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)

BRIEF FOR DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Defendant-Appellant Joshua Baker, makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?

No.

2. Does party/amicus have any parent corporations? If yes, identify all parent corporations, including grandparent and great-grandparent corporations.

No.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? If yes, identify all such owners.

No.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? If yes, identify entity and nature of interest.

No.

5. Is party a trade association? (amici curiae do not complete this question) If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member.

No.

6. Does this case arise out of a bankruptcy proceeding? If yes, identify any trustee and the members of any creditors' committee.

No.

Date: November 26, 2018

/s/ Kelly M. Jolley
Attorney for Defendant-Appellant Joshua Baker

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JURISDICTIONAL STATEMENT

This case arises under the Establishment Clause of the First Amendment to the United States Constitution, U.S. Const. amend. 1, and 42 U.S.C. § 1983. The District Court had subject-matter jurisdiction under 28 U.S.C. §§ 1331. On August 28, 2018, that Court granted Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction. App. 204-221. On September 10, 2018, Joshua Baker, in his Official Capacity as Director, South Carolina Department of Health and Human Services, timely appealed. App. 6. This Court's jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Did Congress, in 42 U.S.C. § 1396a(a)(23), clearly and unambiguously authorize a private right of action for Medicaid patients to collaterally challenge a state agency determination that a particular provider is not qualified to be part of the Medicaid program?

2. Is a Medicaid patient's § 1396a(a)(23) challenge likely to succeed where the provider has waived its right to bring suit against the Medicaid program in federal court and both the patient and provider have failed to exhaust their administrative remedies as required by their agreements with the Medicaid program?

3. Do the harms identified by Edwards—such as having to seek care from a qualified Medicaid provider—satisfy the irreparable harm requirement for granting a preliminary injunction?

4. Has Edwards shown that disqualifying PPSAT as a Medicaid provider during the pendency of this suit is adverse to the public interest?

5. In light of the foregoing, did the district court commit reversible error in granting the preliminary injunction?

STATEMENT OF THE CASE

This is an interlocutory appeal from the District Court's August 28, 2018 entry of a Memorandum Opinion and Order Granting Plaintiffs' Motion for Temporary Restraining Order and Motion for Preliminary Injunction. App. 204-221. Plaintiffs Planned Parenthood South Atlantic (PPSAT) and Julie Edwards, on her own behalf and that of a purported class, sued under 42 U.S.C. § 1983 seeking to secure rights allegedly bestowed on the Plaintiffs by the Medicaid Act (Title XIX of the Social Security Act) and the Fourteenth Amendment of the United States Constitution. Plaintiffs requested injunctive relief and a declaratory judgment finding that Defendant violated the Medicaid Act and the Fourteenth Amendment by terminating PPSAT's enrollment with the South Carolina Department of Health and Human Services (SCDHHS) as a Medicaid provider following the directive in South Carolina Governor Henry McMaster's Executive Order 2018-21 that abortion clinics and affiliated physicians are deemed unqualified to participate in the South Carolina Medicaid program. App. 7, 13, 18-20. Plaintiffs also sought a temporary restraining order and preliminary injunction ordering SCDHHS to allow PPSAT to enroll as a Medicaid provider during the pendency of this suit, claiming that PPSAT, and the

patients served by its clinics and pharmacies, were irreparably harmed by the exclusion of PPSAT from the Medicaid program.

Defendant Joshua Baker is the Director of SCDHHS. SCDHHS is the single state agency responsible for the administration in South Carolina of a program of Medical Assistance under Title XIX of the Social Security Act; it makes all final decisions and determinations regarding the administration of the Medicaid program.

I. The Medicaid Program

As enacted by Congress, the Medicaid program is a joint federal and state program offering. States that establish Medicaid programs complying with specific federal requirements receive federal reimbursement for such programs. Within the requirements of the act, each state determines what services and populations are included in the program and also sets the qualifications and standards of practice for providers who seek to provide the covered services. The federal government reimburses states with programs in conformity with the Medicaid Act and may refuse to issue Medicaid grants to any state whose program is non-compliant. However, while a state found to have a non-compliant program may be ineligible for federal reimbursement, neither the state or its Medicaid agency violates any federal law, let alone violate a federal right, by having a non-compliant state program.

A. States' Power to Qualify Providers and Exclude Unqualified Providers

The Medicaid Act also provides states with flexibility in determining which providers are qualified to participate in a state's Medicaid program. Although Congress provided several specific grounds upon which a state agency either must or may exclude a provider as disqualified, 42 U.S.C. § 1396a(p)(1) also provides that, "[i]n addition to any other authority, a State may exclude any individual or entity for purposes of participating under the State plan under this subchapter *for any reason* for which the Secretary [of the federal Department of Health and Human Services] could exclude the individual or entity from participation in a program under subchapter XVII under section 1320a-7, 1320a-7a, or 1395cc(b)(2) of this title." Viewed in its entirety, the Medicaid Act provides over fifty reasons for the Secretary or a state agency to exclude an entity from the qualified Medicaid provider pool.[1] While not all the stated reasons are discretionary (*e.g.*, a state must exclude a provider with a felony conviction related to controlled substances), the Secretary or the state agency must utilize expertise and experience in the Medicaid field to make decisions regarding disqualification from the Medicaid program. *See, e.g.*, 42 U.S.C. § 1320a-7(b)(6)(B) (the Secretary or program must define and apply the phrase

[1] This is a good faith estimate of the separate number of reasons identified in the statutes regarding termination from the Medicaid program.

"substantially in excess of a patient's needs" and determine what conduct "fails to meet professionally recognized standards of health care").

In addition, the Centers for Medicare and Medicaid Services (CMS) provides states with latitude to set their own additional qualification standards and exclude Medicaid providers based on criminal, unethical or improper conduct. *See, e.g.*, 42 C.F.R. § 431.51(c)(2) (permitting states to establish and enforce their own "reasonable standards relating to the qualifications of providers."); *Guzman v. Shewry*, 552 F.3d 941, 949 (9th Cir. 2009) (concluding that the federal statutes and regulations "plainly contemplate 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 . . . ."); *First Med. Health Plan v. Vega-Ramos*, 479 F.3d 46, 53 (1st Cir. 2007) (explaining that 42 U.S.C. § 1396a(p)(1) "preserves the state's ability to exclude entities from participating in Medicaid under 'any other authority'" and that 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").

Any provider terminated by the Medicaid program is provided an opportunity to challenge the termination decision under both federal and state law. *See, e.g.*, 42 C.F.R. § 1002.213 (a state must give terminated providers "the opportunity to submit

documents and written argument" and "any additional appeals rights that would otherwise be available under procedures established by the state."); 27 S.C. Code Ann. Regs. §126-150, et seq. (1976, as amended); and the Administrative Procedures Act, S.C. Code Ann. §1-23-310 et seq., (1976, as amended).[2]

B. Federal Authority to Regulate State Medicaid Programs

Congress delegated the authority to regulate the Medicaid program to the United States Department of Health and Human Services' Center for Medicare and Medicaid Services (CMS). CMS, on behalf of the Secretary of Health and Human Services, oversees the state agency administration of the Medicaid program. To

[2] PPSAT entered into two enrollment agreements with SCDHHS, effective June 5, 2016 and June 15, 2016, respectively, to provide pharmacy and physician services. App. 97-145. While the enrollment agreements each contain termination provisions, PPSAT's right to participate in the Medicaid program at all is dependent upon PPSAT remaining a qualified provider. These enrollment agreements remained in effect until July 13, 2018, at which point PPSAT was no longer qualified to participate as a Medicaid provider pursuant to Executive Order 2018-21. Both enrollment agreements contain the following forum selection clause:

> That, for any dispute arising under this agreement, the provider shall have as his sole and exclusive remedy the right to request a hearing from SCDHHS within thirty (30) calendar days of the SCDHHS action which [sic] he believes himself aggrieved. Such proceedings shall be in accordance with SCDHHS appeals procedures and S.C. Code Ann. 1-23-310 et seq. (1976, as amended). Judicial review of any final agency administrative decision shall be in accordance with S.C. Code Ann. 1-23-380 (1976, as amended). App. 115, 139.

empower the Secretary to carry out his oversight responsibility, Congress delegated to the Secretary its power of the purse. This structure limits the need for judicial involvement in administration of the Medicaid program.

A state receives a large share of the funds required to operate a Medicaid program by, first, participating, and then by creating a State Medicaid Plan meeting the requirements of 42 U.S.C. § 1396a(a). In exchange for these funds, the state submits to federal oversight of its program. Under 42 U.S.C. § 1396c, the Secretary is charged with ensuring that states substantially comply with their plans. Congress requires states to include a list of items that must be written into a State Medicaid Plan for the Secretary to approve the plan and provide federal funds. *See* 42 U.S.C. § 1396a(a); 42 U.S.C. § 1396a(b) ("The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section . . . ."). 42 U.S.C. § 1396a(a)(1) is one of the 83 subsections of state plan requirements in the Medicaid Act.

Implementing a state Medicaid program requires both state and federal agencies to execute technical and experience-based decisions. Congress provided the Secretary with oversight of a state's implementation of a Medicaid plan, but the mechanism itself requires ongoing consultation and coordination between experts at both the federal and state agencies. Under 42 U.S.C. § 1396c, the Secretary may

withhold all or part of a state's federal Medicaid funding if he finds that "the plan has been so changed that it no longer complies with the provisions of section 1396a" or that "in the administration of the plan there is a failure to comply substantially with any such provision." *Id*. (allowing the Secretary to discontinue payments "until [he] is satisfied that there will no longer be any such failure to comply"). However, the Secretary must provide the state agency "reasonable notice and opportunity for hearing" before withholding any funds. The Secretary may waive any non-compliance. *See* 42 U.S.C. § 1396n(b)(4). The Medicaid Act's enforcement mechanism is not simply an authoritative, top-down structure but, instead, requires ongoing communication and coordination between federal and state agencies. Nothing in the enforcement provisions in the Medicaid Act limits a state's authority to choose its requirements for a provider to be deemed qualified to provide services to Medicaid beneficiaries.

C. The Executive Orders and SCDHHS's Exclusion of PPSAT

Although the Supreme Court has held that a woman has a limited right to obtain an abortion under the Fourteenth Amendment's Due Process Clause, the Court has also asserted that the state has "a legitimate and substantial interest in preserving and promoting fetal life." *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007). A state may, therefore, freely enact laws and policies encouraging pregnant women

to choose childbirth over abortion, provided these laws and policies do not unduly burden a woman's ability to obtain an abortion before her pregnancy is viable. *See id.* at 146.

Withholding taxpayer subsidies for abortions is a constitutionally permissible means of promoting childbirth and discouraging abortion. *See Webster v. Reproductive Health Servs.*, 492 U.S. 490, 511 (1989) ("[T]he State need not commit any resources to facilitating abortions . . . ."). Federal funding of abortion has been prohibited since 1976—under the Hyde Amendment[3]—unless the abortion is necessary to save the life of the mother or where the pregnancy resulted from rape or incest.

In *Harris v. McRae*, the Court held that as a matter of statutory interpretation, the Medicaid Act does not require states to fund the cost of medically necessary abortions for which federal funds are unavailable under the Hyde Amendment. 448 U.S. 297, 309 (1980). Ultimately, the Court upheld the constitutionality of the Hyde Amendment because "a woman's freedom of choice [does not] carr[y] with it a

[3] The Hyde Amendment is part of a budget bill appropriating funds for certain departments of the federal government for a given fiscal year. *See* Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, §§ 507-08, 123 Stat. 524, 802-03 (2009) (enacting H.R. 1105).

constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Id*.

Since the Hyde Amendment, South Carolina has provided Medicaid funding for abortions only in these circumstances: (1) if the pregnancy is the result of an act of rape or incest; or (2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed. *See* footnote 4, p. 11. Section 43-5-1185, of the South Carolina Code of Laws, enacted by the State Legislature in 1995, goes a step further to prohibit Medicaid funds from *indirectly* subsidizing abortion and prohibiting direct payment for abortion services, stating "State funds appropriated for family planning must not be used to pay for an abortion."

Although PPSAT disputes this argument,[4] common sense dictates that when a provider provides both abortion and other medical services, any Medicaid

[4] This concern appears to be supported by the declaration of PPSAT's President and CEO that without public funds, PPSAT may need to reduce the services it offers and hours of operation: "Without Medicaid reimbursements, we may not be able to keep providing services in the same manner we have been and may need to reduce hours at our health centers." App. 53. However, once Baker referred to this claim as evidence that PPSAT is using the state's money to offset operations costs and indirectly support its abortions services, PPSAT restated its

reimbursement it receives for non-abortion services may support the provider's operations. These costs, including largely fixed costs like facilities, staffing, and utilities, are offset by the Medicaid reimbursements, which frees up funds that the provider may then use to support its abortion practice. Since money is fungible, a state's money supports abortions any time the State awards money to an entity that performs abortions. Any money received by an abortion provider—whether in payment for abortion services or reimbursement for family planning services—offsets the expenses of that provider.

PPSAT provides abortions and reproductive health and family planning services. App. 7, 10. Since PPSAT provides family planning services to a very limited portion of the Medicaid participants seeking reproductive health services—approximately 257 participants in fiscal year 2017—PPSAT accordingly receives little SCDHHS reimbursement each year. App. 93, 149-150. No discovery was conducted prior to the hearing on the TRO and preliminary injunction. However, PPSAT has presented no evidence indicating it places any restrictions on Medicaid funds or that such funds are segregated from other revenues.

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concern as being that loss of Medicaid reimbursement would mean that PPSAT would no longer be able to provide reproductive health services to underserved communities. App. 53, 89-90, 162. Either way, the money PPSAT receives from Medicaid is clearly being used to support both of PPSAT's two locations and the services provided at each.

On August 24, 2017, South Carolina Governor Henry McMaster issued Executive order 2017-15, which directed SCDHHS, in part,

> to take all necessary actions, to the extent permitted by law, to seek from the Centers for Medicare and Medicaid Services any and all appropriate waivers that may be required to comply with the provisions of this Order, including but not limited to all necessary actions, to the extent permitted by law, to exclude abortion clinics from the State of South Carolina's Medicaid provider network.

App. 57. The order sets out the State's reasons for both seeking the waiver and the exclusions of abortion clinics from being allowed to participate in South Carolina's Medicaid program:

> Abortion providers may be subsidized by State or local funds intended for other women's health or family planning services, whether such non-abortion services are rendered directly by abortion providers or by affiliated physicians and professional medical practices ….

App. 56. This state interest is compelling, even when weighed against participants' ongoing need for access to Medicaid providers, since as noted in the Order, "a variety of governmental agencies and non-governmental entities offer important women's health and family planning services without resulting in the State directly or indirectly subsidizing abortion providers…."

On July 13, 2018, Governor McMaster issued Executive order 2018-21, which, in part, directed SCDHHS

> to deem abortion clinics, as defined by Section 44-41-75 of the South Carolina Code of Laws, as amended, and any affiliated physicians or professional medical practices, as identified and defined in Executive Order 2017-15, that are enrolled in the Medicaid program as unqualified to provide family planning services and, therefore, to immediately terminate them upon due notice and deny any future such provider enrollment applications for the same.

App. 71. Because Executive Order 2018-21 deemed PPSAT immediately unqualified to be enrolled in the Medicaid program, SCDHHS notified PPSAT that same day that SCDHHS was immediately terminating PPSAT's enrollment agreements with SCDHHS. Notably, this termination was based on PPSAT being deemed unqualified by Executive Order 2018-21, rather than a termination for cause by SCDHHS. Just as SCDHHS immediately terminates any contract with a provider upon that provider's exclusion from Medicare by CMS, SCDHHS immediately terminates any provider otherwise deemed "unqualified" to be a Medicaid provider by state or federal law from participating in the Medicaid program.

PPSAT is only one of the approximately 56,917 Medicaid providers that have billed SCDHHS in the past year. App. 93, 150. Even with PPSAT's disqualification, Medicaid beneficiaries have access to many other qualified Medicaid providers for family planning services. Plaintiffs do not claim that Executive Order 2018-21 deprives Medicaid beneficiaries of the opportunity to obtain family planning services from an otherwise qualified provider. Plaintiffs' only complaint is that

Edwards and other Medicaid participants must forego Medicaid reimbursement if they choose PPSAT as their provider.

Additionally, Plaintiffs have not filed a challenge of Governor McMaster's right to issue Executive Order 2018-21, or the order itself. This suit addresses only whether SCDHHS acted appropriately by excluding PPSAT from participation in the Medicaid program once Executive Order 2018-21 deemed PPSAT unqualified to be a Medicaid provider.

South Carolina, like all states, is authorized by Congress and the U.S. Secretary of Health and Human Services to establish appeal procedures for Medicaid providers. 42 U.S.C. §§ 1396a(a)(4), (39); 42 C.F.R. § 1002.213. South Carolina's appeal procedures are set forth in South Carolina Code of Regulations §126-150, *et seq.* (1976, as amended) and in the Administrative Procedures Act, S.C. Code Ann. §1-23-310 *et seq.*, (1976, as amended). Accordingly, and as set out in PPSAT's enrollment agreements with SCDHHS, a terminated provider may file an administrative appeal within thirty days of the termination and then seek judicial review. App. 115, 139. PPSAT, however, initially declined to exercise its appeal

rights under South Carolina law or its enrollment agreements and instead identified a patient, Edwards, to sue in federal court.[5]

On July 27, 2018, PPSAT and its patient Edwards sued Defendant, seeking, besides claims for declaratory judgment, a temporary restraining order and a preliminary injunction to prevent the SCDHHS from terminating PPSAT's contract. Although PPSAT and Edwards allege constitutional claims, their motion for a temporary restraining order and preliminary injunction is based only on their claim that SCDHHS, by excluding PPSAT from the Medicaid program without notice or a finding of cause, had violated § 23(A) of the Medicaid Act, also described as the Medicaid "free choice of provider" provision. 42 U.S.C. § 1396a(a)(23)(A). Plaintiffs assert that because of SCDHHS's termination of PPSAT's enrollment agreements with the South Carolina Medicaid program, they are suffering, and without an injunction, will continue to suffer irreparable harm. Several of the defenses Baker raised against PPSAT's motion, including that PPSAT waived its right to sue SCDHHS in federal court by agreeing to a forum selection clause in its provider agreements, were not addressed by the District Court. Instead, the District

[5] Once Baker filed a motion to dismiss PPSAT's suit on the grounds that PPSAT had waived its right to bring a claim against SCDHHS in federal court and was contractually obligated to seek administrative remedies but had failed to do so, PPSAT filed an administrative appeal on August 14, 2018. Baker's motion to dismiss and PPSAT's administrative appeal are both still pending.

Court granted Plaintiffs' motion, holding that Edwards likely would have succeeded and was irreparably harmed by being unable to choose PPSAT as her provider. However, Plaintiffs' claim that § 23(A) creates a judicially enforceable right, violations of which can be remedied through an action under 42 U.S.C. § 1983, is erroneous. And Edwards was in no danger of irreparable harm from being denied the opportunity to see a provider the State had deemed unqualified to be a Medicaid provider, given the other qualified providers available who accept Medicaid patients in South Carolina. The District Court's grant of Plaintiffs' motion for temporary restraining order and preliminary injunction should be reversed.

II. Relevant Procedural History

PPSAT and Edwards filed their complaint and motion for a temporary restraining order and preliminary injunction on July 30, 2018. App. 7-79. SCDHHS filed its response to the motion on August 13, 2018. The Court conducted a hearing on August 23, 2018. *See* App. 173-203. On August 28, 2018, the Court granted Plaintiffs' motion for preliminary injunction. App. 204-221. The order required SCDHHS to reinstate PPSAT as a Medicaid provider in the South Carolina Medicaid program. *Id*.

The District Court did not address the standing of the Plaintiffs to sue; however, the District Court granted the preliminary injunction based on its holding

that Congress had authorized a private right of action under § 1983 for Medicaid patients like Edwards to enforce 42 U.S.C. § 1396a(a)(23). App. 209-212.

The District Court found it likely that Edwards can prove SCDHHS's termination of PPSAT was improper, although the court acknowledged that SCDHHS had no choice but to terminate PPSAT once it was deemed unqualified by Executive Order 2018-21. App. 183, 207-216. The District Court was not persuaded by Baker's argument that the agreements both PPSAT and Edwards had executed with SCDHHS required that they appeal any denial of services or rights pursuant to SCDHHS's administrative appeals procedures. The District Court seemed to assume that since the hearing officers were housed within SCDHHS, any appeal by Edwards would be pointless. App. 185-186.

The District Court found that Edwards would likely suffer irreparable harm absent an injunction. App. 216-217. The District Court also found that Edwards's inability to receive Medicaid reimbursement for services provided by her chosen provider PPSAT and the possibility that Edwards may have difficulty finding another provider promptly caused an irreparable harm. The District Court found these harms to Edwards outweighed any potential harm to South Carolina based on South Carolina having to continue reimbursing PPSAT for Medicaid services provided to Edwards and other patients of PPSAT. App. 217-219.

SUMMARY OF THE ARGUMENT

First, Plaintiffs-Appellees cannot demonstrate that Edwards is likely to succeed on the merits of her statutory claims because PPSAT and Edwards misconstrue the application of § 1396a(a)(23), the "choice criterion" of the Medicaid Act, to SCDHHS's decision, mandated by Executive Order 2018-21, to terminate PPSAT from the Medicaid program. Section 1396a(a)(23) states that a State plan for medical assistance must provide that: "[A]ny 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". Using the term "qualified" in § 1396a(a)(23) renders the statute "so 'vague and amorphous' that its enforcement . . . strain[s] judicial competence." *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997). Accordingly, the Medicaid plan requirement set out in § 1396a(a)(23) does not authorize Edwards's attempt in this case to contest under Section 1983 the exclusion of PPSAT as a Medicaid provider.

Additionally, the Medicaid Act provides South Carolina with broad authority to establish provider qualifications that reflect State law and policy, and Medicaid patients have no statutory or constitutional right to access Medicaid-subsidized services from a provider found not to be qualified under State law. Even if SCDHHS

failed to meet the requirements of § 1396a(a)(23), this would—at the very most—provide grounds to the Secretary of HHS to deny funding to South Carolina. A State's Medicaid plan that fails to meet the requirements set out in § 1396a(a)(23) may be ineligible for federal reimbursement in the Secretary's sole discretion, but it does not "violate" any federal law, much less a federal right like Edwards seeks to assert. The Medicaid Act simply does not grant a private right of action to Edwards to challenge SCDHHS's termination of PPSAT from the Medicaid program on the grounds that PPSAT is Edwards's preferred provider.

PPSAT waived is right to bring the present action in federal court and must exhaust its administrative challenge of SCDHHS's decision prior to seeking review of that decision in state court. Federal and state Medicaid regulations specifically contemplate that challenges to a state agency's termination decision will be made by the terminated provider through the state administrative appeals process or in state court. *See, e.g.,* 42 C.F.R. § 1002.213 (requiring a state to give terminated providers "the opportunity to submit documents and written argument" and "any additional appeals rights that would otherwise be available under procedures established by the state").

Second, the harms alleged by Edwards—such as potential longer wait times and potential scheduling issues—are speculative and do not rise to the level of harm this Court requires to justify the extraordinary remedy of a preliminary injunction.

ARGUMENT

I. Standard of Review

The grant or denial of a preliminary injunction is reviewed for abuse of discretion. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 428, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006); *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 524-25 (4th Cir.2003). A preliminary injunction is an extraordinary remedy afforded prior to trial at the discretion of the district court that grants relief pendente lite of the type available after the trial. *See In re Microsoft Corp. Antitrust Litig.*, 333 F.3d at 524-26; *see also De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220-21, 65 S.Ct. 1130, 89 L.Ed. 1566 (1945). Because a preliminary injunction affords, on a temporary basis, the relief that can be granted permanently after trial, the party seeking the preliminary injunction must demonstrate by "a clear showing" that it is likely to succeed on the merits. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *see also Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that

he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. at 20 (2008). However, injunctive relief is always an "extraordinary and drastic remedy," *Mazurek,* 520 U.S. at 972 (1997) (citation omitted). In *Winter*, the Supreme Court articulated clearly what must be shown to obtain a preliminary injunction, stating that the plaintiff must establish "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." 55 U.S at 20-23. Unless a plaintiff provides a clear showing of all four requirements, the grant of a preliminary injunction is an abuse of discretion. *Id*.

II. Edwards Did Not Demonstrate a Substantial Likelihood of Success on the Merits

To justify an injunction before trial on the merits, Edwards must show that she is likely to succeed on the merits. Since 42 U.S.C. § 1396a(a)(23) does not clearly provide Medicaid recipients a private right to contest the exclusion of a provider from a state Medicaid program and PPSAT, the provider in this action, has waived its right to sue SCDHHS in federal court and has yet to exhaust the administrative process required by both law and contract, Edwards cannot meet her

burden. Therefore, the District Court's grant of a preliminary injunction should be reversed.

A. 42 U.S.C. § 1396a(a)(23) Does Not Authorize a Private Right of Action Under § 1983 to Collaterally Attack a State Agency's Decision to Exclude a Provider from the Medicaid Program

What 42 U.S.C. § 1396a(a)(23) imposes on states' Medicaid Plans only as requirement for federal funding, Edwards seeks to enforce as a personal right. Prevailing on a § 1983 claim requires that a plaintiff "assert a violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone* 520 U.S. 329, 340 (1997) (citation omitted) (emphasis added). Since the Medicaid Act is Spending Clause legislation, the standard is very high: "unless Congress speaks with a clear voice, and manifests an unambiguous intent to confer individual rights, federal funding provisions provide no basis for private enforcement." *Gonzaga University v. Doe*, 536 U.S. 273, 280 (2002).

To show a likelihood of success on the merits, Edwards must show that (1) Congress intended that 42 U.S.C. § 1396a(a)(23) benefit her, (2) "the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence;" and (3) "the statute . . . unambiguously impose[s] a binding obligation on the States." *Blessing*, 520 U.S. at 340. If Edwards were able to meet all three of these requirements, a § 1983 claim still does not lie if Congress

has—expressly or impliedly—foreclosed a private remedy. *Blessing,* 520 U.S. at 340 (explaining Congress could impliedly foreclose a private remedy "by creating a comprehensive scheme of enforcement that is incompatible with individual enforcement under § 1983"). Neither PPSAT nor Edwards have a right of action to "enforce" 42 U.S.C. § 1396a(a)(23), called hereafter the "free-choice plan requirement." The Medicaid Act itself does not provide a right of action. Instead, the primary question is whether Edwards can enforce the free-choice plan requirement as a private right of action by way of 42 U.S.C. § 1983.

However, the free-choice plan requirement is not an individual right. It is a *plan* requirement, and one of many criteria for reimbursement that a state's Medicaid plan must meet to receive reimbursement for services. The free-choice plan requirement is one of eighty-three different requirements that a State Medicaid plan must meet to be approved by the Secretary of Health and Human Services and to qualify the State Medicaid program to receive federal Medicaid matching funds. While these requirements guide states in their creation and modification of their plans, the Secretary bears all of the responsibility to ensure state plans comply with program requirements. No "unambiguously conferred" individual right exists.

States have substantial authority to determine provider qualifications under their own medical assistance programs. The free-choice plan requirement does not

limit any state's power to set qualifications for Medicaid providers or grantees. As set out in 42 U.S.C. § 1396a(p)(1), "[i]n addition to any other authority, a State may exclude any individual or entity for purposes of participating under the State plan under this subchapter for any reason for which the Secretary could exclude the individual or entity from participation[.]" Despite PPSAT and Edwards's insistence that South Carolina can have no good reason to deny state funding to abortion providers who also provide non-abortion services, a state is equally empowered to disqualify a provider to avoid indirect subsidy of abortion as it is to disqualify another provider to avoid indirectly subsidizing poor quality patient care or failure to maintain patient confidentiality or complete adequate patient records.

The District Court's holding that Edwards has a private right of action to enforce 42 U.S.C. § 1396a(a)(23) under 42 U.S.C. § 1983 is, therefore, in error and an abuse of discretion. The text and structure of the Medicaid Act as a whole provides simply that States with non-compliant programs may not qualify for federal funds. States retain, even after accepting federal funds, the authority to alter their Medicaid programs under Section 1396c. A state risks its federal funding if it modifies its plan out of compliance with the Medicaid Act, but the State does not violate the Medicaid Act or any Medicaid recipient's rights in doing so. Edwards simply cannot have a federally protected "right" to State Medicaid services from a

specific provider when the free-choice plan requirement on which she relies does nothing more than supply criteria for federal reimbursement.

1. **The free-choice plan requirement creates no "unambiguously conferred rights" enforceable under 42 U.S.C. § 1983**

    a. **Section 1983 affords a cause of action to enforce federal rights, not federal laws**

For a federal statute to be enforceable through 42 U.S.C. § 1983, it must create an "unambiguously conferred" right that the defendant has allegedly violated. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002). Section 1983 provides relief to a plaintiff only when governments violate a plaintiff's federal *rights*; it provides no remedy for a mere violation of federal *law*. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989) ("Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law.").

Courts analyze the Blessing test factors in determining whether a statutory provision causes a federal right: (1) Congress must have intended this provision to benefit the plaintiff; (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 causing the right must be stated in mandatory rather than precatory terms. *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997). A plaintiff bears the

burden of showing that the statute was intended by Congress to create a right enforceable by the plaintiff. *See Gonzaga*, 536 U.S. at 284.

Spending Clause legislation like the Medicaid Act is unlikely to confer individual rights enforceable through Section 1983. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28 (1981), ("[i]n legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State."); *see also Former Special Project Employees Ass'n v. City of Norfolk,* 909 F.2d 89, 91 (4th Cir., 1990) (stating that "[u]nless congressional intent [to create a private cause of action] can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist").

Whether Section 1396a(a)(23) creates rights enforceable through Section 1983 is an issue of first impression for this Court, and remains an open question generally. There is split in the circuits regarding whether Section 1396a(a)(23) confers a private right that can be vindicated by Section 1983. *See Doe v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017)(finding no private right of action); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017)(finding private

right of action), petition for *cert*. filed, (U.S. May 1, 2018) (No. 17-1492); *Planned Parenthood of Kan. & Mid-Mo. V. Andersen,* 882 F.3d 1205 (10th Cir. 2018)(same), *petition for cert. filed,* (U.S. Mar. 23, 2018) (No. 17-1340); *Planned Parenthood Ariz., Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013) (same), *cert. denied*, 571 U.S. 1198 (2014); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012) (same), *cert. denied*, 569 U.S. 1004 (2013). Based upon the statutory language and the detrimental effect that finding a private right in this case would have on the established remedial scheme, Congress did not intend for Section 1396a(a)(23) to confer privately enforceable individual rights.

b. **The Medicaid Act does not impose legal duties on states, nor does it confer rights on providers and recipients**

The Medicaid Act creates a voluntary program enabling States to seek federal matching grants for qualifying State healthcare benefits programs; it is not a civil rights statute imposing duties and restraints on State or local governments. South Carolina is free to opt out of eligibility for federal Medicaid funds and is not required to structure its healthcare benefit program under the conditions required for federal funding. *Collins v. Hamilton*, 349 F.3d 371, 374 (7th Cir. 2003) ("A state's participation in the Medicaid program is completely voluntary.").

The Medicaid Act imposes legal obligations only on the Secretary, who is charged with confirming that states substantially comply with plan requirements before approving federal matching grants. *Id.* If the Secretary finds that a state plan "has been so changed that it no longer complies" with the requirements of Section 1396a or that "in the administration of the plan there is a failure to comply substantially with any such provision," then the Secretary "shall notify [the] State . . . that further payments will not be made to the State." *Id*. The state will then not receive federal funds "until the Secretary is satisfied that there will no longer be any such failure to comply." *Id*. The Secretary has discretion to "limit payments to categories under or parts of the state plan not affected by [the] failure [to] comply" rather than cutting off funding completely. *Id*.

In inferring a private right of action, the District Court erred in reading the language of Section 1396a(a)(23) out of context to the Medicaid Act as a whole and, in particular, by ignoring Section 1396c. Interpreting statutory language "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006).

Read in its entirety, Section 1396a(a) establishes conditions under which states may qualify to receive federal funding. Beginning "[a] State plan for medical

assistance must . . .", the Section then lays out eighty-three subsections delineating the requirements a State plan must provide to qualify for federal matching grants. *See* 42 U.S.C §1396a(a). If a state chooses to exercise its right not to meet these conditions of participation, Section 1396c addresses the consequence for the state: loss of some or all of its federal funding until the Secretary deems the state's plan is back in compliance. *See* 42 U.S.C. § 1396c. The Section 1396a conditions of participation provide guidance to the Secretary administering the Medicaid program and participating states. Its focus is on "the person regulated rather than the individuals protected," and there is "no implication of an intent to confer rights on a particular class of persons." *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (internal quotation marks omitted).

The Supreme Court has found one (since repealed) provision of the Medicaid Act enforceable under Section 1983. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 524 (1990) (permitting hospitals to sue under Section 1983 to enforce the "Boren Amendment," which required participating states' Medicaid programs to reimburse providers at "reasonable and adequate rates"). However, in *Gonzaga*, the Court limited *Wilder*'s holding, explaining that the Boren Amendment was exceptional because it "explicitly conferred specific *monetary* entitlements upon the plaintiffs." *Gonzaga*, 536 U.S. at 280 (emphasis added). The Court noted that "[m]ore recent decisions have rejected attempts to infer enforceable rights from Spending Clause

statutes." *Id*. at 281. The free-choice provider provision provides no such monetary entitlement and *Wilder* is not controlling.

c. **The Medicaid Act expressly embraces state authority to establish provider qualifications**

States have broad latitude to determine the qualifications for providers seeking reimbursement for services under the states' Medicaid programs. The Medicaid Act provides that "[i]n addition to any other authority, a State may exclude any individual or entity [from participating in its Medicaid program] for any reason for which the Secretary [of the Department of Health and Human Services] could exclude the individual or entity from participation in [Medicaid]." 42 U.S.C. § 1396a(p)(1).

Senate Report 100-109 shows that Congress intended to protect the states' right to exclude providers for reasons other than those granted to the Secretary. Section 1396a(p)(1) affords states the ability to prevent "fraud and abuse" and "to protect the beneficiaries . . . from incompetent practitioners and from inappropriate or inadequate care." S. Rep. No. 100-109, at 2 (1987). However, as reported, section 1396a(p)(1) "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*. at 20 (emphasis added).

The federal government's regulations implementing Section 1396a(p)(1) also recognize state authority over provider qualifications. "Nothing contained in this part should be construed to limit a State's own authority to exclude an individual or entity from Medicaid for any reason or period authorized by State law." 42 C.F.R. § 1002.2.

In *First Medical Health Plan v. Vega-Ramos*, 479 F.3d 46 (1st Cir. 2007), the First Circuit interpreted the qualifications authority provided by 1396a(p)(1) as a specific delegation of power to the state rather than a limitation of the state's authority. Citing the legislative history of Section 1396a(p)(1), the court held that the provision "was intended to permit a state to exclude an entity from its Medicaid program for *any* reason established by state law." *Id.* at 53. State authority to disqualify providers has been upheld in several contexts. *See*, *e.g., Guzman v. Shewry*, 552 F.3d 941, 950 (9th Cir. 2008) (providers who commit fraud); *Vega-Ramos*, 479 F.3d at 53 (providers with conflicts of interest); *Triant v. Perales*, 491 N.Y.S.2d 486, 488 (N.Y. App. Div. 1985) (providers who fail to maintain adequate records).

Nonetheless, the District Court interpreted Section 1396a(p)(1) to permit only those state provider qualifications that relate to the provider's quality of services. App. 215-216. The Court concluded that "although § 1396a(p)(1) gives States broad

authority to exclude providers from their Medicaid programs, it does not provide States with unlimited authority to exclude providers for any reason whatsoever" (internal quotations and citations omitted). App. 215.

South Carolina's authority, under Section 1396a(p)(1), to determine whether a provider is qualified does not depend on the state interest the disqualification seeks to protect. In distinguishing the case of abortion providers, the District Court ignored that the statute itself *directly* confers authority to state Medicaid program administrators over provider qualifications commensurate with that of the Secretary. This direct conferral of authority is *"in addition to any other authority"* a state administrator might have pursuant to state statutes and regulations. Section 1396a(p)(1) recognizes that state law can expand upon powers granted by the Medicaid Act to state plan administrators. The HHS Secretary's authority serves as the floor of the state administrator's authority to exclude, not its ceiling.

Not only is the District Court's holding that Medicaid qualifications may relate solely to the provider's "quality of services" unsupported in the statutory text, it is also contradicted by federal regulations. For example, 42 C.F.R. § 1001.1501 allows the Office of the Inspector General to disqualify providers who have defaulted on health education loans and scholarship obligations from participating in Medicare and Medicaid. Under 42 CFR 455.416(c), a provider excluded by CMS

from participating in the Medicare program is also deemed unqualified to participate in the Medicaid program. These disqualifications do not relate to the quality of the unqualified provider's professional services. In the case of 42 C.F.R. § 1001.1501, it does not even relate to any rules broken while providing care. Instead, this rule carries out another important federal policy concern: "[t]here is plainly a connection between requiring a physician who is benefitting from government programs to meet his or her financial obligations to the government, by repayment of loans." Health Care Programs: Fraud and Abuse; Amendments to OIG Exclusion and CMP Authorities Resulting From Public Law 100-93, 57 Fed. Reg. 3298-01, 3313 (Jan. 29, 1992). South Carolina's disqualification of abortion providers from participating in the Medicaid program is directly comparable to such policies. Since the Medicaid Act grants states the same authority as the Secretary to determine provider qualifications, and since the Secretary can disqualify Medicaid providers to avoid indirectly financing particular "non-Medicaid" conduct, South Carolina has the authority to do the same.

Even if the District Court's holding that Section 1396a(p)(1) limits a State's authority to disqualify providers to only those instances involving a provider's fitness to provide quality Medicaid services, App. 215-216, Executive Order 2018-21 survives. Neither Edwards nor PPSAT have challenged Governor McMaster's authority to issue the Executive Order or the order itself. The District Court's

acceptance of the Plaintiffs' assurances that Medicaid funds are not indirectly funding abortion aside, the District Court has not held that South Carolina can have no interest in ensuring that state funds are not used to indirectly subsidize abortion services.

In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court upheld the constitutionality of a similar indirect subsidy prohibition. That case involved the expenditure of Title X family planning funding, where the Court found "the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized." *Id.* at 196. The Supreme Court noted that the plaintiff grantee was free to provide abortion referrals and services, as long as it kept that practice "separate and distinct" from its federally-funded family planning practice. *Id.* The same is true here; South Carolina law, which has not been challenged, also simply insists that public funds appropriated for family planning must not be used to pay for an abortion. See Section 43-5-1185. Furthermore, nothing prohibits PPSAT from operating separate and distinct entities to ensure abortion services are not provided by Medicaid providers.

2. **The free-choice plan requirement does not limit state authority to set provider qualifications**

The District Court held that the free-choice plan requirement of 42 U.S.C. § 1396a(a)(23) limited South Carolina's authority to qualify providers. App. 215-216.

Section 1396a(a)(23) provides that a state plan must allow a beneficiary to receive care from "any institution, agency, community pharmacy, or person qualified to perform the service or services required . . . who undertakes to provide him such services." However, the District Court's interpretation of this section to forbid state provider qualifications that limit patient choice ultimately precludes *all* provider qualification. Any exclusion of a provider outside the Medicaid program will likely limit some beneficiary's free choice.

The crucial element of the free-choice plan requirement that keeps it from slipping down such paths is its limited application to only *qualified* providers. A Medicaid plan must allow a beneficiary to receive care from a provider "qualified to perform the service." U.S.C. § 1396a(a)(23). As the Supreme Court has recognized, the free-choice plan requirement applies only to providers that "continue[] to be qualified" in the Medicaid program. *O'Bannon v. Town Court Nursing Ctr.,* 447 U.S. 773, 785 (1980). As discussed, states are free to determine what it means to be "qualified" as a Medicaid provider.

Following *O'Bannon*, the Second Circuit in *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170 (2d Cir. 1991), held that Section 1396a(a)(23) did not prohibit a Westchester County, New York's Medicaid administrator from unilaterally terminating a contract with a Medicaid provider without cause. *Id.* at 177-78. In

that case, Medicaid recipients could not obtain Medicaid-reimbursed services from Kelly Kare no matter what the grounds of terminating Kelly Kare from the program were. *Id*. However, the court held the recipients inability to choose Kelly Kare as a provider was only an "incidental burden on their right to choose" under Section 1396a(a)(23). *Id.* at 178. According to the court, "Medicaid's freedom of choice provision is not absolute." *Id.* at 177. At most, Section 1396a(a)(23) requires that a state plan must give Medicaid recipients the right to choose among qualified providers in the market. *See id.* at 178.

Along similar lines, the 7th Circuit has held that 1396a(a)(23) was intended "to give the recipient a choice among available facilities, not to require the creation or authorization of new facilities." *Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906, 911 (7th Cir. 2003) (citing *O'Bannon*, 447 U.S. at 785-86; *Kelly Kare*, 930 F.2d at 177). If the free-choice plan requirement does not "require the . . . authorization of new facilities," *id*., then it also does not require a state to continue to allow existing facilities that fail to meet new qualification requirements to participate in Medicaid.

To be sure, there are cases where courts have found violations of the free-choice plan requirement, but these involve instances when a state's policies eliminated all recipient choice. *See*, e.g., *Chisholm v. Hood*, 110 F. Supp. 2d 499,

506 (E.D. La. 2000) (holding that the State of Louisiana could not force school-aged children to seek services at their respective schools, as opposed to an independent provider); *Bay Ridge Diagnostic Lab. Inc. v. Dumpson*, 400 F. Supp. 1104, 1105, 1108 (E.D.N.Y. 1975) (enjoining the City of New York from implementing a program by which only one Medicaid provider would receive an exclusive contract to serve a borough and beneficiaries were prohibited from seeking services from any other provider).

Executive Order 2018-21, on the other hand, does not limit Medicaid recipients to one or even a few providers. Approximately 56,917 providers across the state, the majority of which do not perform abortions, remain available for Medicaid beneficiaries. App. 93, 149-150. In fact, only PPSAT was excluded from Medicaid as a result of the Order. Executive Order 2018-21 does not limit a Medicaid beneficiary's right to choose among qualified providers and the exclusion of PPSAT from the state's Medicaid program does not prevent a beneficiary from receiving care from a provider eligible to receive Medicaid funds.

Reading Section 1396a(a)(23) to prohibit the state from disqualifying providers because it reduces the range of provider choices available to beneficiaries renders Section 1396a(p)(1) meaningless. Only Baker's interpretation gives effect

to both Sections 1396a(a)(23) and 1396a(p)(1) and follows case law outside the specific context of state actions disqualifying abortion providers.

B. Edwards's § 1396a(a)(23) Challenge Is Unlikely to Succeed Since PPSAT Has Waived Its Right To Bring Suit Against the Medicaid Program in Federal Court and Both Edwards and PPSAT Have Failed to Exhaust Their Administrative Remedies as Required by Their Agreements with SCDHHS

PPSAT has waived the right to pursue any § 1983 claim in a federal forum by entering into its Enrollment Agreements with the SCDHHS, and Edwards has also waived the right to pursue any § 1983 claim in a federal forum by enrolling as a Medicaid beneficiary, both of which mandate jurisdiction in accordance with SCDHHS's regulations, 27 S.C. Code Ann. Regs. §126-150, et seq. (1976, as amended), and in accordance with the Administrative Procedures Act, S.C. Code Ann. §1-23-310 et seq., (1976, as amended). The law in this circuit, as set out in *Pee Dee Health Care, P.A. v. Sanford,* is that a healthcare provider's right to bring an action under § 1983 "can be limited by contract." 509 F.3d at 213 (4th Cir. 2007). As set forth in *Pee Dee Health Care*:

> Notwithstanding … that a right of action exists under § 1983 to enforce § 1396a(bb), there is nothing in federal law prohibiting a healthcare provider from waiving the right to pursue such a § 1983 claim in a federal forum. On the contrary, procedural rights under § 1983, like other federal constitutional and statutory rights, are subject to voluntary waiver. …

> This court has applied a voluntariness standard to determine the enforceability of agreements in which a party releases possible § 1983 claims. Where a party knowingly and willingly enters into an agreement that waives a constitutional right, the agreement is enforceable so long as it does not undermine the public's interest in protecting the right. …
>
> Healthcare providers in South Carolina are not required to accept Medicaid patients. Therefore, any decision on the part of a healthcare provider such as Pee Dee to enter into a contract for Medicaid reimbursement is voluntary... Because Pee Dee voluntarily waived its right to bring an action alleging improper reimbursement in federal court, the public interest opposing involuntary waiver of constitutional rights is no reason to hold this agreement invalid.
>
> Furthermore, the contract between Pee Dee and SCDHHS does not completely deprive Pee Dee of a remedy. ... Pee Dee did not contract away its right to bring an action under § 1983, but instead agreed as part of its contract for Medicaid reimbursement that all such claims would be pursued only through state administrative and judicial avenues. That is, Pee Dee's contracts do not involve a waiver of a constitutional right, but only the ancillary right to select a federal forum to pursue a statutory right.

Pee Dee Healthcare, P.A. v. Sanford, 509 F.3d at 212-13.

Absent the Enrollment Agreements, PPSAT is not entitled to any reimbursement at all from SCDHHS. Likewise, agreement to the rights and responsibilities of Medicaid beneficiaries contained in the Beneficiary Agreement was a condition to Edwards becoming a Medicaid beneficiary, and Plaintiff Edwards's claims all arise by virtue of being a Medicaid beneficiary. No rights to Medicaid reimbursement or Medicaid covered services would exist absent PPSAT's Enrollment Agreements and Plaintiff Edwards's Beneficiary Agreement. *See*

Genesis Health Care, Inc. v. Soura, 3:16-cv-003376-CMC, at 6 (D. S.C. 2017); *see also Pee Dee Health Care,* 509 F.3d 204. In *Genesis Health Care,* the Section 1983 action filed by a Federally Qualified Health Center was dismissed on the grounds that

> [a]s the Fourth Circuit noted in Pee Dee Healthcare, both "Sections (R) and (S) reflect an agreement to pursue administrative appeals in a state tribunal." *Pee Dee Health Care*, 509 F.3d at 208, n.6. This conclusion is confirmed by the regulation and statute referenced in the relevant provisions. DHHS Regulation 126-150 and S.C. Code § 1-23-380. As explained in *Pee Dee Health Care*, "Regulation 126-150(B) provides that the tribunal to hear such appeals would be the state administrative hearing system" and the appeal allowed under Section 1-23-380 is to "the South Carolina Court of Appeals or the Administrative Law Court." *Pee Dee Health Care*, 509 F.3d at 208, n.5.

Genesis Health Care, Inc., 3:16-cv-003376-CMC (footnote omitted). While the PPSAT Enrollment Agreements and Plaintiff Edwards's Beneficiary Agreement may not contain the exact same clauses as the FQHC contracts at issue in both *Pee Dee Health Care,* and *Genesis Health Care*, the Enrollment Agreements and Beneficiary Agreement clearly reflect an agreement to pursue administrative appeals in a state tribunal pursuant to SCDHHS Regulation 126-150 and S.C. Code § 1-23-380.

Additionally, Plaintiffs have failed to exhaust their administrative remedies as required by South Carolina law and their agreements with SCDHHS as discussed above. *See Unisys Corp. v. South Carolina Budget and Control Bd. Div. of Gen. Servs. Info. Mgmt. Office*, 346 S.C. 158, 551 S.E.2d 263 (2001). An appeal filed pursuant to SCDHHS's regulations is required by the agreement of the parties. Such

appeal is defined by regulation as "[t]he formal process of review and adjudication of Agency determinations, which shall be afforded to any person possessing a right to appeal pursuant to statutory, regulatory and/or contractual law; provided, that to the extent that an appellant's appellate rights are in any way limited by contract with the Agency or assigned to the Agency, said contractual provision shall control." 27 S.C. Code Ann. Regs. § 126-150(B). The Complaint does not allege that the appeals procedure has been followed by either Plaintiff.

Furthermore, the allegations made by Plaintiffs are the type of issues that the SCDHHS Division of Appeals and Hearings was specifically designed and created to rule upon. As discussed above, an appeal with the SCDHHS Division of Appeals and Hearings is defined as the "formal process of review and adjudication of Agency determinations, which shall be afforded to any person possessing a right to appeal pursuant to statutory, regulatory and/or contractual law…" 27 S.C. Code Ann. Regs. § 126-150(B). The mandatory language of the regulation further requires that "[a]n appeal shall be initiated by the filing of a notice of appeal" which "shall be in writing and shall be directed to Appeals and Hearings, Department of Health and Human Services…." 27 S.C. Code Ann. Regs. § 126-152(A) and (B). This portion of the regulation goes on to contemplate appeals by providers, such as Plaintiff PPSAT, requiring that a provider's notice of appeal "shall state with specificity the adjustment(s) or disallowance(s) in question, the nature of the issue(s) in contest, the

jurisdictional basis of the appeal and the legal authority upon which the appellant relies." 27 S.C. Code Ann. Regs. § 126-152(B).

Because both Plaintiffs have voluntarily waived the right to pursue any § 1983 claim in a federal forum by contract and have failed to exhaust administrative remedies as required by state law and agreement of the parties, Plaintiffs are unlikely to succeed on the merits.

III. Edwards Did Not Show That She Would Suffer Irreparable Harm absent a Preliminary Injunction.

In addition to the required showing that she will likely succeed on the merits, Edwards was also required to show that she was likely to suffer irreparable harm absent the preliminary injunction. *See Winter*, 129 S.Ct. at 374-76; *The Real Truth About Obama v. Federal Election Com'n*, 575 F.3d, 342, 346 (4th Cir. 2009) ("[a] plaintiff seeking [preliminary] injunctive relief must establish that the claimant is 'likely to suffer irreparable harm in the absence of preliminary relief.'"). In *Winter*, the Court rejected a standard that allowed the plaintiff to demonstrate only a "possibility" of irreparable harm because that standard was "inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." 129 S.Ct. at 375-76.

Edwards was not denied access to any services to which she was entitled as a participant in the Medicaid program and Medicaid did not refuse to reimburse for

any care Edwards received. If either had been the case, SCDHHS provided Edwards with the right to appeal such denials of services or funding of claims. Instead, Edwards was only incidentally harmed because only one provider—out of approximately 56,917 providers participating in South Carolina's Medicaid program—had been disqualified. Edwards remained free to choose a qualified provider, including the specific physicians who provide services at PPSAT not terminated individually from the Medicaid program, while awaiting a decision on the merits. App. 147. Any injury that Edwards might experience does not come close to meeting the requisite irreparability standard. Edwards had been receiving care from other providers for years prior to beginning treatment at PPSAT. Despite Edwards's claim she would be harmed by having to travel to find a new provider, she had to travel to even reach PPSAT as neither of its locations was near her home. App. 25-26, 75. Absent clear evidence of irreparable harm to Edwards, her request for preliminary injunction should have been denied, and it was an abuse of discretion by the District Court to grant her motion absent such showing. *See Mazurek*, 520 U.S. at 972 (noting that "the requirement for substantial proof is much higher" when granting a motion for preliminary injunction than that for a motion for summary judgment).

IV. Plaintiffs Have Not Established That The Balance Of Equities Weighs In Their Favor

In order for Plaintiffs to obtain a preliminary injunction, they must show that in balancing the equities, the harm they will suffer in the absence of an injunction is

greater than the harm that Defendants will suffer if the injunction is granted. *See Winter,* 555 U.S. at 24. Plaintiffs have provided no compelling evidence in support of their claim that PPSAT's patients who are Medicaid beneficiaries are being denied care as a result of SCDHHS's terminating PPSAT's enrollment in the Medicaid program. Approximately 56,917 providers participate in South Carolina's Medicaid program and over 97% of the pharmacies in South Carolina are enrolled with Medicaid. App. 148-150. Despite PPSAT's allegations of harm to its Medicaid patients if they cannot receive reimbursement for services rendered at PPSAT, the fact is that there are many other providers available to see PPSAT's limited number of patients and there is little merit to the argument that SCDHHS's termination of PPSAT's enrollment in the Medicaid program may result in a lack of access to health care. In 2017, PPSAT's Columbia and Charleston clinics together provided services to only 257 of the approximately 1,200,000 South Carolinians who receive their healthcare through the Medicaid program, evidencing that the vast majority of South Carolina Medicaid recipients in need of reproductive health services and birth control prescriptions receive those services elsewhere. *Id*.

The State has a compelling reason to deny State funding to any physician or professional medical practice affiliated and operating in the same location as an abortion clinic. App. 70-71. The South Carolina General Assembly recognized that concern in Section 43-5-1185 of the South Carolina Code of Laws, as amended, in

directing that "State funds appropriated for family planning must not be used to pay for an abortion." Had the District Court denied Plaintiffs' motion, Plaintiff Edwards and all of PPSAT's patients who are enrolled with Medicaid could have continued to seek reproductive health services from all other Medicaid providers providing such services, including the specific physicians who see patients at PPSAT's Charleston location and have not been excluded individually from participating in Medicaid, and to fill prescriptions at pharmacies across the state. In granting the Plaintiffs' motion, the District Court has forced the state to continue to subsidize PPSAT's non-Medicaid services, which can include abortion. As explained by Jenny Black, PPSAT's President and CEO in her declaration, Medicaid reimbursements are foundational to supporting PPSAT's other services: "Without Medicaid reimbursements, we may not be able to keep providing services in the same manner we have been and may need to reduce hours at our health centers." App. 53. The chance of state funds subsidizing PPSAT's abortion-related services is therefore both real and significant. When combined with the remarkably low number of Medicaid recipients that PPSAT serves in South Carolina, this harm to the government surpasses the harm PPSAT will experience if required to wait for a full hearing on the merits before receiving additional Medicaid reimbursements for services that Plaintiff Edwards and PPSAT's other Medicaid patients can certainly

receive elsewhere. Therefore, the District Court's grant of a preliminary injunction was in error and should be reversed.

V. Plaintiffs Have Not Shown That Granting The Injunction Will Not Be Adverse To The Public Interest.

The fourth and final showing Plaintiffs were required to make in order to be granted a preliminary injunction is showing that the preliminary injunction is in the public interest. *Winter*, 555 U.S. at 20. Unlike the consideration of the harm to Defendants, the consideration of the public interest does not involve a balancing test. If the requested injunction is adverse to the public interest—even if the harm to the public interest may appear to some as less severe than the harm to Plaintiffs in the absence of an injunction—the injunction cannot issue. The General Assembly, elected by South Carolinians to represent their interests and beliefs, has found that allowing "State funds appropriated for family planning to be used to pay for an abortion" is adverse to the public interest. S.C. Code Ann. § 43-5-1185. Executive Orders 2017-15 and 2018-21 set out the State's interest in prohibiting any indirect funding of abortion providers with state funds. Because the public interest is at the heart of the government's termination of PPSAT as a Medicaid provider, it was in error for the District Court to grant the Plaintiffs' motion for a preliminary injunction. Therefore, the District Court's grant of a preliminary injunction should be reversed.

CONCLUSION

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

REQUEST FOR ORAL ARGUMENT

Baker respectfully requests oral argument because, in Baker's view, oral argument would help the Court in resolving the important regulatory issues raised in this appeal with serious implications far beyond the parties themselves.

Respectfully submitted,

Date: November 26, 2018

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,693 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point Times New Roman typeface.

Date: November 26, 2018

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CERTIFICATE OF SERVICE

I certify that on November 26, 2018, 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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