

**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,	)	
	)	
vs.	)	No. 06 C 3520
	)	
MICHAEL LEAVITT, Secretary of the	)	Judge Guzman
United States Department of Health and	)	
Human Services,	)	
	)	
Defendants.	)	

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

**I. INTRODUCTION**

**(a) Framework of plaintiffs' claims**

Plaintiffs bring this action on behalf of themselves and three somewhat overlapping plaintiff classes.<sup>1</sup> In his Memorandum of Law in Opposition to Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction ("Def. Mem."), the defendant Secretary of the United States Department of Health and Human Services ("Secretary") mischaracterizes plaintiffs' claims. The Secretary's positions on several key issues depend on these mischaracterizations. An accurate understanding of the three plaintiff classes and the different claims they raise is an important threshold task.

Class A is represented by all of the named plaintiffs who are current recipients of Medicaid, who were determined prior to the July 1, 2006, effective date of the new

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<sup>1</sup> Plaintiffs' motion seeking certification of the classes is being briefed separately but will be ready for ruling by August 31, 2006, three days after the filing of this brief.

citizenship documentation requirement ("Section 6036") to have proven all the facts necessary to meet the eligibility requirements for the program, including citizenship.<sup>2</sup> See Memorandum in Support of Plaintiffs' Amended Motion for a Temporary Restraining Order and Preliminary Injunction ("Pl. Mem.") at 19 and n. 11(Class A definition, including all pre-July 1, 2006, recipients).

The members of this class have established the facts necessary to prove their eligibility for Medicaid and received final administrative determinations as to those facts. Section 6036 did not change the eligibility requirements; it only changed procedures involved with documentation for the citizenship requirement. Plaintiffs claim that important rights arise from this situation. They claim that they are entitled to the protection of the finality of those administrative determinations of fact, and that the Secretary's implementation of Section 6036 can and should respect this finality. Plaintiffs also claim that this notion of "repose" with respect to finally determined facts is included in the fair procedures guaranteed by the Due Process Clause of the Fifth Amendment. The factual determination that they are citizens cannot be disturbed without some indication that there has been a change of circumstances (such as a renunciation of citizenship) or that the original determination was wrong or fraudulent. The adoption of a new procedure that reverses the factual determination of citizenship by fiat and without any such legitimate triggering factual indication does not comport with due process and, by itself, harms Class A by impairing the property right and forcing the members of the class into new and complex administrative proceedings. Pl. Mem. at 19-24 (arguments), 37-38 (harm).

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<sup>2</sup> These named plaintiffs are Ruby Bell, Robert Patterson, Eddie Mae Binion, Kevin Harris, George Crawford, A.L., Ruby Trammell, Della Otis, T.W., Jo.N., Ja.N., and Jerome Windley. See Amended Complaint, ¶18.

Class B is represented by all of the named plaintiffs, whether they are applicants or recipients. Amended Complaint ¶19. It includes all of the Class A members, to the extent that they do not prevail on the claims asserted only on behalf of Class A. The Class A claims amount to an assertion that the members of that class should not be subject to the new documentation rules at all; the Class B claims are concerned with the nature and adequacy of the documentation procedures assuming the Class B members are subject to them. If plaintiffs prevail on the Class A claims, then Class B will not include the Class A members and will only include individuals whose eligibility determinations will occur after July 1, 2006. See Pl. Mem. at 24-25, n. 13 (Class B definition).

Plaintiffs and the members of Class B assert that Section 6036 cannot be read as an eligibility requirement for Medicaid. It is instead a change in the administrative arrangements as between the federal and state governments. As such, applicants and recipients can be asked to provide documentation to the extent they have it, and they can be punished if they refuse or fail without good cause to cooperate in the effort to produce the best possible documentation. But that is different than making specialized documentation an eligibility rule in itself, instead of an administrative method to improve the reliability of determinations with respect to the real eligibility rule: citizenship. See Pl. Mem. at 24-26.

Plaintiffs and the members of Class B also assert that they have a property right protected by the Due Process Clause, and this right is unlawfully impaired by flawed procedures that limit the types of evidence that will be considered in the determination of their citizenship and impose unfair time limits for the production of that specialized and limited proof. The members of Class B who are Medicaid recipients have a property interest in continued receipt of health coverage under the program. The members who are applicants

have a property right in their claim of eligibility for health coverage benefits. Section 6036 is procedural in nature, and thus it and the implementing rules are subject to scrutiny as to whether they satisfy "the process due." The interim regulation does not meet this standard. See Pl. Mem. at 26-30. See also Pl. Mem. at 31-35 (the interim regulation also violates the rights of applicant members of Class B under the equal protection component of the Due Process Clause, by disadvantaging them as compared to Medicaid applicants who are noncitizens seeking to document their qualifying immigration status, in that such noncitizens are provided health coverage while the documentation is in progress and the Class B members are not under the interim regulation).

Class C is represented by the named plaintiffs who have been determined eligible for Medicaid in one of several derivative ways, that is, their Medicaid eligibility flows from their eligibility for benefits from other programs.<sup>3</sup> Members of Class C who are recipients of Medicaid determined eligible prior to July 1, 2006, are also members of Class A, and they assert the Class C claims in the alternative to the Class A claims. They and the other recipient and applicant members of Class C are also members of Class B. They assert the Class B claims in the alternative to their Class C claims. Thus the members of Class C are like the members of Class A in that they assert that they are not subject to the new documentation rules at all. If they win their Class A or Class C claims, they do not need to assert the Class B claims, and Class B need not include them. Pl. Mem. at 30, n.17 (Class C definition).

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<sup>3</sup> These named plaintiffs are Robert Patterson, A.L., and Dellas Otis. Amended Complaint ¶20.

Plaintiffs and the members of Class C assert that Section 6036, by its terms, does not apply to them. Section 6036 applies the new documentation requirement to people who declare their citizenship or nationality pursuant to 20 U.S.C. §1320b-7. The members of Class C do not apply separately for Medicaid, and thus they are not required to produce the declaration of citizenship or nationality governed by 42 U.S.C. §1320b-7, and thus the documentation requirements of Section 6036 are never triggered. They are made eligible for Medicaid as a feature of their eligibility for other programs, which have their own rules for establishing citizenship. See Pl. Mem. at 30-31.<sup>4</sup>

**(b) To be lawful, Section 6036 cannot be "self-executing"**

Early and often in the Secretary's memorandum, he asserts that Section 6036 is "self-executing," meaning that the Secretary had no duty to promulgate regulations implementing the statute at all. The Secretary says that the regulation he has promulgated is substantially more accommodating to plaintiffs and the classes than the statute itself, so that emergency relief against the regulation would actually hurt plaintiffs by leaving the less-accommodating statute in place. This framework fails to recognize the relief that plaintiffs seek, and it misunderstands the arguments that plaintiffs make.

Plaintiffs seek an injunction preventing the unlawful outcomes in their cases, regardless of the cause (regulation or statute). See Plaintiffs' Proposed Order. Plaintiffs do not seek a "preliminary declaratory judgment" that would identify the source of any threatened violations of rights; they simply seek an order avoiding the threatened unlawful violations. That is, they seek an order preventing the termination or denial of Medicaid

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<sup>4</sup> All three classes also assert that the interim regulation prematurely implements the new documentation requirement prior to implementing an outreach and education program, which Section 6036 sets as a condition precedent to implementing the documentation requirement. Pl. Mem. at 35-37.

without appropriate respect for final administrative determinations of citizenship already made, without fair and adequate procedures to determine the facts relevant to citizenship, and with respect to cases not even covered by the words of Section 6036. This is not a declaratory judgment that assigns the unlawfulness to either Section 6036 or the implementing regulations, although it surely is one or the other. It is an injunction to prevent harm regardless of the specific source.

Plaintiffs claim that the Secretary can adopt regulations implementing the statute that avoid violating either the Medicaid Act or the Constitution. If the regulations he adopts fall short of reconciling Section 6036 with the Medicaid Act as a whole and/or the Constitution, then the regulations violate the Act and/or the Constitution. Or, if the court finds that the Secretary, in promulgating a regulation that results in a violation of plaintiffs' constitutional rights, has read the statute as Congress intended, then plaintiffs claim that Section 6036 itself, thus construed, violates their constitutional rights. This is not a surprise. Plaintiffs have always asserted that if they are wrong about Section 6036 being capable of constitutional interpretation, then Section 6036 violates the Constitution. The Secretary has indeed adopted a regulation that is more accommodating than the specifics of Section 6036, but he has read out of that statute Congress's instruction to him to implement it with as many more details as necessary. The interim regulation has not gone far enough to reconcile Section 6036 either with the whole Medicaid scheme or the Constitution. The Secretary's defense on this point resembles that of a man accused of shooting six out of twelve people. It is not a defense to those shootings to assert that the man did not shoot the other six. He is not supposed to shoot any of them.

(c) **Plaintiffs seek classwide preliminary relief**

For reasons he never explains, the Secretary does not account for the fact that plaintiffs seek classwide preliminary relief. All of plaintiffs' papers relating to this motion for preliminary relief ask for classwide relief. E.g. Pl. Mem. at 41 (Conclusion, summarizing request for relief covering all states). Defendants attack the justiciability of the named plaintiffs' claims, but they do not do so in the context of class action principles. The named plaintiffs have justiciable claims individually, and the justiciability of these claims is strengthened by the asserted class representation.

II. **THE PLAINTIFFS HAVE JUSTICIABLE CLAIMS**

(a) **No named plaintiffs' claims are moot; no class claims are moot**

The Secretary asserts that the claims of the named plaintiffs Bell, Binion, Brown, Trammell, Patterson, and Otis, who are recipients of Supplemental Security Income (SSI) cash benefits for the aged, blind and disabled in the states that automatically award Medicaid coverage to SSI recipients ("1634 states", See Pl. Mem. at 6, n.4), or of health coverage under the Medicare program are moot, because the interim final regulation construes Section 6036 to exempt the recipients of those programs from the documentation requirement. Def. Mem. at 11. The Secretary also asserts that the claims of plaintiff Kevin Harris are moot, because even though he is an SSI recipient in a state (Illinois) that does not award automatic Medicaid eligibility to SSI recipients ("209(b) states", see Pl Opening Mem. at 6, n.3), the interim final regulation allows all such states to use a computer data match (the "SDX

match") to establish citizenship and identity. However, this is a state option, and the Secretary does not assert that Illinois or any other 209(b) state has actually taken this option.<sup>5</sup>

A defendant claiming that a case has become moot due to the defendant's own voluntary cessation of the challenged conduct "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc. 528 U.S. 167, 190 (2000). As to these self-correcting actions, the burden of proof is somewhat more lenient for government defendants than for private defendants, but the burden remains on a government defendant asserting mootness, and there must be proof of a persuasively "genuine" act of self-correction. Fed'n of Advertising Indus. Representatives, Inc. v. City of Chicago, 326 F.3d 924, 929 (7th Cir. 2003).

As to all of the allegedly moot plaintiffs here, the Secretary has not met his burden. This is so simply because the regulation that allegedly self-corrects the challenged conduct is an "interim" rule that by its own terms is not final. The Secretary has not asserted that he will not change the interim rule with regard to its self-correcting features. He could reverse himself on the issue of exempting Medicare recipients and SSI recipients in 1634 states, as well as on the issue of allowing 209(b) states to use a data match to meet the documentation rule for their SSI recipients.

If the "interim final" rule becomes "final" with respect to the option of 209(b) states to choose to use a data match to satisfy the documentation requirement for SSI recipients, then

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<sup>5</sup> In fact, on July 19, 2006, the responsible Illinois departments administering Medicaid issued a Policy Memorandum indicating that Illinois has adopted this option and will not subject SSI recipients to the documentation rules unless the data match raises a question as to their citizenship. See Policy Memorandum (July 19, 2006), available at <http://www.dhs.state.il.us/ts/cfsmm/OneNet.aspx?item=25388>.

it appears that plaintiff Harris's own claims may be mooted by the action of *Illinois* in adopting the option (See n. 5, supra). This does not, however, moot the claims of similarly situated class members in other 209(b) states that have not adopted this data match option. The burden of proof is on the party asserting mootness, and the Secretary has made no showing, or even an allegation, that all 209(b) states have adopted the option. This claim is not moot, because this is a class action and as such covers all the states, not just Illinois. As plaintiffs demonstrate in the separate briefing on the class action motion, named plaintiffs other than Harris can represent the class on all the claims, since common issues of fact and law predominate. In the 209(b) states that do not adopt the data match option, SSI claimants and recipients are no different than any other Medicaid claimants and recipients subject to the documentation rules.<sup>6</sup>

**(b) Plaintiffs have standing and their claims are ripe**

To demonstrate that they have standing, plaintiffs must allege that they face (1) injury in fact; (2) that is fairly traceable to the defendant's conduct; and that (3) a favorable court decision would redress or remedy that injury. Family & Children's Ctr., Inc. v. School City of Mishawaka, 13 F.3d 1052 (7th Cir. 1994); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). This injury alleged must be "actual or imminent." McConnell v. FEC, 540 U.S. 93, 225 (2003). See also Friends of the Earth 528 U.S. at 190. The standing inquiry is an

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<sup>6</sup> And even if only Harris could represent a class to the extent it includes SSI recipients in 209(b) states, the claims would survive. Since Harris had a "live" claim when this case was filed and he sought to represent the class, the class claims survive the mootness of his own claim. Sosna v. Iowa, 419 U.S. 393, 401 (1975)(certified class claims not mooted by named plaintiff's mootness, where claims are capable of repetition but would evade review if mootness caused dismissal); Gerstein v. Pugh, 420 U.S. 103, 110 n. 11 (1975) (class may be certified after mootness of named plaintiff, and certification relates back to filing of complaint and class motion for purposes of Sosna exception to mootness doctrine, where no one person's claim necessarily could remain live long enough for full court proceedings, the constant existence of a class is not in dispute, and the plaintiffs are represented by public interest attorneys whose job is to assert the interests of the class); United States Parole Com'n. v. Geraghty, 445 U.S.

"undemanding" one – plaintiffs must simply show that they have an actual stake in the outcome that is more than academic or intellectual curiosity. Family & Children's Ctr., 13 F.3d at 1058. See also Black v. McGuffage, 209 F. Supp. 2d 889, 894 (N.D. Ill. 2002). Even a minor or non-economic injury may suffice. Family & Children's Center, 13 F.3d at 1058. The allegations of each plaintiff class easily meet this standard.

First, the interim regulations force Class A members (Medicaid recipients determined eligible prior to Section 6036's effective date) to re-prove their eligibility for Medicaid benefits. Their eligibility determinations would be essentially undone, in the absence of any change in their circumstances, which is an injury in and of itself. See Simpson v. Schweiker, 691 F.2d 966, 969 (11th Cir. 1982). See also Declarations, Appendix to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction. Class C suffers the same harms caused by being forced through a procedure they should not be subjected to at all. See Declarations. In addition, for Class B (those who are subject to Section 6036), being forced to search for and obtain the specific documents designated by the interim regulations within the time there specified, will not only cause the plaintiffs stress and anxiety but also likely result in out of pocket costs that plaintiffs cannot afford. For example, passports cost \$90.00. Plaintiffs are, by definition, among the poorest members of our society, with the least disposable income. Incurring these costs would be a profound hardship – if not impossible. And, since the Secretary has turned Section 6036 into an eligibility requirement, all plaintiffs and class members are threatened with termination of Medicaid eligibility or having their health care coverage delayed or denied if they cannot comply with the specialized process

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388, 404 (1980) (mooted named plaintiff can appeal denial of class certification and, if successful, can on remand obtain class certification that relates back for Sosna purposes).

prescribed by the rules, a process that these plaintiffs also claim to be unfair on its face. All are threatened and suffer the harms associated with the threat. Some will actually lose health coverage. See Declarations of plaintiffs and other declarants, Appendix to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.<sup>7</sup>

The Secretary insists that since the plaintiffs cannot say with certainty exactly who among them will actually lose health coverage, because it is not clear yet exactly how each state will administer the interim regulations, plaintiffs' allegations of harm are too speculative to support standing. This completely ignores the clear and present harms to the Class A and Class C plaintiffs' current eligibility (and property interest) associated with subjecting them to the process in the first place. Like a homeowner who receives notice that his title to the property has been revoked for no reason, but that he can live in the house during an appeal process, the harm occurs and standing is acquired when the title is impaired, even though more harm may occur later. The Secretary's position also ignores the current harm to the members of all three classes caused by the threat of loss of health coverage, and the imminence of the harms (costs, time, stress) associated with a cumbersome and costly process. Plaintiffs do not have to go through the process -- bear these harms and show the scars to the Secretary -- before they can seek relief from the Court to cure the faults in the process.

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<sup>7</sup> The cases the Secretary cites in support of his position involve injuries significantly more speculative than those that will befall the plaintiffs, who are certain to be subjected to the procedures in the interim regulation. Def. Mem. at 13-15. E.g. Schmidling v. City of Chicago 1F.3d 494, 499 (7th Cir. 1993) (anticipation of potential prosecution under weed ordinance too speculative when no threat of prosecution or actual prosecution under ordinance); Warth v. Seldin, 422 U.S. 490, 509 (1975) (plaintiffs' claimed risk of increased taxes needed to support potential influx of low income residents too speculative to allow challenge to neighboring community's zoning ordinance excluding low and moderate income individuals).

The Secretary quibbles about the choice of words in plaintiffs' declarations, noting that plaintiffs say they "do not know how [they are] going to prove" citizenship, instead of categorically stating that they will not be able to do so. The Secretary says this makes the alleged injury "too speculative" to establish standing. Def. Mem. at 15, n.6. At best for the Secretary this might support a request for a hearing on the motion or for evidence depositions to flesh out exactly what the declarants meant with these words, but this would be wasteful. It is clear that these declarants do not have in their possession the means to document their citizenship and as far as they know they will not be able to obtain it. See also Amended Complaint ¶¶ 41-53 (named plaintiffs' individual allegations indicating inability to produce documentation as required by the regulation).

Moreover, Class B has alleged a violation of the constitutional guarantee of Equal Protection because they are being treated differently than non-citizen applicants for Medicaid. This differential treatment and the denial of the right to be considered for eligibility on the same terms as other similarly situated individuals is in itself injury in fact sufficient to confer standing. See Ne. Fla. Contractors v. Jacksonville, 508 U.S. 656, 665 (1993).<sup>8</sup>

In addition, the Secretary is incorrect when he argues that plaintiffs fail to meet the "redressability" standard. He claims that, even if the regulation were enjoined, Section 6036 would still be in effect, which would make it more likely that Plaintiffs would experience

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<sup>8</sup> The cases that the Secretary cites in support of his claim that plaintiffs have not alleged facts necessary to establish standing, Def. Mem. at 13-14, do not support his argument. For example, in Smith v. Wis. Dep't of Agr., 23 F.3d 1134, 1142 (7th Cir. 1994), the plaintiff challenged a regulatory regime governing inspection of dairy cows. The court held that the injury that the plaintiff alleged - the possible suspension of his permit to produce Grade A milk - did not constitute injury in fact. In contrast to this case, however, the Smith plaintiff did not allege that he would suffer injury if he were forced to go through a facially unfair or unlawful process. The same is true of the plaintiffs in Impress Communications v. Unumprovident Corp., 335 F.Supp.2d 1053 (C.D. Cal. 2003). In that case, the

delay or denial of benefits. Def. Mem. at 17. As discussed above in the Introduction (§I(b) supra), this framing of the issues is inaccurate. Plaintiffs are seeking relief from identified harms whether they flow from the interim regulation or from Section 6036. This injury would certainly be redressed by the relief requested. See Proposed Order for Preliminary Relief (requesting that the court enjoin the states from terminating, denying or delaying Medicaid coverage for failure to document citizenship and requiring the Secretary to inform the states that he will not attempt to recoup the federal share of the cost of any services provided as a result of the order). In the final resolution of this case, if the Court decides that the interim regulations are the only correct interpretation of Section 6036, plaintiffs claim that Section 6036 itself would then be unconstitutional. That need not be resolved on this motion, where plaintiffs are able to show that identified harms would violate their rights, and the Court has the power to prevent those harms with emergency relief. The final declaratory judgment can sort out the exact source of the violations -- interim regulations or statute.

The Secretary's closely related assertion that plaintiffs' claims are not ripe is based on the same misconceptions of the case as his claims regarding standing. Plaintiffs are faced with ongoing or imminent harms ripe for judicial resolution.<sup>9</sup>

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plaintiffs were not alleging that they would suffer injury before they could have the opportunity for a fair process, as plaintiffs do here.

<sup>9</sup> The Secretary's ripeness cases are inapposite. Def. Mem. at 19. In contrast with this case, none of the plaintiffs in these cases allege that the processes they challenge would cause injury before even getting to an administrative hearing. In Hinrichs v. Whitburn, 975 F.2d 1329 (7th Cir. 1992), the plaintiff refused to participate in a state training and job search program and therefore her cash assistance benefits were suspended. She claimed that she already had a job home schooling her children and should be given a religious exemption. She had never applied for a religious exception, however, and the court held that her complaint about participation in the program was premature because she had not been denied an exemption. The court specifically noted that she had not shown that it would cause her hardship to apply for such an exemption. The same is true of the plaintiffs in Manufactured Home Communities, Inc. v. City of San Jose, 420 F.2d 1022 (9th Cir. 2005). In Oriental Health Spa v. City of Fort Wayne, 864 F.2d 486 (7th Cir. 1988), the possibility that the plaintiffs would have their licenses suspended was much more remote than the likelihood that plaintiffs will have Medicaid eligibility denied or terminated, nevermind that plaintiffs here allege injury from the process itself. Finally, Peachlum v. City of York, 333 F.3d 429, 434 (3d Cir. 2003), actually supports plaintiffs. In that case, the court held that a challenge to a city ordinance governing

(c) **Exhaustion of administrative remedies is not required**

Courts need not require exhaustion if exhaustion would be inadequate or futile. McCarthy v. Madigan, 503 U.S. 140, 146-147 (1992); Bavido v. Apfel, 215 F.3d 743, 748 (7th Cir. 2000). Requiring administrative exhaustion here would be particularly inadequate and actually harmful. As discussed above, Plaintiffs allege that the very act of submitting to the documentation process prescribed by the rules would cause them injury. Thus, requiring them to wait until they actually have had their eligibility terminated or denied before they could raise their claims would defeat the purpose of this case. Administrative exhaustion may be excused when plaintiffs challenge a policy and make claims "regarding the validity of that policy [that] stand[ ] independent of the ultimate merits of each plaintiff's claim for benefits." Marcus v. Sullivan, 926 F.2d 604, 614 (7th Cir. 1991) rev'd in part on other grounds, 17 F.3d 1033 (1994). In Marcus, the Seventh Circuit held that exhaustion was not required because forcing plaintiffs to do so would cause irreparable harm, and a delayed receipt of benefits could not make the claimants whole. Id. at 614. The same is true in this case.<sup>10</sup> Also, requiring exhaustion is not appropriate when seeking system-wide change, as the Plaintiffs are here. Reynolds v. Giuliani, 118 F. Supp. 2d 352, 383 (S.D. N.Y. 2000) (holding that exhaustion of administrative remedies may be excused as futile in cases involving institutional reform); J.G. v. Bd. of Educ., 648 F. Supp. 1452, 1458 (W.D. N.Y. 1986) (stating that "[t]o require thousands of class members to go through individual administrative hearings, or to expect the hearing officer in one case to order a system-wide

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signs was ripe, stating that "[w]here a party suffers a concrete injury prior to final administrative disposition, such as fines or unreasonable appeal fees, the claim may be considered sufficiently ripe." Id. at 437.

<sup>10</sup> This case is therefore distinguishable from cases Defendant cites at his brief, at page 21, because the plaintiffs in those cases did not show that they would suffer irreparable harm if they were forced to exhaust administrative remedies.

change would be both impractical and futile"). Finally, requiring exhaustion is not appropriate when the administrative tribunal lacks the power to grant the relief sought. McCarthy, 503 U.S. at 146-48; Hodel v. Aguirre, 260 F. Supp. 2d 695, 698 (N.D. Ill. 2003). In this case, even if Plaintiffs were to attempt to produce the appropriate documents, fail, be denied eligibility and then request a Medicaid fair hearing, they could not obtain the relief they seek – declaring that the interim regulations or, in the alternative, Section 6036 violate the Medicaid Act and the Due Process Clause.

### **III. PLAINTIFFS HAVE A HIGH LIKELIHOOD OF PREVAILING ON THE MERITS**

#### **(a) The interim regulation is reviewable under the APA**

The Secretary argues that his regulation is not reviewable at all under the Administrative Procedure Act (APA) because it fits into the APA's exception that provides no review when "agency action is committed to agency discretion by law." 5 U.S.C. §701(a)(2). See Def. Mem. at 22-25. The Secretary rightly concedes that this is a "narrow exception" to the general presumption of reviewability that applies only in the "rare" instances where "statutes are drawn in such broad terms that in a given case there is no law to apply." Id. at 22 (citing authorities). He then argues for such an expansive reading of this "narrow exception" that it would swallow the rest of the APA if this Court were to apply it.

It should be noted first, however, that even if the Secretary were right with this argument, it would do him little or no good in resisting the motion for emergency relief. It might successfully insulate his regulation from review, but in so doing it would expose the statute itself to review on constitutional grounds. See Scalise v. Thornburgh, 891 F.2d 640, 649 (7th Cir. 1989) (separately addressing constitutional claim after holding APA review

precluded). As plaintiffs explained above, they believe that the Secretary can interpret Section 6036 consistently with the whole Medicaid Act and the Constitution, but if he cannot do so then Section 6036 itself is unconstitutional. The Secretary cannot avoid the emergency motion even if he were to win this argument.

The argument is far-fetched. The Secretary is saying that this Court has no role whatsoever in reviewing whether he has construed Section 6036 consistently with the rest of the Medicaid Act and the Constitution. The §701(a)(2) exception to APA review only applies when Congress has provided "no law to apply." The Secretary's ruse here is to analyze the issues only within the four corners of Section 6036. Def. Mem. at 22-23 (relying on the provision's use of the permissive word "may" when referring to the Secretary's role in fleshing out the documentation requirement). But the larger statutory context of the Medicaid Act provides ample "law to apply" for a court to evaluate the Secretary's regulation, including a detailed scheme of an entitlement program that contains, among other relevant provisions, an express eligibility rule that no citizen may be denied benefits. 42 U.S.C. §1396a(b)(3). The Secretary may have different ideas about how to read this scheme, but that is the whole point of APA review -- the Court is there to resolve disputes about what Congress meant when it enacted the "law to apply." The Medicaid program and implementing regulations have repeatedly been at issue in court proceedings without there being an instance of a court finding no "law to apply."<sup>11</sup>

Even within the four corners of Section 6036, the Secretary is wrong about how to construe the provision's use of the word "may" in referring to the Secretary's regulatory role.

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<sup>11</sup> The cases in which courts have found that there is no review under 701(a)(2) involve agency discretion in exerting or not exerting enforcement authority under a broad permissive scheme with no statutory criteria, e.g., Heckler v.

He cites cases that note the legislative use of such ordinarily permissive language to be one among many factors in decisions not to allow review, Def. Mem. at 24, but no case accords this language decisive weight standing alone, and all cases hold that the inquiry is not a technical one about verbs, but a practical one about determining the intent of Congress and whether Congress has given the courts "law to apply." United States v. Rodgers, 461 U.S. 677, 706 (1983) ("may" is normally permissive, but can connote a mandate based on "indications of legislative intent ... or by obvious inferences from the structure and purpose of the statute"). See Massachusetts v. Andrus, 594 F.2d 872, 890-91 (1st Cir. 1979) (in spite of statutory language that "Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper" to reconcile the fishing industry with the oil and gas industry, the court considered the statutory context, the purposes of the law to foster the public good, and the need to reconcile the law in question with provisions of related laws to find that the Secretary had no discretion not to promulgate rules).

The wording of Section 6036 is much the same as the wording of the statute in Andrus. Section 6036 specifies certain documents that Congress cited as examples of the documentation it had in mind, and then left it to the Secretary to identify any further documents to include after due study and public comment. There are three clearly parallel subsections to Section 6036 that address the Secretary's role in implementing the provision, and only one of them uses the word "may". Under the provision, both citizenship and personal identity may be documented by certain listed documents, plus "any other document the Secretary identifies by regulation that provides both proof of citizenship or nationality

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Chaney, 470 U.S. 821, 831 (1985) (holding there is a rebuttable presumption that such enforcement-type decisions are unreviewable), or, for obvious reasons, national security, e.g., Webster v. Doe, 486 U.S. 592 (1988).

and proof of personal identity." 42 U.S.C. § 1396b(x)(3)(B) (2006). Citizenship (but not personal identity) may be documented by certain listed documents, 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) (emphasis added). And personal identity may be documented by certain listed documents, plus "any other reliable documentation of personal identity that the Secretary specifies by rule." 42 U.S.C. § 1396b(x)(3)(D) (2006). Taken together, the sense of this scheme plus the use of "may" in only one out of three references does not connote discretion for the Secretary to regulate or not to regulate at his full discretion, but that Congress, while not knowing or attempting to itemize exactly what the Secretary might ("may") specify, nevertheless was expecting him to specify whatever would be needed to properly effectuate congressional intent. As in Andrus, the larger statute here, the Medicaid Act, is for the public good. The Secretary must produce regulations to effectuate the public good and reconcile Section 6036 with the larger scheme. His discretion in carrying out this intent of Congress is subject to APA review.

(b) **The regulation is arbitrary, capricious, and contrary to law under the APA**

The Secretary and plaintiffs agree that the interim regulation is entitled to deference and will be upheld unless it is "arbitrary, capricious, or manifestly contrary to the statute." Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984). See Def. Mem. at 26-27; Pl. Mem. at 18. In addition, a regulation will not receive deference and will be struck down under the APA if it violates the Constitution. 5 U.S.C. §706(2)(B).<sup>12</sup> The

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<sup>12</sup> Plaintiffs, of course, also assert their constitutional claims regarding the regulation and Section 6036 independently of the APA and directly under the Constitution, with general federal question jurisdiction. 28 U.S.C. §1331. Amended Complaint, ¶¶3-4.

Chevron standard is not a toothless one. It calls upon a Court to 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. Chevron, 467 U.S. at 843.

As to each of the three plaintiff classes, plaintiffs have made a set of statutory and constitutional arguments showing why the Secretary's regulation runs afoul of congressional statements on this precise question, and is otherwise not a permissible interpretation of Section 6036 due to disharmony with Section 6036's own words, the larger Medicaid scheme and the Constitution. See Pl. Mem. at 19-24 (Class A); 24-30, 31-35 (Class B); 30-31 (Class C); 35-37 (all three classes).

At the heart of the Secretary's entire position are two related fundamental mistakes, one statutory and one constitutional. His statutory mistake is that he construes Section 6036 as a new eligibility requirement for Medicaid rather than as a change to the administrative arrangements for the program as between the federal and state governments. The Secretary's related constitutional mistake is that he construes Section 6036 as a substantive eligibility change rather than as a change in the procedures for establishing eligibility. These are two sides of the same coin, for it is the substantive eligibility rules for Medicaid that also comprise the elements of the due process-protected property rights with respect to Medicaid.<sup>13</sup>

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<sup>13</sup> These issues are not necessarily always only a matter of determining congressional intent. It is possible for the legislature to intend to create a substantive eligibility rule, but for the courts to decide that in fact the rule is procedural. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (courts are the arbiter of the difference between substance and procedure). As explained in the text, here Congress did not intend to change the substantive eligibility rules for Medicaid, and, in any event, the documentation provision is procedural.

Congress has spoken directly to the issue. Persons who declare that they are citizens are eligible for Medicaid. 42 U.S.C. §1320b-7(b)(2) and (d)(1)(A). To make this perfectly clear, Congress has told the states that they may not have requirements for the program that result in the denial of Medicaid health coverage to otherwise eligible United States citizens. 42 U.S.C. §1396a(b)(3). This is a categorical statement of congressional intent. Congress did not intend to deny benefits to any United States citizen as a matter of up-front definition of eligibility. Section 6036 does not amend any of these statements. If Congress were changing substantive eligibility rules with Section 6036, it would have amended the substantive provisions creating the eligibility rules. It did not.

The Secretary's response as to these key substantive statutory provisions is revealingly short (one and a half pages), weak and beside the point. Def. Mem. at 32-33. As to 42 U.S.C. §1320b-7, the Secretary does not, because he cannot, claim that Congress amended the provision itself. Instead he says, without citation, that this provision only established the "minimum" requirement for citizenship verification. The Secretary asserts that nothing in the Act requires that everyone who meets the citizenship requirement be found eligible. Def. Mem. at 32. He cites no authority for that remarkable claim, and no wonder, since it is directly contrary to the statute's provisions quoted above that expressly make self-declared citizens eligible and forbid states to adopt rules that exclude citizens. All the Secretary can muster is to cite the fact that four states utilized citizenship documentation rules prior to the enactment of Section 6036. Def. Mem. at 33. That is hardly the stuff of congressional intent. Moreover, those state provisions were procedural ones involving administrative methods for papering the files with respect to citizenship. The Secretary offers no proof that states treated these rules as eligibility rules or ever denied eligibility to

people claiming to be citizens on the basis that the proof they submitted was not on a select list of allowable documents. Most importantly, the Secretary offers no information about whether any of these state schemes was found valid in court. If the states in question never denied benefits to people under these documentation regimes, so that nobody ever challenged them in court, they cannot amount to much authority for the Secretary here on the question of what Congress intended the substantive eligibility requirements for Medicaid to be. Even less can they constitute authority that Congress intended something inconsistent with what it expressly enacted in 42 U.S.C. §§1320b-7 and 1396a(b)(3).

The Secretary also says that nothing in 42 U.S.C. §1320b-7 "prohibit[s] additional state or federal requirements." Def. Mem. at 32. It is close to frivolous for the Secretary to argue that Congress sub silentio authorized states to promulgate their own substantive eligibility rules for Medicaid with respect to United States citizenship, especially when it expressly forbade this in 42 U.S.C. §1396a(b)(3). Whatever Congress may have authorized the states to do, and plaintiffs do not concede even this, it involved the procedural matter of verifying the eligibility factor or papering the file. It is revealing that the Secretary lumps himself with the states when he refers to these "additional state or federal requirements." In effect, he admits that whatever authority he had or has in this regard involves procedural matters and not substantive eligibility rules.

As to 42 U.S.C. §1396a(b)(3), the Secretary's arguments are equally brief and weak. He notes that the provision says he "shall not approve any [state] plan which imposes, as a condition of eligibility for medical assistance under the plan ... any *citizenship* requirement which excludes any citizen of the United States." Def. Mem. at 32 (Secretary's emphasis). The Secretary argues that "citizenship requirement" in this provision means something

different than documentation, but instead something more categorical like, for example, a provision barring a citizen of another state. But documentation requirements with regard to citizenship that, for example, deny eligibility to a citizen because he cannot produce an original birth certificate (even though he can produce a copy and other corroborating evidence) cannot be considered anything other than a species of "citizenship requirements". Moreover, the Secretary's construction ignores the plain words of the provision that refer to national citizenship (not state citizenship). And it ignores the previous subsection of the same section, which provides that the Secretary cannot approve any state plan provision that establishes "any residence requirement which excludes any individual who resides in the State, regardless of whether or not the residence is maintained permanently or at a fixed address." 42 U.S.C. §1396a(b)(2). Clearly, that provision is how Congress dealt with the situation of the eligibility of persons from other states moving into the host state.

The Secretary's final argument about §1396a(b)(3) on this provision is to assert that it does not "grant an affirmative right to every American citizen to receive assistance under Medicaid. And it says nothing about documentation requirements." Def. Mem. at 32. Plaintiffs disagree with the first assertion. In conjunction with 42 C.F.R. §1320b-7, this provision surely does grant every otherwise eligible citizen the right to receive Medicaid. Plaintiffs agree with the second assertion: neither 42 U.S.C. §1396a(b)(3) nor 1320b-7 says anything about documentation. Those provisions deal with substantive eligibility. Documentation is something else.

Elsewhere in his brief, the Secretary makes the general assertion that "Congress has authorized the Secretary to require that states apply the new documentation requirements as a matter of eligibility to promote efficient administration of the Medicaid program under state

plans." Def. Mem. at 27-28 (emphasis added). He does not say how implementing documentation requirements as a matter of eligibility, as opposed to as a matter of administration, promotes efficient administration (assuming that at least one prominent goal of administration is to deliver benefits to those Congress made eligible) or even promotes better documentation. He cites nothing from Section 6036 or its history in support of this. He cites nothing at all in direct support. His string cite of tangential authorities only hurts his point. The lead citation is to 42 U.S.C. §1396a(a)(4), which calls upon states to provide for "methods of administration that the Secretary finds will promote proper and efficient operation of the plan." Def. Mem. at 28. On its face, this provision deals with administrative matters at the state level, not eligibility criteria.<sup>14</sup>

Congress has clearly spoken that a declaration of citizenship is the eligibility rule for Medicaid, and documentation is an important procedural matter but not a substantive eligibility rule. This resolution of this core issue makes the arguments as to each class clear.

**(1) Class A**

Plaintiffs argued, Pl. Mem. at 19-21, that the Secretary has the authority to implement Section 6036 in a way that respects that fact that the Class A plaintiffs and class members all received final administrative determinations of eligibility for Medicaid, including the factual determination that they are citizens, prior to the effective date of Section 6036. Section

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<sup>14</sup> Harris v. MacRae, 448 U.S. 297, 309 (1980), quoted by the Secretary in this string cite, dealt with Congress withdrawing federal funding from a "service" (abortion) under Medicaid, a bright line issue easily dealt with through the FFP parts of the Medicaid Act. That is different than the specification of the substantive criteria for people to be eligible for the program, and the use of FFP as leverage for states to adopt certain procedures in the administration of those criteria. MacRae is not precedent for the principle that whatever Congress deals with through the FFP system is automatically a substantive eligibility rule. The Secretary's quote from Pereira by Pereira v. Kozlowski, 996 F.2d 723, 726 (4th Cir. 1993), undermines his point or is at best beside the point. When the court held that it was "manifestly reasonable for Congress to promote the integrity of state coverage by effectively requiring standardized procedures through its control of the fisc," the reference plainly was to procedures and not eligibility rules, which supports plaintiffs here. Plaintiffs do not claim Congress had no authority to regulate state procedures

6036(b) provides that the new documentation requirements shall be applied in all eligibility redeterminations during the first year after the effective date of the provision "in the case of individuals for whom the [new documentation requirement] was not previously met." Plaintiffs' argument is that, with the other grants of substantial authority to the Secretary under Section 6036(a) to fashion exactly what the "new requirement" is to be, the Secretary had available several different interpretations that would not undo the finality of the Class A plaintiffs' final administrative determinations, but would still greatly improve the documentation in their files and aggressively identify cases where citizenship is actually in question as a matter of fact.

The Secretary has two responses. First, he says that if he had the authority as plaintiffs alleged, he did not have the duty. Def. Mem. at 31. This is true, if the analysis is kept to the four corners of Section 6036, but the Secretary does have a duty to reconcile Section 6036 to the larger Medicaid scheme and the Constitution. As shown below, the interim regulation produces an unconstitutional result with respect to Class A. The Secretary also argues, however, that Section 6036 does not give him the authority to respect the administrative finality of Class A's determinations of eligibility. He says that he is bound by the words of Section 6036(b) to apply the "new requirement" to all recipients at their annual redetermination. This ignores the fact that the Secretary has the authority under Section 6036(a) to define exactly what the "new requirement" is. The argument does not refute the fact that the Secretary has the power to avoid the unconstitutional result. He and this Court have the duty to construe the statute to avoid that result. United States v. Rumely, 345 U.S.

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involving citizenship documentation through control of the fisc. They claim that, in so doing, Congress was not changing the eligibility rule -- a declaration of citizenship -- but changing procedures related to it.

41, 45 (1953) ("[I]t is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality"); Veiga v. McGee, 26 F.3d 1206, 1212 (1st Cir. 1994); United States v. Thompson, 452 F.2d 1333, 1337 (D.C. Cir. 1971).

The Secretary puts all of his constitutional eggs with respect to Class A in the basket that denies that plaintiffs have a property right, on the basis that in Section 6036 Congress changed the eligibility requirements for Medicaid, which therefore deprived plaintiffs of any property right to continuation of their Medicaid eligibility under prior rules. Def. Mem. at 34-38.<sup>15</sup> Plaintiffs have refuted this above. Section 6036 did not change substantive eligibility (citizenship) nor the elements of the property right. It only changed the procedures related to citizenship determinations.<sup>16</sup> The Secretary does not reach and makes no argument at all regarding the second prong of due process analysis involving what process is due to the members of Class A before their property right can be infringed. In particular, he is silent with respect to the claim of Class A that an important element of the "process due" is the

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<sup>15</sup> The Secretary relies heavily on Atkins v. Parker, 472 U.S. 115 (1985), where plaintiffs challenging a changed program rule in a social welfare program were held not to have a property right in their prior status. Def. Mem. at 25, 35. As Atkins itself teaches, however, the determinative issue is whether the program rule in question was a substantive eligibility rule or a procedural matter, and the analysis of this issue rests with the Court. It starts with assessing legislative intent behind the change, as plaintiffs have done above in establishing that Section 6036 is procedural. In Atkins the Court determined that the change (a program-wide alteration of benefit levels) was substantive, and plaintiffs therefore had no property right in a continuation of their prior benefit level. In Logan v. Zimmerman Brush, 455 U.S. 422 (1982), the statutory provision was a requirement that if a state civil rights agency did not process a claim within a given time, the claim died and, as a result, the plaintiff also lost the right to proceed in court. The Logan Court unanimously reversed the Illinois Supreme Court's interpretation of the Illinois legislative intent and held that this provision was not a substantive element of the statutorily created civil rights claim, but a procedure, so plaintiff had a property right in the continuation of the claim, and the provision was subject to analysis under the second prong of due process analysis regarding the "process due". See Youakim v. McDonald, 71 F.3d 1274 (7th Cir. 1995), cert. denied, 518 U.S. 1028 (1996) (challenge to procedural aspect of program change falls on the Logan side and not the Atkins side of the property right analysis).

<sup>16</sup> As noted above, plaintiffs believe that this was the congressional intent, and it is the duty of the Secretary to interpret the statute to avoid a constitutional problem. However, even if the Court finds that Congress intended that Section 6036 change substantive eligibility rules, the Court should find that, notwithstanding congressional intent, the change was procedural in nature, that plaintiffs' had a property interest in continued eligibility as previously determined, and that subjecting them to the new procedures violates the Due Process clause by overthrowing their final administrative determinations.

notion of "repose" with respect to finally determined facts. Pl. Mem. at 21-24. This is the crux of Class A's claim that the interim regulation violates due process when it subjects them to the new documentation procedures at all. The Class A plaintiffs (pre-existing recipients of Medicaid) have a property right to continuing benefits that was not altered substantively by Section 6036, and their claim that subjecting them to the new documentation procedures violates due process by disturbing the final administrative decisions without any new evidence is uncondtraded.

(2) **Class B**

Plaintiffs' statutory claim with respect to Class B (everyone who is subject to the new procedures) is that the interim regulation unlawfully creates new eligibility rules that will result in United States citizens being terminated from or denied Medicaid or having their health coverage delayed. Plaintiffs have shown above that Congress did not intend a change in the eligibility rules for Medicaid, and thus the interim regulation violates the statute notwithstanding Chevron-level deference.

The due process claim of Class B is that all members of the class have a property right either to continued benefits (recipients) or to a fair adjudication of their claim for benefits (applicants). Pl. Mem. at 26-27. The interim regulation deprives the Class B plaintiffs of the "process due" by setting up a system that denies them a fair chance to prove they meet the documentation requirement. They are not allowed to submit any and all relevant evidence; they therefore will not receive a determination based on all relevant evidence; the documents that are allowed are arranged and evaluated in a complex hierarchy and limited only to originals or certified copies, and the time for submission of the documents is unrealistic. Taken as a whole, this is a flawed and unfair system that will result

in some class members being turned away in spite of their best good faith efforts and no real question about their citizenship. It is flawed and unfair on its face, and it is not saved by post-hoc notice and hearing rights that provide information and produce decisions governed by the flawed standards.

The Secretary again puts most of his emphasis on the "property right" prong of due process analysis, asserting that Congress changed the substantive rules to require documentation, so that plaintiffs have no property right to anything other than a determination on the merits of whether they meet the new standards of documentation. Def. Mem. at 36. Plaintiffs have shown above that the substantive eligibility requirement remains citizenship. Plaintiffs have a right to a fair determination of whether they are citizens (not whether they can produce certain "magic" documents within an unrealistic time frame).

As with Class A, the Secretary then has very little to say about the "process due" to Class B. He has nothing specific to argue about plaintiffs' complaints that the process does not allow all documents and testimony on the issue of citizenship, does not allow copies or notarized copies, and thus does not produce a factual determination of citizenship based on all relevant evidence. He does not say this is fair. He just does not address it. Plaintiffs' position is unrebutted.

The Secretary does defend the hierarchical nature of the lists of documents, claiming that he has preferred the documents that Congress listed in Section 6036. Def. Mem. at 30. However, he only offers this in his statutory section, claiming that it is within his authority to implement the provision. He does not try to defend it in the Due Process section in terms of whether, taken with all the other procedures, it contributes to making the process unfair. He

does not deny that the hierarchical approach could contribute to preventing eligible people from establishing their eligibility through a preponderance of all relevant evidence.

The Secretary also defends the time limits for producing documents provided in the interim regulation, claiming that his allowance of a "reasonable opportunity" period and a "good faith effort" exception and a directive for states to help people having trouble producing documents amount to adequate time requirements. Def. Mem. at 37. He claims that, at worst, it is too soon to judge whether these provisions will be fair. *Id.* The Secretary is much closer to the mark here, and the exceptions are useful provisions that might save the constitutionality of the scheme if the time provisions were the only issue. But plaintiffs do not attack the timing provisions in isolation. The time deadlines, especially for applicants, are well-defined and specific while the exceptions to the time deadlines are not well-defined or mandatory, and they are implemented in the context of the Secretary's very explicit threats to states' federal matching funds. States will err on the safe side of the funds question, which is to be demanding on documentation, not lenient. Moreover, plaintiffs' problem with the time provisions is how they will operate in the larger context of all of the documentation rules. These are very demanding, specific and complex rules, and the time dimension (including the pressures being put onto states) is layered onto the package to form the whole context for the "process due" analysis.

The Secretary's only real defense on the "process due" to Class B is to fall back on the standard Medicaid notice and hearing procedures, claiming that they satisfy any due process requirement. Def. Mem. at 36-37. This misses the point that what plaintiffs are attacking is not the individual case-specific determinations, but the flawed process that the Secretary has set up in the interim regulation for making those determinations. That process is attacked

here on its face. Plaintiffs are entitled to a process that allows the submission of all relevant evidence that can be produced within a reasonable time frame and allows a decision as to citizenship to be based on the preponderance of that evidence. When that is in place, then the ordinary notice and hearing procedures will supply the case by case process that is due, but not before.

The Class B plaintiffs' equal protection claim is straightforward: 42 U.S.C. §1320b-7(d)(4)(A)(ii) dictates that Medicaid applicants who claim to be qualifying aliens must receive Medicaid coverage during their reasonable opportunity period to produce supporting documentation. The Secretary's interim rule, rather than putting citizens (Class B) on the same footing with noncitizens, forbids provision of Medicaid coverage to them until after they have produced the documentation. The Secretary responds that it is Section 6036, and not the interim rule, that mandates the distinction, and that there is a rational basis supporting the disparate treatment. Def. Mem. at 38-44.<sup>17</sup>

The Secretary argues that he cannot implement Section 6036 in a way that eliminates the disparate treatment, and therefore plaintiffs are really attacking Section 6036, not the interim rule. As noted numerous times already, this is a misunderstanding of plaintiffs' request for relief in the emergency motion, and it does the Secretary no good. If the regulation cannot be construed in a constitutional way, then plaintiffs claim that the statute is unconstitutional. Either way, the emergency relief motion seeks to prevent the threatened harm, regardless of whether the rule or the statute causes the harm.

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<sup>17</sup> The Secretary first claims there is no disparate treatment of citizens. But he describes the disparate treatment himself: "new applicants will not have their claims 'denied' during the reasonable opportunity period; they will simply not receive benefits until documentation is provided." Def. Mem. at 39. Under §1320b-7(d)(4) new applicants who declare themselves to be in 'satisfactory immigration status' do receive Medicaid before

The Secretary does, however, have ample authority to implement Section 6036 in a way that puts citizens applying for Medicaid on a par with noncitizens. It is a procedural statute governing relations with the states. On its face it grants the Secretary broad implementation powers. It would be entirely within his authority to provide FFP to states that provide Medicaid to otherwise eligible self-declared citizens who are pursuing documentation in good faith, especially where there is no indication that there is any doubt about the applicants' citizenship.

The Secretary's defense of Section 6036 is that there is no evidence of "unmistakable punitive intent" on the part of Congress against the plaintiffs; and the statute passes a rational basis test. Def. Mem. at 40, 42-43. The first argument does not apply here. The Secretary's position on the rational basis argument is unpersuasive.

A plaintiff alleging that a differentiation among classes of people made by statute or regulation does not have a rational basis is not required to first identify an "invidious intent" on the part of the government. A showing of invidious intent earns a plaintiff "a more searching form of rational basis," Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring), but it is the absence of the invidious intent that triggers a standard rational basis review. "Unless a statute employs a classification that is inherently invidious . . . , this Court properly exercises only a limited review . . . At the minimum level, this Court consistently has required that legislation [be]...rationally related to legitimate governmental objectives." Schweiker v. Wilson, 450 U.S. 221, 230 (1981) (internal citations and quotation omitted).

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documentation is verified. The difference is quite plain to see, and it can be very important to someone needing health care.

While limited, the rational basis review is not "toothless." Mathews v. Lucas, 427 U.S. 495, 510 (1976). "Even the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation." Heller v. Doe by Doe, 509 U.S. 312, 321 (1993). It is not enough that a stated or assumed goal behind a statute or regulation is legitimate, but rather the challenged distinction that it makes must somehow be related to the goal. United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 535-536 (1973). The Secretary attempts to defend the distinction within §1320b-7 that (he says) Section 6036 creates on the following grounds: Congress was attempting to advance the legitimate goal of reducing fraud; and Section 6036 is a proper way to eliminate the previous advantage citizen Medicaid applicants had over aliens. Def. Mem. at 42-43.

Addressing fraud in a program such as Medicaid is a legitimate goal, but it is not by itself sufficient to uphold the differentiation between groups of applicants. "In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification." Nordlinger v. Hahn, 505 U.S. 1, 11 (1992) (emphasis added). The Secretary's statements that "Congress enacted section 6036 with the intent to reduce fraud" and that it "was perfectly rational for Congress to act on an incremental basis," Def. Mem. at 42, do not lend any rational justification for the differentiation between citizens and aliens. Neither Congress nor the Secretary is free to differentiate among similarly situated groups if no rational explanation is advanced for the differentiation. The Secretary is misleading when he says, "[W]hile Congress might have felt it wise in 2000 to award benefits to aliens in lawful immigration status while verification of such status was pending with the former INS, Congress was free to decide that such resources were not available to those declaring citizenship in 2006." Id. at 43. In fact, if Section 6036 must be construed the way the

Secretary wants it, then Congress was taking away coverage for declared citizens applying for Medicaid in 2006, not refraining from providing it.<sup>18</sup> The Secretary proposes no reason why taking coverage from citizens while leaving it in place for aliens helps combat fraud.

The Secretary's lone justification addressed specifically to the distinction he says Section 6036 creates is that it is "a rational attempt to correct a preexisting distinction that favored citizens over aliens" notwithstanding the "discriminatory byproduct." Id. Thus, the rationale for the current distinction favoring aliens over citizens is that it dissolves a former distinction that favored citizens over aliens. This begs the question of why the resulting distinction is not worthy of similar corrective action, or why the remedy was not somehow to treat the two groups the same (as under the law prior to Section 6036). Additionally, it is somewhat remarkable that the Secretary surmises that a potential congressional design was to eliminate an "imbalance" in the law that favored citizens, when the law is replete with examples of favoritism toward citizens over aliens. See Mathews v. Diaz, 426 U.S. 67, 79, n.12 (1976).<sup>19</sup>

### (3) Class C

Class C argues that, due to their derivative eligibility for Medicaid, they do not make a declaration of citizenship under §1320b-7, and therefore they are not covered by Section 6036, which applies the documentation requirements only to those who make such

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<sup>18</sup> This is yet another instance of the impact of the Secretary's mistaken reading of Section 6036 as changing substantive eligibility requirements. If Section 6036 is properly construed as a procedural change, then this removal of benefits does not happen. The Secretary's central mistake of construing Section 6036 as an eligibility rule produces the equal protection violation, which is why the plaintiffs' first line of attack is against the interim rule.

<sup>19</sup> The Secretary quotes Milner v. Apfel, 148 F.3d 812, 814 (7<sup>th</sup> Cir. 1998) ("Legislatures are permitted to correct a problem incrementally even though by doing so they create arbitrary distinctions until correction is complete."). Def. Mem. at 43. In Milner, the court analyzed a provision of the Social Security Act which halted payment of disability benefits to criminally committed residents of public mental institutions but which did not similarly halt benefits to civilly committed residents. The court found a number of rational bases for the distinction, including the obvious one that it is rational to treat criminals differently than the law-abiding. The court thus found the deliberate

declarations of citizenship to establish eligibility for Medicaid. Plaintiffs acknowledge that SSI recipients automatically eligible for Medicaid in 1634 states may no longer need relief, if their exemption from documentation under the interim rule becomes final in the final rule. Pl. Mem. at 31, n. 19.<sup>20</sup> There are a number of different types of derivative eligibility for Medicaid where the recipients never sign the declaration of citizenship under 1320b-7. The interim rule does not acknowledge that these recipients are exempt from Section 6036, and as to one specific group, foster children who receive cash benefits under Title IV-E of the Social Security Act, the preamble to the interim rule specifies unlawfully that states must comply with the documentation rules. 71 Fed. Reg. at 39216.

The Secretary counters that 42 U.S.C. § 1320b-7(d)(1)(A) requires all individuals seeking to establish or maintain eligibility for Medicaid to declare in writing under penalty of perjury whether they are United States citizens. Thus, even those who do not sign the declaration in order to establish eligibility, because they have derivative eligibility, nevertheless must sign a declaration in order to maintain eligibility, and therefore Section 6036 applies to them. Def. Mem. at 30, n.11. The Secretary misreads the statutory scheme, especially Section 6036 itself.

Children receiving foster care payments under Section IV-E of the Social Security Act are deemed eligible for Medicaid. 42 U.S.C. § 672 (h) provides in relevant part that "(1) For purposes of subchapter XIX of this chapter [Medicaid], any child with respect to whom foster care maintenance payments are made under this section is ... deemed to be a recipient

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distinction constitutional because it was by itself rational, and not because it was the temporary byproduct of a separate permissible government action. Milner therefore provides no support for the defendant's argument.

<sup>20</sup> Note, however, that SSI recipients in 1634 states were not exempted from the rule due to their derivative eligibility for Medicaid, but because of the Secretary's interpretation of Section 6036's provisions (the "scrivener's error"). Id.

of aid to families with dependent children under part A of this subchapter (as so in effect)." And, 42 U.S.C. § 1396a(10) provides that "(a) A State plan for medical assistance must ... (10) provide (A) for making medical assistance available ... to (i) all individuals (I) who are receiving aid or assistance under any plan of the State approved under ... part A or part E of subchapter IV of this chapter ...." 42 U.S.C. § 1396a(10) also provides that beneficiaries of adoption assistance, by virtue of receiving aid or assistance under part E of subchapter IV, are also deemed eligible for Medicaid.

Because the Social Security Act deems beneficiaries of foster care and adoption assistance eligible for Medicaid, it does not require that these beneficiaries independently satisfy Medicaid eligibility rules. And, among the rules that need not be satisfied are 42 U.S.C. § 1320b-7(d)(1)(A) and 42 U.S.C. § 1396b(x) (Section 6036 codified), which applies to 1320b-7(d)(1)(A) by operation of 42 U.S.C. § 1396b(i)(22).

Section 6036(a) creates the new documentation requirement in a new subsection of the Medicaid Act, which provides that FFP will be denied to states with respect to "an individual who declares under section [1320b-7(d)(1)(A)] to be a citizen or national of the United States for purposes of establishing eligibility for benefits under this title", unless the new documentation requirements are met. 42 U.S.C. §1396b(i)(22) (emphasis added). Persons whose Medicaid eligibility is derived from their eligibility for benefits from other programs, such as foster care assistance under Title IV-E, "establish" their eligibility in that manner. They do not "establish" it via the normal Medicaid route, and they do not need to and do not in fact sign the declaration of citizenship "for purposes of establishing" eligibility. The documentation requirements do not apply to them.

As to the potential harm that emergency relief as to this claim would prevent, the State of Illinois, as operator of child protective services, noted in its Memorandum of State Amici Curiae In Support of Plaintiffs' Amended Motion for Preliminary Injunction ("State Mem.") at 4:

The prospects for ultimately satisfying the documentation requirements for some of these children will be difficult, if not impossible, jeopardizing their receipt of Medicaid benefits in the long term. Some of these children have been abandoned by their parents, or have nobody who can supply information about their birth. Many have never attended school, and therefore have no school records or other documentation of their identity.

(4) **All three classes: the outreach and education program**

Defendant denies Plaintiffs' claim that he has failed to conduct the outreach program for Medicaid applicants and beneficiaries that Section 6036(c) requires as a condition precedent to implementation of the documentation requirements. He claims that he has conducted the necessary outreach; the language of the provision relating to the timing of the outreach is beyond the competence of the court to enforce; and the language of the provision does not create a condition precedent. Def. Mem. at 33-34.

Defendant relies on the Declaration of Richard Felton for evidence of his compliance with Section 6036(c)'s mandate to "establish an outreach program". Nothing in this declaration is indicative of a program. Three conference calls are identified. Second Felton Decl. ¶¶ 4,6. In one of them, Felton declares he "specifically urged those on the call to make their client populations aware of the changes in the law." *Id.*, at ¶ 4. Felton also points to a poster and brochure that he admits have not yet been translated into Spanish, *id.* ¶ 8, and complains that the preparation of materials for states regarding Medicaid changes not related to section 6036 have frustrated the agency's alleged effort to conduct outreach. *Id.* at ¶ 10.

And though Section 6036(c) orders the Secretary to perform a specific, discrete task, Felton declares that CMS is executing the task by relying on states to educate their Medicaid populations.<sup>21</sup>

The Secretary also asserts that he implemented his outreach and education program "as soon as practicable," as required by section 6036(c). He alleges that it was not practicable to conduct the outreach before CMS issued its guidance letter to state Medicaid directors on June 12, 2006, or before issuance of the interim rule on July 6, 2006, even though Felton alleges having begun outreach "one day after passage of the DRA . . ." Second Felton Decl., ¶4. Def. Mem. at 33.

The Secretary cites Legal Services of Northern California, Inc. v. Arnett, 114 F.3d 135, 140 (9th Cir. 1997), Def. Mem. at 33, for the precept that the court is "ill-equipped" to enforce the "as soon as practicable" mandate. However, Arnett is inapposite because the issue there was whether a particular federal regulation provided an enforceable right to plaintiffs such that they could enforce it under 42 U.S.C. §1983.

Lastly, the Secretary responds in a footnote to plaintiffs' argument that the verb tense used in Section 6036 establishes that the outreach program is a condition precedent to application of the documentation requirements by saying, "It is just as likely that the verb tense indicates those who would be affected would be affected months subsequent to Congress' enactment of section 6036(c). In any event, Congress in no sense required the existence of an outreach program as a precondition . . ." Def. Mem. at 34, n. 13. This is unresponsive to the Plaintiffs' argument that the outreach and education program would serve no purpose if begun after

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<sup>21</sup> As the Plaintiffs have previously noted, in the June 9 Dear State Medicaid Director letter the Defendant 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. Pl. Mem. at 36, n. 21.

application of the new documentation requirements, as they would be individuals who "had been affected" rather than ones "to be affected," as the statute refers to. Pl. Mem. at 36.

(5) **Constitutional claims are not barred by laches**

The Secretary cites the well-established principle that for the defense of laches to apply, the defending party must show that the plaintiffs unreasonably delayed filing their claim and that the delay caused prejudice to the defendants. Def. Mem. at 44-45. In this case, plaintiffs did not show an unreasonable lack of diligence in filing this suit less than six months after Section 6036 was signed into law. Rather, plaintiffs acted immediately upon issuance of the CMS Guidance reasonably expected that the Secretary would release regulations well before the July 1 effective date, when states would have to know what to do to protect their federal matching funds. Plaintiffs informed the Secretary on April 11, 2006, that they considered Section 6036 potentially unconstitutional, that they thought, however, that it gave the Secretary sufficient authority to develop implementing rules that would cure the potential defects, and that therefore plaintiffs would delay litigating the matter until rules were issued and stood ready to confer with the Secretary about these matters. April 11, 2006, Letter from John Bouman to Michael Leavitt (copy attached hereto). The Secretary never responded.

The Secretary delayed for months and then issued the June 9, 2006, Dear State Medicaid Director guidance letter. Plaintiffs realized that the Secretary was not working on a constitutional or otherwise lawful interpretation of Section 6036, and they filed this action shortly thereafter, attacking the guidance letter and, in the alternative, the statute itself.

The Secretary claims that he was prejudiced by plaintiffs' purported delay because the Secretary had already spent money to ready CMS and the states for enforcement by July 1.

This is nonsense. The Secretary did not settle on implementing rules until after the case was filed. The Felton Declaration reveals an extremely frugal outlay in any event. And it is extremely disingenuous for the Secretary to imply that he would have stopped nationwide preparations for implementation immediately if plaintiffs had filed their suit a few months earlier. If it were true that the Secretary ever had the slightest interest in the doings of plaintiffs, he would have responded to plaintiffs' letter way back in April.<sup>22</sup>

#### **IV. EQUITABLE CONSIDERATIONS FAVOR EMERGENCY RELIEF**

As plaintiffs have exhaustively laid out in their pleadings and declarations and the preceding sections of this brief, class representatives and members will experience irreparable harm from having their health coverage threatened, being subjected to procedures that should not apply to them and that are burdensome, costly and unfair, and being exposed to lose or actually losing not only their only source of health insurance and their access to health care but also their personal health. As the Attorney General of Illinois points out in her amicus brief on behalf of the Illinois state agencies that serve Medicaid recipients, numerous studies have shown that negative health consequences including death can occur from even the shortest delay in receiving care due to a lack of health insurance or access to providers. State Mem. at 13, n. 8. It is well settled that a loss of Medicaid benefits

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<sup>22</sup> The Secretary only claims laches against plaintiffs' constitutional claims to the extent they attack Section 6036 itself. Def. Mem. at 44 and n. 19. For some reason, he believes that plaintiffs do not seek relief against the statute in the current emergency relief motion. It is true that plaintiffs' motion prays for relief against "the regulation". But this was in the context of the regulation not going far enough to avoid the alleged harms plaintiffs are seeking to avoid, as detailed in the motion. In the complaint (as the Secretary acknowledges, *id.*), and the briefing in support of this motion, plaintiffs have always sought alternative relief in this case against the statute, to the extent the court holds the statute cannot be construed to be constitutional. To make this clear and avoid ambiguity about their prayer for emergency relief, plaintiffs filed their proposed draft order, which details this relief explicitly. The Secretary had all of these materials well before his brief was due, yet he claims, with blinders on, that "plaintiffs have not yet moved for any relief against the statute." Def. Mem. at 44, n. 19. As explained in detail above, and as the Secretary knows, plaintiffs have moved for relief from specified harms, regardless of the source (regulation or statute). Any ambiguity about this in the wording of the motion was clarified in the brief and the proposed draft order long before the Secretary was due to respond, and he has no right to claim surprise or prejudice regarding it.

constitutes irreparable harm and the Secretary cites to nothing to the contrary. See, e.g. Kai v. Ross, 336 F.3d 650, 656 (8th Cir. 2003) (danger to plaintiffs' health gives them a strong argument of irreparable injury); Nemnich v. Stangler, 1992 WL 178963 (W.D. Mo. Jan. 7, 1992) (enjoining the state from eliminating several categories of dental treatment); White v. Martin, 2002 U.S. Dist. LEXIS 27281, \*10-11 (W.D. Mo. Oct. 3, 2002). See also Mass. Ass'n of Older Am. v. Sharp, 700 F.2d 749, 753 (1st Cir. 1983) (policy causing "individuals to forgo such necessary medical care is clearly irreparable injury"); Beltran v. Meyers, 677 F.2d 1317, 1322 (9th Cir. 1982) (irreparable injury shown when enforcement of Medicaid rule "may deny [plaintiffs] needed medical care"); Caldwell v. Blum, 621 F.2d 491, 498 (2d Cir. 1980) (same). No remedy at law can compensate for the denial of necessary medical assistance. See McMillan v. McCrimon, 807 F. Supp. 475, 479 (C.D. Ill 1992); cf. Southside Welfare Rights Org. v. Stangler, 156 F.R.D. 187 (W.D. Mo 1993) (irreparable injury is clearly present, and there are no other adequate remedies at law for violations of federal law in denying food stamp benefits).

The Secretary implies that the only harm plaintiffs claim is due to the emotional stress of meeting these new requirements. While plaintiffs do claim they will experience irreparable harm from stress and emotional impact of the documentation rules and the threat to their health care, this harm is by no means the only harm plaintiffs allege. Even if it were, this harm is substantial and alone would justify emergency relief. See Pl. Mem. At 37-38 (citing cases).

The Secretary also claims that plaintiffs have not alleged that harm will occur in the period during which the emergency relief would be in place because plaintiffs do not say specifically in their declarations the exact date of their annual redeterminations for Medicaid

(when the new rules would be applied to recipients). Def. Mem. at 46. This argument ignores the immediate, daily impact on all Medicaid applicants and on every Medicaid recipient who has undergone an annual redetermination since July 1. That is, the Secretary does not take account of the class action nature of the case.

The Secretary says his interest here is in saving Medicaid funds for those who are truly entitled to them. Def. Mem. at 47. That is plaintiffs' interest, too. It does not serve that purpose for the Secretary to set up a process that denies benefits to those who are entitled to them. Since both parties have this interest, it can hardly outweigh the substantial harms that would be inflicted on plaintiffs in the absence of emergency relief.

**V. THE PROPOSED REMEDY PROPERLY FITS THE VIOLATION AND IS WITHIN COURT'S POWER**

Defendants argue that it is an improper remedy for this court to enjoin them from denying federal financial participation to the States on an emergency basis during the period of time that this case is being decided. The Defendants are incorrect. The Defendants cite case law that is completely inapplicable here; Georgia v. Heckler involved a state suing the federal government for retroactive FFP for a period of time in which the state alone was under a court order to provide Medicaid reimbursement for abortion services. The Court found, in part, that because the federal government was never a party to the case in which the State was ordered to pay reimbursement, they could not later be ordered to pay FFP – facts distinguishable here in which the federal government is a party and would be under the court order itself. It is clearly within the equitable power of this court to maintain the status quo by ordering HHS to maintain FFP to the states and to take no enforcement actions during the period of the injunction if the court chooses to do so. Connecticut v. Schweiker, 684 F. 2d.

979 (D.C. Cir. 1982), cert. denied 455 US 1207 (1983) (finding that courts have broad equitable power to award federal funds to the State even when a statutory funding period has lapsed), Bowen v. Massachusetts 487 U.S. 879 (1988) (finding that courts can order the federal government to pay FFP to states as equitable injunctive relief). Preventing HHS from denying FFP while this court is considering the merits of the case is not only within the power of this court, it is necessary to preserve the status quo so that States are not compelled to deny or terminate individuals' Medicaid benefits for fear of losing FFP. The very threat of denial of FFP which is a substantial portion of State Medicaid funding would negate the power of this court to order interim relief.

DATED: August 28, 2006

Respectfully submitted,

RUBY BELL, et al.

By /s/ Mary E. Anderson  
One of Their Attorneys

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# EXHIBIT A



Taking action to end poverty

April 11, 2006

Mike Leavitt  
Secretary of Health and Human Services  
U.S. Department of Health and Human Services  
200 Independence Avenue, S.W.  
Washington, D.C. 20201

Re: Deficit Reduction Act, Section 6036  
Notice of Intent to Sue

Dear Secretary Leavitt:

This office represents thousands of low-income people in Illinois and around the country who depend upon the Medicaid program or who will be applying for Medicaid for health coverage. Section 6036 of the Deficit Reduction Act contains new documentation requirements for Medicaid applicants and recipients. States are required to demand new documentation of citizenship and accept only a birth certificate or passport or other equivalent immigration documentation. You, as Secretary, have some authority to specify more detailed policies and procedures to implement this stringent new requirement.

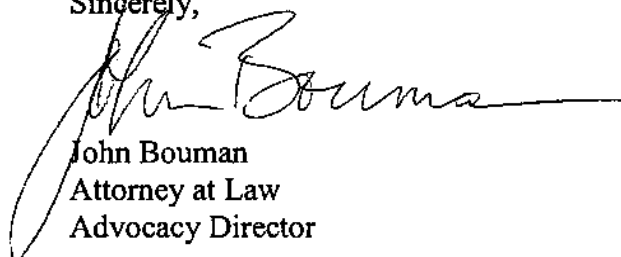
We represent many low-income people who are citizens of the United States and eligible for Medicaid but do not possess these forms of documentation. Of these, many have already established their citizenship sufficiently to be eligible for Medicaid. Others will be able to do so when they apply for Medicaid, but through other forms of proof. We believe that a large proportion of these citizens who do not have the documentation called for by Section 6036 are people who were born in the rural South, predominantly African American. Native Americans and others not born in hospitals or with attending health professional are in this group. And significant numbers of people with mental disabilities do not have orthodox documentation.

We believe that Section 6036 is unconstitutional, to the extent that it prevents people who can establish their citizenship and are otherwise eligible for Medicaid from getting or retaining health coverage under the program, or it delays, threatens or adds to the cost of such coverage. It violates the Due Process Clause by denying a fair opportunity to establish eligibility in a timely way (or, for some, ever). It violates the Equal Protection Component of the Due Process Clause by disadvantaging people who do not have birth certificates by imposing delays, costs, and/or a total bar to the program on them, for the sole reason that they do not have specified documentation. People who do have the "magic" documents, but are otherwise indistinguishable, do not experience the disadvantages.

We will await your implementation decisions in the hope that you will find a way to apply this law that avoids the harm the statute appears to create. This is your notice, however, that if the

harm persists upon implementation we intend to file class action litigation to attack the constitutionality of Section 6036. We always prefer not to take that course, however, so if you wish to discuss this matter, please contact me or have a representative contact me at (312) 368-2671, or [johnbouman@povertylaw.org](mailto:johnbouman@povertylaw.org), or the address on the letterhead. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "John Bouman", written over a horizontal line. The signature is fluid and cursive, with the first name "John" being more prominent than the last name "Bouman".

John Bouman  
Attorney at Law  
Advocacy Director

Cc: Dennis G. Smith, Director  
Center for Medicaid and State Operations

Mark B. McClellan, Administrator  
Center for Medicare and Medicaid Services