

**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' MOTION FOR RECONSIDERATION**

I. INTRODUCTION

The central point of the Plaintiffs’ Reconsideration Motion is that the Court’s dismissal of the Class A claims and Class A plaintiffs for lack of standing was based on the factually erroneous predicate that these plaintiffs failed to request relief against section 6036 of the Deficit Reduction Act of 2005, 42 U.S.C. §1396b(x) (“Section 6036”). The First Amended Complaint¹ contains a claim challenging the constitutionality of Section 6036, and standing should be based upon the allegations in the First Amended Complaint, not the statements in Plaintiffs’ Motion for a Temporary Restraining Order and Preliminary Injunction (“TRO/PI Motion”). The defendant Secretary of Health and Human Services (“Secretary”), in his Memorandum of Law in Opposition to Plaintiffs’ Motion for Reconsideration (“Sec. Mem.”), ignores the allegations in the First Amended Complaint, and thus he misses the point of the Reconsideration Motion. He erroneously treats the Reconsideration Motion as if plaintiffs were seeking reconsideration of the denial by this

Court of the Class A plaintiffs' TRO/PI Motion. Plaintiffs seek reconsideration of the Court's dismissal of the Class A claims on standing grounds. Since the Court did not reach and never ruled on the class certification and TRO/PI Motions as to Class A, plaintiffs do not seek reconsideration as to those motions; there are no rulings as to the merits of those motions for the court to reconsider. Plaintiffs request that, if the Court grants reconsideration and reinstates the Class A claims, the Court consider (for the first time on the merits) and grant the TRO/PI and Class Certification motions as to Class A.

II. PLAINTIFFS MEET THE STANDARDS FOR RECONSIDERATION

The Secretary asserts that plaintiffs' Reconsideration Motion fails under the relevant standard for a motion to reconsider, but he refuses to apply the standard in the context of plaintiffs' argument that the Court should reconsider its dismissal of the Class A plaintiffs because the Court made no ruling on the constitutional claim they included in their First Amended Complaint. Though acknowledging that this is the basis of the plaintiffs' motion, Sec. Mem., at 3, the Secretary omits any reference to it in his application of the reconsideration standard to plaintiffs' motion. Applying this standard to the basis of the plaintiffs' motion clearly demonstrates that granting the motion in this circumstance is proper.

A motion for reconsideration "enables a district court to correct its own errors, sparing the parties and the appellate courts the burden of unnecessary appellate proceedings." Russell v. Delco Remy Div. of Gen. Motors Corp., 51 F.3d 746, 749 (7th Cir. 1995). As the Secretary notes, motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Keene Corp. v. Int'l Fid. Ins.

¹ Technically, the "corrected" First Amended Complaint, filed August 11, 2006 (Document 44).

Co., 561 F. Supp. 656, 665 (N.D. Ill. 1983). And while reconsideration is proper in only a narrow set of circumstances, see Shakman v. Democratic Org. of Cook County, 844 F. Supp. 422, 425 & n.6 (N.D. Ill. 1994) (discussing the law of the case doctrine), reconsideration is nevertheless indisputably proper where the court's resolution of that issue is based on a manifest misunderstanding between the court and a litigant. See EEOC v. Lockheed Martin Co., 116 F.3d 110, 112-13 (4th Cir. 1997) (holding that granting a motion to reconsider was proper where the court's original ruling was based on a misunderstanding of the relevance of certain evidence and permitting that ruling to stand would result in plain injustice); Bank of Waunakee v. Rochester Cheese Sales, Inc., 906 F.2d 1185 (7th Cir. 1990) (observing that a motion for reconsideration is proper where a court has misunderstood a party or made an error of apprehension); Gregg v. Am. Quasar Petroleum Co., 840 F. Supp. 1394, 1401 (D. Colo. 1991) (same).

In this case there has been a plain misunderstanding as to whether Plaintiffs have attacked Section 6036 or only the regulations implementing Section 6036. The Court's ruling that Plaintiffs had not satisfied the "redressability" or "traceability" elements of standing was based on its understanding that Class A Plaintiffs had only attacked the implementing regulation for Section 6036. See September 14 Order at 12-13. But this understanding is mistaken. Paragraph 2 of the First Amended Complaint states:

Plaintiffs seek a declaration that defendant's implementation of Section 6036 violates plaintiffs' rights under the Medicaid Act and the Due Process Clause of the Fifth Amendment to the United States Constitution, or, in the alternative, that Section 6036 is unconstitutional. (emphasis added).

Plaintiffs were consistent in their challenge to the statute throughout the First Amended Complaint. For example, paragraph 60 sets forth the Class A claims and alleges

that, if the implementing regulation is permissible under the statute, then "Section 6036 violates the Due Process Clause of the Fifth Amendment of the United States Constitution." In Paragraph B of the Prayer for Relief, Plaintiffs ask the Court to "Declare that the Secretary's regulations implementing Section 6036 violate, or in the alternative Section 6036 itself violates, plaintiffs' rights under the Administrative Procedure Act and/or the Due Process Clause of the Fifth Amendment to the United States Constitution," First Amended Complaint, page 30 (emphasis added). Paragraph C of the Prayer for Relief, clearly intended to be read together with and correspond to the prayer for declaratory relief, Plaintiffs request the court to "[p]reliminarily and permanently enjoin the Secretary from applying, implementing or effectuating in any way Section 6036 in a manner that violates plaintiffs' rights." Id. Finally, paragraph E of the Prayer for Relief asks that the Court "[e]nter such other further or ancillary relief as the Court deems just." This alternative pleading is clear evidence that plaintiffs indeed were challenging the statute itself.²

In this case there has been a plain misunderstanding as to whether Plaintiffs have attacked Section 6036 or only the regulations implementing Section 6036. See September 14 Order at 12-13. This has resulted in an incorrect ruling on the standing issue. See Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) (standing turns on "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial

² Additionally, in the First Amended Complaint, the plaintiffs assert their claim as to the unconstitutionality of Section 6036 not only under the Administrative Procedure Act, which is typically invoked to challenge administrative rules and actions, but also directly under the Constitution and via general federal question jurisdiction, which is appropriate for constitutional challenges to statutes. First Amended Complaint, ¶¶3,4. See also Pl. TRO/PI Reply at 18, n.12 (reiterating these claims).

powers on his behalf.”) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)) (emphasis added).

It is true that plaintiffs regrettably omitted the request for relief against Section 6036 in their TRO/PI Motion.³ Although this omission is in no way tantamount to waiver of the claim (indeed the claim was asserted in the briefing on the motion), it was done in the context of a complex set of claims and issues, and it may have contributed to the court’s oversight of plaintiffs’ constitutional challenge to Section 6036. But this misunderstanding, if left intact, will result in a manifest injustice: the dismissal of the Class A plaintiffs’ challenge to Section 6036 without a determination on the merits of that claim. In other words, the misunderstanding in this case has led to the wrongful dismissal of a properly-pled, fully-preserved claim. Plaintiffs’ thus respectfully request that the Court exercise its discretion to reconsider its dismissal of the Class A plaintiffs’ challenge to Section 6036. The Secretary’s consistent reference to the plaintiffs’ TRO/PI Motion as the reason for his opposition to the Reconsideration Motion is simply unresponsive to plaintiffs’ argument.

³ Defendants refer to a passage in one of plaintiffs’ briefs in which plaintiffs stated that they were seeking an injunction to prevent the violation of their rights, and that, at this preliminary stage, it was not necessary to finally assign as the source of that harm either the regulation or the statute. Sec. Mem. at 5. This same passage caused plaintiffs trouble on the “traceability” element of standing in this Court’s standing order. See September 14 Order at 13 n.4. This language was not, however, as defendants would have it, a surrender of any claim against Section 6036 itself. Indeed, in the same quoted language plaintiffs made it clear that they were attacking the regulations and, in the alternative, the statute (“it surely is one or the other”). See Pl. TRO/PI Reply at 6. This argument came in the context of plaintiffs’ assertion in their First Amended Complaint of alternative claims attacking either the regulation or the statute. Without surrendering any claim, plaintiffs’ intent with this argument was to note that emergency relief could be granted without a final determination of the legal issues -- that is, once the court decided that plaintiffs were entitled not to have the new documentation rules applied to them, it could enter a TRO or preliminary injunction to prevent that harm, without making a final determination as to whether it was under the regulation or the statute that the Secretary was producing that violation. Whatever may be said about the success or failure of this briefing formulation, it clearly is not a waiver of any claim, nor is it reasonable, in light of the allegations in the First Amended Complaint, to draw from this language the conclusion that plaintiffs do not attack the statute.

III. THE COURT SHOULD REINSTATE THE TRO/PI AND CLASS MOTIONS

This Court has not yet addressed the merits of the Class A plaintiffs' motions for preliminary injunctive relief and class certification. Rulings on those motions became unnecessary when the Class A claims were dismissed. If the Court grants the Motion for Reconsideration and reinstates the claims, it should also reinstate the motions and proceed to rule upon them as to Class A.

The Secretary argues that, even if the Court reinstates the Class A claims, it should not "revisit" the TRO/PI Motion because the request for relief in that motion did not seek relief against Section 6036 (but only against the implementing regulation). Sec. Mem. at 7-9. The Secretary's position seems to be that the Court denied the motion for preliminary relief on the merits of the constitutional claim based on this flaw in the drafting of the motion. Sec. Mem. at 8 (invoking standards for motions for reconsideration and claiming that the motion was "already decided" by the court). But this Court never addressed the TRO/PI Motion on its merits. While the drafting issue was a factor in the Court's standing analysis (incorrectly, as explained above), the Court in fact did not reach the merits of the TRO/PI Motion. The standards for "reconsideration" are not applicable here. If the Court reinstates the Class A claims, then it will be addressing the TRO/PI Motion on its merits for the first time.

Plaintiffs have already admitted that the omission in the prayer for relief in the TRO/PI Motion was a drafting mistake. They have urged the Court either to consider the motion to have been amended de facto, in light of the allegations in the Amended Complaint and in the briefing on the motion seeking relief against the statute,⁴ or to allow plaintiffs now

⁴ In spite of the omission of a request for relief directly against Section 6036 in their motion for preliminary injunctive relief, plaintiffs clearly indicated that they were seeking this relief, if necessary, in the briefing on the motion. See, Memorandum in Pl. TRO/PI Motion at 24 (if the regulation is permitted or required by the statute,

to file an amended motion that includes the full prayer for relief. This is the most sensible and economical way to proceed to a ruling. If plaintiffs are held not to have sought the relief in their pending TRO/PI Motion and are not allowed to amend the motion, and thus their motion is denied for failure to seek the appropriate relief, they would have to file another motion that cures the defect (assuming the Court has reinstated the Class A claims). It is more efficient and more just, given the emergency nature of the case, to decide the issue based on the current motion (with either a de facto or an actual amendment to the prayer for relief) and the current briefs. Even the Secretary agrees that, if the Court decides to reach the motion for preliminary relief on its merits, the court can decide it "on the existing papers". Sec. Mem. at 2. See also, id. at 9 (incorporating prior briefs on the motion). That is by far the most sensible and efficient course.

IV. CLASS A IS ENTITLED TO CLASS CERTIFICATION

The Secretary has not stated any new arguments and incorporates his prior briefing on the issue of whether Class A should be certified. Sec. Mem. at 7 n. 3. For the reasons stated in plaintiffs' opening brief on the Reconsideration Motion, and in the prior briefing on the class certification motion as to Class A, this Court should certify Class A.

V. CLASS A IS ENTITLED TO PRELIMINARY RELIEF

The Secretary begins his argument against plaintiffs' likelihood of success on the Class A constitutional claim by asserting that plaintiffs are "revisiting" arguments the Court has already rejected. Sec. Mem. at 9.⁵ As explained above, this Court has not ruled on any

"then Section 6036 itself is unconstitutional."); Pl. TRO/PI Reply at 6 ("... plaintiffs claim that Section 6036 itself ... violates their constitutional rights.").

⁵ The Secretary concedes that he has already had ample chance to brief his positions on plaintiffs' likelihood of success on their Class A constitutional claims. Id. at n.5 (incorporating those arguments by reference). He also concedes that plaintiffs indeed did argue against the constitutionality of both the regulation and the statute, and that

aspect of the TRO/PI Motion, so there is no "reconsideration" or "law of the case" issue presented here. When the Court addresses that motion as to the Class A constitutional claim, it will be for the first time.

The Secretary has mischaracterized the September 14 Order's interpretation of the statute and its impact on plaintiffs' Due Process argument. As the Secretary correctly notes, plaintiffs argue that that Section 6036's documentation requirements are "procedural" in nature. Sec. Mem. at 9 n.6. The procedural nature of the requirement is important because the procedures employed in determining whether an individual may continue to participate in a benefits program must comply with due process requirements. Atkins v. Parker, 472 U.S. 115, 128-29 (1985). There is no constitutional limit, however, on the power of Congress to make substantive changes in the law of entitlement to public benefits. Id. at 129. The Secretary asserts that this Court has "already rejected" the argument that Section 6036 is procedural, but this assertion, which places words in the Court's mouth, is not correct. It is true, as the Secretary notes, that the Court stated in its September 14 Order that the documentation requirement's withdrawal of federal matching funds when states do not adequately implement the citizenship documentation rules can result in states denying benefits to people and thus is a "de facto" change in eligibility rules; therefore, any resulting injury to plaintiffs arises from the statute. Id. (citing September 14 Order at 12). In making this statement, the Court simply noted that the source of plaintiffs' injury – for standing purposes – is the statute. September 14 Order at 12. The September 14 Order contains no determination of whether the requirement is procedural or substantive for due process

he made counterarguments as to both. Sec. Mem. at 9 ("As the Secretary has previously explained in detail, the plaintiffs' Due Process challenge, whether to the Rule or the statute, lacks merit.").

purposes, nor does it undertake any other due process analysis. The Secretary is thus mistaken when he argues that the Court has “already rejected” plaintiffs’ due process argument.

Furthermore, the observation that the citizen documentation rule is “in the statute” begs, but does not resolve, the determinative constitutional question on this issue: whether the requirement is a procedural measure or a substantive change in program eligibility rules. Even if there were some evidence that Congress intended Section 6036 to create a substantive change in eligibility rules, it remains up to this Court to determine into which category Section 6036 falls for due process purposes. Logan v. Zimmerman Brush, 455 U.S. 422, 431-33 (1982) (holding that a provision for state processing of civil rights complaints was a procedure, not a substantive element of a statutorily-created right, despite a contrary determination of legislative intent by the state supreme court); Youakim v. McDonald, 71 F.3d 1274, 1289-92 (7th Cir. 1995) (citing Logan and determining that the statutory effective date for new rules limiting foster care benefits was procedural, and not a substantive element of the property right to continuing benefits under the old rules); see also Cleveland Bd of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (“The right to due process is conferred, not by legislative grace but by constitutional guarantee.”) (internal quotation marks omitted).⁶

⁶ The Secretary cites Harris v. McRae, 448 U.S. 297, 309 (1980), for the proposition that states may refrain from providing services (such as abortions) under Medicaid when Congress has decided to withdraw federal matching funds for those services. Sec. Mem. at 9, n. 6. The Secretary asserts that the same principle holds true here. Since Congress has decided to withdraw funding from “individuals” who do not meet the citizenship documentation rules, the states need not provide Medicaid to them, and thus, says the Secretary, these rules are substantive eligibility rules, too. However, the matter of covered services under Medicaid is different than the matter of eligibility determinations for individuals. The provision in Harris prohibited the coverage in question. The statute here requires coverage to citizens, while Section 6036 introduces evidentiary procedures regarding citizenship. The provision in Harris categorically prohibited federal matching funds for the service in question, while the federal funding implications of Section 6036 depend on state compliance with procedural requirements and on federal enforcement tactics regarding state compliance. In fact, as plaintiffs demonstrate below, the citizenship documentation rule is manifestly procedural in nature. Moreover, in Harris the analysis of whether the Medicaid Act allowed a state to deny the service to Medicaid beneficiaries was followed by a separate analysis of whether, in

The Secretary's entire due process argument hinges on the erroneous and unsupported assumption that Section 6036 is a substantive change in Medicaid eligibility rules. See Sec. Mem. at 9-12 (citing cases asserting the right of Congress to change the substantive rules for programs or eliminate programs entirely and denying that program recipients or applicants have any property right to benefits under prior rules that can support a challenge to those kinds of changes on due process grounds).

Contrary to the Secretary's misguided assumption, Section 6036 is plainly a change in procedure, not a change in substantive Medicaid eligibility criteria. The relevant Medicaid eligibility criteria at issue here is U.S. citizenship. Section 6036 makes no substantive change to this Medicaid eligibility requirement. Rather, it changes the evidentiary procedures states must use to determine whether an individual has met that substantive requirement. This common sense observation is supported by the structure of the Medicaid statutes. Substantive Medicaid eligibility criteria are found in 42 U.S.C. §§ 1396a, 1320b-7. See, e.g., § 1396a(b)(3) (forbidding states from adopting eligibility criteria that deny benefits to otherwise eligible U.S. citizens); § 1320b-7(d) (setting forth citizenship eligibility requirement). Congress did not add Section 6036 to either of these sections. Instead, it added Section 6036 to 42 U.S.C. § 1396b, which generally governs the administrative arrangements between the states and federal government with respect to matching funds. Based on this statutory structure, Section 6036 is best understood not as a new substantive eligibility requirement, but as a procedural measure aimed at prompting states to better supplement their Medicaid files as to the citizenship issue. Section 6036 is permeated with

so doing, the Medicaid Act violated the Constitution. 448 U.S. at 310ff. As noted in the text, the analysis of whether Congress intended Section 6036 to be substantive or procedural does not control the constitutional inquiry as to that issue.

alternative forms of proof and authority for the Secretary to expand the acceptable forms of proof, as well as allow the states to delay or waive compliance or work with states that are noncompliant in ways that do not actually deny the states matching funds for isolated or correctable errors. See 42 U.S.C. § 1396b(x). Section 6036 is, at its heart, an administrative matter, a procedure.

Even if it could be shown that Congress intended to create a substantive eligibility requirement in enacting Section 6036, such a showing would have only a limited role in this Court's due process analysis. In Youakim, the court rejected the argument that a provision establishing the effective date for new restrictions on foster care benefits was a part of the legislated substantive change to the scope of the foster care program. The court reached this conclusion because the provision at issue involved "the procedural fairness of individual eligibility determinations" as to whether previously eligible people, who had a property right to continuing eligibility, could meet the new requirements. Youakim, 71 F.3d at 1289-90 (quoting Atkins v. Parker, 472 U.S. 115, 129 (1985)). Section 6036 likewise involves the procedural fairness of individual eligibility determinations – specifically, the procedures for making individual citizenship eligibility determinations. See also Loudermill, 470 U.S. 532 (state employment termination procedures); Logan, 455 U.S. 422 (a legislated time limit on administrative processing of a state-defined employment discrimination claims is a procedure and not an element of the claimant's property right in the claim). As noted above, the Secretary offers nothing to refute plaintiffs' position that Section 6036 is procedural.

To determine whether a procedure comports with the constitutional requirements of due process, courts employ a two-part test: whether there is a deprivation of a property interest, and, if so, what process is due. Logan, 455 U.S. at 428.

The Class A plaintiffs indisputably have a property interest in the continued receipt of Medicaid benefits. Because Congress has not changed the substantive Medicaid eligibility rule requiring citizenship, the members of Class A have the status of qualified recipients. They have met all the eligibility rules applicable at the time they established eligibility, including citizenship. The Class A plaintiffs therefore have a property interest in the ongoing receipt of those benefits for so long as the program is on the books and the eligibility rules remain the same. Having established the existence of this property interest, the inquiry turns to the second of the two-parts of the due process analysis: what process is due prior to a deprivation of that property interest.

Plaintiffs established in their Memorandum in Support of Plaintiffs' Motion for Reconsideration, and in the briefing on the TRO/PI Motion that a fundamental feature of due process is that once a person has established factually the elements of eligibility for a benefit, the factual basis for the property right cannot be reversed or removed without "cause". Pl. Mem. at 7-10. In other words, the holders of the property right are entitled to "repose" with respect to finally determined facts. Those facts may not be overturned or questioned without "cause," which in this case would be comprised of some legitimate question as to whether the determination of a Medicaid recipient's U.S. citizenship was in fact mistaken or fraudulently obtained in the first place, or has since changed (e.g., by renunciation of citizenship). Id. (citing numerous authorities).

The Secretary's analysis of this "process due" issue is fatally tainted by his assumption that the citizenship documentation rule is a substantive program change that Congress has plenary authority to change. Sec. Mem. at 10-12. Thus he never grapples at all with the issue of "repose" as an element of required process. And, since he frames the issue

entirely in terms of the power of Congress to make substantive changes, he is able to assert that plaintiffs have cited "no authority" for the proposition that the right to "repose" as to finally determined facts can prevent Congress from making substantive changes. Id. at 11. Because plaintiffs never advanced that proposition, they of course agree that they have not tried to cite authority for it.

Thus, because the Secretary has assumed that the citizenship documentation rule is a substantive eligibility change, he not only has failed to make any arguments on that point (that is, whether it is substantive or procedural), he has also failed to make any arguments as to "repose" (or any other procedure) being a component of the process due prior to deprivation of Class A's property right to continued benefits.

One of the many authorities cited by plaintiffs, and not addressed by the Secretary, is DuPuy v. Samuels, 397 F.3d 493 (7th Cir. 2005). See Pl. Mem. at 7. There it was established that the plaintiffs had a liberty interest protected by the Due Process Clause in their ability to pursue a career in the child care industry. Publication of allegations of child abuse or neglect against a person effectively ends their career possibilities in that industry. The court was called upon to decide what process was due before the plaintiffs' liberty interest in seeking employment in the child care industry could be impaired by the publication to potential employers by the defendant state agency of allegations against the plaintiffs of child abuse or neglect. In discussing the quantum of proof necessary to constitute a legitimate cause to disturb the plaintiffs' protected interest, the court drew on precedents discussing the issue in the context of public employment: "[T]he pre-deprivation process required when terminating an employee often need not be elaborate or extensive. [I]t should be an initial check against mistaken decisions -- essentially, a determination of

whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." 397 F.2d at 504 (quoting from Hudson v. City of Chicago, 374 F.3d 554, 560 (7th Cir. 2004)). The Court then went on to approve a set of procedures to be in place prior to taking any action to threaten the protected liberty interest that included a balanced assessment of all credible evidence and an independent review. 397 F.3d at 505-09.⁷ In both the employment context relied upon by the court and the child abuse and neglect context that it was deciding upon, the court addressed the need for these procedures in spite of and in addition to the fact that there were substantial post-deprivation notice and hearing procedures available. Id. at 504. DuPuy and the other cases cited by plaintiffs together stand for the notion that there is a right to "repose" -- that is, that the present enjoyment of a protected interest cannot be threatened or disturbed without some legitimate factual "cause."

The Class A plaintiffs have an interest in continuing health coverage and health care, and they have an interest in the avoidance of the stress and expense associated with challenges to their continuing eligibility, including those involving the acquisition of documentation. They have proven that they are citizens for purposes of their Medicaid eligibility. Section 6036 introduces a procedure that reverses those determinations of citizenship and destroys the Class A plaintiffs enjoyment of their property right on the basis of no evidence at all. The deprivation is by fiat and without any legitimate factual cause.

⁷ In DuPuy, the Court's analysis of the "process due" was framed in the three-part test of Mathew v. Eldridge, 424 U.S. 319, 335 (1976): "First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probably value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." 397 F.3d at 504.

DuPuy and the cases it cites and the other authorities that plaintiffs have cited⁸ all struggle with the level of proof required to upset the factual status quo and trigger a challenge to the protected interest. Together they stand for the proposition that some legitimate factual trigger must be present. It cannot just be the whim of the administrative agency or the legislature. The Class A plaintiffs do not ask for anything like the process approved in DuPuy. They only ask that they not be put to the proof unless there is some legitimate factual trigger of any kind that calls their citizenship into question. There is no countervailing governmental interest here. What Class A wants by way of additional procedure actually saves the government millions of unnecessary administrative tasks. Section 6036's dragnet approach does not even promise better enforcement of the citizenship rule, since there was no evidence that the rule was being abused prior to adoption of Section 6036. Nothing that Class A suggest would prevent the Secretary from a variety of checks on the citizenship of current recipients, such as computer matches and file reviews.

The Secretary makes no new arguments as to the equitable factors involved in the Class A plaintiffs' TRO/PI Motion. Plaintiffs rely on their previously stated arguments on these issues.

VI. CONCLUSION

This Court should grant the Class A plaintiffs' Reconsideration Motion and reinstate their claims. Then the Court should certify Class A and grant a preliminary injunction preventing the Secretary from applying Section 6036 to Class A.

⁸ Plaintiffs cited a number of cases invoking the "medical improvement" standard, under which a finding of disability may not be overturned unless there is a factual indication that the person has improved medically. Pl. Mem. at 8. The Secretary, stuck in his framework that Section 6036 is a substantive change, conclusorily asserts that these cases are "wholly irrelevant". Sec. Mem. at 12 n.8. In fact, these cases are closely analogous, and they are among the leading authorities on the issue of "repose" as an element of due process.

DATED: November 8, 2006

Respectfully submitted,

RUBY BELL, et al.

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

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