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

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

PHIL BERGER and TIM MOORE, Plaintiffs, v. SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of Health and Human Services, *et al.*, Defendants.	)	**FEDERAL DEFENDANTS' EMERGENCY MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER**

Pursuant to Rule 65(b)(4) of the Federal Rules of Civil Procedure, the federal defendants—Sylvia Mathew Burwell, in her official capacity as Secretary of Health and Human Services; the United States Department of Health and Human Services; Andrew Slavitt, in his official capacity as Acting Administrator for the Centers for Medicare & Medicaid Services; and the Centers for Medicare & Medicaid Services—respectfully request that the Court dissolve the temporary restraining order entered in this action on January 14, 2017, ECF No. 7. Because the merits of this action are clear—plaintiffs have pled no basis for jurisdiction or any plausible claim for relief under federal law, let alone any basis for injunctive relief—the federal defendants respectfully ask that the Court act **immediately** to dissolve the temporary restraining order. If the Court is inclined to hold a hearing, the federal defendants ask that the Court set the matter for a hearing no later than **Tuesday, January 17, 2017**, and that the Court issue its ruling promptly thereafter.

For the reasons explained in the accompanying memorandum, this Court lacks jurisdiction over the complaint. The plaintiffs have no likelihood of success on the merits of their claims

against the federal defendants, and cannot satisfy the remaining factors for emergency injunctive relief. Because the plaintiffs lack the grounds for the issuance of a temporary restraining order, and because the order in place threatens to interfere with the exercise of the federal defendants' powers and responsibilities under federal law, the federal defendants respectfully request that the temporary restraining order be dissolved.

Dated: January 16, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 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/ Joel McElvain
JOEL McELVAIN

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PHIL BERGER and TIM MOORE, Plaintiffs, v. SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of Health and Human Services, *et al.*, Defendants.	)	**FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF EMERGENCY MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER**

INTRODUCTION AND SUMMARY

This case does not belong in federal court. North Carolina legislators are engaged in a dispute with the Governor and the state's Department of Health and Human Services as to whether the state agency may seek to amend North Carolina's Medicaid state plan to accept coverage for an expanded population. In describing their dispute to this Court, the legislators have seriously misstated it. Far from asserting a "dictatorial theory of executive power," Pls.' Mem. in Support of Mot. for TRO at 8 n.3, ECF No. 6-1 (Pls.' Br.), the Governor has recognized that he could only implement the proposed amendment if the General Assembly grants budgetary and legal authority before the amendment's contemplated January 1, 2018 effective date.

But no matter the merits of the dispute, it is purely a matter of state law, which this court has no role in settling. Federal courts may not "award injunctive relief against state officials on the basis of state law" because "[a] federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal

law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 91, 106 (1984). "On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Id*. at 106. Such an order therefore can only be issued by state courts, which alone have the power and the obligation to ensure that the Governor and other state officials comply with state law.

No doubt aware of this limitation on the power of the federal courts, plaintiffs—the leaders of the two houses of the North Carolina General Assembly—have contrived to transmute their state law dispute into federal causes of action. Each claim rests on the same premise: that the plaintiffs have the correct view of North Carolina law, and the state Department of Health and Human Services lacks the authority (under North Carolina law) to submit a state plan amendment accepting the Medicaid expansion on behalf of North Carolina. Rather than presenting that argument to the North Carolina state courts, plaintiffs take it as a given, and from their premise conclude that an unauthorized submission would not satisfy the requirements of Title XIX of the Social Security Act, which governs the Medicaid program. But the Social Security Act does not prohibit the state Medicaid agency from making a submission, even a faulty one, or the Secretary from considering it; rather, the Act vests the Secretary with authority to evaluate submissions, and to accept or reject them as appropriate.

If the Secretary errs, then injured parties may seek judicial review under the Administrative Procedure Act. But this Court has no authority to intervene prematurely. Fear that the Secretary will make an erroneous determination cannot support an injunction barring her from making any determination at all. Nor would the Secretary's consideration of the state agency's submission violate the Tenth Amendment, let alone the U.S. Constitution's guarantee of a republican form of state government. By making such fanciful arguments, plaintiffs only demonstrate the weakness

of their case. Plaintiffs have no viable federal claims. A dispute about the authority of the political branches of North Carolina state government belongs in state court.

And even if plaintiffs had a plausible federal case, which they do not, they are not faced with any irreparable harm that would justify extraordinary injunctive relief. North Carolina's Department of Health and Human Services contemplates submitting a proposed state plan amendment that, if approved, would not become effective until January 1, 2018. Even then, the state's implementation of any approved amendment will turn on whether it obtains relevant budgetary and legal authorities from the General Assembly in the meantime. There is ample opportunity for this Court to consider plaintiffs' claims on the merits (spurious though they may be) before any state plan amendment would go into effect. The public interest and the balancing of the equities also weigh heavily against injunctive relief; the balance lies against a federal court's interference with the Secretary's exercise of her statutory duties under the Medicaid Act.

Finally, but most basically, plaintiffs lack standing to bring this suit. Plaintiffs assert standing as representatives of the General Assembly to litigate the meaning of enacted state law. But, like any plaintiff, a legislator cannot base his or her claim to standing on the generalized interest that all citizens share in the proper interpretation of the law. Although there are narrow circumstances in which legislators have been accorded standing because the state legislature has been completely disabled from acting by virtue of, say, a challenged provision of a state constitution, those circumstances are not remotely implicated here. Again, far from being disempowered, the General Assembly will be required to participate in the implementation of any approved state plan amendment if implementation is to proceed. Because plaintiffs lack standing, this Court lacks jurisdiction.

STATEMENT OF THE FACTS

I. The Medicaid Program

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." 42 U.S.C. § 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 of Health and Human Services (Secretary, or HHS), 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 must also submit to CMS any amendments to the plan that it may make from time to time. 42 C.F.R. § 430.12(c).

CMS has, by regulation, established the procedure for a state to submit its plan or amendment. The state Medicaid agency is the entity designated to submit the plan or amendment on behalf of the state. 42 C.F.R. § 430.12(b). That agency is instructed to submit the plan or amendments after consultation with, or a delegation of authority from, the state governor. *Id.* North Carolina has designated the state's Department of Health and Human Services as the entity responsible for the submission and administration of its Medicaid state plan and any state plan amendments. N.C. Gen. Stat. §§ 108A-54(a), 108A-54.1B.

When a state plan or state plan amendment is submitted, CMS determines whether it 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). Except in limited circumstances, the statute requires that the Secretary "shall approve any plan which fulfills the conditions specified" in the statute and regulations. 42 U.S.C. § 1396a(b).

It is not uncommon for a state Medicaid agency to first obtain approval from CMS for a state plan amendment and then later secure relevant authorities from the state's legislature to allow the amendment to be implemented. *See* Declaration of Timothy B. Hill ¶ 3. CMS considers it to be the responsibility of the state agency to ensure that its proposed expenditures comply with state law, and thus CMS does not purport to engage in an independent review of state law. *Id.* ¶ 4. CMS would not have grounds to disapprove such a proposal on the basis of state law; there is no requirement in 42 U.S.C. § 1396a(b) that allows the Secretary to deny a state plan amendment because the state may need to enact further legislation or seek additional budgetary approvals, or otherwise seek authority from other state actors under state law. *Id.* Indeed, absent explicit authority allowing her to disapprove a state plan amendment, the Medicaid statute provides that the Secretary "shall approve" any such amendment that fulfills the requirements of 42 U.S.C. § 1396a(a); *see id.* § 1396a(b). Accordingly, "CMS, in the course of reviewing state plan amendments, does not require particular state approvals before approving federal matching payments of a state's non-federal share of Medicaid expenditures." Hill Decl. ¶ 4.

II. North Carolina's Proposed State Plan Amendment

The Affordable Care Act amended 42 U.S.C. § 1396a to provide for coverage of 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). (The Supreme Court has held that this provision is not a mandatory condition for a state's participation in the Medicaid program. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2606–07 (2012) (plurality opinion).) On January 6, 2017, Governor Roy Cooper announced that North Carolina would seek federal approval for a state plan amendment that would secure federal funds to provide coverage for the expanded 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-expand-medicaid. The Governor announced that, if CMS were to approve the state plan amendment, its implementation would be contingent on approval from the General Assembly: "If CMS approves a change, if local matching money can be secured, and if state eligibility requirements are changed, then"—and only then—"more than a half-million North Carolinians could receive health care beginning in January 2018." *Id.* The Governor also announced that "[t]he state will accept comments for 10 days on North Carolina's notice of intent to amend its Medicaid plan," and would submit the proposed state plan amendment to CMS thereafter. *Id.*

As noted, the proposed effective date for the state plan amendment is January 1, 2018. North Carolina Dep't of Health & Human Services, Div. of Medical Assistance, *Public Notice: Alternative Benefit Plan*, https://ncdma.s3.amazonaws.com/s3fs-public/documents/files/Public_Notice_for_ABP_SPAs.pdf. *See* Hill Decl. ¶ 3.

STANDARD OF REVIEW

"The substantive standard for granting a temporary restraining order is the same as that for entering a preliminary injunction." *Reale v. Wake Cty. Human Servs.*, 2012 WL 6203121, at *3 (E.D.N.C. Dec. 12, 2012). A court may grant a temporary restraining order if the moving party demonstrates "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. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). All four elements of this test must be satisfied. *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). A temporary restraining order "may only be awarded upon a clear showing that

the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22.

ARGUMENT

Plaintiffs have brought this suit to prevent the Secretary from considering a state plan amendment that has not yet been submitted, because they contend that North Carolina's Governor and executive agencies lack authority to make the submission under state law. Plaintiffs suggest that, absent injunctive relief, the North Carolina Department of Health and Human Services would make a legally deficient submission that would nonetheless be approved by the Secretary. They have asked this Court to step in and prohibit both the state Department and the federal Secretary from acting. But this Court has no grounds on which to do so: plaintiffs lack standing to press their claims, have not alleged any violation of federal law, and are not facing any irreparable harm. Their case against the Secretary rests entirely upon her comment that she intends to "process" any submission "expeditiously," Compl. ¶ 27, which they dramatically overread as a promise of approval. The Secretary has said that she intends to act quickly, and no more. Nor would her action cause plaintiffs irreparable harm even if she did approve the state plan amendment, and even if she was wrong to do so. As explained at greater length below, that approval would simply be the first step in a process that would require the participation of the General Assembly before a Medicaid expansion could be implemented. If, for instance, the General Assembly refused to appropriate funds for the expansion, or if a proper plaintiff gained relief against state officers in state court, the expansion would not proceed. Because plaintiffs have no standing, no cause of action, and no irreparable harm, the temporary restraining order should be dissolved.

I. Plaintiffs Lack Standing to Bring Their Claims

"[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).

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.

The plaintiffs purport to represent the interests of the North Carolina General Assembly in the proper interpretation of North Carolina law. But such a claim amounts to nothing more than a

simple interest in the vindication of the rule of law, which cannot suffice to establish a particularized injury that could support Article III standing. Such a claim by a legislator amounts to a mere assertion of an "abstract dilution of institutional legislative power." *Raines*, 521 U.S. at 826. Because such an asserted injury "is wholly abstract and widely dispersed," *id.* at 829, it is not legally cognizable for the purposes of Article III. *See also Russell v. DeJongh*, 491 F.3d 130, 134–35 (3d Cir. 2007) ("[T]he authorities appear to hold uniformly that an official's mere disobedience or flawed execution of a law for which a legislator voted . . . is not an injury in fact for standing purposes. . . . The principal reason for this is that once a bill has become law, a legislator's interest in seeing that the law is followed is no different from a private citizen's general interest in proper government.").

The plaintiffs cite *Karcher v. May*, 484 U.S. 72 (1987), *see* Pls.' Br' at 7, but that case refutes their claim to standing. In *Karcher*, the leaders of both houses of the state legislature had intervened to defend a state statute from a constitutional challenge. By the time the case reached the Supreme Court, the intervenors no longer held their positions, but nonetheless sought to participate in their capacity as legislators. The Court held that the former officeholders lacked standing, and dismissed the appeal. *Id.* at 80–81. The Supreme Court nonetheless declined to vacate the lower court's judgment, because the Court found that the intervenors had standing during the proceedings below, when they still held their offices. But their standing below was not based on their status as legislators, or even as the leaders of their respective houses; instead, it was based on the grant of "authority under state law to represent the State's interests." *Id.* at 82.

There is no provision of North Carolina state law that gives the plaintiffs here any authority to bring suit on behalf of the state. Plaintiffs cite N.C. Gen. Stat. § 1-72.2, but that provision only accords them standing "to intervene on behalf of the General Assembly as a party in any judicial

proceeding challenging a North Carolina statute or provision of the North Carolina Constitution." No North Carolina statute or provision of the North Carolina Constitution is challenged here. State law does not purport to grant the plaintiffs any right to bring federal court actions challenging the authority of federal agencies or the state executive, or alleging that they have violated state or federal law.

Neither does *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), support the plaintiffs' claim to standing. In that case, the state legislature was accorded standing, as a body, to litigate its claim that the Elections Clause of the federal constitution, U.S. Const. art. I., § 4, cl. 1, gave it the sole authority to adopt a congressional redistricting plan; a voter initiative had purported to vest that authority instead in an independent commission. The legislature filed suit "after authorizing votes in both of its chambers." 135 S. Ct. at 2664. The fact that the legislature was an "institutional plaintiff asserting an institutional injury" was critical to the Court's reasoning; the Court cited *Raines* for the proposition that individual legislators lack standing to litigate their views regarding the proper implementation of the law. *Id.* Again, no "authorizing vote" of the North Carolina General Assembly has occurred here, and the state law that the plaintiffs invoke to establish standing does not authorize them to bring this suit.

Moreover, the Arizona Legislature was only accorded standing in a narrow circumstance in which a state constitutional amendment had completely disabled it from adopting legislation on the subject of congressional redistricting. As a result, the Court concluded that the voter initiative injured the Arizona Legislature because "Proposition 106, together with the Arizona Constitution's ban on efforts to undermine the purposes of an initiative, would 'completely nullify' any vote by the Legislature, now or 'in the future,' purporting to adopt a redistricting plan." *Id*. at 2665

(quoting *Raines*, 521 U.S. at 823–24) (internal citation and alterations omitted). Here, by contrast, the North Carolina General Assembly is in no way disabled, "now or in the future," from legislating on the question of the Medicaid expansion. To the contrary, as explained above, the participation of the General Assembly will be required in order for the state to proceed with implementation of any state plan amendment.

The temporary restraining order must be dissolved because plaintiffs lack standing to bring this case, and the Court therefore lacks jurisdiction to hear it.

II. Plaintiffs Are Not Entitled to Emergency Injunctive Relief

A. Plaintiffs have no likelihood of success on the merits of their claims

Plaintiffs' complaint sets out five claims. One invokes the Administrative Procedure Act, which allows for judicial review of final agency action. But there is no final agency action for this court to review. Two others are brought directly under Title XIX of the Social Security Act, which contains no private right of action. The remaining constitutional claims are a transparent attempt to avoid the APA's finality requirement, and meritless in any event. None of plaintiffs' claims has any likelihood of success.

Administrative Procedure Act. Review of the Secretary's decision whether to approve a proposed state plan amendment proceeds under the Administrative Procedure Act. *See, e.g., West Virginia v. Thompson*, 475 F.3d 204, 212 (4th Cir. 2007) (considering "whether the Secretary's rejection of West Virginia's proposed amendment was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'" (quoting APA, 5 U.S.C. § 706(2)(A)). Plaintiffs' APA claims are unlikely to succeed, because there is no final agency action for them to challenge.

The APA grants judicial review of "final agency action for which there is no other adequate

remedy in a court." 5 U.S.C. § 704. "'Agency action' is defined to include 'the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof.'" *Invention Submission Corp. v. Rogan*, 357 F.3d 452, 459 (4th Cir. 2004) (quoting 5 U.S.C. § 551(13)). That action is "final" when it "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)). Without final agency action to review, this Court lacks subject matter jurisdiction under the APA. *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 857 (4th Cir. 2002) ("Because we conclude that the [subject of the challenge] was not final agency action, . . . the district court lacked subject matter jurisdiction to hear plaintiffs' claims . . . ."); *accord Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 433 (4th Cir. 2010); *Invention Submission Corp.*, 357 F.3d at 454.

Plaintiffs argue that "[t]he Federal Defendants, as a practical matter, have taken a final agency action by announcing their intention to expeditiously process the State Plan Amendment." Compl. ¶ 101. But an announcement of the Secretary's intention to quickly process—meaning "put through the steps of a prescribed procedure"—a submission that she has not yet received is not an agency action within the meaning of the APA, and it certainly is not final. Such an announcement obviously does not "mark the 'consummation' of the agency's decisionmaking process." *Bennett*, 520 U.S. at 178 (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)). Moreover, no "rights or obligations have been determined" by the Secretary's announcement of her intention to proceed expeditiously, nor do any "legal consequences . . . flow" from it. *Id.* (internal quotations omitted). Without a consummation of agency decisonmaking or any legal consequences at all, this court is doubly without jurisdiction to hear plaintiffs' APA claim. *See COMSAT Corp.*, 190 F.3d at 274 (emphasizing that both

elements are required).

And that result is particularly appropriate here because of the deference due to the Secretary for her interpretations of the Medicaid statute and her conduct of the administrative process for state plan amendments. As the Fourth Circuit has said, "[t]he Medicaid statute is a prototypical 'complex and highly technical regulatory program' benefitting from expert administration, which makes deference particularly warranted." *West Virginia*, 475 F.3d at 212 (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). "The administrative process through which state plan amendments are considered also counsels deference." *West Virginia*, 475 F.3d at 212. That process allows the Secretary to apply her expertise to address the requirements of the Medicaid statute, including the provisions that plaintiffs cite here. If a court rules before the Secretary acts, it cannot accord her the deference she is due.

If the Secretary errs in implementing the Medicaid statute, review is available under the appropriate standards of the APA. But the APA's jurisdictional requirement of final agency action precludes the Court from interfering with the administrative process before it is complete, as it plainly is not here. Because there is no final agency action for this Court to review, plaintiffs have no likelihood of success on their APA claim.

Social Security Act. To circumvent the APA's requirement of final agency action, Plaintiffs purport to bring two claims directly under Title XIX of the Social Security Act, which governs the Medicaid program. But, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). A plaintiff must identify an explicit right of action in the statutory text, or else demonstrate that Congress "intended to create the private remedy sought by the plaintiff[ ]" despite failing to

do so explicitly. *Reg'l Mgmt. Corp., Inc. v. Legal Servs. Corp.*, 186 F.3d 457, 461 (4th Cir. 1999) (quoting *Suter v. Artist M.*, 503 U.S. 347, 364 (1992)) (alteration in *Suter*). "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexande*r, 532 U.S. at 286. "The burden is on the plaintiff to demonstrate such an intent, and the requirement in order for a plaintiff to succeed is 'a stringent one' . . . ." *Reg'l Mgmt. Corp*., 186 F.3d at 462 (quoting *Donaldson v. Dep't of Labor*, 930 F.2d 339, 347–48 (4th Cir. 1991)).

Plaintiffs have not identified a right of action explicitly granted by Title XIX of the Social Security Act—and cannot, because the statute contains no such explicit grant. Nor have they met their "stringent" burden to demonstrate the fanciful proposition that Congress intended to create a right of action for state legislators to litigate their state Medicaid agency's compliance with the Social Security Act. Instead, plaintiffs point to this Court's "inherent equitable power to enjoin federal or state executive action that violates federal law." Pls.' Br. at 8. Plaintiffs' reference is to the Supreme Court's recognition of a limited, nonstatutory exception to the APA's finality requirement in cases such as *Leedom v. Kyne*, 358 U.S. 184 (1958). But this exception is "properly invoked only where 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, LLC v. United States*, 516 F.3d 225, 233 (4th Cir. 2008) (quoting *Bd. of Governors, Fed. Reserve Sys. v. MCorp Fin., Inc*., 502 U.S. 32, 43, (1991)). Plaintiffs do not attempt to make this showing, nor could they; if the Secretary were to err in deciding whether to approve a state plan amendment, the APA calls for review of that decision after it is made.

Without a private right of action, or any plausible claim to satisfy the limited exceptions to

the APA's finality requirement, Plaintiffs cannot proceed directly under Title XIX of the Social Security Act. Their claims instead must be brought under the APA which, as explained above, requires Plaintiffs to wait for the Secretary to take final agency action. Plaintiffs' statutory claims brought directly under the Social Security Act have no likelihood of success.

Tenth Amendment. The absence of a final agency action deprives this Court of jurisdiction over Plaintiffs' constitutional claims as well as their statutory claims. *See Virginia v. United States*, 74 F.3d 517, 523 (4th Cir. 1996). And in any event, their constitutional claims are meritless. Plaintiffs assert that, if the Secretary considered and approved the intended state plan amendment, she 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 does not attempt to adjudicate such disputes, and does nothing to suggest that the Tenth Amendment requires her 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 Secretary accepts submissions from the North Carolina

Department of Health and Human Services because the state has designed that Department to make them. 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 does not inquire into the Department's authority to make any particular submission.

To do so would force the Secretary to make the very determination of state authority that plaintiffs believe to be barred by the Tenth Amendment: if the Governor thinks that his Department of Health and Human Services has the authority to make a submission, and the General Assembly thinks it does not, it cannot be (as plaintiffs' argument implies) that the Tenth Amendment first requires the Secretary to settle their dispute, and then makes it a constitutional violation for her to reach the wrong conclusion. Any attempt by the Secretary to dictate to North Carolina how to interpret or apply its own state laws would implicate the concern that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions." *New York v. United States*, 505 U.S. 144, 162 (1992).

If the General Assembly believes that North Carolina's designated Medicaid agency is acting in excess of its authority under state law, it has rights and remedies under state law. The Secretary has no role in resolving that dispute, and the Tenth Amendment has nothing to do with it. Because the Tenth Amendment does not require the Secretary to adjudicate the authority under state law of a properly designated state Medicaid agency, plaintiffs have no likelihood of success on their Tenth Amendment claim.

Guarantee Clause. Plaintiffs' final claim is that if the Secretary accepted the submission of the intended state plan amendment, she would thereby violate the federal government's constitutional duty to "guarantee to every State in this Union a Republican Form of Government," U.S. Const. art. IV, § 4, because the Governor's usurpation of legislative authority would have

rendered North Carolina an effective dictatorship. *See* Pls.' Br. at 8 n.3. This argument is plainly absurd. "If there is any role for federal courts under the [Guarantee] Clause, it is restricted to real threats to a republican form of government." *Largess v. Supreme Judicial Court for State of Mass.*, 373 F.3d 219, 227 (1st Cir. 2004). The Guarantee Clause only applies "in highly limited circumstances" where the basic fundamentals of republican governance are threatened by, for example, "abolish[ing] the legislature" or the "establishment of a monarchy." *Id.* at 228–29. Because those circumstances are not remotely implicated here, plaintiffs have no likelihood of success on their Guarantee Clause claim.

B. Plaintiffs face no likelihood of irreparable harm in the absence of preliminary relief

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. Plaintiffs assert two theories of irreparable harm: first, that the Secretary is on the verge of nullifying state law and infringing state constitutional prerogatives, which are inherently irreparable injuries; and second, that the Secretary's approval of the state plan amendment would "likely . . . trigger expenditures that are unrecoverable," Pls.' Br. at 19. Neither theory holds water. Because the proposed state plan amendment would not take effect until January 2018, no supposed constitutional injury would occur before then. *See* North Carolina Dep't of Health & Human Services, Div. of Medical Assistance, Public Notice: Alternative Benefit Plan, https://ncdma.s3.amazonaws.com/s3fs-public/documents/files/ Public_Notice_for_ABP_SPAs_5.pdf; Hill Decl. ¶ 3. A year is more than enough time for this court to resolve this case on its merits without resort to preliminary relief. Moreover, as noted, in the meantime the General Assembly will consider the Governor's requests for budgetary and legal authorities, and will either approve those requests (thereby resolving the supposed injuries to North Carolina's sovereignty) or deny them (in which case implementation

of any approved state plan amendment would not go forward). And plaintiffs' argument about unrecoverable expenditures is deeply conjectural. They say that it is "likely that the Department will need to begin expending resources immediately"; despite a state statute that (they argue) forbids such expenditures, plaintiffs suggest that the expenditures will be made because the North Carolina Department of Health and Human Services "cannot be trusted to follow State law." Pls.' Br. at 20. This Court cannot rest a finding of likely irreparable harm on a presumption that state agencies will act unlawfully. *See Sansotta v. Town of Nags Head*, 724 F.3d 533, 542 (4th Cir. 2013) ("a court is required to presume good faith on the part of public officials"). Plaintiffs have not satisfied their burden of establishing a likelihood of irreparable harm.

C. The balance of equities and the public interest both counsel against injunctive relief

Finally, a plaintiff seeking emergency relief must show "that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. When the government opposes injunctive relief, these two factors merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Plaintiffs cannot make either showing. The public interest would be best served by allowing the Secretary to exercise the powers and responsibilities conferred upon her by statute to consider North Carolina's submission of a proposed state plan amendment. "[T]here is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop and enforce." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008). The public interest further weighs heavily in favor of allowing this dispute between North Carolina legislators and the Governor to be resolved through the political process and, if necessary, in state court. No equitable consideration counsels otherwise.

CONCLUSION

The Court should dissolve the temporary restraining order or, in the alternative, set an expedited preliminary-injunction hearing and deny the preliminary injunction.

Dated: January 16, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 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/ Joel McElvain
JOEL McELVAIN

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

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

PHIL BERGER and TIM MOORE, Plaintiffs, v. SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of Health and Human Services, *et al.*, Defendants.	)	**DECLARATION OF TIMOTHY B. HILL**

DECLARATION OF TIMOTHY B. HILL

I, Timothy B. Hill, declare as follows:

1. I am Timothy B. Hill, Deputy Director for the Center for Medicaid and CHIP Services (CMCS) within the Centers for Medicare and Medicaid Services (CMS) at the U.S. Department of Health and Human Services. As Deputy Director of CMCS, I lead activities related to national Medicaid policy and operations and I work with states in the implementation of their Medicaid programs, including review and approval of Medicaid state plan amendments.

2. The Affordable Care Act (ACA) allows states to provide Medicaid coverage to all adults with incomes up to 133 percent of the federal poverty level. This is commonly referred to as Medicaid expansion. The state of North Carolina has not previously submitted a state plan amendment to CMS to expand its Medicaid program under the ACA. In recent weeks, CMS has been involved in conversations with representatives of the Governor of North Carolina, and I understand from those conversations that the state is preparing to submit a state plan amendment that proposes to expand the state's Medicaid program.

3. It is my understanding that the state of North Carolina seeks to submit its state plan amendment to expand Medicaid coverage and that their planned future effective date is January 1, 2018. Our conversations with representatives of the Governor of North Carolina have not depended upon, and have not resolved, how North Carolina ultimately may authorize or finance the state share of expenditures of this proposed Medicaid expansion. Consistent with CMS's usual approach involving state plan amendments, it is not uncommon for the agency to approve a state plan amendment and for the state thereafter to seek authorization or otherwise obtain approval from the state legislature for specific budgetary authority for certain state Medicaid expenditures. Moreover, in the case of North Carolina, if CMS were to approve a state plan amendment and the state legislature did not subsequently enact legislation authorizing changes in the state Medicaid program, the state could submit an additional state plan amendment ending the authority for expansion. In the case of North Carolina, this would have the practical effect of

the state not expanding its Medicaid program under the ACA.

4. The Medicaid statute, 42 U.S.C. § 1396a(b), specifies that the Secretary of Health and Human Services "shall approve" any state plan amendment that fulfills the conditions specified in subsection (a) of that statutory provision unless a state plan amendment imposes certain restrictive age requirements, restrictive residency requirements, or restrictive citizenship requirements. There is no requirement in 42 U.S.C. § 1396a(b) that allows the Secretary to deny a state plan amendment because the state may need to enact further legislation or seek additional budgetary approvals, or otherwise seek authority from other state actors under state law. Indeed, absent explicit authority allowing her to disapprove a state plan amendment, the Medicaid statute provides the Secretary "shall approve" any state plan amendment that fulfills the requirements of 42 U.S.C. § 1396a(a). CMS, in the course of reviewing state plan amendments, does not require particular state approvals before approving federal matching payments of a state's non-federal share of Medicaid expenditures. In reviewing state plan amendments, the agency normally considers it to be the responsibility of the state to ensure that expenditures proposed in a state plan amendment will comply with state law.

5. Even if North Carolina seeks to expand Medicaid coverage under an approved state plan amendment and later rescinds such coverage through a subsequent state plan amendment, CMS would not impose a financial penalty and there would be no reduction to the federal matching dollar rates otherwise available to North Carolina for its Medicaid program. In the case of North Carolina, upon federal approval of its proposed Medicaid expansion state plan amendment, the state could receive 94 percent federal matching dollars for costs associated with medical assistance for its newly-eligible adult beneficiaries starting January 1, 2018, and at the statutorily prescribed rate after that time.

6. The Medicaid statute obligates the Secretary to pay a state the federal matching percentage for amounts that are expended in accordance with an approved state plan. But there is no federal authority to recoup or deny federal funding for medical assistance that were approved and are expended consistent with federal law, regardless of questions that arise with respect to state law, either before or after the submission of a state plan amendment. This is the case whether the state withdraws its state plan amendment before it is approved, or if the state submits a new state plan amendment in response to legislative developments or if a state court orders North Carolina to submit a new state plan amendment. With respect to Medicaid expansion, a state can choose whether and when to expand, and, if a state covers the expansion group, it may decide later to drop such coverage by state plan amendment.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 16, 2017
Baltimore, Maryland

Timothy B. Hill
Deputy Director, CMCS, CMS

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

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

PHIL BERGER and TIM MOORE, Plaintiffs, v. SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of Health and Human Services, *et al.*, Defendants.	)	**[PROPOSED] ORDER GRANTING FEDERAL DEFENDANTS' EMERGENCY MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER**

Before the Court is the federal defendants' motion to dissolve the temporary restraining order pursuant to Rule 65(b)(4) of the Federal Rules of Civil Procedure. After consideration, and good cause appearing:

IT IS ORDERED that the motion is GRANTED, and the temporary restraining order entered in this action on January 16, 2017, is hereby DISSOLVED.

Dated this ___ day of _____, 2017

_____
Louise Wood Flanagan
United States District Judge