**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF NORTH CAROLINA**
**WESTERN DIVISION**

Civil Action No. 5:17-cv-00025-FL

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| PHIL BERGER and TIM MOORE,<br><br>Plaintiffs,<br><br>v.<br><br>THOMAS E. PRICE, M.D., in his official capacity as Secretary of Health and Human Services, *et al.*,<br><br>Defendants. | ) | **FEDERAL DEFENDANTS' COMBINED MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS AND OPPOSITION TO A PRELIMINARY INJUNCTION** |

## INTRODUCTION

A federal court cannot enjoin an executive agency from considering an unsubmitted proposal on the grounds that the agency would be required to reject the proposal if it were ever submitted. Yet that is precisely what plaintiffs have asked this Court to do. There are many deficiencies in plaintiffs' case, but that is the fundamental flaw: rather than allowing the Secretary of Health and Human Services (the "Secretary" or "HHS") to evaluate a proposed Medicaid state plan amendment ("SPA") once it is submitted, plaintiffs would have this Court preemptively declare its view. Plaintiffs lack standing to bring this premature case. Plaintiffs' theory is that because Governor Roy Cooper announced his intention to submit a proposed state plan amendment three months ago, and because the former Secretary said that HHS would "process the governor's proposal as expeditiously as possible when we get it," Compl. ¶ 27, it is as though the submission was made and approved, and this Court is free to rule as if it had been. That was not a viable theory when this case was filed, and it is entirely implausible three months later, when the Governor still has not submitted his proposal and the Secretary who made the

statement on which plaintiffs rely left office months ago. Plaintiffs' motion for a preliminary injunction must therefore be denied, and their complaint dismissed for lack of standing and failure to state a claim on which relief can be granted.

Because no state plan amendment has even been submitted to the Secretary, much less approved, any injury that plaintiffs would suffer upon its acceptance or approval is purely hypothetical. And plaintiffs (the leaders of the North Carolina General Assembly) also lack legislative standing in this case: the General Assembly has not authorized them to bring suits challenging federal action, and any injuries they purportedly suffer as individual legislators are not cognizable. For all of those reasons, plaintiffs lack standing to bring this case. Nor is their case ripe—and it would not be ripe even if the General Assembly had authorized plaintiffs to sue, or had itself filed suit.

Plaintiffs also lack any cognizable claim. Plaintiffs first argue that they have an equitable right to enforce the federal Medicaid statute's requirements that each plan for medical assistance "provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them," 42 U.S.C. § 1396a(a)(1), and that each plan "provide for financial participation by the State" at a particular level, *id.* § 1396a(a)(2). But those requirements are enforced by the Secretary, *id.* § 1396c, not by private litigants. And in any event, these statutory requirements would only be relevant if the Secretary were to approve a proposed state plan amendment that this court could review, rather than merely agreeing to accept and consider any proposed state plan amendment submitted by a "single state agency," 42 C.F.R. § 430.10—for the purpose of the state's existing Medicaid plan, the North Carolina Department of Health and Human Services—as the Medicaid statute requires. The mere physical acceptance and subsequent consideration of a proposed state plan amendment, by

contrast to a final decision to approve or disapprove that proposed amendment, does no harm to anyone. If the former two acts (acceptance and consideration of a proposal) were subject to judicial review, then the Secretary's acceptance (through mail delivery or otherwise) of a letter requesting some agency action would also suffice to create judicially reviewable action. But that is not the law.

Plaintiffs' next theory is that the Administrative Procedure Act ("APA") authorizes their suit. But the APA only provides for judicial review of "final agency action," 5 U.S.C. § 704, and the receipt of a proposed SPA is not final agency action. Here, there has been no agency action at all, much less final agency action. Plaintiffs' argument to the contrary rests entirely upon one comment by the former Secretary, who left office more than two months ago, committing to expeditious processing. And even if the present Secretary were to echo her remark, a commitment to proceed expeditiously has no effect on plaintiffs and does not amount to final agency action subject to judicial review. Plaintiffs press on nonetheless, arguing that the Tenth Amendment prohibits the Secretary from accepting a state plan amendment from the designated state Medicaid agency whenever the submission is not authorized by state law. But it cannot be that the U.S. Constitution requires the Secretary to resolve a separation of powers dispute between the political branches of the North Carolina government before he may receive and review a proposed SPA. Finally, plaintiffs argue that for the Secretary to even accept the submission of the proposed state plan amendment would violate the constitutional guarantee of a republican government for each state. But even if a claim could be brought under the Guarantee Clause, the Secretary's mere acceptance of a state plan amendment submitted by the designated state Medicaid agency does not implicate it.

For all of these reasons, plaintiffs lack standing, their case is not ripe, they cannot state a valid claim for relief—and they therefore have no likelihood of success on the merits of their claims. Finally, plaintiffs have not shown any risk of imminent harm, irreparable or otherwise. Any actions taken by the Secretary can be undone in a proper case—which this is not. Plaintiffs' complaint must be dismissed, and their motion for a preliminary injunction denied.

## BACKGROUND

The Medicaid program, established in 1965 by Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.*, is a cooperative federal-state program to provide medical care to individuals "whose income and resources are insufficient to meet the costs of necessary medical services." *Id.* § 1396-1; *see Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1208 (2012). To qualify for federal Medicaid funding, participating states must submit to the Secretary, through the Centers for Medicare & Medicaid Services ("CMS"), a "plan for medical assistance" detailing the nature and scope of the state's program. 42 U.S.C. § 1396a(a); *see* 42 C.F.R. § 430.10. A state, through its designated "single state agency," 42 C.F.R. § 431.10, must also submit to CMS any proposed amendments to the plan that it may wish to make from time to time. 42 C.F.R. § 430.12(c).

CMS has, by regulation, established a procedure for states to submit their plans or amendments. A state Medicaid agency is selected by each state to submit plans or amendments on its behalf. 42 C.F.R. § 430.12(b). North Carolina has designated the State's Department of Health and Human Services ("NC HHS") as the entity responsible for the submission and administration of its Medicaid state plan and any proposed state plan amendments. N.C. Gen. Stat. §§ 108A-54(a), 108A-54.1B. When a proposed state plan amendment is submitted by a state's designated Medicaid agency, CMS determines whether the submission complies with the

requirements set forth in 42 U.S.C. § 1396a(a) and implementing regulations. 42 U.S.C. §§ 1316(a)–(b), 1396a(b).

The Affordable Care Act amended 42 U.S.C. § 1396a to provide Medicaid coverage for an expanded population of individuals, with incomes of up to 133% of the federal poverty level. 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII). Because the Supreme Court has held that this provision is not a mandatory condition for a state's participation in the Medicaid program, any state that wishes to accept the Medicaid expansion must affirmatively act to do so. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2606–07 (2012) (plurality opinion).

In 2013, the North Carolina General Assembly passed, and Governor Patrick McCrory signed, a law providing that:

> The State will not expand the State's Medicaid eligibility under the Medicaid expansion provided in the Affordable Care Act, P.L. 111-148, as amended. . . . No department, agency, or institution of this State shall attempt to expand the Medicaid eligibility standards provided in S.L. 2011-145, as amended, or elsewhere in State law, unless directed to do so by the General Assembly.

N.C. Session Law 2013-5, § 3. On January 6, 2017, Governor Roy Cooper announced that he would seek federal approval for a state plan amendment that would provide coverage for the expanded Medicaid population specified in 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII). Press Release: Governor Cooper Tells Washington that North Carolina Will Seek to Expand Medicaid, http://governor.nc.gov/news/governor-cooper-tells-washington-north-carolina-will-seek-expandmedicaid. The Governor announced that, if CMS approved the state plan amendment, it would only be implemented "if local matching money can be secured, and if state eligibility requirements are changed." *Id*.

On January 13, Phil Berger and Tim Moore, the leaders of the North Carolina Senate and House of Representatives, filed this suit seeking to enjoin the Secretary and CMS from

considering the state plan amendment that Governor Cooper had announced his intention to submit. The complaint alleged that then-Secretary Sylvia Burwell's statement that HHS would "process the governor's proposal as expeditiously as possible when we get it" was tantamount to official approval of the submission that had not yet been made. Compl. ¶ 27. The complaint contained no other factual allegation regarding the Federal Defendants.

On January 14, the plaintiffs moved for a temporary restraining order, which this Court granted that same day.[1] Federal Defendants subsequently moved to vacate the temporary restraining order on grounds repeated and expanded upon in this memorandum. To date, the State Defendants have not submitted the proposed state plan amendment at issue in this case, although they have been free to do so since this Court's temporary restraining order expired on January 28.

## ARGUMENT

### A. The complaint must be dismissed for lack of standing.

The Federal Defendants move to dismiss the complaint for lack of standing, pursuant to Federal Rule of Civil Procedure 12(b)(1). When a defendant challenges the court's subject matter jurisdiction under Rule 12(b)(1), the plaintiff bears the burden of showing that federal jurisdiction is appropriate. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). Where the defendant contends that the complaint "simply fails to allege facts upon which subject matter jurisdiction can be based," then "all facts alleged in the complaint are assumed true." *Adams*, 697 F.2d at 1219. This Court lacks

[1] On January 20, then-Secretary Burwell and CMS Acting Administrator Slavitt left office with President Obama. On February 10, the U.S. Senate confirmed Thomas E. Price, M.D. as Secretary of HHS. On March 14, Seema Verma was confirmed as CMS Administrator. Pursuant to Federal Rule of Civil Procedure 25(d), Secretary Price and Administrator Verma are substituted as defendants in this action.

subject matter jurisdiction over plaintiffs' complaint because, even on the facts they allege, they have not suffered a justiciable injury.

"[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (internal quotation omitted). "One element of the case-or-controversy requirement" is that plaintiffs "must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). In order to establish "the irreducible constitutional minimum" of Article III standing, a plaintiff must adequately allege that it has suffered an injury in fact that is fairly traceable to the defendant's challenged actions, and that is redressable by the court. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). For this purpose, an "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id*. at 560 (citations and internal quotations omitted). Legislators are not excused from this injury-in-fact requirement. To the contrary, Article III demands that any plaintiff, including a legislative plaintiff, must demonstrate an injury in fact before invoking the court's jurisdiction. *See Raines*, 521 U.S. at 829–30; *see also Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662–63 (2013). Plaintiffs fail to satisfy the standing requirement for two separate reasons: the interest they assert is not legally protected and, even if it were, the injury they allege is not actual or imminent.

To begin with, it is well established that a mere interest in the "vindication of the rule of law" is not a legally cognizable interest that could support a plaintiff's Article III standing. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106 (1998). Simply put, "'an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer

jurisdiction on a federal court.'" *Hollingsworth*, 133 S. Ct. at 2662 (quoting *Allen v. Wright*, 468 U.S. 737, 754–55 (1984)). *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("An interest shared generally with the public at large in the proper application of the Constitution and laws will not do."); *Lujan*, 504 U.S. at 576–77.

Plaintiffs claim that, as leaders of the North Carolina General Assembly, they "have standing both to vindicate their duly enacted laws and to represent the institutional interest of the North Carolina General Assembly in not being stripped of its prerogative to decide whether the State shall expand its Medicaid program." Pls.' Opp. to Fed. Defs.' Mot. to Dissolve TRO (Pls.' Opp.") at 22, ECF No. 30. Plaintiffs principally rely upon *Karcher v. May*, 484 U.S. 72 (1987). *Karcher* involved a federal court challenge to the constitutionality of a New Jersey statute; when the New Jersey Attorney General refused to defend the law, the leaders of the New Jersey Legislature were permitted to do so. 484 U.S. at 75. The Supreme Court concluded that the *Karcher* defendants were proper parties because "the New Jersey Legislature had authority under state law to represent the State's interests in both the District Court and the Court of Appeals." *Id.* at 82. Plaintiffs suggest that as officers of the General Assembly, they similarly have the authority under North Carolina law to defend the validity of state legislative acts. They point to *State v. Berger*, 368 N.C. 633 (2016), in which they were permitted to defend a state statute found to violate the North Carolina Constitution, and *Cooper v. Berger*, No. 16 CVS 15636 (N.C. Super. Ct.), in which they are currently defending another statute against a state constitutional challenge.

But no state statute is challenged here. Rather plaintiffs assert against the Federal Defendants a right, as state legislators, to challenge federal actions that may eventually occur. Such a claim of standing extends far beyond *Karcher*, which never suggested that New Jersey

legislators could challenge contemplated federal actions that they believed would denigrate state laws, and indeed beyond the North Carolina statutes on which plaintiffs rely. *See* N.C. Gen. Stat. § 120-32.6(b) (allowing the General Assembly to appear "[w]henever the validity or constitutionality of *an act of the General Assembl*y . . . is the subject of an action in any court"); *id.* § 1-72.2 (providing that the Speaker and President Pro Tempore "shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging *a North Carolina statute*") (emphases added). No state statute is challenged here, and North Carolina law does not purport to grant the plaintiffs any right to bring federal actions against federal agencies.

Plaintiffs also point to *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015). But that case only underscores plaintiffs' lack of standing. Unlike *Karcher*, the case was affirmatively brought by the Arizona Legislature, which alleged that the Arizona Independent Redistricting Commission was established in violation of the Elections Clause of the U.S. Constitution. *Id.* at 2658–59. The Supreme Court concluded that the Legislature had standing, in significant part because it was "an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes in both of its chambers." *Id.* at 2664. No such authorizing vote was conducted here. Indeed, plaintiffs cannot point to any source of authority whatsoever for an affirmative suit on behalf of the General Assembly.

And even if plaintiffs had some authorization to press this suit, *Raines v. Byrd* forecloses it. 521 U.S. 811 (1997). The legislators' claims are grounded in nothing more than their interest in the rule of law, which cannot suffice to establish a particularized injury that could support Article III standing. Such an asserted injury "is wholly abstract and widely dispersed," *id.* at 829,

and is not legally cognizable for the purposes of Article III. Plaintiffs stand as taxpayers, but this is not a case in which taxpayers have standing. Because Plaintiffs lack any legally protected interest in the claims raised here, their complaint must be dismissed.

And even if plaintiffs do have a "legally protected interest" at stake in any of their claims, they are not subject to an "actual or imminent" invasion of that interest. *Lujan*, 504 U.S. at 560–61. Unless and until a state plan amendment is approved by the Secretary, any injury will remain "conjectural or hypothetical," *id.* at 560—the plaintiffs merely suppose that an amendment will be unlawfully submitted and approved at some point in the future. The only basis on which plaintiffs rest their belief that "the Secretary has already made a decision on the proposed State Plan Amendment and intends to approve it," Compl. ¶ 27, is a single statement by former Secretary Burwell that HHS would "process the governor's proposal as expeditiously as possible when we get it," *id.*, which has not been affirmed by the current Secretary or CMS Administrator. From this statement—which on its face is no more than indication of intent to move quickly—plaintiffs conclude that the former Secretary had decided to approve the proposed state plan amendment "before she le[ft] office on January 20, 2017." *Id.* But the proposed state plan amendment was not submitted and was not approved before former Secretary Burwell left office, and plaintiffs offer no reason at all for this Court to believe that the current Secretary or CMS Administrator has in any way pre-judged any state plan amendment that may be proposed by Governor Cooper. As the case now stands, they offer absolutely no allegations that could lead this Court to conclude that their alleged injury is actual or imminent. For this reason too, plaintiffs lack standing to press any of their claims, which must therefore be dismissed.

**B. The complaint must be dismissed for failure to state a claim on which relief can be granted.**

The Federal Defendants move to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim on which relief can be granted. A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint, "it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). To meet this standard, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In evaluating whether a claim is stated, "[the] court accepts all well-pled facts as true and construes these facts in the light most favorable to the plaintiff," but does not consider "legal conclusions, elements of a cause of action, . . . bare assertions devoid of further factual enhancement[,] . . . unwarranted inferences, unreasonable conclusions, or arguments." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (citations omitted).

Plaintiffs' complaint sets out five claims. Two are brought directly under Title XIX of the Social Security Act (the "Medicaid Act"), which contains no private right of action or waiver of sovereign immunity of which plaintiffs can avail themselves here. A third invokes the Administrative Procedure Act which, subject to certain requirements, allows for judicial review of final agency action. But there is no final agency action for this Court to review here. The remaining constitutional claims are a transparent attempt to avoid the APA's finality requirement, and are meritless in any event. None of plaintiffs' claims can survive review under Rule 12(b)(6).

*The Medicaid Act*. Although plaintiffs bring two claims for violations of Title XIX of the Social Security Act, which governs the Medicaid program, they do not assert that the Act affords them any private right of action against the Federal Defendants or waives the federal government's sovereign immunity. Pls.' Opp. at 7 ("Plaintiffs . . . do not seek to rely on a private right of action directly under the Social Security Act."); *cf. Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Instead, plaintiffs invoke the limited equitable authority of this court to enjoin statutory violations by federal agencies, as described in *Leedom v. Kyne*, 358 U.S. 184 (1958), and its progeny.

The Fourth Circuit has articulated a two-part test to identify the rare circumstances in which a plaintiff can successfully invoke federal jurisdiction under the doctrine of *Leedom v. Kyne*. *Scottsdale Capital Advisors Corp. v. Financial Industry Regulatory Authority, Inc.*, 844 F.3d 414, 421 (4th Cir. 2016). First, a petitioner must make "a 'strong and clear demonstration that a clear, specific and mandatory [statutory provision] has been violated.'" *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 234 (4th Cir. 2008) (quoting *Newport News Shipbuilding and Dry Dock Co. v. NLRB*, 633 F.2d 1079, 1081 (4th Cir. 1980)) (alteration in original). "When a party invokes *Leedom* as the basis for [federal] jurisdiction," courts in the Fourth Circuit "conduct a 'cursory review of the merits' to determine if the agency acted 'clearly beyond the boundaries of its authority.'" *Id.* (quoting *Champion Int'l Corp. v. EPA*, 850 F.2d 182, 186 (4th Cir. 1988)).

This Court has no jurisdiction under *Leedom v. Kyne* because HHS has not "acted clearly beyond the boundaries of its authority"—to the contrary, the agency has not acted at all. (In any event, the acceptance and review of a proposed state plan amendment by the Secretary is expressly provided for, rather than beyond the authority of, the Federal Defendants. 42 U.S.C.

§ 1316(a)(1). Plaintiffs themselves admit as much when they describe the Secretary's "[p]roposed [a]ctions" as "threatened" or "contemplated" violations of the Medicaid Act. Pls.' Br. in Supp. of TRO at 10, 12, ECF No. 6-1. An action that is "proposed," "threatened," or "contemplated" is one that has not yet occurred (and indeed may never occur). *Leedom v. Kyne* confers jurisdiction to review agency action under certain limited circumstances, but it does not authorize the federal courts to prohibit agencies from taking actions that have merely been proposed or contemplated. Agency action reviewed under *Leedom v. Kyne* need not be final within the meaning of the APA, but there must be some agency action for a court to review. *See MCorp*, 502 U.S. at 42–44; *Champion Int'l Corp.*, 850 F.2d at 186; *accord Newport News Shipbuilding*, 633 F.2d at 1081 (requiring finding that a statutory provision "has been violated"). Because the Secretary has not done anything that could be reviewed, the doctrine of *Leedom v. Kyne* provides no basis for this court to exercise jurisdiction over plaintiffs' Medicaid Act claims.[2]

Plaintiffs also fail the second half of the Fourth Circuit's test for invoking *Leedom v. Kyne*, which is that "the absence of federal court jurisdiction over an agency action 'would wholly deprive' the aggrieved party 'of a meaningful and adequate means of vindicating its statutory rights.'" *Long Term Care Partners*, 516 F.3d at 233 (quoting *Bd. of Governors, Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991)); *accord Scottsdale Capital Advisors*, 844 F.3d at 421; *see Nyunt*, 589 F.3d at 449 (explaining that "[t]he *Leedom v. Kyne* exception applies . . . only where . . . there is no alternative procedure for review of the statutory claim").

[2] Even if the Secretary did accept a proposed state plan amendment from the North Carolina Department of Health and Human Services, *Leedom v. Kyne* would not be implicated because it is beyond doubt that under the Medicaid statute, the Secretary is authorized to accept and consider a state plan amendment submitted by a state's designated Medicaid agency.

Plaintiffs, assuming they would have standing, would have "a meaningful and adequate means of vindicating" any "statutory rights" that they may have—if the Secretary approves the state plan amendment at issue in this case, a proper plaintiff could challenge that approval under the Administrative Procedure Act. Plaintiffs argue that APA review is an inadequate remedy because the Secretary's approval of the proposed state plan amendment would "require the State to incur implementation expenses immediately." Pls.' Opp. at 9. But "immediately" is, at the very least, an exaggeration. No automatic, irreversible expenditure would be triggered the very moment that the proposed amendment was submitted or approved. The Federal Defendants certainly would not require any such immediate expenditures. Judicial review under the APA is every bit as adequate as it would be under *Leedom v. Kyne* (which, as explained above, also requires some agency action for a court to review) and, for that additional reason, the doctrine of *Leedom v. Kyne* does not grant this court jurisdiction over plaintiffs' Medicaid Act claims.

Plaintiffs have conjured a counterfactual world in which this Court is empowered to pronounce upon the meaning of federal statutes in advance of any real action by the Secretary. Our actual system of administrative action and judicial review works quite differently. The Medicaid statute includes a long list of requirements for each state plan or plan amendment, including the two at issue here. *See* 42 U.S.C. § 1396a(a)(1)–(82). When the Secretary receives a proposed state plan or plan amendment, he determines whether it complies with each of these statutory mandates, and approves or rejects it on that basis. *Id.* §§ 1316(a)–(b), 1396a(b). Aggrieved parties who believe that the Secretary has erred can then seek APA review of the Secretary's decision. *See, e.g.*, *West Virginia v. Thompson*, 475 F.3d 204, 212 (4th Cir. 2007). A reviewing court will examine his decision while according it due deference, because "[t]he Medicaid statute is a prototypical 'complex and highly technical regulatory program' benefitting

from expert administration, which makes deference particularly warranted" and "[t]he administrative process through which state plan amendments are considered also counsels deference." *Id.* (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)); *see also Cmty. Health Ctr. v. Wilson–-Coker*, 311 F.3d 132, 138 (2d Cir. 2002). If, upon APA review, the Secretary's decision is found to violate the Medicaid statute, then the reviewing court will choose an appropriate remedy.

Plaintiffs are not seeking judicial review here, but rather a judicial prohibition against administrative actions that may occur in the future. Such a preemptive injunction is not available under *Leedom v. Kyne* or any other equitable doctrine. Plaintiffs' two claims for violations of Title XIX of the Social Security Act must therefore be dismissed for failure to state a claim on which relief can be granted.

*Administrative Procedure Act.* Plaintiffs' third claim is brought under the Administrative Procedure Act, which only authorizes judicial review of "final agency action," 5 U.S.C. § 704—that is, action which "signals the consummation of an agency's decisionmaking process *and* gives rise to legal rights or consequences." *COMSAT Corp. v. Nat'l Science Found.*, 190 F.3d 269, 274 (4th Cir. 1999) (citing *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

Plaintiffs argue that the former Secretary's announcement of her intention "to expeditiously process the State Plan Amendment" constitutes final agency action "as a practical matter." Compl. ¶ 101. They invoke two cases in support of this proposition, neither of which does them the least bit of good. The first, *Arch Mineral Corporation v. Babbitt*, 104 F.3d 660 (4th Cir. 1997), involved the issuance of a letter declaring a presumed connection between two companies. Establishing that connection would have blocked one company from receiving certain permits. *Id.* at 663–64. Although the agency argued that its "enforcement action against

Arch was not final" because additional administrative steps were required, *id.* at 665, the Fourth Circuit found that "[f]or all practical purposes . . . the decision ha[d] been made" when the letter was issued, *id.* at 666, and therefore the case was ripe for adjudication. The second case on which plaintiffs rely is *Fort Sumter Tours, Inc. v. Andrus*, 564 F.2d 1119 (4th Cir. 1977). In *Fort Sumter*, one company claimed that it was entitled to preferential negotiating rights, which the agency had violated by negotiating with a competitor. *Id.* at 1121–22. The Fourth Circuit found that the agency's "decision to deny Fort Sumter its statutory preference and to negotiate instead with Gray Line [wa]s 'final agency action' within the meaning of the Administrative Procedure," even though the new contract had not yet issued. *Id.* at 1123.

Neither *Arch Mineral* nor *Fort Sumter* suggests that APA review is available here. Each case involved review of some actual agency action—the issuance of a formal letter, or the negotiation of a contract—which is entirely absent here. Each case was, at bottom, about issues of ripeness. And, most importantly, each case preceded the Supreme Court's announcement of its test for final agency action in *Bennett v. Spear*. Neither *Arch Mineral* nor *Fort Sumter* suggests that an administrative indication of an agency's intention to process an application quickly "signals the consummation of an agency's decisionmaking process" or "gives rise to legal rights or consequences." *COMSAT*, 190 F.3d at 274 (citing *Bennett*, 520 U.S. at 177–78). Nor do plaintiffs offer an explanation of how this could be so. Instead, they flatly assert that the former Secretary's statement that she would process the state plan amendment expeditiously amounted to "preordained approval," Pls.' Opp. at 17, and then attest that this approval satisfies the *Bennett v. Spear* test. Plaintiffs' theory of pre-ordained approval is fatuous—and especially curious now, as it completely ignores the fact that the official who had supposedly made up her mind has been out of office for months. The current Secretary and CMS Administrator are not

bound by the former Secretary's non-decisional statement. But even if former Secretary Burwell's statement were still relevant, a statement about the speed of processing does not signal that the agency's decisionmaking process, which has not yet begun, is actually at an end. And no rights or consequences flow from such a statement. APA review is plainly unavailable here, because the Secretary has taken no action at all, much less final agency action. Plaintiffs' APA claim must be dismissed for failure to state a claim on which relief can be granted.

*Tenth Amendment*. Plaintiffs next claim that the Tenth Amendment allows this court to enjoin the Secretary from accepting and considering a state plan amendment that has not yet been submitted to him. Plaintiffs argue that, if the Secretary considered and approved the intended state plan amendment, he would thereby violate the Tenth Amendment of the U.S. Constitution. Their theory is that the question of which North Carolina official is authorized to submit a state plan amendment is a matter for North Carolina to resolve, and the federal government cannot usurp state authority by making the decision for it. Plaintiffs argue, somewhat paradoxically, that the Secretary is therefore required to take their side in their dispute with the Governor over the allocation of state authority, because they are right and he is wrong and to conclude otherwise would infringe state sovereignty. Their argument demonstrates precisely why the Secretary generally does not attempt to adjudicate such disputes, and does nothing to suggest that the Tenth Amendment requires him to do so.

A state is free to designate any entity it chooses as its Medicaid agency. Once such an agency is designated, the Secretary will not accept submissions from any other state actor. If the identity or authority of the Medicaid agency changes, the State Plan must be amended to reflect those changes. *See* 42 C.F.R. § 430.12(c) (A State Plan "must provide that it will be amended whenever necessary to reflect . . . [m]aterial changes in State law, organization, or policy, or in

the State's operation of the Medicaid program."). This system leaves each state's prerogative to organize itself entirely untouched. The state has designated the North Carolina Department of Health and Human Services to make submissions. N.C. Gen. Stat. § 108A-54(a), (b). The State can alter that designation at any time, but while it remains in effect, the Secretary generally does not wade into state-law disputes about NC HHS's authority to make any particular submission.

Plaintiffs' Tenth Amendment claim must be dismissed for failure to state a claim on which relief can be granted.

*Guarantee Clause*. Plaintiffs' final claim invokes the Guarantee Clause, which "has been an infrequent basis for litigation throughout our history." *New York v. United States*, 505 U.S. 144, 184 (1992). Indeed, there is reason to believe that such claims cannot be litigated at all: "In most of the cases in which the [Supreme] Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine." *Id.* (collecting cases). The Fourth Circuit has similarly left open the question of whether "any justiciable claim" can be brought under the Guarantee Clause. *Virginia v. United States*, 74 F.3d 517, 524 (4th Cir. 1996). But even if Guarantee Clause claims are justiciable, plaintiffs have not made out any plausible violation: the acceptance of a state plan amendment submitted by the designated state Medicaid agency simply does not threaten to upend republican governance in the state of North Carolina. Their Guarantee Clause claim must therefore be dismissed for failure to state a claim on which relief can be granted.

**C. Plaintiffs are not entitled to a preliminary injunction.**

To be entitled to a preliminary injunction, the moving party must demonstrate that it is likely to succeed on the merits of at least one claim. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see Real Truth About Obama, Inc., v. Fed. Election Comm'n*, 575 F.3d 342,

346 (4th Cir. 2009), *reinstated in relevant part on remand*, 607 F.3d 355 (4th Cir. 2010). Plaintiffs have asserted five federal claims, none of which has any likelihood of success, as shown above. For that reason alone, plaintiffs' motion for a preliminary injunction denied.

To obtain preliminary relief, plaintiffs must also show that they are "likely to suffer irreparable harm" in its absence. *Winter*, 555 U.S. at 20. But plaintiffs have failed to establish any significant risk of harm, irreparable or otherwise. Plaintiffs cite *Ross v. Meese*, 818 F.2d 1132 (4th Cir. 1987), for the proposition that constitutional injuries are irreparable harms, but that case concerned personal rights under the Fourth Amendment. In any case, no conceivable constitutional injury is either occurring or imminent, nor could one be. No state plan amendment has even been submitted, much less approved by the Secretary. The present Secretary has not said or done anything to suggest that approval is imminent or inevitable. And no unrecoverable expenditures would be made before plaintiffs could seek judicial review of an actual agency action, rather than the proposed action that is the subject of this suit.

**CONCLUSION**

For the reasons set forth above, plaintiffs cannot establish standing, have not stated a claim on which relief may be granted, and are not entitled to a preliminary injunction. This case must therefore be dismissed, and plaintiffs' motion for a preliminary injunction denied.

Dated: April 7, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 7th day of April, 2017, I caused the foregoing document to be filed electronically with the Clerk of Court through the CM/ECF System for filing, and served on counsel registered to receive CM/ECF notifications in this case.

*/s/ James Bickford*
James Bickford