UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CIVIL ACTION NO. 5:17-CV-25-FL

PHIL BERGER, et al., **Plaintiffs,** **v.** **SYLVIA BURWELL, et al.,** **Defendants.**	**STATE DEFENDANTS' OPPOSITION TO PRELIMINARY INJUNCTION AND REPLY IN SUPPORT OF MOTION TO DISSOLVE OR VACATE TRO**

INTRODUCTION

Having initially persuaded this Court to restrain federal and state agencies without a hearing, Plaintiffs Phil Berger and Tim Moore fail completely in their attempt to justify an extension of this extraordinary relief. With their request for a preliminary injunction, Plaintiffs would have this Court disregard core constitutional limitations on the federal courts, as well as time-honored principles of federalism, even while they are unlikely to succeed on the merits and unable to show that they will suffer irreparable harm. Indeed, Plaintiffs acknowledge that the crisis upon which they founded their emergency application – a "friendly presidential administration" embracing a so-called "ultra vires" request for Medicaid expansion – no longer exists.

But the fundamental problems with Plaintiffs' case – administration change or not – persist. No amount of artful pleading can disguise that their claim arises under state law, nor can they conceal that this "intramural dispute" between state officials, *see infra* n. 1, has no business in federal court. Indeed, no less than nine times, Plaintiffs embrace the view that the only reason that the proposed state plan amendment ("SPA") is invalid is that it allegedly conflicts with North Carolina law. Their doing so coincides with an unambiguous point in their opening brief: "The question of how a State consents to a proposed government contract is quintessentially one of State law." Pl. Br. 13.

In sum, Plaintiffs attempt to proceed here without Article III standing, seek to bring claims that the Eleventh Amendment bars, and ask this Court to proceed when federalism dictates that it should

abstain. On the merits, Plaintiffs' lack of a federal cause of action and their misguided arguments concerning state and federal law, combined with the dissipation of the only basis they asserted for the Court's urgent action, doom their request for a preliminary injunction.

ARGUMENT

A. The Court lacks subject matter jurisdiction.

This Court cannot issue a preliminary injunction unless it has jurisdiction. *See, e.g.*, *City of Alexandria v. Helms*, 728 F.2d 643, 645-46 (4th Cir. 1984) (reversing a preliminary injunction because the district court lacked subject matter jurisdiction); *Jordan v. United States*, 863 F. Supp. 270, 272-74 (E.D.N.C. 1994) (holding that, before addressing the merits of the plaintiffs' preliminary injunction motion, "the court must address the issue of plaintiffs' standing to bring this action," and denying a preliminary injunction because the court lacked jurisdiction on multiple grounds, including the plaintiffs' lack of standing). Here, the Court lacks jurisdiction over Plaintiffs' claim against the State Defendants because (1) Plaintiffs lack Article III standing to assert that claim, (2) the Eleventh Amendment prohibits Plaintiffs from pursuing it, and (3) that claim is not ripe.

1. Plaintiffs lack Article III standing.

In their previous brief, the State Defendants explained that Plaintiffs lack Article III standing because they are attempting, without authority, to bring suit on behalf of the General Assembly. State Def. Br. 11. The only purported authority that Plaintiffs identified was a statute allowing them to intervene on behalf of the General Assembly in actions challenging the constitutionality of state law. *See* Pl. Br. 7 (citing N.C. Gen. Stat. § 1-72.2). That statute, however, does not authorize Plaintiffs to do what they have done here—initiate litigation on behalf of the General Assembly. State Def. Br. 11. The General Assembly therefore has not authorized Plaintiffs "to represent [it] in this action," *Raines v. Byrd*, 521 U.S. 811, 829 (1997), and Plaintiffs have no standing to assert injuries to the General Assembly.

Plaintiffs offer no meaningful response. They concede that they are attempting to assert the "institutional interests" of the General Assembly, Pl. Resp. Br. 21, not any personal injury, and that they therefore need authority under state law to bring this action on behalf of the General Assembly, *see id.* at

22. But they fail to identify any such authority, and instead merely cite additional cases and statutes that stand for the same proposition as Section 1-72.2: that Plaintiffs can properly represent the General Assembly as a *defendant* in actions challenging the constitutionality of state law. In particular, Plaintiffs cite constitutional cases in state court in which they were named as defendants, *id.* at 22-23, and a case in which they intervened to defend the constitutionality of a state statute, *id.* at 24. They also cite a statute that allows the General Assembly to hire, and Plaintiffs to designate, outside counsel for actions challenging the constitutionality of state law. *Id.* at 24 (citing N.C. Gen. Stat. § 120-32.6). What Plaintiffs do not cite is *any* case or statute authorizing them to *file suit* on behalf of the General Assembly—much less to file suit against the executive branch for allegedly violating state law, or to file such a suit in federal court.[1]

Plaintiffs nevertheless appear to argue that, because they have authority to "represent the institutional interests" of the General Assembly in *some* litigation, they necessarily have the authority to represent those interests in *all* litigation, including litigation that Plaintiffs choose to initiate for their own private and unreviewable reasons. Pl. Resp. Br. 22. But the cases and statutes on which Plaintiffs rely do not say that, and interpreting them to grant Plaintiffs the *carte blanche* prerogative to initiate litigation would give rise to serious separation-of-powers problems. Under Plaintiffs' proposed approach, whenever they believed that someone was acting contrary state law—be it a member of the executive branch or even a private citizen—Plaintiffs could file suit against that person on behalf of the General Assembly. But that would be no different from exercising the power to execute state law. That power

[1] In *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247 (2011), Justice Kennedy emphasized the "striking novelty" of a suit (like this one) between officials of the same state in federal court. *Id.* at 263 (Kennedy, J., concurring). He explained that such suits can "upset[] the federal balance," and that there are three "protections built into the structure of federal litigation to ensure that state officials do not too often call upon the federal courts to resolve their intramural disputes." *Id.* All three apply here. First, "state law must authorize an agency or official to sue another arm of the State . . . in a federal forum." *Id.* at 264. Here, as explained above, Plaintiffs have no such authority. Second, "to the extent there is some doubt under state law as to an officer's or agency's power to sue, or any other state-law issue that may be dispositive, federal courts should abstain under [*Pullman*]." *Id.* As explained *infra*, *Pullman* abstention is also warranted here. Third, "federal law does not often create rights for state officials or agencies to assert against other arms of the State." *Id.* That is also true here—Plaintiffs rely on state law, so the Eleventh Amendment bars their claim against the State Defendants.

belongs to the Governor, not the General Assembly, and certainly not to Plaintiffs. Indeed, for all of their protestations here about "brazen" actions of the executive branch, Plaintiffs are the ones who are advocating a breathtaking arrogation of power to themselves to police compliance with the laws the General Assembly enacts. Plaintiffs are simply wrong in attempting to convert their limited authority to intervene on behalf of the General Assembly in constitutional litigation into a sweeping power to execute the laws of the State on behalf of the General Assembly.

Plaintiffs' expansive interpretation of their authority also has no support in *Karcher v. May*, 484 U.S. 72 (1987). In *Karcher*, the Supreme Court held that the leaders of the New Jersey legislature had standing to intervene on behalf of the legislature in an action challenging the constitutionality of a New Jersey statute because state law authorized them to do so. *Id.* at 81-82. Unlike this case, *Karcher* did not involve an attempt by legislators to initiate litigation on behalf of the legislature. Thus, the Court did not hold (as Plaintiffs would have it) that the limited authority to intervene in litigation also implies a far broader authority to initiate litigation.

Plaintiffs' reliance on *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), is equally misplaced. As the State Defendants discussed earlier, *see* State Def. Br. 11-12, the plaintiff in that case was the Arizona legislature itself, and Plaintiffs acknowledge that "the legislature was authorized to represent itself under State law because it 'commenced [the] action after authorizing votes in both of its chambers.'" Pl. Resp. Br. 22 (quoting 135 S. Ct. at 2664). There has been no such vote here. And, for the reasons explained above, Plaintiffs are wrong in arguing that they "already have the authority that [such] a resolution would give them." Pl. Resp. Br. 25.

In sum, because Plaintiffs have not been authorized to initiate this suit on behalf of the General Assembly, this case is governed by *Raines*, not by *Arizona State Legislature* or *Karcher*, and Plaintiffs lack standing to assert injuries to the General Assembly.

Plaintiffs fall back on the argument that, "[e]ven if [they] were appearing only in their individual capacity as individual legislators, they would still have standing" because the State Defendants are

"usurp[ing]" Plaintiffs' authority as legislators to decide whether to expand North Carolina's Medicaid program. Pl. Resp. Br. 25. That argument cannot be squared with *Raines* because this alleged injury is not particularized to Plaintiffs. Rather, it is an injury "which necessarily damages all Members of [the General Assembly] and both Houses of [the General Assembly] equally," and which therefore fails to give rise to standing. *Raines*, 521 U.S. at 821.

In their opening brief, Plaintiffs also relied on *Russell v. DeJongh*, 491 F.3d 130 (3d Cir. 2007), *see* Pl. Br. 7, but the State Defendants showed that *Russell* supports them, not Plaintiffs, *see* State Def. Br. 12. In an about-face, Plaintiffs now argue that this case is "unlike *Russell*," and is instead "more like *Dennis v. Luis*, 741 F.2d 628 (3d Cir. 1984)." Pl. Resp. Br. 26. In fact, this case is nothing like *Dennis*, in which a majority (8 out of 15) of the members of the Virgin Islands legislature sued the governor for appointing an "acting" official whose nomination for the same position had just been rejected by the legislature. 741 F.2d at 629-30. Because the suit was brought by a majority of the legislature, the Third Circuit's holding that the legislators had standing was consistent with *Raines*, which recognized that "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." 521 U.S. at 823. Here, in contrast, Plaintiffs are only two members of the General Assembly, they are not a majority and they have no authorization from the General Assembly to bring this suit. Moreover, Plaintiffs cannot legitimately argue that their votes in favor of legislation limiting the expansion of Medicaid have been "completely nullified." *See* State Def. Br. 12; *cf.* Pl. Resp. Br. 25. To the contrary, Plaintiffs acknowledge that their votes were given effect—the legislation that they supported became "duly enacted law[]." Pl. Resp. Br. 22. They now argue (erroneously) that this law is being disobeyed, but they cannot equate disobedience with "nullification." Otherwise, any violation of state law would "nullify" the law, and give a single legislator the right to bring a judicial action to enforce the law.

Plaintiffs lack standing for an additional reason: Even if Plaintiffs could represent the interests of the General Assembly here, the General Assembly would be asserting a generalized grievance against a

purported violation of state law. State Def. Br. 12 (citing *Harrington v. Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1985)); Fed. Def. Br. 8-9. Plaintiffs' only answer is to repeat their assertion that they have the "right" under state statutes to determine "whether North Carolina seeks to expand Medicaid eligibility." Pl. Resp. Br. 26. But that is no different from saying that the State Defendants are violating these statutes, and Plaintiffs' asserted injury is therefore nothing more than an abstract, generalized complaint that state officials are not following the law, which does not afford Article III standing.

2. The Eleventh Amendment prohibits this Court from exercising judicial authority over a state dispute.

The Eleventh Amendment also deprives this Court of jurisdiction over Plaintiffs' claim against the State Defendants. *See Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 227 (4th Cir. 1997) (observing that the Eleventh Amendment is jurisdictional). As the State Defendants previously explained (State Def. Br. 13), the key Eleventh Amendment decision here is *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), which held that a federal court cannot "award injunctive relief against state officials on the basis of state law." *Id.* at 91. The Court reasoned that, although *Ex parte Young* permits some suits for prospective relief against state officials, that exception to the Eleventh Amendment "rests on the need to promote the vindication of federal rights." *Id.* at 105. Thus, "when a plaintiff alleges that a state official has violated *state* law, . . . the entire basis for the doctrine of *Young* . . . disappears." *Id.* at 106. "[I]t is difficult," the Court further explained, "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.* The Court therefore held that "a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment." *Id.* at 121. That holding governs this case because all the allegations in the Complaint that are directed at the State Defendants are based on state law. State Def. Br. 13.[2]

[2] Plaintiffs further disregarded the Eleventh Amendment when they named the North Carolina Department of Health and Human Services as a defendant in this case (as opposed to naming only Interim Secretary Benton). "[R]egardless of the relief sought," "in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst*, 465 U.S. at 100-01.

Plaintiffs attempt to brush aside this problem, addressing the Eleventh Amendment only in a single paragraph, and failing even to mention *Pennhurst*. Pl. Resp. Br. 28. Plaintiffs observe (as the State Defendants have already acknowledged) that they labeled their claim against the State Defendants as arising under the Social Security Act. *See id.* at 28; State Def. Br. 13. But Plaintiffs do not dispute that their Complaint fails to make a single substantive allegation that the State Defendants are violating the Social Security Act, and instead alleges *only* that they are violating state law. *See id.*; State Def. Br. 13. Nor do Plaintiffs even address the State Defendants' argument that *saying* a claim arises under federal law is not enough to withstand the Eleventh Amendment—it is instead the substance of the claim that matters. *See* State Def. Br. 13; *Equity In Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 108 (4th Cir. 2011) (holding that a claim against state officials alleging violations of state law was barred by the Eleventh Amendment even though the plaintiff characterized the claim as arising under 42 U.S.C. § 1983); *Martin v. Wood*, 772 F.3d 192, 196 (4th Cir. 2014) (under the Eleventh Amendment, courts must "look beyond the form of the complaint and the conclusory allegations against [the defendants]" and "examine *the substance* of the claims stated in the complaint").

To be sure, Plaintiffs now assert in their brief that the State Defendants would violate the Medicaid statute by submitting the proposed SPA. Pl. Resp. Br. 28. But Plaintiffs do not identify any such allegation in their Complaint. As a result, they cannot show (as they must to invoke *Ex parte Young*) that their "complaint alleges an ongoing violation of federal law." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002).

In any event, even in their brief, Plaintiffs continue to make clear that their purported federal claim (that the State Defendants would violate the Medicaid statute by submitting the proposed SPA) rests entirely on a state law claim (that the State Defendants would violate North Carolina law by submitting the proposed SPA). *See, e.g.*, Pl. Resp. Br. 6. Thus, under Plaintiffs' own theory, the Court can rule that the State Defendants are violating federal law only if it first rules that the State Defendants are violating state law. It follows that there is no way for the Court to rule for Plaintiffs without

"instruct[ing] state officials on how to conform their conduct to state law," in contravention of the Eleventh Amendment. *Pennhurst*, 465 U.S. at 106.[3]

3. *Plaintiffs' claim against the State Defendants is not ripe for adjudication.*

This Court also lacks jurisdiction on ripeness grounds. State Def. Br. 18-19. Plaintiffs argue that their claim against the State Defendants is ripe because, absent an order to the contrary, the State Defendants could submit the proposed SPA at any time. Pl. Resp. Br. 27. But the proposed SPA would not take effect until 2018. Plaintiffs thus do not face any imminent injury from it. And any number of events could occur in the coming months that would prevent any such injury from materializing. For example, as Plaintiffs acknowledge, CMS might decline to approve the proposed SPA. Pl. Resp. Br. 18. Or the General Assembly could vote to expand Medicaid—in which case the proposed SPA would not even arguably violate state law or injure Plaintiffs. Plaintiffs do not even address these contingencies. They therefore fail to overcome the State Defendants' showing that this case is governed by the rule that an action is not ripe when it rests on future injuries that are contingent and speculative. State Def. Br. 18; *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 749 (4th Cir. 2013)).

B. Even if determines it has jurisdiction, the Court should abstain.

1. *The Court should abstain under* Pullman *because Plaintiffs' constitutional claims turn on undecided questions of state law.*

Plaintiffs have no response to the State Defendants' argument that the Court should abstain from hearing this action under *Pullman*. State Def. Br. 13-16. Plaintiffs dispute none of the following: (1) Their complaint raises two federal constitutional questions (Tenth Amendment and the Guarantee

[3] This case is therefore unlike *Suarez*, on which Plaintiffs rely. Pl. Resp. Br. 28. Plaintiffs observe that, in *Suarez*, the Fourth Circuit held that the Eleventh Amendment barred state law claims against state officials, but did not bar federal claims "predicated on [the] same alleged actions." *Id.* Here, however, Plaintiffs are not asserting a federal claim that is based on "the same alleged actions" as their state law claim. They instead argue that Plaintiffs violated federal law *because* they violated state law. The resolution of Plaintiffs' purported federal claim therefore rests solely on the resolution of their state law claim. But the Eleventh Amendment bars this Court from resolving that state law claim vis-à-vis the State Defendants. It thus equally bars the Court from resolving Plaintiffs' purported federal law claim vis-à-vis the State Defendants. Otherwise, by reaching the purported federal claim, the Court would violate *Pennhurst*'s holding that "a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment." 465 U.S. at 121.

Clause). (2) Those questions turn entirely on whether the SPA is valid under state law—specifically, whether the SPA conflicts with the North Carolina statutes cited in Plaintiffs' brief, and if so, whether those statutes are invalid insofar as they encroach on the Governor's powers under the North Carolina Constitution. (3) If a state court were to answer those novel questions in favor of the State Defendants, and thus hold that the SPA is valid under North Carolina law, then Plaintiffs' federal constitutional claims—and this entire lawsuit—will be moot.

Those are the exact circumstances warranting abstention: "Federal courts should abstain under *Pullman* where a case involves an open question of state law that is potentially dispositive inasmuch as its resolution may moot the federal constitutional issue." *W. Virginia Citizens Def. League, Inc. v. City of Martinsburg*, 483 F. App'x 838, 839-40 (4th Cir. 2012). Abstaining will serve the doctrine's purposes of "[not] impinging upon state sovereignty and forestall[ing] premature consideration of sensitive federal controversies." *Id.* at 840.

It is difficult to imagine issues closer to the heart of North Carolina's sovereignty than how it provides for the health and welfare of its inhabitants and how it allocates the authority to do so between its executive and legislative branches. This Court should allow North Carolina courts to answer those questions definitively, rather than try to predict the answer in what would be a non-binding federal advisory opinion on the meaning of state law.

Plaintiffs barely respond. They say *Pullman* does not apply because it is "clear as a bell" that they are right, and the State Defendants are wrong, on the underlying state law issues. Pl. Resp. Br. 29. Plaintiffs are doubly mistaken. First, it is far from "clear" that the proposed SPA violates the state statutes at issue, given that the SPA cannot be implemented using taxpayer funds without appropriation from the North Carolina General Assembly. But second, even if Plaintiffs were correct that the SPA violates those statutes, the dispositive question would then become whether those statutes are permissible under the North Carolina Constitution. Not even Plaintiffs make the (unsupportable) argument that any court has opined on that novel issue, much less opined in their favor.

Also overlooked by Plaintiffs is the Fourth Circuit's rigorous application of *Pullman*. In *K Hope, Inc. v. Onslow County*, for example, the plaintiffs challenged a local ordinance under both state law and on federal First Amendment grounds. 107 F.3d 866 (4th Cir. 1997) (per curiam). On appeal from a summary judgment ruling, the Fourth Circuit *sua sponte* raised the *Pullman* issue and held that the district court erred by failing to abstain. *Id.* (remanding in favor of abstention because "resolution of this perplexing state issue in favor of Plaintiffs would avoid any need to address the constitutional questions presented"). Indeed, the Fourth Circuit has applied *Pullman* abstention to state law issues not nearly as consequential as the separation-of-powers and health-and-welfare concerns present here. *See, e.g.*, *Meredith v. Talbot Cty.*, 828 F.2d 228, 229, 232 (4th Cir. 1987) (abstaining from challenge to county's refusal to allow "subdivision and residential development of five lots" because the relevant state law "has not been interpreted by Maryland's trial or appellate courts" and resolution of the state law issue could cause "the federal constitutional questions raised in the complaint [to] disappear").

2. This Court Should Abstain under Burford.

In addition to abstaining under *Pullman*, the Court should abstain under *Burford* "to avoid needless conflict with the administration by [North Carolina] of its own affairs." *Meredith*, 828 F.2d at 231 (abstaining under both *Pullman* and *Burford*). In their response, Plaintiffs try to obscure the issue by noting that they have asserted federal claims, insisting that *Burford* therefore does not apply. Pl. Resp. Br. 28-29. But the Fourth Circuit has (repeatedly) rejected that argument. A plaintiff cannot evade *Burford* when its federal claims depend on resolving state law issues. *See Johnson v. Collins Entm't Co.*, 199 F.3d 710, 722 (4th Cir. 1999) (holding that district court erred in failing to abstain under *Burford* in lawsuit concerning South Carolina gambling laws because "[t]he mere presence of a federal question thus cannot mask the quintessentially state character of this controversy. Plaintiffs' claims depend ultimately on alleged violations of state law for their predicate acts."; "The existence of each of these federal law violations . . . turns on underlying questions of state law."). The Fourth Circuit underscored that "[m]any of our decisions applying abstention rest on this same 'state law in federal law clothing' rationale." *Id.* at 721 (citing cases). Just so here.

Johnson also identified a further reason why *Burford* abstention is necessary: Plaintiffs rely on this Court's equitable power as the sole basis for their lawsuit and the injunction they seek.[4] In *Johnson*, the district court likewise relied "on its 'inherent equitable power' to grant [an] injunction." *Id.* at 726. The Fourth Circuit "decline[d], however, to endorse such a broad and open-ended assertion of federal judicial power over core state concerns." *Id.* "Without a solid foundation in statute for its remedy and with the substantial risk of compromising the independence of state regulatory policy and efforts, the case was a classic one for the exercise of *Burford* abstention." *Id.* at 727. Again, just so here. Plaintiffs seek the extraordinary relief of a preliminary injunction based solely on this Court's equitable powers.

Plaintiffs make no effort to distinguish *Johnson*. And their remaining arguments also fail. Plaintiffs acknowledge that *Burford* applies when there are "difficult questions of state law . . . whose importance transcends the result in the case then at bar." Pl. Resp. Br. 29. They claim that the state law issues here are not "difficult," but "clear as a bell." *Id.* But as noted, the state statutory questions are far from clear. And even assuming *arguendo* the SPA somehow compromises state statutory provisions, that does not resolve the case, but only raises the question whether the statutes restricting preparatory executive actions are invalid under the North Carolina Constitution. Plaintiffs do not even attempt to argue that the State constitutional question, which no court has yet addressed, has a clear answer (let alone in their favor).

Finally, Plaintiffs acknowledge a second and independent basis for applying *Burford*—if "federal review would disrupt state efforts to establish a coherent policy with respect to a matter of substantial public concern." Pl. Resp. Br. 29. Plaintiffs' assertion that there is no disruption here is both ironic and wrong—at this very moment, Plaintiffs are preventing the State Defendants from performing their duties under state law to administer North Carolina's Medicaid program. If that is not "disruption" of state efforts to establish coherent policy on important public matters, what is? *See Johnson*, 199 F.3d at 720

[4] Plaintiffs have no choice but to do so, because as they concede, no federal statute—whether the Medicaid Act, 42 U.S.C. § 1983, or otherwise—authorizes this lawsuit. We explain below why the Court, in the particular circumstances of this case, lacks the equitable power that Plaintiffs try to invoke. *See infra* pp. 16-17.

("When the district court interpreted this provision, it was necessarily trying to predict how the South Carolina Supreme Court would decide the question. But because this question involved a most basic problem of South Carolina public policy, the state court system should have been permitted the first opportunity to resolve it.").

C. Even assuming the Court has jurisdiction and does not abstain, Plaintiffs cannot meet their burden to obtain a preliminary injunction.

"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 Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). "A preliminary injunction is an extraordinary remedy never awarded as of right." *Id.* at 24. Plaintiffs fail to demonstrate either a likelihood of success on their claims or a likelihood of irreparable harm from denial of an injunction.

1. Plaintiffs have not clearly shown they are likely to suffer irreparable harm.

The absence of imminent irreparable harm from denial of an injunction here is so apparent and conclusive that it should be addressed first. Plaintiffs' burden is to show a "likelihood" of such harm, not simply a "possibility": "Issuing a preliminary injunction based only on a possibility of irreparable harm is 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." *Id.* at 22.

Plaintiffs – who submitted but a single affidavit in support of their claim for extraordinary relief here – have not discharged this burden. As an initial matter, Plaintiffs now acknowledge the critical fact omitted from their request for a temporary restraining order – that even if the State Defendants were to submit the SPA and the Federal Defendants were to approve it, implementation would not occur until January 1, 2018. Further, as set forth in Defendants' uncontested declarations, *see* Mann Dec., Dkt. #15, Richard Dec., Dkt. #16, multiple steps must occur before implementation of Medicaid expansion becomes possible. Plaintiffs' unverified motion for temporary restraining order rested upon two pillars of "likely irreparable harm:" actions "saddl[ing] North Carolinians with hundreds of millions of dollars of Medicaid

expenses" (Pl. Br. 1) and losing "all [of the State's] federal Medicaid funding." (Compl. ¶ 58). But the record provides no proof – much less a likelihood – of the occurrence of either of these events.[5]

What is more, as Plaintiffs acknowledge, a dramatic change of circumstances has occurred since Plaintiffs filed this action with the inauguration of a new president and the appointment of a new acting secretary of USDHHS. This change, as Plaintiffs implicitly concede by suggesting this Court might "stay" the action to allow the new administration to be "briefed" and to determine if the action is moot, has eliminated the emergency upon which Plaintiffs rested their prior application. Given that Plaintiffs themselves remain uncertain about whether CMS will approve the SPA, it is hardly justified for the Court to intervene with an extraordinary order further enjoining state and federal officials from proceeding with the performance of their ordinary functions.

Plaintiffs argue (Pl. Resp. Br. 17) that the State Defendants have somehow conceded that per se irreparable harm flows from a Tenth Amendment and Guarantee Clause violation, and therefore only the imminence of such harm is in issue. To the contrary, Defendants do not concede the point, nor have they waived their right to contest it. More to the point, however, is that none of the cases Plaintiffs cite supports their argument that irreparable harm necessarily flows from the supposed constitutional violations that Plaintiffs assert here solely against the Federal Defendants. The cases Plaintiffs cite all concern deprivations of individuals' constitutional rights such as under the First, Fourth, and Sixth amendments to the U.S. Constitution, *e.g., Ross v. Meese*, 818 F.2d 1132 (4th Cir. 1987), or under the equal protection clause of the Fourteenth Amendment, *NAACP-Greensboro Branch v. Guilford Cty. Bd. Of Elections*, 858 F. Supp. 2d 516 (M.D.N.C. 2012). None concerns alleged violations of the Tenth Amendment or of the Guarantee Clause, and whatever "injuries" Senator Berger and Representative Moore assert are hardly tantamount to a violation of their individual civil rights.

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[5] So intent are Plaintiffs on spinning a narrative that involves rogue executive action, they attempt to manufacture a case for irreparable harm by asserting that the State Defendants' position in this case is "flatly inconsistent with the Governor's prior public statements" (Pl. Resp. Br. 2), and that Governor Cooper actually "intends to circumvent the Legislature and expand the State's Medicaid Program." Pl. Resp. 3. But not only are these imaginings unsupported in the actual record, they point up the substantial inability of Plaintiffs to provide any support for a theory of irreparable harm here.

Plaintiffs' contentions that the allocation of some state resources to the SPA submission and approval process, if allowed to go forward, would constitute irreparable harm sufficient to support injunctive relief is likewise neither tenable nor supported by the case law upon which they rely. Plaintiffs cite *International Labor Mgmt. Corp. v. Perez*, 2014 WL 1668131 (M.D.N.C. Apr. 25, 2014), in which the court ruled that the U.S. Department of Labor's delay in processing temporary agricultural worker visa applications was resulting in irreparable harm to plaintiff and its clients. Plaintiff alleged that some of its harm was in "unrecoverable staff costs ... devoted to ameliorating DOL's actions." The court found such losses "speculative" and not supportive of injunctive relief. Further, the court found that staff time required to complete allegedly excessive questionnaires was not "the type of irreparable harm that would provide a basis for injunctive relief." *Id.* The court found irreparable harm only in the harms to reputation and good will suffered by plaintiff traceable to DOL's delays, and in the specific unrecoverable losses of revenue caused to plaintiff's clients. *Id.* at *13.

Thus *International Labor Mgmt. Co.* weighs against Plaintiff's contention that the allocation of DHHS staff time to the potential Medicaid expansion constitutes the sort of irreparable harm that justifies an injunction here, and it is remarkable that Plaintiffs found their attempt to extend injunctive relief upon such a slim reed. First, Plaintiffs' declaration, from a former budget official, Art Pope, who never worked in DHHS or was in charge of implementing Medicaid reform, rests upon speculation. Mr. Pope merely states his "expectation" that tasks may be required that involve the allocation of resources and expenditures of funds, but his declaration provides no specificity, and he does not take issue with the Richard Declaration that "Medicaid expansion has not impacted the DHHS budget." Pope Dec. ¶¶ 8-9. Second, Mr. Pope relies primarily on the assertion that preparations for Medicaid expansion will involve the utilization of staff who could be working on other projects. But under *International Labor Mgmt. Co*, the diversion of staff time is not the sort of injury that justifies an injunction. Third, and critically, any expenditures and allocation of state resources are fully within the ordinary course of business for DHHS. Specifically, preparations for potential expansion of Medicaid have been ongoing since the adoption of the ACA as a part of DHHS's fulfillment of its ordinary responsibilities to administer Medicaid and to

prepare the State of North Carolina for potential changes in the program. *Further Declaration of Dave Richard* ¶¶ 4-7.

2. *The balance of equities and the public interest weigh against an injunction.*

Plaintiffs give short shrift to any consideration of a balancing of the harm to Defendants from the issuance of a preliminary injunction and consideration of the public impact of such relief. Yet all four factors must be considered. *See Winter*, 555 U.S. at 32-33. The harm to Defendants and to the public from an injunction is in fact substantial. As for the State Defendants, if they are enjoined, they will be prevented from carrying out their ordinary agency functions and purposes. See *Syngenta Crop Protection, Inc. v. U.S. Environmental Protection Agency*, 202 F. Supp. 2d 437 (M.D.N.C. 2002) (harm to EPA from injunction that would have impacted its decision process greater than potential business harm to plaintiff). The State Defendants are charged, as an agency, with "[managing] the delivery of health- and human-related services for all North Carolinians, especially our most vulnerable citizens – children, elderly, disabled and low-income families." Further Richard Decl. ¶ 3. Something in the order of 600,000 of those lower income citizens, who are unable currently to afford medical insurance, would gain access to essential medical care if Medicaid were expanded. Dkt # 16 ¶ 7. The restraining order issued by this Court, and a preliminary injunction, would interfere with this purpose and function of the State Defendants by impairing their ability to plan for the possibility of Medicaid expansion, or for a possible substitute public health insurance program that would nevertheless carry forward an expansion of benefits. And notwithstanding policy disagreements among the public about the benefits of Medicaid expansion, it cannot be gainsaid that the great number of prospective new beneficiaries, and the providers of services to them who stand to receive new payments, would be benefited by expansion. These certain harms to Defendants and to the public arising from an inability to take essential preparatory steps represent greater harm than any conceivably forecast by Plaintiffs on this record.

3. *Plaintiffs cannot show they are likely to succeed on the merits of their claim, which is untenable under both state and federal law.*

As explained above, Plaintiffs do not truly plead a federal claim against the State Defendants, and instead allege only violations of state law. Even assuming that they have pleaded a federal claim against the State Defendants, however, they could succeed on that claim only by persuading the Court to accept a remarkable series of arguments: (a) that they have a private right of action for alleged violations of the Social Security Act, (b) that the State Defendants would violate state law by submitting the SPA, and (c) that the State Defendants would therefore violate federal law by submitting the SPA. The claim fails at each step of the analysis.

a. Plaintiffs have conceded that they have no private right of action.

Plaintiffs concede that they do not have a private right of action to remedy an alleged violation of the Social Security Act. *See* Pl. Resp. Br. 7 (stating that "Plaintiffs have not attempted" to meet the standard for implying a private right of action under *Alexander v. Sandoval*). Instead, they claim that they can proceed based on the Court's alleged "inherent equitable power" to "enjoin unlawful executive action." *Id.* But the Court has no such power here.

The Supreme Court just recently *rejected* an effort to invoke such "equitable power" to enforce a neighboring provision of the Social Security Act, 42 U.S.C. § 1396a(a)(30)(A)). *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1382 (2015). Plaintiffs cannot distinguish *Armstrong*. They acknowledge that, as in *Armstrong*, the Social Security Act vests the federal government with express authority to enforce the specific provisions they assert the SPA violates (§§ 1396a(a)(1) and (2)). Pl. Resp. Br. 9. Yet they claim the Social Security Act somehow evinces Congress's intent to supplement that federal enforcement power by sanctioning equitable lawsuits like this one.

That notion is refuted by the Social Security Act itself. *See Armstrong*, 135 S. Ct. at 1385 ("The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations."). The Social Security Act sets out, in great detail, more than 80 requirements that every state plan must meet. *See* 42 U.S.C. § 1396a(a)(1)-(83). Not one of those provisions contains the

requirement that Plaintiffs try to impose in this lawsuit—that a plan amendment be valid as a matter of state law. Hence, Plaintiffs must turn somersaults to try to explain how a plan amendment that allegedly violates state law violates the Social Security Act. *See* Pl. Resp. Br. 10-12 (using a daisy chain of analysis to argue that, if the SPA is invalid under the state statutes, and if the state statutes are not invalid under the state constitution, then the SPA would be invalid under state law, in which case the SPA would not apply uniformly in North Carolina, and in which case the General Assembly would be unlikely to fund the SPA, in which case there would allegedly be a violation of §§ 1396a(a)(1) and (2) of the Social Security Act).

But "Congress . . . does not . . . hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). Had Congress wanted to require an inquiry into the validity of a plan amendment under state law, Congress could simply have included this requirement in the Social Security Act among the dozens of other ones it imposed. Yet Congress did not do so, and Plaintiffs cannot circumvent that decision by imposing that requirement through a federal equitable lawsuit.

Plaintiffs therefore have no authority to bring this lawsuit. And, even if one were to assume (at best for Plaintiffs) that their authority to bring this lawsuit is unclear (rather than foreclosed), that still does not help Plaintiffs, because such uncertainty shows they cannot carry their burden of proving that they are likely to succeed on the merits of their claim.

b. Plaintiffs are not likely to succeed on the merits of their state law argument that the Governor and the State Defendants lack authority to propose the SPA.

As the State Defendants have established, the submission of the SPA to CMA hardly represents the final "determination" of "eligibility categories" or "income thresholds" for Medicaid recipients. *See generally* N.C. Gen. Stat. § 108-54(f). CMA approval is neither self-executing nor unconditional, Mann Decl. ¶¶ 7-9, and if the General Assembly ultimately decides not to provide any needed funds for expansion, there will be no irreparable harm. *Id.* ¶ 9, State Def. Br. 7-8. Despite Plaintiffs' failure to adduce any proof to the contrary, they persist in calling the SPA an "illegal State Plan Amendment," and forecast imagined "irreparable" injury from the mere submission of the SPA by NC DHHS. But not only

does no injury attend DHHS's submission of the SPA to CMS, DHHS is not "attempting to expand the Medicaid eligibility standards"[6] by doing so. The expansion of those standards, if they occur, will result from future General Assembly action and its funding decisions, not the plenary, unreviewable action of CMS. Taking the first step in the process does not itself represent an "expansion" of Medicaid or even an attempt to do so without General Assembly approval. Thus, Plaintiffs' protestations of 'illegality' are ill-founded.

Indeed, to the extent Plaintiffs suggest that the Governor – or executive officials acting under his direction – may not advocate for Medicaid expansion, include in the Governor's budget federal funds available to additional Medicaid recipients, or take action in furtherance of these proposals, Plaintiffs face problems under both state statutory and constitutional principles. The Session Laws upon which Plaintiffs rely – which purport to restrict "institutions, agencies and instrumentalities" of the State from "attempting" to expand Medicaid, Session Law 2013-5 – do not on their face even apply to the Governor, who is a constitutional State Officer. And even if this legislation purported to restrict the Governor from such advocacy or preparatory actions – which it does not – this interpretation would infringe the Governor's constitutional authority to propose a budget, which includes steps necessary to secure and propose the allocation of available federal funds. Indeed, grappling with these issues – which implicate core State Constitutional principles – are precisely the kinds of claims that the federal courts are neither empowered nor advised to adjudicate. *See supra* pp. 8-12.

c. Plaintiffs are not likely to succeed on the merits of their federal law argument that the Social Security Act bars the State Defendants from submitting the SPA.

The third step in Plaintiffs' claim (assuming for the sake of argument that they plead a federal claim at all) is that submission of a plan that is not currently authorized under state law violates Section 1902(a) of the Social Security Act.[7] *See, e.g.*, Pl. Resp. Br. 6, 28. But not only is the submission valid

[6] Session Law 2013-5, § 3.

[7] This step requires a whole series of intermediate legal conclusions, including a multitude of issues under North Carolina law. *See* Compl. ¶ 45 (citing N.C. Gen. Stat. § 108A-54.1B(d)); *id.* ¶ 46 (citing N.C. Gen. Stat. § 108A-54(e)(4), 108A-54.1A(a), and N.C. Session Law 2013-5); *id.* ¶ 49 (citing N.C. Gen. Stat.

under state law, as discussed above, Section 1902(a)(1) does not prohibit the submission of a plan that lacks authority under existing state law and that has an effective date in the future. To the contrary, Section 1902(a)(1) provides only that "[a] State plan for medical assistance must . . . provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them." This prohibits a State from adopting a SPA that would "provide" that it is in effect and mandatory in only parts of a State. *See* 42 C.F.R. § 431.50 (interpreting Section 1902(a)(1) to impose a requirement of statewide operation). Neither the Social Security Act nor its implementing regulations, however, prevents a State from submitting, or CMS from approving, a SPA that requires further state action in order to be implemented, Mann Dec. ¶¶ 7-9, and Plaintiffs provide the Court with no proof to the contrary.

By its terms, Section 1902(a)(1) requires only that a SPA be approved based on what is "provided" on the face of the submission for actions that "shall" occur in the future. Indeed, a federal district court has held as much, noting that when state authority for an optional Medicaid program is withdrawn, it does not violate Section 1902(a)(1) for the state to continue to operate under a SPA that does not reflect its current operations: "There is no statutory or regulatory requirement that when a state eliminates from its approved state plan a program, which it had adopted voluntarily, the state must submit for approval a new plan." *Babbitt v. Michigan*, 778 F. Supp. 941, 949 (W.D. Mich. 1991). The same is true of Section 1902(a)(2). This section only requires a state plan "provide" that the State's share of costs will be funded in a certain manner; it does not require that CMS scrutinize whether the funding condition will be met when the plan is eventually implemented. *See* Mann Dec. ¶ 6.

Plaintiffs' only attempt to address the unrebutted statutes, regulations, and declarations cited by the State and Federal Defendants—all of which support the conclusion that CMS considers only federal law, not "underlying" state law, Pl. Resp. Br. 11, in reviewing a proposed state plan amendment—is their

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§ 108A-54(f) and N.C. Session Law 2013-5, § 3); and *id.* ¶ 52 (citing N.C. Gen. Stat. § 108A-54(e)(1) and N.C. Const. Art. V, § 7).

citation to a CMS rejection letter of a prior North Carolina SPA. *See id.* (referring to the Slavitt letter).[8] The Slavitt letter provides no support for the contention that CMS considers, or is even permitted to consider, underlying state law issues in its review of SPAs. CMS denied this proposed plan amendment because it would have imposed different eligibility standards on particular individuals depending on whether they applied for Medicaid before or after November 2014. As the letter makes clear, CMS determined that this aspect of the SPA would violate *federal law* codified at 42 C.F.R. § 435.232(a)(9).

To reach this conclusion, CMS was only required to consider the manner in which the State proposed to carry out its Medicaid program as described in the proposed plan amendment. The Slavitt letter expressly states that "I am unable to approve this SPA because it is inconsistent with Medicaid comparability requirements described at section 1902(a)(17) of the Social Security Act." Slavitt Letter at 1.

This determination rested upon no underlying question of *state* law but considered only the issue whether the proposed plan amendment complied with *federal* law. The proposed SPA clearly stated that different eligibility standards would apply based solely on whether an individual had applied before or after November 2014, and CMS rejected it for that reason. *See* Further Richard Decl. Ex. 1, Supplement 6 to Attachment 2.6-A. Thus, this example provides no support for the unfounded conclusion that CMS may reject a SPA that on its face satisfies federal requirements based on "underlying" state law defects. *Cf.* Pl. Resp. Brief 11.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in their Brief In Support of Motion to Dissolve or Vacate TRO (Dkt. 13), the State Defendants request that the Court deny Plaintiffs' request for a preliminary injunction and dissolve or vacate the TRO entered in this case on January 14, 2017.

[8] Letter from Andrew M. Slavitt, Administrator, Centers for Medicare & Medicaid Services, to Robin Gary Cummings, Deputy Secretary for Health Services, N.C. Department of Health and Human Services (Apr. 29, 2015), https://goo.gl/OYD1x7 ("Slavitt letter")

This 25th day of January 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send electronic notification to the following counsel of record:

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This 25th day of January, 2017.

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