

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

RUBY BELL, et al., individually and on behalf of all similarly situated persons,)	
)	
Plaintiffs,)	
)	No. 06 C-3520
vs.)	
)	Judge Guzman
MICHAEL LEAVITT, Secretary of the United States Department of Health and Human Services,)	
)	
)	
Defendant.)	

**MEMORANDUM IN SUPPORT OF PLAINTIFFS'
AMENDED MOTION FOR A TEMPORARY RESTRAINING
ORDER AND PRELIMINARY INJUNCTION**

I. Introduction

The plaintiffs and the members of the classes they seek to represent ("Plaintiffs") are low-income United States citizens eligible to receive health coverage from the Medicaid program. Defendant Michael Leavitt is the Secretary (the "Secretary") of the United States Department of Health and Human Services ("DHHS") and responsible for the oversight of the Medicaid program. The Secretary administers Medicaid through the DHHS sub-agency, the Centers for Medicare & Medicaid Services ("CMS").

Plaintiffs challenge new procedures the Secretary has adopted for determining eligibility for Medicaid. Section 6036 of the Deficit Reduction Act of 2005, Pub.L.No. 109-171, signed into law by the President in February 2006 ("Section 6036") (a copy is attached in Plaintiff's Appendix), mandates that states must now obtain documents from Medicaid beneficiaries and applicants verifying their citizenship in order for the states to receive reimbursement from the federal government for the services provided to the beneficiaries.

Though Section 6036 is written as an administrative mandate for states, the Secretary has published implementing regulations that declare the citizenship documentation requirements to be a mandate for beneficiaries and applicants and a condition of their eligibility for health coverage. Additionally, the Secretary has sharply limited the scope of the documentation that will be allowed to serve as proof of a Medicaid applicant's or beneficiary's citizenship, making it impossible for some individuals to meet the requirements and thereby attain or maintain their vital Medicaid coverage.

Plaintiffs claim that the Secretary's procedures exceed the scope of his statutory authority in violation of the Administrative Procedure Act, 5 U.S.C. §§701 et seq., and violate both the due process and equal protection components of the Due Process Clause of the Fifth Amendment to the United States Constitution. Plaintiffs also assert that the Secretary has violated Section 6036 by applying it to categories of Medicaid beneficiaries to which it does not apply, and by not establishing an outreach and education program about the new documentation requirements prior to implementing it, as Section 6036 requires.

II. Proceedings to Date

The plaintiffs filed their original complaint, along with a motion for class certification, on June 28, 2006. They filed a motion for a temporary restraining order and preliminary injunction on June 30 and this Court scheduled a hearing on that motion for July 7. The original complaint challenged the Secretary's construction of Section 6036 as represented by a Dear State Medicaid Director Letter issued June 9, 2006 (June 9 SMD Letter). Late in the day on July 6, however, the Secretary issued interim final regulations implementing Section 6036. These regulations had an effective date of July 6, but did not appear in the Federal Register until July 12, 2006. Medicaid Program; Citizenship

Documentation Requirements, 71 Fed. Reg. 39214 (Dep't Health and Human Services, July 12, 2006) (hereafter, "interim regulations").

On July 7, this Court continued the motion for temporary restraining order and preliminary injunction to provide time for plaintiffs to consider the new interim regulations and make appropriate changes to the pleadings and motions. The court also granted permission for plaintiffs to file expedited discovery and scheduled a status hearing for July 28, 2006. Plaintiffs filed expedited discovery on July 10, 2006. Plaintiffs now are filing a First Amended Complaint and an Amended Motion for Class Certification and supporting Memorandum, along with an Amended Motion for a Temporary Restraining Order and Preliminary Injunction and this supporting Memorandum.

III. The Preliminary Injunction Standard

The court may grant a preliminary injunction where the plaintiffs demonstrate (1) that their case has some likelihood of success on the merits; (2) they will suffer irreparable harm if the injunction is not granted; and (3) that no adequate remedy at law exists. Nat'l People's Action v. Vill. of Wilmette, 914 F.2d 1008, 1010 (7th Cir. 1990), cert denied, 499 U.S. 921 (1991). Once the plaintiffs meet this initial burden, they must establish that the harm they will suffer if a preliminary injunction is wrongfully denied outweighs the harms to the defendants if a preliminary injunction is wrongfully granted. Id. at 1011. The court must also consider the effect that granting or denying the request for a preliminary injunction will have on the public interest. Gateway E. Ry. Co. v. Terminal R.R. Ass'n of St. Louis, 35 F.3d 1134, 1137 (7th Cir. 1994); Am. Med. Ass'n v. Weinberger, 522 F.2d 921, 925 (7th Cir. 1975). Plaintiffs easily satisfy all of these requirements.

IV. Plaintiffs Have A High Likelihood Of Success On The Merits

A. The Medicaid Program

The Medicaid program was created in 1965, as Title XIX of the Social Security Act, to help provide medical treatment for low-income people, by "enabl[ing] each State, as far as practicable, to furnish medical assistance to individuals whose income and resources are insufficient to meet the costs of necessary medical services." Elizabeth Blackwell Health Ctr. for Women v. Knoll, 61 F.3d 170, 173 (3d. Cir. 1995) (quoting Beal v. Doe, 432 U.S. 438, 444 (1977)). See generally 42 U.S.C. §§1396 et seq. (the "Medicaid Act"). As a cooperative federal-state program, state participation in Medicaid is voluntary. All states currently participate, however, and as a result are required to comply with the federal statutes and regulations governing Medicaid in order to receive federal reimbursements. See 42 U.S.C. §1396b (providing the conditions for federal matching funds).

Each state participating in the Medicaid program is required to develop a plan that incorporates the mandatory federal requirements and identifies the optional features the state has chosen to include. The state plan must also include "reasonable standards...for determining eligibility for and the extent of medical assistance." Schweiker v. Gray Panthers, 453 U.S. 34, 36 (1981) (quoting §1396a(a)(17)). See 42 U.S.C. §1396a (state plan mandates and options). Medicaid applicants must meet financial and non-financial requirements. One non-financial requirement is that applicants must declare under penalty of perjury that they are either United States citizens or noncitizens with satisfactory immigration status. 42 U.S.C. §1320b-7(b)(2) and (d)(1)(A).¹ Another is that the states may

¹ Certain "qualified" non-citizens are also eligible for Medicaid. See 8 U.S.C. §§ 1611 (barring all aliens who are not "qualified"); §§ 1612-13 (establishing time limits and waiting periods); § 1641 (setting forth categories of immigration status for "qualified alien"). This case only concerns citizens and the citizenship documentation rules.

not administer the program in any way that results in the denial of health coverage to otherwise eligible American citizens. 42 U.S.C. §1396a(b)(3).

Once a Medicaid applicant has demonstrated that she meets the financial and non-financial requirements and is granted coverage, federal regulations require that the individual be provided continuing coverage unless and until the state Medicaid agency establishes that the individual no longer meets the eligibility requirements. See Schweiker, 453 U.S. at 36-37 (noting that "[a]n individual is entitled to Medicaid if he fulfills the criteria established by the State in which he lives"). Eligibility does not end as a result of any pre-established time limit or condition, but continues until the recipient is no longer eligible as a matter of fact. "The agency must... [c]ontinue to furnish Medicaid regularly to all eligible individuals until they are *found to be ineligible*." 42 C.F.R. 435.930 (emphasis added).

Although state agencies are required to "redetermine the eligibility of Medicaid recipients, with respect to circumstances that may change, at least every 12 months," 42 C.F.R. §435.916, and recipients are required to cooperate with that process, the redetermination does not define an end-point to a period of eligibility. That is, the redetermination is not a re-application, but is simply a periodic check on the state of facts with respect to eligibility factors that might change over time.²

Some Medicaid beneficiaries attain coverage without having their eligibility determined by the state Medicaid agency. For example, individuals who qualify for state-administered foster care or adoption assistance under Title IV-E of the Social Security Act

² Congress knows how to expressly establish a program with closed-end eligibility periods when it wants to. The Food Stamp program, unlike Medicaid, has that type of structure. See 7 U.S.C. §2020(e)(4); 7 C.F.R. 273.10, 273.14 (stating that the entitlement to Food Stamp is limited to a "definite period of time" such that "no household may participate beyond the expiration of the certification period...without a determination of eligibility for a new period," which requires an application).

are automatically eligible for Medicaid. 42 U.S.C. § 1396a(a)(10)(A)(i)(I). Recipients of Supplemental Security Income (SSI) are another example. SSI is the cash assistance benefit for aged, blind and disabled individuals with low incomes. 42 U.S.C. § 1382, et seq. In most states, Medicaid coverage must be provided to all individuals who are receiving SSI.³ 42 U.S.C. § 1396a(a)(10)(A)(i)(II). Section 1634 of the Social Security Act, 42 U.S.C. § 1383c(a), permits states to have the Social Security Administration (SSA) make determinations of Medicaid eligibility for aged, blind and disabled individuals. Individuals applying for SSI who live in these "Section 1634" states make no separate application for Medicaid eligibility.⁴ Id. See also 2004 Green Book (108th Congress), at 3-15. Accordingly, individuals who qualify for SSI in Section 1634 states automatically are eligible for Medicaid.

B. Self-Declaration of Citizenship and Section 6036 of the Deficit Reduction Act

Applicants are able to establish citizenship for purposes of Medicaid eligibility by making a written declaration, under the penalty of perjury, that they are citizens of the United States. 42 U.S.C. § 1320b-7(b)(2) and (d)(1)(A). See generally Department of Health and Human Services, Office of Inspector General, "Self-Declaration of U.S. Citizenship for Medicaid", OEI-02-03-00190 (July 2005) (reporting on an investigation of state practices

³ In certain states, individuals do not automatically qualify for Medicaid because of receipt of SSI. These states, known as "209(b)" states, use different criteria to determine whether an individual is eligible for Medicaid by reason of disability. The 209(b) states are Connecticut, Hawaii, Illinois, Indiana, Minnesota, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma, and Virginia.

⁴ These "1634" states are: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, New Jersey, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. These "Section 1634" individuals comprise about 791 of the SSI population. Green Book at 3-16. Individuals who receive SSI and who live in Alaska, Idaho, Kansas, Nebraska, Oregon, and Utah also qualify for Medicaid, but must make a separate application for Medicaid. Green Book at 3-15.

under this policy) (Attached in Plaintiff's Appendix, and hereinafter referred to as the "OIG Report"). Before enactment of Section 6036, states were not required to demand documentation of citizenship, and in fact most did not find it necessary. See OIG Report at 9 (noting that forty-seven states permit or sometimes permit self-declaration of U.S. citizenship). Where states chose to ask an applicant for documentation of citizenship, the types of documentation that could be used to prove citizenship were not limited in any way, but could include documents such as hospital records or baptismal records. See id. at 14-15. The OIG Report did not recommend the elimination of self-declaration. Instead it recommended, inter alia, that the states strengthen post-eligibility quality control activities (like data-matches and file reviews). Id. at 18. In responding favorably to this recommendation, CMS noted, "The report does not find particular problems regarding false allegations of citizenship, nor are we aware of any." Id. at 27.

Congress decided in enacting Section 6036 to require states to supplement the self-declaration of citizenship by Medicaid applicants and beneficiaries with documentary support. Section 6036 amends 42 U.S.C. § 1396b to deny federal matching funds to states for any Medicaid program expenditures made on behalf of any recipient from whom the state has not received acceptable citizenship-related documentation. Thus, Section 6036 does not change the citizenship eligibility requirement for Medicaid, but instead alters the federal-state administrative arrangements regarding documenting the citizenship of Medicaid beneficiaries.

Specifically, Section 6036(a) requires states to seek from persons declaring themselves to be citizens of the United States pursuant to 42 U.S.C. §§ 1320b-7(b)(2) and (d)(1)(A) documents that establish both citizenship and personal identity. The statute allows

both factors to be established by a limited set of documents, most notably a United States passport,⁵ plus "any other document the Secretary identifies by regulation that provides both proof of citizenship or nationality and proof of personal identity." 42 U.S.C. § 1396b(x)(3)(B) (2006). Section 6036(a) allows citizenship (but not personal identity) to be demonstrated by another list of documents, most notably a United States birth certificate, plus "any other document that the Secretary may identify that establishes United States citizenship or nationality." 42 U.S.C. §1396b(x)(3)(C) (2006). Finally, Section 6036 allows personal identity to be established by certain documents, most notably a driver's license or similar official photo identification, plus "any other reliable documentation of personal identity that the Secretary specifies by rule." 42 U.S.C. § 1396b(x)(3)(D) (2006).

Section 6036(b) makes the amendment effective with respect to all initial determinations of eligibility for Medicaid health coverage made on or after July 1, 2006, and it makes the amendment applicable to all Medicaid redeterminations for existing beneficiaries of Medicaid health coverage made on or after July 1, 2006, to the extent that the Secretary determines that the beneficiaries have not already met the documentation requirements that the Secretary will establish under the new law.

C. Interim Final Regulations Effective July 6, 2006

Although the interim regulations did not appear in the Federal Register until July 12, the regulations were issued late in the day on July 6, 2006, and were effective that same day.

71 Fed. Reg. at 39214. According to CMS, they govern all initial or ongoing Medicaid

⁵ One of the specified documents is a state driver's license, if the state requires proof of citizenship to obtain the license. According CMS' most recent guidance, however, "CMS is not currently aware that any State has these processes in place at this time. Therefore, until such time as a State has this requirement in place, this documentation may not be accepted." CMS, Medicaid Fact Sheet: Overview of New Requirements of Citizenship Documentation for Medicaid Benefits, July 6, 2006.

eligibility determinations made on or after July 6. The Secretary will, however, be taking comments on the regulations until August 11, 2006, and may amend them thereafter.

The interim regulations exempt some Medicaid applicants and beneficiaries from the requirements of Section 6036. Individuals who are eligible for Medicare or who automatically qualify for Medicaid benefits because of their receipt of SSI (all SSI recipients living in "Section 1634" states; see supra, n.4) will not be subject to the documentation requirements.⁶ The regulations do, however, apply the requirements to all other Medicaid beneficiaries and applicants.

Under the interim regulations, the Secretary turns citizenship documentation into a new eligibility requirement. The statutory eligibility requirement -- sworn self-attestation of citizenship and identity -- is no longer sufficient to establish Medicaid eligibility. 71 Fed. Reg. at 39215. States are prohibited from finding a person eligible for benefits until the permissible documentation has been requested, sought by the applicant, and attained. Id. at 39218 – 19, 39222 - 25.

The interim regulations limit the ways that individuals may document citizenship. They establish five lists of documents that may constitute acceptable proof of citizenship and personal identity. The first list consists of "Primary Documents," and lists the only documents that will be accepted to prove both factors: U.S. passports and the other

⁶ The Secretary made this decision despite the fact that Section 6036 actually provides that the citizenship documentation requirements shall not apply to *an alien* who is eligible for Medicaid and is entitled to or enrolled in Medicare or who is eligible on the basis of receiving SSI. 42 U.S.C. § 1396b(x)(2) (emphasis added). In the preamble to the interim regulations, this language is attributed to an obvious clerical or typographical mistake, or, a "scrivener's error." 71 Fed. Reg. at 39215. The Secretary explains that Congress clearly meant this exception to apply to citizens and mistakenly used the word "alien" when it meant "individual." Id. Accordingly, "to give meaning to the exemption," the Secretary declares that states will not be subject to a denial of federal financial participation for failing to document the citizenship of Medicaid beneficiaries who are eligible by virtue of their receipt of SSI or who are eligible for Medicare. Id. at 39215-16, 39225 (to be codified at 42 C.F.R. § 435.1008). Plaintiffs do not dispute this interpretation.

documents named in the statute. Id. at 39222 (to be codified at 42 C.F.R. § 435.407(a)). Pursuant to the statutory authority to add additional types of documentation, the interim regulations also specify that states may, if they choose, use the Social Security Administration's State Data Exchange (SDX) to verify identity and citizenship for individuals who receive SSI, but who live in 209(b) states (see *supra*, n.3) and are therefore not automatically eligible for Medicaid because they receive SSI.⁷ 71 Fed. Reg. at 39218, 39222 (to be codified at 42 C.F.R. § 435.407(a)(5)).

For persons who cannot produce one of the "Primary Documents," the interim regulations establish a hierarchy of lists of documents that can prove citizenship or nationality, but not personal identity. These lists consist of "secondary evidence," "third level evidence," and "fourth level evidence." If a person needs a document from one of these lists to establish citizenship, then the person must also present a document from yet another list to establish personal identity. 71 Fed. Reg. at 39222 – 39224 (to be codified at 42 C.F.R. § 435.407(b)-(f)). Originals or copies certified by the issuing agency must be provided. Copies – including notarized copies – are not acceptable. 71 Fed. Reg. at 39216.

Secondary evidence is allowable only if a primary document is unavailable. Examples of documents constituting secondary evidence include a U.S. birth certificate or an official military record of service. Id. at 39222 (§ 435.407(b)). Third level evidence is permissible only if primary and secondary evidence are not available. Id. at 39223 (§435.407(c)). An example of a document that constitutes third level evidence is a hospital record of the person's birth or a life, health or other insurance record that was created at least

⁷ The State Data Exchange, or SDX, allows the state and federal computers to identify when a person is eligible for SSI benefits, and it includes an item among the SSI data that indicates that an SSI recipient has satisfied the SSI program's citizenship requirement.

five years prior to the initial application for Medicaid, and also indicates a U.S. place of birth. Id.

Fourth level evidence is evidence of the "lowest reliability" and "should only be used in the rarest of circumstances." Id. at 39219, 39224 (§ 435.407(d)). Examples of documents in this category include census records for those born between 1900 and 1950, and various medical records, but only those created at least five years prior to the *initial* Medicaid application (which for many elderly or disabled recipient may mean decades). Id. at 39224. As a last resort, a written affidavit may suffice as fourth level evidence. The affidavit must be made by at least two individuals of whom one is not related to the applicant or recipient, who have personal knowledge of the event(s) establishing the applicant's or recipient's claim of citizenship. Id. Since for almost all cases the claim to citizenship is based on birth in the United States, this amounts to needing witnesses to one's birth. Further, the two affiants themselves must be able to provide proof of their citizenship and identity for the affidavit to be accepted. Id. This is the case whether or not the affiants are themselves seeking Medicaid benefits, and without any explanation why noncitizens are considered incapable of providing a truthful affidavit.

It is possible that the final version of the regulations may eliminate the option of using third and fourth level evidence. The preamble to the interim regulations states that "in light of the exception provided for citizens and nationals receiving SSI . . . and for individuals entitled to or enrolled in Medicare, we are soliciting comments as to whether individuals would have difficulty proving citizenship and identity if only primary or secondary level documents were permitted." 71 Fed. Reg. at 39219 – 20.

The final list contains the options for establishing personal identity (but not citizenship). This list consists of official identification cards with photographs or detailed physical descriptions, such as drivers' licenses, school identification with photographs, military identification, or tribal documents.⁸ *Id.* at 39224-25 (§ 435.407(e)). It also provides that, in the case of children under 16, an affidavit may be used if none of the listed documents are available. The affidavit must be signed by a parent or guardian stating the date and place of birth and cannot be used if an affidavit for citizenship was used. *Id.* at 39225 (§ 435.407(f)).

The preamble to the interim regulations makes it clear that a Medicaid recipient may be terminated from eligibility if the recipient fails to document citizenship according with the interim regulation's requirements after having been given a "reasonable opportunity" to do so, or if the state decides that the recipient has not made a "good faith effort" to secure the required documentation. The Secretary thus places the burden on beneficiaries to re-prove an element of eligibility that they already demonstrated when initially applying, without any requirement that there be some fact or circumstance indicating the original determination is obsolete or mistaken to trigger this new burden of proof.⁹

⁸ This personal identity list actually reduces the types of proof allowed in the statute. Section 6036 specifies "any identity document described in section 274A(b)(1)(D) of the Immigration and Nationality Act". The regulatory list references this provision of the Immigration and Nationality Act but only adopts a few of the documents specified in the four subclauses of the regulation that implements that provision at 8 C.F.R. §274a.2(b)(1)(v)(B)(1), leaving out some of the documents listed in subclauses (1) and completely omitting all the documents listed in clauses (2) through (4) of that regulation. In 8 C.F.R. §274a.2(b)(1)(v)(B)(4), for example, the Regulations specifically address the difficulties some people with disabilities may have coming up with usual forms of identification and allows operators of rehabilitation programs serving the people with disabilities to complete a citizenship and identity form for them.

⁹ Thus, States will have to check citizenship documents for an estimated 40 million current Medicaid recipients in the coming year. See Leighton Ku & Matt Broadus, Ctr. On Budget & Policy Priorities, New Requirement for Birth Certificates or Passports could Threaten Medicaid Coverage for Vulnerable Beneficiaries: A State by State Analysis (February 17, 2006), <http://www.cbpp.org/1-5-06health.htm>. (the authors estimate the number of recipients, including those who are Medicare or SSI recipients, to be 50 million, and we have subtracted the estimated 8-10

For Medicaid applicants, the Secretary also allows a "reasonable opportunity" period for complying with the documentation rules, but he does not specify what constitutes a "reasonable opportunity" to obtain the documentation prior to denial of an application, and insists that the period should not exceed the period states are otherwise limited to for the processing of applications under 42 C.F.R. §435.911 (45 days for most applications, and 90 days for applications requiring a determination of disability). 71 Fed. Reg. at 39216, 39225. States may create exceptions to these limits where applicants have tried in "good faith" to obtain documentation and, only at that point, offer to "assist" the applicants, but these terms are not defined. *Id.* at 39216. Moreover, the policy requires that individuals present original documents or copies certified by the issuing agency. "Copies or notarized copies may be not accepted." *Id.*¹⁰ Most importantly, Medicaid eligibility may not be granted until the documentation is produced by the applicant.

D. Plaintiffs' Dilemma

The interim regulations put current Medicaid recipients at risk of losing benefits, and force them into a very onerous process, whether or not they ultimately save their benefits. Many of them have never had passports, or never had birth certificates because they were born outside of hospitals, or are too infirm now to attain any of the qualifying documentation. The categories of alternative documents that can be used when birth certificates are not available are so narrow that they will afford little relief. For example, insurance records qualify as third level evidence, but many low income individuals have no

million that the Secretary, according to his press statements when the interim regulations were released, will exempt because they are Medicare or SSI recipients).

¹⁰ As a practical matter, this requirement will severely limit the use of mail-in applications, which are particularly useful for elderly, disabled, and working applicants. Few will want to send originals of important citizenship and identity documents by mail.

health or life insurance. The fourth level of documentation includes medical records, but these records must have been created five years before the date of *application*. Some beneficiaries have been eligible for Medicaid for decades and will have great difficulty locating records that fall into this category. Since nearly all Medicaid applicants and beneficiaries are very poor and have no health insurance, it is not likely that these individuals will have medical records, or that they will be able to get certified copies of the records from the provider if they have unpaid bills. To the extent any of these documents are available at all, it is likely that many, perhaps most, of them do not include evidence of the birthplace of the Medicaid recipient or applicant. Finally, the requirement of original or certified documents further complicates this option. It would be very difficult, if not impossible, to convince a hospital or clinic to give a patient their original record. Many providers may not have a practice of "certifying" documents, and the regulations forbid copies (including notarized copies). Thus, the imposition of the Secretary's citizenship documentation requirements as a condition of Medicaid beneficiaries' continued eligibility for health coverage, whether or not their document searches are successful, is a severe burden. Any resulting coverage terminations will be severely damaging or life-threatening.

Applicants for Medicaid face similar challenges, but they are also constrained by unreasonable time deadlines. The "reasonable opportunity" period for them has a definite end point (45 or 90 days), which will often come too soon for applicants to comply with the demands placed upon them. Despite having met the statutory eligibility requirement by declaring their citizenship under penalty of perjury, their applications and their health care will be delayed or denied.

The declarations of some of the named plaintiffs, attached to Plaintiffs' Amended Motion for Temporary Restraining Order and Preliminary Injunction, show that they have encountered the following difficulties:

- Betty Jo Watkins was born in 1950 and believes that she was born in Baltimore, Maryland. She has no birth certificate. She was not raised by her birth parents but has no adoption papers nor does she know whether she was legally adopted by the couple who raised her. She has tried to get a birth certificate from city, county and state governments but none of them were able to find it. All relatives who would know about her birth are dead. She does not receive Medicare or SSI, although an application for SSI is pending. Watkins Declaration.
- Mary West was born in Louisville, Georgia in 1935. She has no birth certificate. She requested a birth certificate from the county clerk in Louisville under both her maiden name and married name, but was told that there was no record of her birth under either name. She knows no one who was a witness to her birth. She does not receive SSI or Medicare. West Declaration.
- A.L. was born in North Carolina in 1989 and adopted in 1999. Her adoptive parents once had a photocopy of a birth certificate issued when she was born, but it has since been lost and they currently do not have any documentation for A.L. meeting the new requirements. They have no photo identification for A.L. Bauknight Declaration.

Service providers and public officials are similarly concerned about the impact of these new requirements. Robert F. Harris, the Public Guardian of Cook County, Illinois, is the guardian of the estate and/or person for over 800 individuals, many of whom have dementia, mental illness, or developmental disabilities. Harris states that his office often encounters difficulties in obtaining documents for their wards because the wards were previously living in deplorable conditions or victims of financial exploitation. Many wards cannot even state their names and are of little assistance in providing basic information such as where or when they were born. He states that many of his wards are dependent on

Medicaid to pay for nursing home care and have no other housing options if they were to lose their Medicaid because of this new documentation requirement.

Diane Coleman, the Executive Director of Progress Center for Independent Living, serves people with disabilities, many of whom rely on Medicaid to cover necessary health care. According to Coleman, many of the clients have difficulty navigating the benefits system and may not be able to satisfy the new requirement because of lost possessions during periods of homelessness, lost contact with family members, and lack of access to information while residing in institutions. Some of Coleman's clients need Medicaid but are not also recipients of SSI or Medicare, and so they will be subject to the documentation rules.

Larry Klowden, the Resource Coordinator at Northwestern Memorial Hospital in Chicago, Illinois, serves many mentally ill homeless people who depend on Medicaid to cover their health care and medication costs. Klowden is concerned about the strain this new requirement will put on his clients because many of them become symptomatic and fearful of the system when they are faced with complicated and unfamiliar procedures. Many of his clients will not have the required documents due to homelessness and estrangement from family and friends from their past. Clinic staff and clients have spent a lot of time and effort getting the clients on a medication schedule that controls their illnesses, and Klowden fears that this new barrier will destabilize many of these schedules, leading the clients to deteriorate and require further hospitalization. Some of Klowden's clients need Medicaid and are not recipients of SSI or Medicare, so they will be subject to the citizenship documentation rules.

If disabled people are eligible for disability insurance benefits under the Social Security program based upon their earnings records accumulated while they were able to

work, most of them will not be financially eligible for SSI, and all of them will have a two-year waiting period prior to qualifying for Medicare. During that two-year period they will be subject to the citizenship documentation rules under the Secretary's interim regulations.

Moreover, all of the agencies anywhere in America that serve people with mental illness or other disabilities encounter many of those people prior to them having established their eligibility for SSI benefits based on the disability. One of the most important services they provide is to help people apply for and win SSI. The application process takes many months, sometimes years. During that process and prior to the finding of eligibility for SSI, the applicants will seek Medicaid coverage from their states, which they need not only to obtain medical treatment but to obtain the documentation of their conditions necessary to establish disability for SSI purposes. These applicants, not yet eligible for SSI, will be subject to the Medicaid citizenship documentation rules. To the extent those rules bar them from Medicaid eligibility, they also bar or severely impede their efforts to establish SSI eligibility.

In addition, children who are separated from their parents by circumstances or by the state (because of abuse or neglect), are particularly unlikely to be in possession of documentation that satisfies the Secretary's interim regulations. Some of these children are cared for by relatives, such as plaintiffs, T.W., Jo.N., and Ja.N., who were taken in by their grandmother, Janie Cook. Numerous federal and state laws protecting privacy and confidentiality make it difficult, sometimes impossible, for such relatives to obtain documents such as birth certificates, medical records, or school records. State vital records laws, for example, usually limit access to birth certificates to immediate family members such as parents or siblings and legal guardians. See, for example, Illinois Vital Records Act,

410 ILCS 535/25(4)(b), limiting access to birth certificates to parents and legal representatives. Others become wards of the state, entering foster care and perhaps becoming adopted, such as plaintiff A.L.

Medicaid recipients, their family members, their guardians, their nursing home providers and even federal and county government agencies have searched for documentation of citizenship and failed. The burden of providing this documentation is significant and often impossible for many to meet. See Leighton Ku, Ctr. on Budget and Policy Priorities, Revised Medicaid Documentation Requirement Jeopardizes Coverage for 1 to 2 Million Citizens, (July 13, 2006) (available at <http://www.cbpp.org/7-13-06health2.pdf>).

E. Plaintiffs are likely to prevail on their legal claims

1. Standard For Evaluating the Interim Final Regulations

When Congress delegates authority to an agency generally to make rules that have the force of law, and the agency acts pursuant to that authority, the rules are entitled to what is known as "Chevron" deference. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); United States v. Mead Corp., 533 U.S. 218, 226-27 (2001). When evaluating a rule pursuant to this standard, the court should first look to whether Congress has spoken directly to the precise question at issue and, if not, to whether the agency's interpretation is a "permissible construction" of the statute. 467 U.S. at 842 - 43. The court should give the agency's interpretations "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Id. at 844.

In Section 6036, Congress gave the Secretary authority to promulgate regulations to flesh out the documentation requirement. Because the Secretary's interpretation of Section 6036, embodied in the interim regulation, is contrary to the plain language of Section 6036,

other clear provisions of the Medicaid Act, and the Constitution, this Court should not give it controlling weight, but should strike it down.

2. The Interim Regulations Improperly Apply the Full Documentation Procedure to all Current Medicaid Recipients.

Plaintiffs and the members of Class A are current recipients of Medicaid.¹¹ The interim regulations improperly implement Section 6036 by arbitrarily and capriciously overturning the final administrative decisions establishing that Plaintiffs and Class A meet the citizenship requirement for Medicaid, even though there has not been any indication that there has been a change in their citizenship status or that the original determination was the product of mistake or fraud.

Requiring the members of Class A to go through the new documentation process is an improper interpretation of Section 6036 that is contrary to the Medicaid Act and the Secretary's own prior rules, and it imposes an unconstitutional result that a better interpretation of Section 6036 would avoid.

Section 6036(b) provides that the Secretary is to apply the new documentation rule "to redeterminations of eligibility made on or after [July 1, 2006] in the case of individuals for whom [the new documentation requirement] was not previously met."¹² This language allows the Secretary to adopt a documentation procedure that respects the citizenship determinations previously made in the cases of Class A members (already Medicaid recipients on the effective date of Section 6036). The statutory language would allow the

¹¹ Class A consists of: All persons who, prior to July 1, 2006, have been determined eligible for health coverage under the Medicaid Program, 42 U.S.C. §1396 et seq., and who declared on their applications for Medicaid coverage or otherwise that they are citizens or nationals of the United States, or who were made eligible for Medicaid without the need for a declaration of citizenship or eligible alien status under 42 U.S.C. §1320b-7.

¹² Section 6036(b)'s reference to the new documentation requirement refers to the new "section 1903(z) of the Social Security Act". This is a typographical error. The reference should be to the new "section 1903(x)" which

Secretary, for example, to adopt the recommendation of the OIG Report. Under the method recommended by the OIG, the Secretary would not instruct the states to ask its entire Medicaid population for documentation, but to undertake data matches and make a careful paper review during redeterminations of eligibility, and then, where there is some fact or circumstance that legitimately calls the original determination into question (such as multiple recipients using one Social Security number), demand documentation from those particular recipients, with eligibility legitimately in play in only those cases.

Under another alternative allowed by the statutory language, the Secretary could instruct the states to ask its current Medicaid enrollees to produce documentation to the extent that they are able, but only for administrative purposes. Accordingly, no recipient who already had been determined to be a citizen for purposes of Medicaid would be terminated from Medicaid for failing to produce documentation. If some affirmative fact or circumstance arose that called the original determination into question, those particular recipients' eligibility could be questioned and documentation demanded to resolve the issue.

The Secretary's regulation imposes the documentation demand on each state's entire current Medicaid population, and treats the demand as an eligibility matter in every single case, effectively overturning the original substantive determinations that the members of Class A are citizens for purposes of Medicaid eligibility. The statutory language, however, does not require him to do that. He did not have to require that millions of Medicaid recipients be put through the process of re-proving citizenship as if they were new applicants attempting to establish eligibility for the first time, as he does in the interim regulations. As

was added to the statute by Section 6036(a) and contains the documentation requirement, which is codified at 42 U.S.C. §1396b(x). See 71 Fed.Reg. at 39215 (noting “several clear scrivener errors” in the statutory language).

we demonstrate in our argument in support of the Class B claims, (see section III.E.3, below), Section 6036(a) gives the Secretary ample authority to define types of documents of all kinds. See 42 U.S.C. 1396b(x)(3)(B),(C), (D) (authorizing Secretary to develop types of documentation by rule). With this power, the Secretary easily could develop a procedure for determining that the cases of current recipients had "met" the new requirements, for purposes of Section 6036(b), unless there was an indication in the file or otherwise that the original finding as to citizenship was incorrect, in which cases the beneficiaries would be asked for more documentation.

Plaintiffs have described these alternative interpretations of Section 6036(a) and (b) to demonstrate that the interim regulations are not the only possible interpretation, and that other interpretations avoid the impermissible outcomes caused by the interim regulations. The alternative interpretations are fully consistent with the Medicaid Act's treatment of eligibility as ongoing and only subject to a threat of termination when facts indicate eligibility has ended. The Secretary has for a very long time acknowledged in a formal regulation that this presumption of ongoing eligibility is what the Act requires. 42 C.F.R. § 435.930. Further, unlike the interim regulations, the alternative interpretations square with the Medicaid Act's express prohibition on the denial of benefits to citizens. See 42 U.S.C. § 1396a(b)(3) (providing that the Secretary shall not approve a state plan that contains a citizenship requirement that excludes any citizen of the United States).

In addition to being inconsistent with the Medicaid Act, the interim regulations produce an unconstitutional result that can be avoided by the above-suggested alternative interpretations of Section 6036. The analysis for any due process claim consists of two parts: whether Plaintiffs have a protectable property interest; and, if so, what process is due them in

connection with a threatened deprivation of that interest. Logan v. Zimmerman Brush, 455 U.S. 422, 428 (1982); Youakim v. McDonald, 71 F.3d 1274, 1288 (7th Cir. 1995), cert. denied, 518 U.S. 1028 (1996).

It is well established that individuals who meet the eligibility criteria for public benefit programs have a property interest in the continued receipt of those benefits that cannot be eliminated without adequate due process. Goldberg v. Kelly, 397 U.S. 254, 262 (1970). While the legislature can determine and change the eligibility requirements to receive those benefits, the legislature cannot deprive recipients of those benefits, once defined and conferred, without appropriate procedural safeguards. Logan, 455 U.S. at 432; Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985). Governmental actions that trigger a deprivation of individuals' entitlements must be limited and cannot be arbitrary and capricious, regardless of the sufficiency of the procedures used after the deprivation is set in motion. Pearson v. City of Grand Blanc, 961 F.2d 1211, 1216 (6th Cir. 1992). "The hallmark of property, the Court has emphasized, is an individual entitlement grounded in [] law, which cannot be removed except 'for cause.'" Dupuy v. Samuels, 397 F.3d 493, 515 (7th Cir. 2005) (quoting Logan, 455 U.S. at 430).

The "cause" that triggers a threat to a property interest cannot be grounded in the whim or caprice of the government providing the benefit. In Shaw v. Schweiker, the Social Security Administration attempted to terminate the disability benefits of a recipient without finding any change in the circumstances that gave rise to his initial grant of eligibility. 536 F.Supp. 79, 82 (E.D.Penn. 1982). The proposed termination occurred as a result of a review by the SSA of the individual's eligibility. Id. In restoring the plaintiff's benefits, the court stated:

Once a final determination of disability has been rendered, it is logically impossible for a claimant to become non-disabled without a change amounting to improvement (unless, of course, as recognized in *Miranda v. Secretary of Health, Education and Welfare*, 514 F.2d 966 (1st Cir. 1975)], new evidence shows the original decision to be in error). After a final determination of disability, if a termination of benefits were effected without a showing either of improvement or newly-discovered evidence, such a termination would of necessity be based on whim or caprice or would constitute an impermissible relitigation of facts and determinations already finally decided.

Id. at 82-83. Accord Simpson v. Schweiker, 691 F.2d 966, 969 (11th Cir. 1982)

When an individual has been found to qualify for benefits, they cannot be terminated absent a demonstration of a change in condition or evidence of mistake or fraud in the original determination. Cassiday v. Schweiker, 663 F.2d 745, 747 (7th Cir. 1981) (quoting Miranda v. Secretary of Health, Educ. and Welfare, 514 F.2d 996, 998 (1st Cir. 1975))(requiring a demonstration of medical improvement in order to terminate disability benefits). In Medicaid cases as well, due process mandates that "[t]he presumption that a condition, once shown to exist, continues to exist..., requires a showing of some change in circumstances if the termination of benefits is not to be deemed arbitrary." Cherry v. Tompkins, 1995 U.S. Dist. LEXIS 21989 at *5 (S.D. Ohio 1995) (quoting Weaver v. Colorado Dept. Soc. Serv., 791 P.2d 1230, 1235 (Colo. Ct. App. 1990)).

A component of the due process-driven set of fair procedures that attaches to the property interest that Medicaid recipients have, then, can be described as the principle of "repose" with respect to finally determined facts. Once a fact that helps to establish eligibility has been finally determined, the recipient cannot be "put to the proof" again with respect to that fact, absent some legitimate case-specific "cause" such as a change of circumstances or new facts indicating that the original determination was the result of mistake or fraud. Undergoing the exposure to possible loss of benefits and being put through

the process is a harm that due process protects against, regardless of whether the wronged individual might eventually succeed in re-proving his eligibility. That is precisely the harm that the Secretary has done to the Class A plaintiffs in the interim regulations. There are alternative and constitutional ways to interpret Section 6036. However, if this Court decides that the Secretary's interpretation is the only one the statute allows, then Section 6036 itself is unconstitutional for this reason.

Plaintiffs and Class A suffer harm by being forced to go through the process of re-proving their eligibility and suffering exposure to loss of Medicaid eligibility. This harm is immediate or imminent, depending on when each person's annual redetermination is scheduled. This Court can prevent it by ordering that members of Class A not be subject to any documentation process that implicates their eligibility for Medicaid without a case-specific triggering fact or circumstance that legitimately calls into question the original determination of citizenship for Medicaid eligibility purposes.

3. The Interim Regulations Violate the Rights of Class B by Impermissibly Creating a New Eligibility Requirement and Establishing an Unfair Documentation Procedure

The Class B claims focus on the documentation process that the interim regulations establish, assuming arguendo that the members of the class may legitimately be subjected to that process.¹³ The interim regulations impermissibly convert Section 6036's administrative change into an eligibility requirement for Medicaid, in violation of Section 6036 itself and other provisions of the Medicaid Act. The interim regulations also establish a documentation procedure that unfairly limits both the types of allowed documents and the time window in which to produce them, which violates the rights of Class B to due process of law.

By disallowing eligibility to United States citizens who cannot comply with the documentation procedures established in the interim regulations, the Secretary ignores the fact that "Congress has directly spoken to the precise question." Chevron, 467 U.S. at 842. Congress has made eligible for Medicaid any citizen who signs the declaration under 42 U.S.C. 1320b-7. And, in 42 U.S.C. §1396a(b)(3), Congress requires that the Medicaid program not be administered in a way that denies benefits to any citizen. Section 6036 did not amend these existing provisions of the Medicaid Act. It creates an administrative procedure for the states to acquire documentation to support the declaration of citizenship. The Secretary's interpretation of Section 6036 contravenes the Medicaid Act by creating a new eligibility requirement that will result in the denial or termination of benefits to citizens whom the Medicaid Act has made eligible for benefits.

Section 6036 gives the Secretary ample leeway to implement its directives without violating the Medicaid Act. The Secretary was free to construct a system under which no citizen, in the end, would be barred from the program due to inability to produce a specific document. He could have allowed Medicaid applicants to pursue any and all corroborating documents that support their §1320b-7 declarations. The statute does not mandate the hierarchical approach that requires individuals to ensure that they do not have documents in one list before using documents in another list. Compare Section 6036(a) (requiring that individuals prove citizenship with either a document in paragraph (B) or one document each from paragraphs (C) and (D)) with interim regulation 42 C.F.R. § 435.407(dividing the documents suitable for proving citizenship into four levels and requiring that individuals may

¹³ Class B consists of: All persons who, on or after July 1, 2006, are receiving or will receive, or are applying or will apply for health coverage under the Medicaid Program, 42 U.S.C. §1396 et seq., and who on their applications for Medicaid health coverage or otherwise have declared or will declare that they are United States citizens.

use third level evidence only if secondary evidence is not available and only use secondary evidence if primary evidence is not available). A more open and flexible approach to documentation would have accomplished the congressional intent that there be a heightened focus on this aspect of program integrity, while also accomplishing the express statutory directives not to deny benefits to citizens and that the eligibility requirement for citizens remains the declaration of citizenship under 42 U.S.C. §1320b-7.

In addition, the interim regulations depart from both the language of Section 6036 and from the statutory eligibility rules without any evidence of a necessity to do so. As the Inspector General and CMS itself stated less than a year ago, there is no evidence of a problem with fraudulent declarations of citizenship. OIG Report at 27. The statutory self-declaration policy strikes an appropriate balance between the urgent purpose of Medicaid to provide health care to eligible people who need it and program integrity. The interim regulations ignore the overriding purpose of the program, health care, in favor of an entirely overzealous attention to documentation that will deprive eligible citizens of the health care Congress wanted them to have. The interim regulations violate congressional directives and thus should not be afforded Chevron deference but should instead be enjoined.

The Secretary's documentation procedures are not only unfaithful to the statute, they are unconstitutional. Section 6036 cannot be read to create an eligibility requirement, as the Secretary interprets it, or else Section 6036 would produce a violation of the Due Process Clause. As explained above, the members of Class B who are already Medicaid beneficiaries have a property interest in the continuing receipt of benefits.¹⁴ The members of Class B who

¹⁴ Recipients of Medicaid are members of Class A and also members of this Class B. They assert the Class B claims regarding the adequacy of the citizenship documentation process only in the alternative to the Class A claim that they should not have to go through the process at all.

are applicants for Medicaid also have a property interest in their claim for benefits. Logan, 455 U.S. at 434 (property interest in claim of disability discrimination not yet proven). In other words, the applicant members of Class B have a property right because the law establishes that, if they meet the eligibility requirements, the states have no discretion to deny them entry to the program. See Davis v. Ball Mem'l Hosp., 640 F.2d 30, 40 (7th Cir. 1980) (quoting and relying upon the dissent in Geneva Towers Tenant Org. v. Federated Mortgage Investors, 504 F.2d 483, 494 (9th Cir. 1974) ("To create an entitlement, the law must remove the decision to grant the benefit from agency discretion"); Holbrook v. Pitt, 643 F.2d 1261, 1279 n. 39 (7th Cir. 1981) (same).

Before these property interests can be eliminated, recipients and applicants are entitled to a fair opportunity to obtain an individualized determination, based on all the evidence that they can present, of whether they have satisfactorily met the eligibility requirement that they declare their citizenship under penalty of perjury. Youakim, 71 F.3d at 1290 - 91 (citing Greene v. Babbitt, 64 F.3d 1266, 1274 (9th Cir. 1995)). It is certainly acceptable for Congress to ask the Secretary to ask the states to request documentation to corroborate this eligibility requirement, but this documentation procedure must be a fair one, and it must not swallow the substantive eligibility rule.

The Secretary in the interim regulations has instructed states to deny or terminate Medicaid benefits to anyone who cannot produce one or more documents from constricted lists of options. The ability to produce a qualifying document will depend on any number of factors, many of them beyond the control of the applicant or recipient. The document limitations set forth in the interim regulations are so stringent that they also exclude many types of proof that the Class B plaintiffs could produce that would corroborate their

declaration of citizenship. The regulations exclude sworn testimony (if it does not satisfy the restrictions on the permissible affidavits), photocopies of documents, all kinds of contemporaneous records, voting records, family Bibles, billing records, rent or mortgage records, wills and probate records, post office records, church records, and many other corroborating proofs that will almost always be uncontradicted and clearly establish or corroborate that the Class B member was born in America.

In addition, the Secretary imposes an unreasonable and arbitrary deadline, given the stringent document list and the cumbersome hierarchical process that the regulations establish. As to recipients, the regulations establish a time deadline described as a "reasonable opportunity", and they leave the term open for the states to interpret as tightly as they wish. 71 Fed. Reg. at 39216. The interim regulations also allow states to terminate recipients they deem are not making a "good faith effort", a concept that is also left open to state interpretation. Id. Together with the strong threat the interim regulations make to deny federal matching funds to any state that does not vigorously enforce the documentation rules, the vague and undefined time deadline for producing the required documents, especially in the context of the tight restrictions on allowable types of documents and insistence on original or certified documents, is procedurally unfair. The operation of the deadline will produce terminations of Medicaid before the recipient members of Class B have had a chance to produce whatever documentation it is in their power to produce.

For applicants, the interim regulations specify that the time deadline is the same as the states have to determine any application: 45 days to determine eligibility for most cases (90 for cases requiring a disability determination). 42 C.F.R. § 435.911. States cannot make applicants eligible for Medicaid "until they have presented the required evidence

[documenting citizenship]." 71 Fed. Reg. at 39216 This period of time is likely to be insufficient for any Medicaid applicant not possessing the relevant documentation at the time of application.¹⁵ The time deadline will operate to deny Medicaid to many recipients who could eventually satisfy the documentation requirements.

Thus, the documentation procedure established by the interim regulations, in its totality of limited forms of proof and unreasonable time deadlines, operates to deny a fair opportunity to the members of Class B to establish that they meet the Medicaid Act's requirement that they be declared citizens. It is not a defense to these unfair procedures to argue that Congress in Section 6036 was establishing new substantive eligibility requirements and not simply new procedures for satisfying pre-existing substantive eligibility rules. The Secretary is not free to make that claim.

[T]he Due Process Clause provides that certain substantive rights -- life, liberty, and property -- cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest ..., it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.

Loudermill, 470 U.S. at 541. See Youakim, 71 F.3d at 1292 (holding an administrative deadline for producing proof of eligibility to be "procedural" in spite of defendant agency's claim that it was an element of the substantive entitlement, and striking it down for being part of a scheme unfairly denying a chance to prove eligibility).

¹⁵ For example, North Carolina's vital records office estimates that it typically takes 6 – 8 weeks to process a request for a birth certificate. <http://vitalrecords.dhhs.state.nc.us/vr/requests>. And, if thousands of Medicaid beneficiaries are requesting these documents, such circumstances would not be typical and the wait likely to be longer.

It is for the Court to decide what is substance and what is procedure, and the Court weighs the constitutional adequacy of the procedures. Congress conferred a property right in Medicaid to people who declare that they are United States citizens. The arrangements in the interim regulations for further documenting that eligibility factor are procedures, no matter what the Secretary may say to the contrary. And those procedures are unfair, depriving Class B of its property interest without due process of law.¹⁶

4. Applying the interim regulations to Class C is contrary to Section 6036's Express Language

The interim regulations violate the rights of Class C by applying the documentation requirement to them when Section 6036 does not apply to them.¹⁷

As discussed above, 42 U.S.C. §1320b-7 (which is the codification of §1137(d)(1)(A) of the Social Security Act) requires that an individual who is applying for Medicaid declare in writing under penalty of perjury that the individual is a U.S. citizen or national. 42 U.S.C. § 1320b-7(d)(1)(A). Section 6036 expressly applies to "an individual who declares under section 1137(d)(1)(A) to be a citizen or national of the United States for purposes of establishing eligibility for [Medicaid] benefits." Most Medicaid applicants are required to make these declarations. One significant exception is the beneficiaries of foster care or adoption assistance agreements pursuant to Title IV-E in states in which a separate Medicaid application is not made for these children. Another is the 79% of SSI beneficiaries living in

¹⁶ As with Class A, the Class B claims are ripe and Class B members have standing to raise them because they are now or will imminently be subjected to the challenged application and redetermination process.

¹⁷ Class C is composed of: All persons who are receiving or will receive health coverage under the Medicaid Program, 42 U.S.C. §1396 *et seq.*, and who are not required to make a declaration of citizenship under 42 U.S.C. §1320b-7 in connection with an application for Medicaid, because they acquire their eligibility for Medicaid coverage as a result of the determination of their eligibility for Foster Care and Adoption Assistance under Title IV-E of the Social Security Act or any other program listed in 42 U.S.C. §1396a(a)(10)(A)(i)(I) and (II).

"Section 1634" states. Thus, on its face, Section 6036 does not apply to these categories of individuals.¹⁸

The Secretary, however, does not acknowledge that the requirements of Section 6036 are not applicable to Title IV-E children. In fact, the preamble to the interim regulations specifies that Title IV-E children must have a declaration of their citizenship and documentary evidence in their Medicaid file, even though they are not required to declare citizenship for Title IV-E. 71 Fed. Reg. at 39216. Thus, these provisions and omissions of the interim regulations are in conflict with the statute and should be struck down. The interim regulations apply the documentation process to Medicaid beneficiaries to whom Section 6036 does not apply.¹⁹

5. The application of the documentation requirements to Class B members violates their rights to Equal Protection

Members of Class B who will declare or have declared themselves to be citizens pursuant to 42 U.S.C. §1320b-7 but do not have supporting documentation will be treated differently than similarly situated individuals who declare themselves pursuant to 42 U.S.C. §1320b-7 to be noncitizens with "satisfactory immigration status." Individuals in the latter category must *not* be denied or terminated from Medicaid on the basis of their failure to

¹⁸ These are examples of several types of state-administered programs established under the Social Security Act that the Medicaid Act specifies as creating automatic eligibility for Medicaid. That is, status as a beneficiary under one of these programs confers eligibility for Medicaid without the need for a separate Medicaid application or a declaration of citizenship. 42 U.S.C. §1396a(a)(10)(A)(i)(I) and (II). Class C is defined to include all of these Medicaid beneficiaries.

¹⁹ The interim regulations do exempt SSI recipients who are automatically eligible for Medicaid because they receive SSI. 71 Fed. Reg. at 39225 (to be codified at 42 C.F.R. § 435.1008). However, the Secretary provides this exemption by interpreting language of Section 6036 to a "scrivener's error" which the agency may permissibly correct. See supra, n. 6. Plaintiffs agree with this interpretation. However, the Secretary fails to acknowledge that Section 6036 should never have been applied to SSI recipients in Section 1634 states because they never attain Medicaid by declaring citizenship under 42 U.S.C. §1320b-7. If for any reason the Secretary changes his interpretation as to the "scrivener's error", then his resulting application of Section 6036 to SSI recipients in Section 1634 states will be erroneous. The SSI recipient members of Class C are entitled to a declaration of the proper reading of Section 6036 to forestall this potential error and the resulting harm.

produce supporting documentation prior to the expiration of a "reasonable opportunity" period. 42 U.S.C. §1320b-7(d)(4)(A). Under the Defendant's regulation, however, individuals who declare themselves to be citizens *must* be denied or *may* be terminated from Medicaid in the absence of supporting documentation *regardless* of whether a reasonable opportunity period has elapsed. This approach denies to the Class B plaintiffs the equal protection of law due them under the Fifth Amendment to the U.S. Constitution.²⁰

Every Medicaid applicant must declare in writing, under penalty of perjury, that s/he is either a citizen or has satisfactory immigration status. 42 U.S.C. §1320b-7(d)(1)(A). If an individual asserting a satisfactory immigration status does not have the relevant documentation at application, the state must provide the individual a "reasonable opportunity" to produce the documentation. 42 U.S.C. §1320b-7(d)(4). And significantly, the state "may *not* delay, deny, reduce, or terminate the individual's eligibility for benefits under the program on the basis of the individual's immigration status *until such reasonable opportunity has been provided . . .*" Id. (emphasis added). If the individual produces an INS-issued document, a state is similarly prohibited from denying or terminating Medicaid eligibility during the time period between the production of the document and INS's verification of the individuals' status. Id.

The Secretary's interim regulations, however, construe Section 6036 to deny similar protections during the reasonable opportunity period to Medicaid applicants or recipient who declares pursuant to 42 U.S.C. §1320b-7 that they are citizens and do not have supporting documentation. Rather, 42 C.F.R. §435.407(j), provides a "reasonable opportunity" period to

²⁰ "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination quoting is 'so unjustifiable as to be violative of due process.'" Schneider v. Rusk, 377 U.S. 163, 168 (1964) (citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

an applicant or recipient to produce the documentation, but does not provide any allowance for the applicant or recipient to receive Medicaid coverage during this time period.

In the Preamble to the interim regulations, the Secretary makes clear that the omission of any such allowance is deliberate. Discussing the "reasonable opportunity" to produce documents establishing citizenship, the Preamble states that "applicants for Medicaid (who are not currently receiving Medicaid), should not be made eligible until they have presented the required evidence." 71 Fed.Reg. at 39216. With regard to current beneficiaries, the Secretary provides states the discretion to terminate coverage for failure to produce documentation if the state believes the Medicaid recipient is not making a "good faith" effort to obtain the documentation, regardless of whether the reasonable opportunity period has elapsed. "A determination terminating eligibility may be made after the recipient has been given a reasonable opportunity to present evidence of citizenship *or* the State determines the individual has not made a good faith effort to present satisfactory documentary evidence of citizenship." *Id.* (emphasis added).

The Secretary's interpretation of Section 6036 in the interim regulations creates a dichotomy between individuals who declare on their Medicaid applications that they are citizens and those who declare that they are noncitizens with satisfactory immigration status. The Secretary's interim regulations have established a documentation scheme that disadvantages citizens without any rational basis, in violation of the Fifth Amendment.

In City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), a city zoning ordinance required a special use permit for a home for the mentally retarded, but did not require in the same zone a special use permit for other housing structures. *Id.* at 447. The Court ruled that the city could not differentiate in this way because it failed to identify any

objective that rationally could be connected to or advanced by the special permit requirement of the zoning ordinance. Ultimately, the Court simply refused to accept that separate treatment could be justified solely on the basis of a definable difference between residents of one housing structure and another. "The question is whether it is rational to treat the mentally retarded differently. It is true that they suffer disability not shared by others; but why this difference warrants a . . . regulation that others need not observe is not at all apparent." Id. at 449-450.

Here, the Secretary cannot justify the disparate treatment as between Medicaid applicants who declare themselves to be citizens and those who declare themselves to be eligible noncitizens. To begin with, the scope of Medicaid coverage provided to a Medicaid recipient is not affected by the declaration the individual makes upon application, so the disparate treatment aimed at those declaring citizenship cannot be justified on the basis of a concern that these individuals are trying to access a greater scope of coverage. Indeed, the Medicaid statute generally prohibits any variation in the coverage provided to Medicaid recipients. See 42 U.S.C. §1396a(a)(10)(B).

Secondly, there is not any apparent governmental interest supporting a denial or termination from Medicaid prior to the expiration of a reasonable opportunity period for an individual declaring citizenship that would not extend equally to a noncitizen declaring satisfactory immigration status. Both need health coverage, which is the purpose of the Medicaid program, both have declared a species of eligibility under penalty of perjury, and both need time to produce documentation in support of the declaration. Congress wrote 42 U.S.C. §1320b-7 to provide health coverage to noncitizens during the reasonable opportunity period. Congress wrote Section 6036 in a way that gave the Secretary enough flexibility to

treat citizens the same way. The interim regulations instead disadvantage citizens. Citizens need health care as much as noncitizens. Citizens are no more likely to commit fraud than noncitizens. People who are neither citizens nor eligible noncitizens are no more likely to commit fraud by claiming citizenship than they are by claiming eligible noncitizen status. The scope of coverage is not impacted by the choice of declaration, and an individual fraudulently asserting either status is liable for the same charge: perjury.

Put simply, if the Secretary is requiring Medicaid applicants and beneficiaries declaring citizenship to produce supporting documentation as a condition of eligibility, then there is nothing that distinguishes individuals who make this declaration from individuals who declare satisfactory immigration status. The application process becomes the same, the scope of coverage to be provided upon a finding of eligibility is the same, and the penalty for a fraudulent declaration is the same. It is therefore "not at all apparent," Cleburne, 473 U.S. at 449, that the Secretary could advance any rational justification for denying Medicaid eligibility during a reasonable opportunity period for one group and requiring it for another. The Secretary's refusal to mandate Medicaid eligibility for the members of Class B during their reasonable opportunity period therefore denies them equal protection of law.

6. The Secretary Has Not Fulfilled a Condition Precedent to Implementation of Section 6036

The Secretary has failed to observe a statutory condition precedent that Congress imposed on implementation of Section 6036, violating the rights of the members of all three classes. Section 6036(c) requires the Secretary to establish an outreach program to educate individuals who are likely to be affected by the new documentation requirements. Section 6036(c) provides:

IMPLEMENTATION REQUIREMENT – As soon as practicable after the date of enactment of this Act, the Secretary of Health and Human Services shall establish an outreach program that is designed to educate individuals who are likely to be affected by the requirements of subsections (i)(23)[sic] and (x) of section 1903 of the Social Security Act (as added by subsection (a)) about such requirements and how they may be satisfied.

As the above language clearly indicates, the outreach program described therein is a "requirement" that Congress said "shall" be established as soon as practicable following the passage of the law, now over five months ago. The interim regulations make no mention of any outreach program. To date, the Secretary has done virtually nothing to establish the congressionally mandated outreach program designed to help affected individuals negotiate the new documentation landscape.²¹

While subsection 6036(c) does not contain a certain date by which the Secretary was expected to establish the required outreach program, its language nonetheless demonstrates that Congress wanted that done before the rest of Section 6036 was to be implemented on July 1, 2006. Congress in subsection 6036(c) demanded an outreach program "designed to educate individuals who are likely *to be* affected" by the rest of that section. (Emphasis added.) The use the future tense in the outreach requirement ("individuals . . . to be affected") demonstrates that Congress intended that the program be in place before the date on which individuals would be affected by the amendments, which is July 1st 2006. Otherwise, for those individuals, the outreach and education program would serve no purpose, as they would already be persons who "had been affected" rather than ones "to be affected."

²¹ In the June 9 SMD Letter the Secretary acknowledged his obligation to create an outreach program, but instead of doing so passed that obligation, and the costs associated with it, along to the states. ("We encourage States to alert your Medicaid beneficiaries and potential applicants as soon as possible about the requirement to provide acceptable

A statute should be given its ordinary and plain meaning. Cler v. Illinois Educ. Ass'n, 423 F.3d 726, 731 (7th Cir. 2005). Specifically, verb tense is considered a significant factor when construing a statute. United States v. Wilson, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes"); Otte v. United States, 419 U.S. 43, 49-50 (1974) (Court's decision based on the verb tenses used in the statute); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 63, n.4 (1987) (verb tense consciously chosen by Congress must be respected).

Here, both the verb tense chosen by Congress and the very purpose of the required outreach program demonstrate that Congress intended that program to be implemented before the new documentation requirements went into effect. Because the Secretary has failed to do that, and because the individuals intended to benefit from the outreach program will be harmed by that failure, the Secretary should be enjoined from implementing the new statutory provision until he has complied with all its requirements, in the order that Congress mandated.

IV. Plaintiffs Will Suffer Irreparable Harm If Injunctive Relief Is Denied

The named plaintiffs demonstrate the hardship Section 6036 and the interim rules create for Medicaid recipients and applicants. For example, the named plaintiffs will experience significant financial, administrative and emotional harm just going through the documentation process, regardless of whether they satisfy it in the end. See Robertson v. Granite City Cmty. Unit Sch. Dist., 684 F.Supp. 1002, 1007 (S.D. Ill. 1988) (finding irreparable harm to plaintiff's emotional well-being); Moore v. Miller, 579 F.Supp. 1188, 1191 (N.D. Ill. 1983) (noting that although financial harm is generally insufficient to find

documentary evidence of citizenship . . . and how the requirements may be met. . . . We are confident that your

irreparable harm, where the case involved individuals in the "grip of poverty," even a small welfare payment decrease can cause irreparable harm); Norton v. Richardson, 333 F.Supp. 1382, 1384 (E.D. Wisc. 1971) (recognizing that emotional and psychological harm would be irreparable harm).

The named plaintiffs and their relatives and guardians will also suffer financial harm when trying to locate the specified documents under Section 6036, and they will suffer emotional and psychological stress based on a fear of losing Medicaid benefits. Many of the named plaintiffs, relatives, and guardians have been frantically attempting to gather the necessary citizenship and identify documentation, to no avail. Likewise, trustees and nursing home administrators have spent time and resources searching recipient records in an attempt to locate certified copies of original birth certificates and photo identification cards for the named plaintiffs before the July 1, 2006 deadline. With each subsequent document search and failure, the emotional and psychological stress associated with the anticipated loss of Medicaid benefits increases the irreparable harm suffered.

The named plaintiffs may be in a better position than many, however, because at least they or their caretakers became aware of the new requirement before it went into effect. Because the Secretary has failed to create an outreach and education program, many class members will not find out about the new requirement until their state agencies tell them that the clock is ticking to produce documentation. Their stress will be amplified by surprise.

The purpose of the Medicaid program is to provide necessary health care benefits for individuals who live in poverty in the United States. Medicaid recipients range from children requiring basic health care to full-time nursing home care for the elderly and the

implementing procedures will assure compliance with this requirement" June 9 SMD Letter at 12-13).

mentally and physically incapacitated. The deprivation of these necessary health benefits is quite serious and will cause irreversible harm, possibly death. Weinberger, 522 F.2d at 926. Danger to a person's health and life from potential loss of Medicaid coverage can be considered irreparable harm. Kai v. Ross, 336 F.3d 650, 656 (8th Cir. 2003). If plaintiffs' benefits are terminated and therefore they forego seeking medical care, they will certainly suffer irreparable harm. Massachusetts Ass'n of Older Americans v. Sharp, 700 F.2d 749, 753 (1st Cir. 1983).

V. Plaintiffs Have No Adequate Remedy At Law

No legal remedy could make the Plaintiffs whole for the deprivations they will suffer from the implementation of the interim final rules. The loss of time and energy and emotional investment in responding to the threat of lasting and irreversible harm to their personal health cannot be remedied by law. Nor, of course, can the actual loss of personal health coverage and health itself. Damages would be inadequate and in any case are barred by sovereign immunity. None of these harms are remediable by a permanent injunction entered months or even years from now, after full litigation of the case and infliction of irreparable damage. Weinberger, 522 F.2d at 926 (court upheld preliminary injunction issued to stop implementation of new Medicaid and Medicare regulations).

VI. Balance Of Harms Weighs Heavily In Favor Of Plaintiffs

In contrast to the harms Plaintiffs will suffer in the absence of injunctive relief, entry of the injunction will cause Defendant little to no harm. The Office of Inspector General for the Department of Health and Human Services found no substantial evidence that non-U.S. citizens or nationals were obtaining Medicaid by falsely claiming citizenship, and CMS concurred. OIG Report at 27. In fact, because the new requirements imposed by the interim

regulations are so cumbersome and will apply to every single Medicaid applicant and recipient, stopping the implementation of these requirements will actually save the government in administrative costs.²²

VII. The Public Interest Will Be Served By Granting Injunctive Relief

The public interest will be served by granting the injunction. The interim regulations will affect a nationwide program with over 50 million recipients and millions of applicants. Weinberger, 522 F.2d at 926. If the injunction is not granted, millions of medically vulnerable people will be subjected to an onerous, unreasonable documentation process and may ultimately lose their only health care coverage. The economic burden on the health care sector, such as hospitals, clinics, and skilled care facilities, with thousands if not millions of their patients losing coverage, could be devastating.

The public interest is also served by vindicating the language enacted by Congress and enforcing the Due Process Clause of the U.S. Constitution. Buckhanon v. Percy, 533 F.Supp. 822 (E.D. Wis. 1982) ("Compliance with due process benefits not only those whose benefits were wrongfully terminated or reduced. All citizens benefit when the Constitution is upheld"); Weinberger, 522 F.2d at 926 ("[T]he public interest demands that any assertion of constitutional and legal rights . . . be adjudicated in an orderly, principled and judicious manner"). Unless an injunction is granted, millions of citizens of the United States will be sent through needless and costly administrative ordeals that will waste tax dollars, and many of them will lose their Medicaid benefits crucial to their health and the public health.

²² The Medicaid Director for Connecticut has observed that the requirements of Section 6036 "would be an enormous administrative burden," and the Medicaid Director for Wisconsin has said that Section 6036 "would have a material and significant effect on enrollment." Critics Say New Documentation Rules for Medicaid Would Reduce Enrollment, CQ HealthBeat, November 8, 2005.

VIII. CONCLUSION

This Court should grant Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and enter an order directing Defendant Leavitt to instruct states that the interim regulations are not to be implemented and that states will not have their federal financial participation put at risk for serving eligible Medicaid recipients during the time this case is pending prior to a ruling on the merits by this Court, regardless of the outcome of that ruling. If states could be retroactively deprived of federal funds after a ruling by this Court, they would immediately implement the documentation rules regardless of whether this Court had temporarily enjoined the Secretary from enforcing them, to protect against possible retroactive loss of matching funds.

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Respectfully submitted,

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