

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

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

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

**I. Introduction**

The plaintiffs and the members of the classes they seek to represent ("Plaintiffs") are low-income United States citizens eligible to receive health coverage from the Medicaid program. Many are extremely ill and have significant health problems requiring full-time medical services, while others need timely maintenance and preventative and diagnostic care. All of them currently rely on Medicaid for coverage of vital medical services, or will need it in the future.

Defendant Michael Leavitt is the Secretary (the "Secretary") of the United States Department of Health and Human Services ("DHHS") and responsible for the oversight of the Medicaid program. The Secretary administers Medicaid through the DHHS sub-agency, the Centers for Medicare & Medicaid Services ("CMS").

Plaintiffs challenge new procedures the Secretary has adopted for determining eligibility for Medicaid. Section 6036 of the Deficit Reduction Act of 2005, Pub.L.No. 109-171, signed into law by the President in February 2006 ("Section 6036") (a copy is attached hereto as Exhibit A), mandates that states must now obtain specific documents from Medicaid beneficiaries and

applicants verifying their citizenship in order for the states to receive reimbursement from the federal government for the services provided to the beneficiaries. Though Section 6036 is written as purely a mandate for states, the Secretary has declared that the citizenship documentation requirements are a mandate for *beneficiaries and applicants*, and has instructed states to condition their provision of health coverage on the beneficiaries' production of the necessary documentation. Additionally, the Secretary has sharply limited the scope of the documentation that will be allowed to serve as proof of a Medicaid applicant's or beneficiary's citizenship, making it impossible for some individuals to meet the requirements and thereby attain or maintain their vital Medicaid coverage.

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

## **II. The Preliminary Injunction Standard**

The court may grant a preliminary injunction where the plaintiffs demonstrate (1) that their case has some likelihood of success on the merits; (2) they will suffer irreparable harm if the injunction is not granted; and (3) that no adequate remedy at law exists. Nat'l People's Action v. Vill. of Wilmette, 914 F.2d 1008, 1010 (7th Cir. 1990), cert denied, 499 U.S. 921 (1991). Once the plaintiffs meet this initial burden, they must establish that the harm they will suffer if a preliminary injunction is wrongfully denied outweighs the harms to the defendants if a preliminary injunction is wrongfully granted. Id. at 1011. The court must also consider the

effect that granting or denying the request for a preliminary injunction will have on the public interest. Gateway E. Ry. Co. v. Terminal R.R. Ass'n of St. Louis, 35 F.3d 1134, 1137 (7th Cir. 1994); Am. Med. Ass'n v. Weinberger, 522 F.2d 921, 925 (7th Cir. 1975). Plaintiffs easily satisfy all of these requirements.

### **III. Plaintiff Has A High Likelihood Of Success On The Merits**

#### **A. The Medicaid Program**

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

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

citizens. 42 U.S.C. §1320b-7(b)(2) and (d)(1)(A).<sup>1</sup> Another is that the states may not administer the program in any way that results in the denial of health coverage to otherwise eligible American citizens. 42 U.S.C. §1396a(b)(3).

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

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

Some Medicaid beneficiaries attain coverage without having their eligibility determined by the state Medicaid agency. Recipients of Supplemental Security Income (SSI) are an

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

<sup>2</sup> Congress knows how to expressly establish a program with closed-end eligibility periods when it wants to. The Food Stamp program, unlike Medicaid, has that type of structure. See 7 U.S.C. §2020(e)(4); 7 C.F.R. 273.10, 273.14 (stating that the entitlement to Food Stamp is limited to a "definite period of time" such that "no household

example. SSI is the cash assistance benefit for aged, blind and disabled individuals with low incomes. 42 U.S.C. §1382. In most states, Medicaid coverage must be provided to all individuals who are receiving SSI. 42 U.S.C. §1396a(a)(10)(A)(i)(II). An individual must verify that he is a citizen or lawful alien to qualify for SSI.

Section 1634 of the Social Security Act permits states to have the Social Security Administration (SSA) make determinations of Medicaid eligibility for aged, blind and disabled individuals. 42 U.S.C. §1383c(a). Individuals applying for SSI who live in these “1634” states make no separate application for Medicaid eligibility. Id. See also 2004 Green Book (108<sup>th</sup> Congress), at 3-15.<sup>3</sup> Nearly 80 percent of SSI recipients live in 1634 states.<sup>4</sup> Green Book at 3-16. Accordingly, individuals who qualify for SSI in Section 1634 states automatically are eligible for Medicaid.

In addition, individuals who qualify for adoption assistance under Title IV-E of the Social Security Act are automatically eligible for Medicaid. 42 U.S.C. §1396a(a)(10)(A)(i)(I). These individuals also do not make a separate application for Medicaid.

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

The Medicaid Act provides that most applicants establish citizenship for purposes of Medicaid eligibility by making a written declaration, under the penalty of perjury, that they are citizens of the United States. 42 U.S.C. §1320b-7(b)(2) and (d)(1)(A). See generally Department of Health and Human Services, Office of Inspector General, “Self-Declaration of

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may participate beyond the expiration of the certification period...without a determination of eligibility for a new period,” which requires an application).

<sup>3</sup> The states that make their own determinations are Connecticut, Hawaii, Illinois, Indiana, Minnesota, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma, and Virginia. Green Book at 3-16.

<sup>4</sup> These states are: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, New Jersey, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

U.S. Citizenship for Medicaid”, OEI-02-03-00190 (July 2005) (reporting on an investigation of state practices under this policy) (Attached hereto as Exhibit B, and hereinafter referred to as the “OIG Report”). States have always had authority to request documentation to corroborate the citizenship declaration where the state had reason to believe that there was a question about the applicant's citizenship. States were not required to demand documentation, and in fact most did not find it necessary. See OIG Report, at 9 (noting that forty-seven states permit or sometimes permit self-declaration of U.S. citizenship). In the event that states chose to ask an applicant for documentation of citizenship, the types of documentation that could be used to prove citizenship were not limited in any way, but could include documents such as hospital records or baptismal records. See id. at 14-15. The OIG Report did not recommend the elimination of self-declaration. Instead it recommended, inter alia, that the states strengthen post-eligibility quality control activities (like data-matches and file reviews). Id. at 18. In responding favorably to this recommendation, CMS noted, “The report does not find particular problems regarding false allegations of citizenship, nor are we aware of any.” Id. at 27.

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

Specifically, Section 6036 requires states to seek from persons declaring themselves to be citizens of the United States pursuant to 42 U.S.C. §§1320b-7(b)(2) and (d)(1)(A) documents

that establish both citizenship and personal identity, with one or more of the following documents, depending on the document's type:

Both citizenship and personal identity may be established by:

- a United States passport
- a Certificate of Naturalization
- a Certificate of United States Citizenship
- a valid state driver's license from a state that requires proof of citizenship for issuance of the license,<sup>5</sup> or
- any other document the Secretary identifies by regulation that provides both proof of citizenship or nationality and proof of personal identity.

42 U.S.C. §1396b(x)(3)(B) (2006).

Citizenship (but not personal identity) may be demonstrated by:

- a United States birth certificate,
- a Certification of Birth Abroad,
- a United States Citizen Identification Card,
- a Report of Birth Abroad of a Citizen of the United States, or
- any other document that the Secretary may identify that establishes United States citizenship or nationality.

42 U.S.C. §1396b(x)(3)(C) (2006).

Personal identity may be established by:

- any identity document described in section 274A(b)(1)(D) of the Immigration and Nationality Act (most commonly a driver's license or similar official photo identification), or
- any other reliable documentation of personal identity that the Secretary specifies by rule.

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<sup>5</sup> According to the June 9 Guidance, however, "CMS is not currently aware that any State has these processes in place at this time. Therefore, until such time as a State has this requirement in place, this documentation may not be accepted. June 9 Guidance, at 10.

42 U.S.C. §1396b(x)(3)(D) (2006).

Section 6036(b) makes the amendment effective with respect to all initial determinations of eligibility for Medicaid health coverage made on or after July 1, 2006, and it makes the amendment applicable to all Medicaid redeterminations for existing beneficiaries of Medicaid health coverage made on or after July 1, 2006. States will have to check citizenship documents for an estimated 50 million current Medicaid recipients in the coming year, and all the new applications for Medicaid. See Leighton Ku & Matt Broadus, Ctr. On Budget & Policy Priorities, New Requirement for Birth Certificates or Passports could Threaten Medicaid Coverage for Vulnerable Beneficiaries: A State by State Analysis (February 17, 2006), <http://www.cbpp.org/1-5-06health.htm>.

### **C. June 9, 2006, State Medicaid Director Letter**

The Secretary has not promulgated the regulations required by Section 6036 that will identify all of the documentation that will satisfy the documentation requirement. See 42 U.S.C. §§1396b(x)(3)(B)(v) (Secretary to identify by regulation additional documents that will prove both citizenship or nationality and personal identity); (x)(3)(C)(v) (Secretary to identify additional documents that will prove citizenship or nationality, but not personal identity) ; and (x)(3)(D)(ii) (Secretary to identify by regulation additional documents that will prove personal identity).

Instead of promulgating regulations, the Secretary, through CMS, issued a Dear State Medicaid Director letter on June 9, 2006 ("June 9 SMD Letter") to all state Medicaid agencies. A copy is attached hereto as Exhibit C. The June 9 SMD Letter makes the Secretary's policy very clear: sworn self-attestation of citizenship and identity is no longer sufficient to establish Medicaid eligibility, despite the fact that a duly enacted statute continues to declare that it is.

June 9 SMD Letter at 1. The letter declares that states are prohibited from finding a person eligible for benefits until the permissible documentation has, in a regimented and restricted order, been requested, sought by the applicant or beneficiary, attained, or demonstrated not to exist.

The Letter then limits the ways to document citizenship. It establishes five "charts" that are lists of documents that may constitute acceptable proof of citizenship and personal identity. Chart 1 is titled "Primary Documents," and it lists the documents that prove both factors: U.S. passports and certificates of citizenship or naturalization. While Section 6036 authorizes the Secretary to specify additional documents, the June 9 SMD Letter does not do so.

Charts 2 through 4 set up a hierarchy of documents that can prove citizenship or nationality, but not personal identity. If a person does not possess a document from Chart 1, but does have a document from Charts 2 through 4, then the person must also present a document from Chart 5 to establish personal identity. June 9 SMD Letter at 2.

Chart 2 is titled "Secondary Documents." These documents are allowable only if the "primary documents" in Chart 1 are not available. Examples of Chart 2 documents include a U.S. birth certificate or an official military record of service. Id. at 4-5.

Chart 3 consists of "Third Level Documents." These documents are permissible only if documents from Charts 1 and 2 are not available. An example of a third level document is a hospital record of the person's birth that was created at least five years prior to the initial application for Medicaid, and also indicates a U.S. place of birth. Id. at 6.

Chart 4 is titled "Fourth Level Documents," and "should ONLY be used in the rarest of circumstances." Id. at 6 (emphasis in original). Examples of documents in this category include census records for those born between 1900 and 1950, and various medical records, but only those created at least five years prior to the *initial* Medicaid application (which for many elderly

or disabled recipients means records so old as to no longer exist). Id. at 6-7. Chart 4 also includes, as a last resort, the possibility of a written affidavit. The affidavit must be "by at least two individuals of whom one is not related to the applicant/recipient and who have personal knowledge of the event(s) establishing the applicant's or recipient's claim of citizenship." Id. at 7. Since for almost all cases the claim to citizenship is based on birth in the United States, this amounts to needing witnesses to one's birth. Further, the two affiants themselves "must be able to provide proof of [their] citizenship and identity for the affidavit to be accepted." Id. at 7. This is the case despite the fact that the affiants are not in any way themselves seeking Medicaid benefits.

Chart 5 contains the options for establishing personal identity (but not citizenship). Chart 5 only specifies official government identification with a photograph or detailed physical description, such as a driver's license.<sup>6</sup>

The June 9 SMD Letter applies the documentation requirement to every current recipient of Medicaid. The Letter also provides that a recipient may be terminated from eligibility if the recipient fails to document citizenship under the Letter's dictates after having been given a "reasonable opportunity" to do so. Id. at 10. States may also terminate the Medicaid eligibility of recipients they decide have not made a "good faith effort" to secure the required documentation. Id. The Letter thus places the burden on beneficiaries to re-prove an element of eligibility that they already demonstrated when initially applying, without any requirement that

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<sup>6</sup> Chart 5 actually reduces the types of proof allowed in the statute. Section 6036 specifies "any identity document described in section 274A(b)(1)(D) of the Immigration and Nationality Act". Chart 5 references this provision of the Immigration and Nationality Act but only adopts the documents specified in one of the four subclauses of the regulation that implements that provision at 8 C.F.R. §274a.2(b)(1)(v)(B)(1), leaving out subclauses (2) through (4) of that regulation. In 8 C.F.R. §274a.2(b)(1)(v)(B)(4), for example, the Regulations specifically address the difficulties some people with disabilities may have coming up with usual forms of identification and allows operators of rehabilitation programs serving the people with disabilities to complete a citizenship and identity form for them.

there be some fact or circumstance indicating the original determination is obsolete or mistaken to trigger this new burden of proof.

The June 9 SMD Letter also instructs states to provide Medicaid applicants with a "reasonable opportunity" to obtain the documentation prior to denial of an application. However, the period given to an applicant to produce the documents cannot exceed the period states are otherwise limited to for the processing of applications under 42 C.F.R. §435.911 (45 days for most applications, and 90 days for applications requiring a determination of disability). States may create exceptions to these limits where applicants have tried in "good faith" to obtain documentation and, only at that point, offer to "assist" the applicants, but these terms are not defined. Id. at 10. Moreover, the policy requires that individuals present original documents. Id. at 11.<sup>7</sup>

#### **D. Plaintiffs' Dilemma**

Not only will current recipients be at risk of losing benefits, and future applicants in danger of being unable to prove that they are eligible, fulfilling the requirements will be very onerous to many of these individuals. Many of them have never had passports, or were born outside of hospitals because they lived in rural areas or because their race prohibited admission to hospitals, or are too infirm now to attain any of the qualifying documentation. The imposition of the Secretary's citizenship documentation requirements as a condition of their continued eligibility, whether or not their document searches are successful, is a severe burden, in addition to being unauthorized by the Medicaid Act. Any resulting coverage terminations will be life-threatening.

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<sup>7</sup> As a practical matter, this requirement will severely limit the use of mail-in applications, which are particularly useful for elderly, disabled, and working applicants. Few will want to send originals of important citizenship and identity documents by mail.

Applicants for Medicaid face a similar challenge. While they are U.S. citizens and meet all the eligibility requirements for Medicaid, many of them will find it difficult or even impossible to access the required documents to demonstrate their citizenship. The “reasonable opportunity” period for them has a definite end point (45 or 90 days), which will often come too soon for applicants to comply with the demands placed upon them. Despite having met the statutory eligibility requirement with regard to citizenship, their applications and their health care will be delayed or denied. For example, the declarations of the named plaintiffs, attached to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, show that they have encountered the following difficulties.

- Ruby Bell was born in Little Rock, Arkansas in 1911. Her daughter contacted Little Rock seeking a birth certificate, but was told that they only have birth certificates going back to 1914. Bell Declaration.
- Robert Patterson was born in a farmhouse in Jackson, Mississippi and does not know if a birth certificate exists for him, nor is he certain of his birth date. Patterson Declaration.
- Eddie Mae Binion believes she was born in 1934, but does not know the location of her birth, her mother’s name at the time of Binion’s birth, or the name she was given at the time of her birth. When she applied for benefits from the Social Security Administration, the agency searched for a birth certificate for her but was unable to locate one. Binion Declaration.
- The Cook County Public Guardian, on behalf of Alocia Brown, requested her birth certificate from Little Rock, Arkansas where Brown’s niece believes she was born in 1930 or 1931. The Public Guardian received a reply indicating that the Arkansas Department of Health, Division of Vital Records has no birth certificate on file for Brown for those or surrounding years, in that location or any other. Robert Harris, on behalf of Alocia Brown Declaration.
- Kevin Harris was adopted in a sealed adoption in Illinois in 1964, and does not know the location of his birth. The Public Guardian requested a birth certificate for him from the Cook County and State of Illinois Bureaus of Vital Statistics but they responded that they have no record of his birth. Robert Harris, on behalf of Kevin Harris Declaration.
- George Crawford was born in 1926 and does not have a birth certificate nor does he know if one recording his birth exists. His Trustee has looked through all of his

belongings but could not find a birth certificate or photo identification. Art Huenkemeier, on behalf of George Crawford Declaration.

- A.L. was born in North Carolina in 1989 and adopted in 1999. Her adoptive parents once had a photocopy of a birth certificate issued when she was born, but it has since been lost and they currently do not have any documentation for A.L. meeting the new requirements. Bauknight Declaration.
- Ruby Trammell was born in 1920 in a home in Bluff City, Arkansas and does not have a birth certificate or know if one was ever issued for her. She knows of no living witnesses to her birth. Trammell Declaration.
- Della Otis was born in South Carolina and does not have a birth certificate or know if one exists for her. She wrote to South Carolina Vital Records requesting a birth certificate, but received a reply indicating that the only record they had was for a different date, different name, and different county than the information she sent on her request. Otis does not know if that is her birth record and has been unable to obtain a copy of that record. Otis Declaration.

Service providers and public officials are similarly concerned about the impact of these new requirements. Robert F. Harris, the Public Guardian of Cook County, Illinois, is the guardian of the estate and/or person for over 800 individuals, many of whom have dementia, mental illness, or developmental disabilities. Harris states that his office often encounters difficulties in obtaining documents for their wards because the wards were previously living in deplorable conditions or victims of financial exploitation. Many wards cannot even state their names and are of little assistance in providing basic information such as where or when they were born. He states that many of his wards are dependent on Medicaid to pay for nursing home care and have no other housing options if they were to lose their Medicaid because of this new documentation requirement.

Diane Coleman, the Executive Director of Progress Center for Independent Living, serves people with disabilities, many of whom rely on Medicaid to cover necessary health care. According to Coleman, many of the clients have difficulty navigating the benefits system and may not be able to satisfy the new requirement because of lost possessions during periods of

homelessness, lost contact with family members, and lack of access to information while residing in institutions.

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

Medicaid recipients, their family members, their guardians, their nursing home providers and even federal and county government agencies have searched for documentation of citizenship and failed. The burden of providing this documentation is significant if not impossible for many to meet.

**E. Plaintiffs are likely to prevail on their legal claims**

1. Standard For Evaluating the June 9 SMD Letter

In United States v. Mead Corp., 553 U.S. 218, 226-27 (2001), the Supreme Court held that when Congress delegates authority to an agency generally to make rules that have the force of law, and the agency acts pursuant to that authority, the rules are entitled to the higher level of deference set forth in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Otherwise, the agency's interpretations of law are entitled to the lower level of deference set forth in Skidmore v. Swift & Co., 323 U.S. 134 (1944). Mead, 553 U.S. at 235.

Under Chevron, a court should first look to whether Congress has spoken directly to the precise question at issue, 467 U.S. at 842, and, if not, to whether the agency’s interpretation is a “permissible construction.” Id. at 843. The court should give the agency’s interpretation “controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” Id. at 844. Under Skidmore, the agency’s interpretation is not given controlling weight, and the court looks to the experience of the agency and “the thoroughness evident in [the rule’s] construction, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” 323 U.S. at 140.

In Section 6036, Congress gave the Secretary authority to promulgate regulations to flesh out the documentation requirement. If the Secretary had promulgated a notice-and-comment regulation, he might perhaps have an argument that it should be evaluated under Chevron. The June 9 SMD Letter does not qualify for evaluation under the Chevron deference standards, because the Secretary was not acting pursuant to the authority given by Congress to promulgate formal regulations. Mead, 553 U.S. at 227. Instead the Secretary has fired off a preliminary guidance that should not receive controlling weight even if it could meet the standard for heightened deference. See Alaska Dept. of Env’tl. Conservation v. EPA, 540 U.S. 461, 487 (2004) (declining to give agency guidance materials Chevron deference).<sup>8</sup>

2. The June 9 SMD Letter Improperly Applies the Full Documentation Rule to all Current Medicaid Recipients.

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<sup>8</sup> Letters to State Medicaid Directors are normally afforded some deference if they do not contradict the Medicaid statute. Grey Bear v. N.D. Dep’t Human Services 651 N.W.2d 611, 617 (N.D. 2002). The provisions of CMS State Medicaid Manual, consisting of sub-regulatory guidance similar to State Medicaid Directors, is only entitled to deference if it does not conflict with the Medicaid Act. Ramey v. Reinertson, 268 F.3d 955, 963 (10th Cir. 2001). See also Indiana Family and Soc. Serv. Admin. v. Thompson, 286 F.3d 476 480 (7th Cir. 2002) (holding that Skidmore level deference is due to provisions of the State Medicaid Manual depending on the agency’s care, consistency, formality, relative expertness and the position’s overall persuasiveness.)

Plaintiffs and the members of Class A are current recipients of Medicaid. They claim that the June 9 SMD Letter improperly implements Section 6036 by arbitrarily and capriciously overturning the final administrative decisions that establish that they meet the citizenship requirement for Medicaid, even though there has not been any indication that there has been a change in their citizenship status or that the original determination was the product of mistake or fraud. Class A consists of:

All persons who, prior to July 1, 2006, have been determined eligible for health coverage under the Medicaid Program, 42 U.S.C. §1396 et seq., and who declared on their applications for Medicaid coverage or otherwise that they are citizens or nationals of the United States.

As plaintiffs will demonstrate in the argument applicable to Class B (see Section III.E.3 below), the Secretary has improperly turned Section 6036's documentation requirements into an eligibility requirement for Medicaid. Even assuming, however, that the Secretary was not violating the law by doing this, he may not apply the documentation requirements to current Medicaid beneficiaries without some factual indication that the citizenship determinations previously made in their cases were mistaken or are no longer true. Requiring the members of Class A to go through the new documentation process is an improper interpretation of Section 6036 that is contrary to the Medicaid Act and the Secretary's own prior rules, and it imposes an unconstitutional result that a better interpretation of Section 6036 would avoid.

Section 6036(b) provides that the Secretary is to apply the new documentation rule “to redeterminations of eligibility made on or after [July 1, 2006] in the case of individuals for whom the [new documentation requirement] was not previously met.” This language would allow the Secretary to instruct the states to examine current cases and request more documentation only where there is some indication that citizenship was not adequately documented already. He did not have to require that every single Medicaid recipient be put

through the process of re-proving citizenship, as he does in the June 9 SMD Letter. He could have followed the recommendation of the OIG Report and called upon the states to undertake data matches and make a careful paper review at the next redetermination of eligibility, and then, where there is some fact or circumstance that legitimately calls the original determination into question, demand documentation from those particular recipients.

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

Unlike the June 9 SMD Letter, this alternative interpretation is fully consistent with the Medicaid Act's treatment of eligibility as ongoing and only subject to a threat of termination when facts indicate eligibility has ended. The Secretary has for a very long time acknowledged in a formal regulation that this presumption of ongoing eligibility is what the Act requires. 42 C.F.R. §435.930. Further, also unlike the June 9 SMD Letter, this alternative interpretation squares with the Medicaid Act's express prohibition on the denial of benefits to citizens. 42 U.S.C. §1396a(b)(3). The Secretary's approach in the June 9 SMD Letter will deny benefits to many recipients already determined to be citizens who cannot produce the specialized documentation within the time allotted, if ever. The alternative interpretation also would dramatically limit the administrative costs of implementing Section 6036 as to the estimated 50

million current recipients, while the Secretary's approach squanders immense public resources by imposing the full documentation process even when circumstances do not warrant it. The alternative interpretation is also a reasonable response to the fact that the OIG Report, with CMS concurrence, found no evidence of people falsely declaring citizenship. And it would implement the OIG Report's recommendation, concurred in by CMS, to address a perceived potential vulnerability by focusing on post-eligibility data matches and file reviews. The Secretary's approach in the June 9 SMD Letter ignores this evidence and these (his own) prior recommendations, and instead utilizes a blunderbuss where a scalpel would do just fine. The Secretary's interpretation violates the express command of Congress not to deny benefits to citizens, contravenes his own prior interpretations of the law, and otherwise lacks all "power to persuade," especially when there is another interpretation that suffers none of the same defects.

Additionally, the June 9 SMD Letter produces an unconstitutional result that can be avoided by the above-suggested alternative interpretation of Section 6036. If the Secretary's interpretation were correct, or were the only permissible interpretation, then Section 6036 would violate the Due Process rights of Class A.

The analysis for any due process claim consists of two parts: whether Plaintiffs have a protectable property interest; and, if so, what process is due them in connection to a threatened deprivation of that interest. Logan v. Zimmerman Brush, 455 U.S. 422, 428 (1982); Youakim v. McDonald, 71 F.3d 1274, 1288 (7th Cir. 1995), cert. denied, 518 U.S. 1028 (1996).

It is well established that individuals who meet the eligibility criteria for public benefit programs have a property interest in the continued receipt of those benefits that cannot be eliminated without adequate due process. Goldberg v. Kelly, 397 U.S. 254, 262 (1970). While the legislature can determine and change the eligibility requirements to receive those benefits, the legislature cannot deprive recipients of those benefits, once defined and conferred, without

appropriate procedural safeguards. Logan, 455 U.S. at 432; Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985). Governmental actions that trigger a deprivation of individuals' entitlements must be limited and cannot be arbitrary and capricious, regardless of the sufficiency of the procedures used after the deprivation is set in motion. Pearson v. City of Grand Blanc, 961 F.2d 1211, 1216 (6th Cir. 1992). "The hallmark of property, the Court has emphasized, is an individual entitlement grounded in [] law, which cannot be removed except 'for cause.'" Dupuy v. Samuels, 397 F.3d 493, 515 (7th Cir. 2005) (quoting Logan, 455 U.S. at 430).

The federal regulations governing the Medicaid program also help define the property interest that is created, and they confirm that recipients have a legitimate expectation of continuing receipt of benefits, once eligibility is established. See Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) (Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source"). For example, federal regulations require that Medicaid must be provided to all eligible recipients of Medicaid and before any adverse action can be taken against a recipient of Medicaid, the agency must provide the cause for taking such action. 42 C.F.R. 435.210; 42 C.F.R. 435.930. This is additional support for the fact that the property interest in Medicaid, once conferred, is not closed-ended and includes a "for cause" standard for its removal.

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

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

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

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

A component of the due process-driven set of fair procedures that attaches to the property interest that Medicaid recipients have, then, can be described as the principle of “repose” with respect to finally determined facts. Once a fact that helps to establish eligibility has been finally determined, the recipient cannot be “put to the proof” again with respect to that fact, absent some legitimate "cause" such as a change of circumstances or new facts indicating that the original determination was the result of mistake or fraud. The government cannot whimsically send the owners of such property interests – as a class and apart from anything specific to individual cases -- back to the proof of the facts establishing their eligibility over and over again. Undergoing the

exposure to possible loss of benefits and being put through the process is a harm that due process protects against, regardless of whether the wronged individual might eventually succeed in re-proving his eligibility. That is precisely what the Secretary has done to the Class A plaintiffs in the June 9 SMD Letter. There are alternative and constitutional ways to interpret Section 6036. However, if this Court decides that the Secretary's interpretation is the only one the statute allows, then Section 6036 itself is unconstitutional for this reason.

3. The June 9 SMD Letter Violates the Rights of Class B by Impermissibly Creating a New Eligibility Requirement and Establishing an Unfair Documentation Procedure

The June 9 SMD Letter is not authorized by section 6036. It not only impermissibly attempts to convert an internal administrative change into an eligibility requirement, but also sets up a procedure that denies the members of Class B a fair and timely opportunity to produce documentation by limiting the types of allowed documents and the time window in which to produce them. The Secretary's interpretation of Section 6036 produces an internal conflict with other provisions of the Medicaid Act and an unconstitutional result.

Class B consists of:

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

The June 9 SMD Letter is not a permissible interpretation of Section 6036 and therefore is entitled to no deference, whether under Chevron or otherwise. By disallowing eligibility to United States citizens who cannot comply with the documentation requirement established in the Letter, the Secretary is invading where “Congress has directly spoken to the precise question.” Chevron, 467 U.S. at 842. Congress in 42 U.S.C. §1396a(b)(3) unequivocally requires that the Medicaid program not be administered in a way that denies benefits to any citizen. And Congress has made eligible for Medicaid any citizen who signs the declaration under 42 U.S.C.

1320b-7. Section 6036 did not in any way amend these existing provisions of the Medicaid Act. The Secretary's interpretation of Section 6036 will result in the denial or termination of benefits to citizens who cannot meet its requirements but have declared under penalty of perjury that they are citizens as the Act requires, and could corroborate that, if necessary, with many types of proof that the June 9 SMD Letter refuses to recognize.

Section 6036 gives the Secretary ample leeway to implement its directives without violating the Medicaid Act. See 42 U.S.C. §§1396b(x)(3)(B)(v) (Secretary to identify by regulation additional documents that will prove both citizenship or nationality and personal identity); (x)(3)(C)(v) (Secretary to identify additional documents that will prove citizenship or nationality, but not personal identity); and (x)(3)(D)(ii) (Secretary to identify by regulation additional documents that will prove personal identity). The Secretary was free to construct a system under which no citizen, in the end, would be barred from the program due to inability to produce a specific document. He could have allowed Medicaid applicants to pursue any and all corroborating documents that support their §1320b-7 declarations, and, as a last resort, rely on an uncontradicted self-declaration to show citizenship. Nor did he need to require the hierarchical approach that requires individuals to ensure that they do not have documents in one chart before using documents in another chart. Compare Section 6036(a) (requiring that individuals prove citizenship with either a document in paragraph (B) or one document each from paragraphs (C) and (D)) with June 9 SMD Letter at 3, 5, 6 (dividing the documents listed in paragraph (C) of the statute into three charts and requiring that individuals may use documents from chart 3 only if documents from chart 2 are not available and only use documents from chart 2 if documents from chart 1 are not available). This would have accomplished the congressional intent that there be a heightened focus on this aspect of program integrity, while also accomplishing the express statutory directive not to deny benefits to citizens and that the eligibility requirement for citizens

remains the declaration of citizenship under 42 U.S.C. §1320b-7. The June 9 SMD letter instead violates these express directives and thus should not be afforded Chevron deference but should instead be enjoined.

In addition, the June 9 SMD Letter has no “power to persuade” under Skidmore. It is a complete departure from both the language of Section 6036 and from prior practice without any evidence of the necessity to do so. As the Inspector General and CMS itself stated less than a year ago, there is no evidence of a problem with fraudulent declarations of citizenship. OIG Report at 27. The self-declaration policy struck an excellent balance between the urgent purpose of Medicaid to provide health care to eligible people who need it and program integrity. The June 9 SMD Letter completely forsakes the overriding purpose of the program, health care, in favor of an entirely overboard attention to documentation that will deprive eligible citizens of the health care Congress wanted them to have. The June 9 SMD Letter makes no attempt to explain or rationalize this about-face, no citation to agency experience, no effort to portray the history and issues related to documentation. Instead, the Letter reads Section 6036 as a straightjacket imposed by Congress, which it plainly is not. The Secretary's interpretation is not only unfaithful to the statute, it is also unconstitutional.

If Section 6036 could be read as an attempt to create an eligibility requirement, as the June 9 SMD Letter interprets it, Section 6036 would produce an unconstitutional violation of the Due Process Clause. As explained above, due process analysis consists of two inquiries: whether the plaintiffs have a property interest, and what process is due prior to a denial or termination of that interest.

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

As to the process that is due, recipients and applicants are entitled to a fair opportunity to obtain an individualized determination, based on all the evidence that they can present, of whether they satisfy the requirement to document their declaration of citizenship. Youakim, 71 F.3d at 1290 (citing Greene v. Babbitt, 64 F.3d 1266 (9th Cir. 1995)).

But the Secretary has instructed states to deny or terminate Medicaid benefits to anyone who cannot produce one or more documents from a constricted list of options. The ability to produce a "qualifying" document will depend on any number of factors, many of them beyond the control of the applicant or recipient. None of the named plaintiffs, for example, possess a passport, and all would have difficulty affording the cost of acquiring one. Many African Americans born in the south were not born in hospitals that might have provided a birth certificate, and so do not have one. The document limitations set forth in the June 9 SMD Letter

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<sup>9</sup> They are members of this Class B and asserting this claim regarding the adequacy of the citizenship documentation process only in the alternative to the Class A claim and in the event that this Court disagrees with them about the

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

In addition, the Letter imposes an unreasonable and arbitrary deadline, given the stringent document list and the cumbersome hierarchical process that the Letter sets up. As to recipients, the Letter establishes a "reasonable opportunity" which the states are free to interpret. And it allows states to terminate recipients it deems are not making a "good faith effort" which is also open to state interpretation. Together with the strong threat to state matching funds that the Letter makes with respect to any state that does not vigorously enforce the documentation rules, this time limitation for recipients, coupled with the tight restrictions on types of documents, is far from a guarantee of a fair opportunity.

As to applicants, the time limit is 45 days for most cases (90 for cases requiring a disability determination). And states are not to begin Medicaid coverage until the documentation is in hand. This will likely be an insufficient amount of time for any Medicaid applicant not possessing the relevant documentation at the time of application. For example, obtaining an original birth certificate from a state of origin different than the one of current residence will often follow this trajectory: the applicant needs time to figure out where to send a request; a request is sent; the state of origin sends back the proper form and a demand for a fee; the

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Class A claim and finds it acceptable to have recipients go through the proof process on citizenship again.

recipient sends the form and the fee; the state of origin conducts a search and finds nothing and notifies the applicant. Several weeks may potentially pass in this attempt to obtain a document high on the hierarchy established by the June 9 SMD Letter, and only now does the applicant know to begin working on documents further down the hierarchy. Many recipients who could eventually satisfy the documentation requirements will be unable to satisfy them within the time deadlines.

It is not a defense to these unfair procedures to argue that Congress in Section 6036 was establishing new substantive eligibility requirements and not simply new procedures for satisfying pre-existing substantive eligibility rules. The Secretary is not free to make that claim.

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

Loudermill, 470 U.S. at 541.

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

4. Applying the June 9 SMD Letter's documentation requirements to Class C is contrary to Section 6036's Express Language

The June 9 SMD Letter violates the rights of Class C by applying the documentation requirement to them when Section 6036 does not apply to them. Class C is composed of:

All persons who are receiving or will receive health coverage under the Medicaid program, 42 U.S.C. §1396 et sequ., and are not or will not be required to file a separate application for Medicaid, because they have been determined eligible or claim eligibility for Medicaid coverage pursuant to 42 U.S.C. §1396a(a)(10)(A)(i)(I), based on a determination that they are eligible for Supplemental Security Income cash benefits under Title XVI of the Social Security Act or Adoption Assistance under Title IV-E of the Social Security Act.

As discussed above, 42 U.S.C. §1320b-7 (which is §1137(d)(1)(A) of the Social Security Act) requires that an individual who is applying for Medicaid, as well as a number of other public benefit programs, declare in writing under penalty of perjury that the individual is a U.S. citizen or national. 42 U.S.C. § 1320b-7(d)(1)(A). Section 6036 expressly applies to “an individual who declares under section 1137(d)(1)(A) to be a citizen or national of the United States for purposes of establishing eligibility for [Medicaid] benefits.” Most Medicaid applicants are required to make these declarations. One significant exception is the 79% of SSI beneficiaries living in "Section 1634" states. This is also the case for the beneficiaries of adoption assistance agreements pursuant to Title IV-E in states in which a separate Medicaid application is not made for these children. Thus, on its face, Section 6036 does not apply to these categories of individuals.

The CMS guidance, however, does not acknowledge that the requirements of 6036 are not applicable to these individuals. Nowhere in the June 9 SMD Letter does it communicate to the states that SSI recipients in 1634 states should be exempt. In addition, it states explicitly that Title IV-E children must have in their files both a declaration of citizenship and documentary evidence of the citizenship. June 9 SMD Letter at 9. Thus, these provisions and omissions of the June 9 SMD Letter are in conflict with the statute and should be struck down.

5. The Secretary Has not Fulfilled a Condition Precedent to Implementation of Section 6036

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

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

As the above language clearly indicates, the outreach program described therein is a “requirement” that Congress said “shall” be established as soon as practicable following the passage of the law, now over five months ago. To date, the Secretary has done virtually nothing to establish the congressionally mandated outreach program designed to help affected individuals negotiate the new documentation landscape.<sup>10</sup>

While subsection 6036(c) does not contain a certain date by which the Secretary was expected to establish the required outreach program, its language nonetheless demonstrates that Congress wanted that done before the rest of Section 6036 was to be implemented on July 1, 2006. Congress in subsection 6036(c) demanded an outreach program “designed to educate individuals who are likely *to be* affected” by the rest of that section. (Emphasis added.) The use of the future tense in the outreach requirement (“individuals . . . to be affected”) demonstrates that Congress intended that the program be in place before the date on which individuals would be affected by the amendments, which is July 1<sup>st</sup> 2006. Otherwise, for those individuals, the

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<sup>10</sup> In the June 9 SMD Letter the Secretary acknowledged his obligation to create an outreach program, but instead of doing so passed that obligation, and the costs associated with it, along to the states. (“We encourage States to alert your Medicaid beneficiaries and potential applicants as soon as possible about the requirement to provide acceptable documentary evidence of citizenship . . . and how the requirements may be met. . . . We are confident that your implementing procedures will assure compliance with this requirement” June 9 SMD Letter at 12-13).

outreach and education program would serve no purpose, as they would already be persons who “had been affected” rather than ones “to be affected.”

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

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

The Secretary also has not complied with another provision of Section 6036. As noted above, Section 6036 authorizes the Secretary to broaden the types of citizenship documentation that will be deemed acceptable for a state to receive federal financial participation, and it requires that he do so by way of regulation, not through a letter. This is no mere technicality. Regulations, unlike the June 9 SMD Letter, are subject to public notice and comment. Had there been such input in this case, the Secretary might have written more comprehensive rules that are more attuned to the realities about documentation among American citizens.

Ultimately, however, it does not matter whether the defendant would in fact have produced different or better rules had he acted as Congress instructed. What matters is that the public, including affected Medicaid recipients and applicants, has been deprived of the input that is required before rules like these can be put into effect. See 5 U.S.C. § 553(b)-(c) (“General notice of proposed rule making shall be published...After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation”); Hector v. United States Dep't of Agric., 82 F.3d 165 at 167 (7th Cir. 1996) (“A rule promulgated by an agency that is subject to the Administrative Procedure Act is invalid unless the agency first . . . gives the public an opportunity to submit written comments; and if after receiving the comments it decides to promulgate the rule it must set forth the basis and purpose of the rule in a public statement”). In this case, Congress demanded regulations and the defendant has to date ignored that demand, to the detriment of affected individuals and public input. He is nevertheless threatening states' federal Medicaid funds and beneficiaries' Medicaid coverage under a letter that does not comply with his statutory obligations.

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

The named plaintiffs demonstrate the hardship Section 6036 and the June 9 SMD Letter creates for Medicaid recipients and applicants. For example, the named plaintiffs will experience significant financial, administrative and emotional harm just going through the documentation process, regardless of whether they satisfy it in the end. See Robertson v. Granite City Cmty. Unit Sch. Dist., 684 F.Supp. 1002, 1007 (S.D. Ill. 1988) (finding irreparable harm to plaintiff's emotional well-being); Moore v. Miller, 579 F.Supp. 1188, 1191 (N.D. Ill. 1983) (noting that although financial harm is generally insufficient to find irreparable harm, where the case involved individuals in the "grip of poverty," even a small welfare payment decrease can

cause irreparable harm); Norton v. Richardson, 333 F.Supp. 1382, 1384 (E.D. Wisc. 1971) (recognizing that emotional and psychological harm would be irreparable harm).

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

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

The purpose of the Medicaid program is to provide necessary health care benefits for individuals who live in poverty in the United States. Medicaid recipients range from children requiring basic health care to full-time nursing home care for the elderly and the mentally and physically incapacitated. The deprivation of these necessary health benefits is quite serious and will cause irreversible harm, possibly death. Weinberger, 522 F.2d at 926. Danger to a person's health and life from potential loss of Medicaid coverage can be considered irreparable harm. Kai v. Ross, 336 F.3d 650, 656 (8th Cir. 2003). If plaintiffs' benefits are terminated and therefore

they forego seeking medical care, they will certainly suffer irreparable harm. Massachusetts Ass'n of Older Americans v. Sharp, 700 F.2d 749, 753 (1st Cir. 1983).

The declarations of the named plaintiffs and the other Declarants attached to the Motion for Temporary Restraining Order and Preliminary Injunction amply portray the actual and potential harm in the absence of an injunction. This is multiplied across the millions of people in the plaintiff classes.

#### **V. Plaintiffs Have No Adequate Remedy At Law**

No legal remedy could make the Plaintiffs whole for the deprivations they will suffer if the June 9 SMD Letter is implemented. The loss of time and energy and emotional investment in responding to the threat of lasting and irreversible harm to their personal health cannot be remedied by law. Nor, of course, can the actual loss of personal health coverage and health itself. Damages would be inadequate and in any case are barred by sovereign immunity. None of these harms are remediable by a permanent injunction entered months or even years from now, after full litigation of the case and infliction of irreparable damage. Weinberger, 522 F.2d at 926 (court upheld preliminary injunction issued to stop implementation of new Medicaid and Medicare regulations).

#### **VI. Balance Of Harms Weighs Heavily In Favor Of Plaintiffs**

In contrast to the harms Plaintiffs will suffer in the absence of injunctive relief, entry of the injunction will cause Defendant little to no harm. The Office of Inspector General for the Department of Health and Human Services found no substantial evidence that non-U.S. citizens or nationals were obtaining Medicaid by falsely claiming citizenship, and CMS concurred. OIG Report at 27. In fact, because the new requirements under the June 9 SMD Letter are so cumbersome and will apply to every single Medicaid applicant and recipient, stopping the

implementation of these requirements will actually save the government in administrative costs.<sup>11</sup>

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

The public interest will be served by granting the injunction. The June 9 SMD Letter will affect a nationwide program with over 50 million recipients and millions of applicants.

Weinberger, 522 F.2d at 926. If the injunction is not granted, millions of medically vulnerable people may lose their only health care coverage. The economic burden on the health care sector, such as hospitals, clinics, and skilled care facilities, with thousands if not millions of their patients losing coverage, could be devastating.

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

## **VIII. CONCLUSION**

This Court should grant Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and enter an order directing Defendant Leavitt to instruct states that the June 9 SMD Letter is not to be implemented and that states will not have their federal financial

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<sup>11</sup> The Medicaid Director for Connecticut has observed that the requirements of Section 6036 “would be an enormous administrative burden,” and the Medicaid Director for Wisconsin has said that Section 6036 “would have

participation put at risk for serving eligible Medicaid recipients during the time this case is pending prior to a ruling on the merits by this Court, regardless of the outcome of that ruling. If states could be retroactively deprived of federal funds after a ruling by this Court, they would immediately implement the documentation rules regardless of whether this Court had temporarily enjoined the Secretary from enforcing them, to protect against possible retroactive loss of matching funds.

Respectfully submitted,

BELL, et al.

DATED: June 30, 2006

By: \_\_\_\_\_  
One of Their Attorneys

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