areas in which primary care professionals are practically inaccessible" is misleading. Brief for Plaintiffs ("Pls.' Br.") at 16-17, Doc. 21. Plaintiffs also miss Defendant's point regarding the fact that PPSAT is merely one of 56,917 providers participating in South Carolina's Medicaid program. It is immaterial how many of those providers are in Columbia or Charleston, where PPSAT is located; Edwards lives in Aiken and travels an hour to reach PPSAT regardless. App. 75, 77. Notwithstanding Plaintiffs' assertions of PPSAT's superior reproductive healthcare, the vast majority of South Carolina's

[3] Plaintiffs mistakenly allege that Edwards brought the claims in this action on her own behalf, Pls. Brief p. 9; she brought them on behalf of both herself and a purported class. App. 10. Plaintiffs' motion for class certification is still under review before the District Court along with Respondents' motion to dismiss.

Medicaid recipients have chosen to receive their reproductive health from other providers. In 2017 alone, PPSAT provided services to only 257 of the almost 1,200,000 Medicaid beneficiaries in South Carolina[4]. Edwards was not even one of those. PPSAT mischaracterizes Edwards's declaration as saying that "she switched to PPSAT because of negative experiences with other providers"; her declaration merely states that she was considering changing to PPSAT for all of her reproductive healthcare due to negative experiences with other providers. App. 77-78. However, there is no evidence in the record that Edwards or any member of the purported class was at any time denied access to reproductive health services because PPSAT could not receive state reimbursement for those services.

Additionally, contrary to what Plaintiffs argue, and the District Court held, whether alternatives to PPSAT exist is not immaterial. A preliminary injunction should only be awarded where the plaintiff makes a clear of showing of material harm. If safe alternatives exist, then the termination of PPSAT's Medicaid agreements did not and could not pose actual, material harm to any Medicaid beneficiary.

[4] Plaintiffs habitually fail to acknowledge the relative low volume of South Carolina Medicaid patients treated by PPSAT. For example, in fiscal year 2017 there were approximately 1,200,000 individuals enrolled in the South Carolina Medicaid Program. App. 150, ¶ 15. Of those approximately 1.2 million individuals, only 257 individual patients were provided pharmacy and/or physician services at PPSAT. App. 149, ¶ 10.

This is no doubt the reason Plaintiffs turn again to the Free Choice Plan Requirement and allege that the harm Edwards suffered is the right to state reimbursement for reproductive health services received from whatever provider she chooses, whether or not that provider is deemed qualified by the state. Pls.' Br. at 24-26, Doc. 21. In other words, not even Edwards appears to believe she lost anything but opines that she might one day in the future want to use PPSAT. By her own admission Edwards received the services she sought from PPSAT. At best, Edwards might hypothetically be harmed, one day in the future, but most likely not until after a decision on the merits is reached in this case. This conjecture fails to meet the standard for a showing of irreparable harm.

CONCLUSION

For these reasons, this Court should reverse the District Court's decision and vacate the preliminary injunction.

Respectfully submitted,

Date: February 4, 2019

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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CERTIFICATE OF SERVICE

I certify that on January 28, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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