No. 09-1441

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

D.T.M., a minor child, by his mother Penny McCartney; E.C., a minor child, by his mother Selena McMillan; K.T., a minor child, by her father, Greg Tipton, individually and on behalf of themselves and others similarly situated,

Plaintiffs-Appellees,

v.

Lanier M. Cansler, Secretary, North Carolina Department of Health and Human Services, in his official capacity,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of North Carolina

BRIEF OF APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 09-1441 Caption: D.T.M., et al. v. Cansler, Secretary, DHHS

Pursuant to FRAP 26.1 and Local Rule 26.1,

D.T.M., et al. (name of party/amicus) who is Appellee (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

****

I certify that on Nov. 13, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Mr. Ronald M. Marquette
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/s/ Jane Perkins (signature) Nov. 13, 2009 (date)

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JURISDICTIONAL STATEMENT

The collateral order doctrine provides the Court with jurisdiction over the interlocutory appeal from the denial of a state official's motion to dismiss pursuant to the Eleventh Amendment. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45 (1993).

STATEMENT OF ISSUES FOR REVIEW

I. Whether the District Court correctly held that the Eleventh Amendment does not bar this suit against a state official alleging ongoing violations of federal law and seeking prospective injunctive relief.

II. Whether the succession of a new Secretary or the enactment of a temporary state law in 2009 made this case moot.

III. Whether the Court should exercise pendent jurisdiction over the District Court's denial of the state official's motions to dismiss based on standing, mootness, and failure to allege a due process violation.

IV. Whether, if jurisdiction is granted, the District Court correctly denied the Secretary's motions to dismiss based on standing, mootness, and failure to allege a due process violation.

STATEMENT OF THE CASE

The named Plaintiffs commenced this proposed class action on April 7, 2008, alleging that policies and practices used by the North Carolina Department

of Health and Human Services ("Department" or "DHHS") to deny, reduce, or terminate the Medicaid services received by them and other Medicaid recipients violate the Due Process Clause of the United States Constitution, U.S. Const. amend. XIV, and the Medicaid Act, 42 U.S.C. § 1396a(a)(3). (J.A. 1, 8-9, 10-11, 44-45, Am. Compl. ¶¶ 3-5, 9-11,159-64.) The Defendant is the Secretary of the Department ("Secretary") and, as such, has primary responsibility for ensuring that the Medicaid program operates in conformance with federal law. (J.A. 11, Am. Compl. ¶ 12.) The Plaintiffs sued the Secretary in his official capacity. (*Id.*) Plaintiffs filed a Motion for Class Certification on June 6, 2008. (J.A. 2.)

The Secretary filed a Motion to Dismiss on July 2, 2008, claiming Eleventh Amendment immunity, that the recipients could not enforce the Medicaid Act pursuant to 42 U.S.C. § 1983, that the recipients lacked standing, that the case was not ripe and was moot, and moving for abstention. (J.A. 2, 87-89.) On August 11, 2008, the Secretary filed another motion to dismiss, asserting that enactment of a temporary state statute in 2008 had caused the case to become moot. (J.A. 3.) On January 28, 2009, Defendant's counsel notified the court that Lanier M. Cansler had become the Secretary of the Department. (J.A. 193.)

Thereafter, on March 16, 2009, U.S. District Judge Malcolm Howard denied the motions to dismiss. *See McCartney v. Cansler*, 608 F. Supp. 2d 694 (E.D.N.C 2009) (J.A. 196-218, Order.) The Order also denied the Medicaid recipients'

motion for class certification without prejudice to re-filing after discovery relevant to class certification. (*Id.*)

On April 14, 2009, the Secretary a Notice of Appeal from the Order denying his Motion to Dismiss for lack of subject matter jurisdiction based upon Eleventh Amendment immunity. (J.A. 320, Notice of Appeal.) On April 23, 2009, the District Court stayed proceedings pending the outcome of this appeal. (J.A. 6.) No discovery has occurred in this case.

STATEMENT OF FACTS

As alleged in the Amended Complaint, thousands of North Carolina Medicaid recipients are being denied access to mental health and developmental disability services because the policies and practices of the Department violate federal constitutional and statutory due process requirements. (J.A. 7-47, Am. Compl. ¶¶ 1-5, 15, 117-58.) According to the complaint, the Defendant has directed or ratified the challenged practices. (J.A. 8, 44, Am. Comp. ¶¶ 2, 158.)

Among other things, the Complaint alleges that DHHS makes decisions to deny or terminate Medicaid services under arbitrary procedures and fails to provide timely and adequate written notices of those decisions. (J.A. 36-39, Am. Compl. ¶¶ 117-129.) In some circumstances, services are denied, reduced, or terminated with no written notice at all. (J.A. 36-37, 42-43, Am. Comp. ¶¶ 118-120 (both); 150; 154.) The Complaint also alleges that, when written notices are sent, they do

not contain legally required information that will allow recipients to understand the decision or what to do about it. (J.A. 40, Am. Comp. ¶¶ 135-41.) Notices are provided after services have been stopped and, when individuals do request appeals, services are not timely reinstated pending appeal as federal law requires. (J.A. 39, 41, 44, Am. Comp. ¶¶ 128-31, 143-44, 155-56.) Due to improper procedures, notices are not sent to the parent of a child or legal guardian of an incompetent person or are not sent to the recipient's current address. (J.A. 39-40, Am. Comp. ¶¶ 132-34.) The Complaint also alleges that DHHS has improperly delayed action on requests for services and on appeals, and then fails to permit a *de novo*, meaningful hearing as required by federal law. (J.A 39, 42-43, Am. Comp. ¶ 127, 147-53.)

Plaintiff D.T.M. alleges that he lost all of the Medicaid-funded mental health services that were being provided while he attended school and, as a result, was excluded from school. (J.A. 15-23, Am. Comp. ¶¶ 29-60.) D.T.M.'s loss of services resulted from multiple due process violations by the Department, including oral denials, improper notice, use of arbitrary procedures in reducing and terminating services, interruptions of service without notice, unreasonable delay in hearing D.T.M.'s appeal, and denial of the right to a *de novo*, meaningful hearing. (*Id.*) The Department's practices ultimately caused D.T.M.'s state administrative appeal to be dismissed, forcing him to request relief from the federal court. (*Id.*;

J.A. 46, Am. Comp. Prayer for Relief 3(b).) As alleged, D.T.M. is threatened with the future illegal interruption, reduction or termination of his remaining services, because the Department regularly reviews the services he does receive. (J.A. 8-9, Am. Comp. ¶ 3; Br. of Appellant at 6.)

Plaintiff E.C. alleges that his mental health services in the school were reduced without any written notice as a result of "misinformation, discouragement, and intimidation." (J.A. 23-30, Am. Comp. ¶¶ 64-68.) As alleged, the content of this misinformation directly contradicted the Department's own written policies, but there is a regular, ongoing practice of using oral communications to discourage requests for services and appeals. (J.A. 8-9, 36-37, 44, Am. Comp. ¶¶ 2- 3, 118-120 (both), 158.) The complaint further alleges that the Department violated E.C.'s due process rights by reducing his services a second time without showing any change in his medical needs, failing to mail notice to his current address, failing to include legally required information in the notice, interrupting services pending appeal, and improperly dismissing his appeal. (J.A. 23-30, 42-43, Am. Comp. ¶¶ 61-88, 148-50; J.A. 86.) At the time of the filing of the complaint, E.C. was threatened with denial of a meaningful, *de novo* hearing and illegal reductions or terminations of his services by the Defendant in the future, because his services must be reauthorized every 90 days. (J.A. 8-9, 27, Am. Comp. ¶¶ 3, 75.)

Plaintiff K.T. also alleges she is the victim of illegal DHHS practices, including an interruption of thirty-six days in the Department's authorization for her services before written notice informed her that her services were being terminated and reduced, an inadequate notice of the Department's action, and failure to timely reinstate authorization for her services to continue after she did request an appeal, threatening her with imminent harm. (J.A. 30-35, Am. Comp. ¶¶ 89-116.) K.T. also is threatened with further improper interruption, reduction, or termination of her services, which are reviewed by the Department every year. (J.A.8-9, 31, Am. Comp. ¶¶ 3, 91, 93.)

The Medicaid recipients seek declaratory and injunctive relief on behalf of themselves and the proposed class "requiring the Defendant, his agents, successors, and employees" to comply with the Medicaid Act and the Constitution. (J.A. 9, 45-46, Am. Comp. ¶ 5, Prayer for Relief.)

SUMMARY OF ARGUMENT

The District Court correctly held that the Eleventh Amendment does not bar this suit. *Ex parte Young* and its progeny provide a narrow, yet well-recognized exception to the Eleventh Amendment that allows the federal court to hear this complaint by Medicaid recipients who seek only prospective declaratory and injunctive relief against the state Medicaid director to halt ongoing violations of the United States Constitution and the Medicaid Act.

The Court should reject the Secretary's suggestion to broaden the *Ex parte Young* exception to include a requirement that plaintiffs allege and prove the defendant is violating rights secured by the Constitution and laws of the United States. The Court should also reject the Secretary's request to decide whether there is an ongoing violation of federal law by determining what pre-deprivation and post-deprivation due process is being provided and whether it is legally adequate. These evaluations are precluded at this stage by *Verizon Md. Ins. v. Pub. Servs. Comm'n of Md.*, 535 U.S. 635 (2002).

The Secretary has not met his heavy burden to establish that the case became moot when he took office or when a new state law was enacted in August 2009. The Amended Complaint is against the Secretary in his official capacity, and the allegations of the complaint describe the ongoing policies and practices of the Department. Moreover, the new state law is limited in scope and, by its terms, only temporary.

The Secretary attempts to graft the District Court's denial of his motion to dismiss based on standing, mootness, and the lack of enforceable rights onto the Court's review of the Eleventh Amendment issues. Stripped of their Eleventh Amendment gloss, as they must be, these rulings are not appropriate for immediate review. The Secretary did not provide the requisite notice of appeal under Fed. R. App. P. 3, nor did he follow the certification process for obtaining interlocutory

appellate review of these issues pursuant to 28 U.S.C. § 1292(b). The non-immunity issues do not meet the narrow standards for pendent appellate jurisdiction because they are neither inextricably intertwined with the Eleventh Amendment issue nor is consideration of the issues necessary to ensure meaningful review of the immunity question. However, should the Court accept jurisdiction, then it should affirm the District Court's denial of the motions to dismiss.

STANDARD OF REVIEW

On appeal, the determination of whether a state official is entitled to Eleventh Amendment immunity is reviewed *de novo*. *Antrican v. Odom*, 290 F.3d 178, 184 (4th Cir.), *cert. denied*, 537 U.S. 973 (2002) (citing *CSX Transp., Inc. v. Bd. of Pub. Works*, 138 F.3d 537, 541 (4th Cir. 1998). Because a factual inquiry into jurisdiction is not appropriate at this stage, plaintiffs are "afforded the same procedural protection as [they] would receive under a Rule 12(b)(6) consideration." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). Thus, where a challenge implicates the sufficiency of facts pled in the complaint, the Court must "accept as true all of the factual allegations contained in the complaint." *Erikson v. Pardus*, 551 U.S. 89, 94 (2007) (citation omitted). To survive a motion to dismiss, "the facts alleged 'must be enough to raise a right to relief above the speculative level' and must provide 'enough facts to state a claim to relief that is plausible on its face.'" *Robinson v. American Honda Motor Co.*, 551 F.3d 218,

222 (4th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007)). The Court should "presume that general allegations embrace the specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), and construe all reasonable inferences from those allegations in the plaintiffs' favor, *Warth v. Seldin*, 422 U.S. 490, 501 (1975). *See Antrican v. Buell*, 158 F. Supp. 2d 663, 667 (E.D. N.C. 2001) (holding that "plaintiffs are entitled to reasonable inferences"), *aff'd*, 290 F.3d 178 (4th Cir. 2002).

The federal rules do not generally permit the introduction—or consideration—of new evidence in the courts of appeal. *See* Fed. R. of App. P. 10; *see also Adams v. Holland*, 330 F.3d 398, 406 (6th Cir. 2003) (noting that "the purpose of amendment under this rule [Fed. R. App. P. 10(e)] is to ensure that the appellate record accurately reflects the record before the District Court, *not* to provide this Court with new evidence not before the District Court, even if the new evidence is substantial") (emphasis in original). However, in determining mootness, the Court will review the district court's holding "in light of [the state] law as it now stands, not as it stood when the judgment below was entered." *Md. Highways Contractors Ass'n v. State of Md.*, 935 F.2d 1246, 1249 (4th Cir. 1991) (citation omitted).

ARGUMENT

I. THE DISTRICT COURT ORDER SHOULD BE AFFIRMED BECAUSE THE ELEVENTH AMENDMENT DOES NOT BAR THIS LAWSUIT.

A. This case fits squarely within the *Ex parte Young* exception.

"[T]he Eleventh Amendment [does not] preclude a private citizen from suing a state officer in federal court 'to ensure that the officer's conduct is in compliance with federal law.'" *Litman v. George Mason Univ.*, 186 F.3d 544, 550 (4th Cir. 1999) (quoting *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 71 n. 14 (1996).[1] Under the *Ex parte Young* exception, 209 U.S. 123 (1908), a federal court may enjoin the state officer's conduct, because an official who acts in violation of federal law "loses 'the cloak of State immunity.'" *Antrican*, 290 F.3d at 184 (quoting *Bragg v. W.V. Coal Ass'n*, 248 F.3d 275, 292 (4th Cir. 2001)). *See Ex parte Young*, 209 U.S. 123 (1908) (holding that Eleventh Amendment did not bar suit against state attorney general to enjoin him from enforcing law that plaintiffs alleged violated the Due Process Clause of Fourteenth Amendment).

In determining whether *Ex parte Young* applies, "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing

[1] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. The Court has construed the Amendment to apply to suits by a state's own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890).

violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md. Ins. v. Pub. Servs. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997)). *See S.C. Wildlife Fed. v. Limehouse*, 549 F.3d 324, 332 (4th Cir. 2008) (citing *Verizon* and holding, for purposes of Eleventh Amendment analysis, "it is sufficient to determine that … [the plaintiff] … alleges facts that, if proven, would violate federal law and that the requested relief is prospective").

In this case, the Medicaid recipients have sued the Secretary, as the state official responsible for the Medicaid program, in his official capacity. (J.A. 5, Am. Compl. ¶ 12.) They allege that this official has failed to comply with mandatory federal laws and that the violations are ongoing. (J.A. 8-9, 12, 44-45, Am. Compl. ¶¶ 2-3, 19, 159-64.) The recipients seek only prospective relief. (J.A. 45-46, Am. Compl., Prayer for Relief.) The suit is a textbook *Ex Parte Young* action.

Nevertheless, Secretary Cansler makes three arguments against application of *Ex parte Young*: the state is the real party in interest (Br. for Appellant at 26-28); the relief sought is not prospective relief (*id.* at 28-33); there is no ongoing violation of federal law (*Id.* at 34-54). Each argument should be rejected.

1. Pursuant to *Young*, North Carolina is not the real party in interest.

The Secretary focuses on one aspect of the relief requested in the Amended Complaint, namely that the court enjoin the Defendant, his agents, successors, and

employees to prospectively reinstate behavioral health and developmental disability services to the named Plaintiffs and members of the class whose Medicaid services were improperly reduced or terminated as a result of the due process violations alleged in the complaint. (J.A. 46; Am. Compl., Prayer for Relief 3.b.). According to the Secretary, this relief is "in essence" against the State for the recovery of money and the entire complaint should be dismissed. (Br. for Appellant at 26-28.)

The Secretary's classification is incorrect. The request for prospective reinstatement of benefits is not seeking monetary compensation for Medicaid recipients who, as a result of the practices alleged in the complaint, experienced denial or termination of their Medicaid services in the past. Rather, the Prayer for Relief is asking the court to prospectively reinstate coverage for services that were improperly reduced or terminated until the illegal due process practices are corrected by the Secretary.

The relief requested here is precisely the type of injunctive relief that the Fourth Circuit recognizes plaintiffs may obtain when the state Medicaid agency's practices violate federal due process requirements. *See Kimble v. Solomon*, 599 F.2d 599 (4th Cir.), *cert. denied*, 444 US 950 (1979). In *Kimble*, the Fourth Circuit found no Eleventh Amendment bar to the plaintiffs' request for "prospective restoration of benefits." *Id.* at 600. The Court ordered the Medicaid agency to

restore Medicaid to class members and continue this prospective restoration of benefits until after the state had complied with the federal due process notice requirements. *Id.* at 605. *See Cyrus v. Walker*, 409 F. Supp. 2d 748, 753 (S.D. W.Va. 2005) (applying *Kimble* and *Antrican* to complaint alleging state Medicaid violations of constitutional and statutory requirements for due process and holding recipients' request for prospective adjustments in benefits fit "squarely" within *Ex parte Young*). *See generally Nelson v. Univ. of Texas*, 535 F.3d 318, 322, 324 (5th Cir. 2008) (citing *Verizon* and cases from the circuits, including the Fourth, holding that a "request for reinstatement is sufficient to bring a case within the *Ex parte Young* exception to Eleventh Amendment immunity, as it is a claim for prospective relief designed to end a continuing violation of federal law"). *Cf. Edelman v. Jordan*, 415 U.S. 651, 656 n.5, 671 (1974) (upholding prospective relief but reversing that part of district court order requiring state to "release and remit" welfare checks as compensation to individuals whose aid applications were not processed in a timely manner).

The cases cited by the state official do not benefit him. (Br. for Appellant at 26-27.) *Ex parte Ayers*, 123 U.S. 443 (1887), was a suit for specific enforcement of a contract between the plaintiffs and the State of Virginia. *Ex parte Ayers* did not question that state officials can be sued in their official capacities to enjoin ongoing violations of federal law. 123 U.S. at 507 ("If, therefore, an individual,

acting under the assumed authority of a state, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States."). The passage quoted from *DeKalb Co. Sch. Dist. v. Schrenko,* 109 F.3d 680 (11th Cir. 1997), responds to facts different from those here. In *DeKalb County*, the Eleventh Circuit refused to exercise jurisdiction over a school district's cross claim for a financial contribution from the state for past desegregation costs. The cross-claim was filed decades after the child plaintiffs originally obtained a court order of desegregation against the school district. *Id.* at 689, 691. The court expressly distinguished numerous cases that *are* comparable to the case at hand—those where the state officials, as parties to the original action, were ordered to contribute to the cost of future desegregation activities. *Id.* at 691. Finally, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), was brought in federal court to enjoin state officials from allegedly acting contrary to *state* law. The basis for *Young* jurisdiction was not even arguably present. *Id.* at 106. In sum, the Court should not dismiss this case on the grounds that the State is the real party in interest.

2. The Medicaid recipients seek only prospective relief.

The Secretary argues that the Medicaid recipients "seek only retrospective relief," to be "paid for a past medical service," and that the Eleventh Amendment precludes such relief. (Br. for Appellants at 33.) While the Secretary correctly points out that *Ex parte Young* does not allow a federal court to order retroactive relief, that is beside the point because the complaint does not seek retroactive relief.

The Secretary provides an extensive discussion about the Medicaid Act's definition of "medical assistance" and argues that, because medical assistance is defined in the Medicaid Act as payment, an order directing the Secretary to provide medical services would be "ineffectual" and would not vindicate a "federal interest." *Id.* at 29-31. The Secretary's argument misses the point of this case, which is not about failure to pay claims for past services, but about the practices the Department is using when it decides whether services will be covered by Medicaid or continued in the future. *Cf.* Am. Compl. ¶ 21, J.A. 6-7 (noting that the Medicaid program "typically does not directly provide health care services to eligible individuals, nor does it provide beneficiaries with money to purchase health care directly. Rather, Medicaid is a vendor payment program….")

As the Secretary concedes, DHHS requires preauthorization before the services at issue here may be provided through Medicaid initially and then requires

reauthorization on a regular basis (e.g., every 90 days) to continue coverage. (Br. of Appellant at 3-4.) The Secretary's construct would insulate the Department from accountability for the range of due process violations alleged here, which occur during these authorization processes. (J.A. 14-15, Am. Compl. ¶ 28.) Under this theory, the Department could refuse to provide notice or any appeal rights when a request for preauthorization is denied or when reauthorization is refused and there would be no remedy. Due process protections would be enforceable only in instances where the Department was unwilling to pay for a service that had been authorized and then delivered by the Medicaid-participating provider.

Antrican instructs that, in determining whether the *Ex parte Young* exception applies, "the proper focus must be directed at whether the injunctive relief sought is prospective or retroactive in nature." 290 F.3d at 186. *Verizon* dictates that this determination is to be made using "a straightforward inquiry into whether the complaint ... seeks relief properly characterized as prospective." 535 U.S. at 645. The Amended Complaint seeks relief as follows:

> Plaintiffs respectfully request that this Court:
>
> … 2. Issue a declaratory judgment pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57 that Defendant's failure to provide behavioral health and developmental disability services under Medicaid due to the practices and procedures alleged herein violates the named Plaintiffs' and the Plaintiff class's rights under the Due Process Clause of the Fourteenth Amendment and the Social Security Act, 42 U.S.C. § 1396a(a)(3).
>
> 3. Grant a preliminary and permanent injunction requiring the Defendant, his agents, successors, and employees to:

> (a) continue to provide behavioral health and developmental disability services to all persons who have been receiving them, until Defendant corrects the practices and procedures alleged herein;
>
> (b) prospectively reinstate behavioral health and developmental disability services previously provided to the named Plaintiffs and members of the Plaintiff class that were improperly reduced or terminated under the illegal practices and procedures alleged herein;
>
> (c) comply with the Due Process Clause of the U.S. Constitution and the Medicaid Act.

(J.A. 45-46, Am. Compl., Prayer for Relief.) Clearly, the Medicaid recipients are seeking only prospective relief from the date of entry of an injunction against the Secretary.[2]

3. The case involves ongoing violations of federal law.

The Secretary also asks the Court to reject application of *Ex parte Young* on grounds that the "plaintiffs do not allege a current deprivation of property without due process of law." (Br. of Appellant at 44.) The Secretary argues that to determine whether plaintiffs allege an ongoing violation, "this Court must determine what pre-deprivation and post-deprivation process is provided and whether it is constitutionally adequate." (*Id.* at 45.) The Secretary then extensively argues the merits of the case. (*Id.* at 44-54.)

[2] The Defendant's citations do not advance his argument. (Br. of Appellants at 32.) In *Reed v. Health & Human Services*, the plaintiffs were admittedly seeking retroactive payments, and the court refused to view these payments as "an adjunct of the court ordered prospective relief." 774 F.2d 1270, 1276 (4th Cir. 1985). *Vargas v. Trainor* held that "the entry of a court order or judgment requiring that payments be made divides the past from the prospective for Eleventh Amendment purposes." 508 F.2d 485, 491 (7th Cir. 1974). The Medicaid recipients' requested relief does not implicate the *Vargas* holding.

The determination that the Secretary wants is clearly uncalled for at this point. It would require the Court to weigh the underlying facts and merits of the case. The request resembles that made by the officials in *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085 (9th Cir.2007). In that case, the officials appealed the district court's denial of their Eleventh Amendment motion to dismiss, arguing that *Ex parte Young* did not apply because they had taken no actions that violated federal law and the plaintiffs had not proved that the officials intended to violate the law. Citing *Verizon*, the court rejected this argument because, at this stage of the case, the plaintiff is "not required to 'prove' anything; it is sufficient …[to] … allege[] a violation of federal law." *Id.* at 1092. *See also In re Deposit Ins. Agency*, 482 F.3d 612, 621 (2d Cir. 2007) ("The appellant's belief in the nonexistence of a federal law violation simply does not speak to 'whether suit lies under *Ex parte Young*, because ordinarily 'an *allegation* of an ongoing violation of federal law is sufficient for purposes of the *Young* exception.") (citation omitted) (emphasis in original); *cf.* James W.M. Moore, *Moore's Federal Practice Third Edition* § 202.07[3] (2009) (noting circuit courts "generally will not use their discretion to exercise pendent appellate jurisdiction when the issue over which jurisdiction is sought would involve a review of the underlying factual matter"). It would be premature for this Court to decide this issue prior to discovery and the opportunity for the Plaintiffs to produce evidence

and before the District Court hears the evidence and makes a determination on the merits of Plaintiffs' due process claims. *See Adams*, 697 F.2d at 1219.

Indeed, *Verizon* instructs the courts to conduct a "straightforward inquiry" into whether the complaint alleges an "ongoing violation of federal law." 535 U.S. at 645. The lower court properly conducted this inquiry and concluded that the complaint's allegations of ongoing due process violations, which must be accepted as true at this stage, are clearly sufficient to survive a motion to dismiss. *See* J.A. at 203-05; Order at 8-10 (citing *Twombly* and finding that, while some allegations in the complaint are phrased in the past tense, they are sufficient to put defendant on notice that plaintiffs are alleging an ongoing violation).

The Amended Complaint describes three types of systemic, ongoing due process violations by DHHS: first, violations that occur in the *initial decision-making process*, e.g. failure to consider the opinions of treating clinicians, to request sufficient information to evaluate requests, to provide recipients with a meaningful opportunity to present evidence, and applying decisional standards that are not ascertainable by recipients (J.A. 21-22, 28-29, 31-39, Am. Compl. ¶¶ 52-54, 56, 79-82, 93-95, 101-103, 110-112, 114, 118-128); second, violations that have the effect of denying *access to the hearing process*, e.g. oral denials of service requests, discouragement and misinformation concerning the submission of requests, and improper written notices (J.A. 16-17, 19, 21-26, 28-33, 35-41, 43-44,

Am. Compl. ¶¶ 34, 37, 42, 44, 51-52, 55-56, 58-60, 64-66, 68-71, 74, 79, 82-88, 93-95, 104-105, 112-116, 118-120 (both), 127-142, 154-155); and third, violations *during the hearing process,* e.g. improper dismissals of hearing requests, long waits for hearings, illegal interruptions of services while awaiting a hearing, and denial of a meaningful *de novo* hearing (J.A. 17-18, 26-27, 33-34, 38, 41-44, Am. Compl. ¶¶ 38-41, 72-73, 75-76, 105-109, 124-125, 143-157).

The Amended Complaint further alleges that the Secretary's policies and practices are causing the Medicaid recipients and the proposed class to be denied coverage of behavioral health services prescribed by their treating providers (J.A. 8-9, Am. Compl. ¶ 3) and that the policies and practices violate the U.S. Constitution and the Medicaid Act (J.A. 9, Am. Compl. ¶ 4). All three named Plaintiffs continue to be Medicaid recipients and will continue to be subject to periodic review of their covered services by DHHS and, thus, all of them continue to be threatened with the loss of services due to the alleged illegal policies and practices. (J.A. 8-9, Am. Compl. ¶ 3.)

Contrary to the Secretary's assertions that the Plaintiffs are whining about "errors" and "too many mistakes" (Br. of Appellant at 5, 8, 43), the Amended Complaint clearly alleges numerous ongoing and systemic polices, practices, and procedures. (J.A. 8-10, 36-44, Am. Compl. ¶¶ 1-5, 15, 117-128.) According to more than a century of Supreme Court and Fourth Circuit jurisprudence, the

Secretary's claims of Eleventh Amendment immunity should be rejected, and the Court should allow this case to proceed under *Ex parte Young*.

B. The Court should reject the Secretary's suggestion to broaden the application of *Ex parte Young* to include a requirement that plaintiffs allege and prove the defendant is violating rights secured by the Medicaid Act.

The District Court applied the Supreme Court test for deciding whether Congress intended the Medicaid statutory due process provision, 42 U.S.C. § 1396a(a)(3), to create a privately enforceable right under § 1983 and concluded that it did.[3] (J.A. 199-203, Order at 4-6.) *See also*, *e.g.*, *Gean v. Hattaway*, 330 F.3d 758, 772-73 (6th Cir. 2003) (concluding that "fair hearing" right provided by § 1396a(a)(3) is privately enforceable under § 1983); *Mundell v. Bd. of Co. Comm'rs*, No. 05-cv-00585-REB-MJW, 2005 WL 2124842 (D. Colo. Sept. 2, 2005) (denying defendant's motion to dismiss and holding plaintiff had a clearly established right to due process enforceable under §1983); *cf. Doe v. Kidd*, 501 F.3d 348, 356 (4th Cir. 2007) (concluding that similarly worded Medicaid reasonable promptness requirement, 42 U.S.C. § 1396a(a)(8), provides private right of action under § 1983). The Secretary seeks to obtain an immediate appeal of the District Court's denial of the motion to dismiss the (a)(3) claim.

[3] 42 U.S.C. § 1396a(a)(3) states: "A state plan for medical assistance must … provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness."

The Appellant's Brief does not ask the Court to exercise pendent jurisdiction over the appeal. That avenue was closed to him by *Antrican v. Odom*, 290 F.3d 178 (4th Cir. 2002). In *Antrican*, the Secretary appealed the District Court's denial of his motion to dismiss based on the Eleventh Amendment. He also asked the Court to exercise pendent jurisdiction over his argument that the Medicaid Act provisions could not be enforced pursuant to § 1983. The Fourth Circuit easily refused, holding that "[t]hese issues are not 'inextricably intertwined' with North Carolina's Eleventh Amendment immunity claims, nor is consideration of these issues 'necessary to ensure meaningful review of the … immunity question.'" 290 F.3d at 191 (citation omitted). This precedent controls here. *See also Rosie D. v. Swift*, 310 F.3d 230, 233-34, 238 (1st Cir. 2002) (finding appeal proper as to Eleventh Amendment issue but refusing as "not ripe for review" the holding that plaintiffs could enforce Medicaid Act under § 1983); *Lewis v. N.M. Dep't of Health*, 261 F.3d 970, 979 (10th Cir. 2001) ("[W]hether the plaintiffs have failed to state a claim upon which relief may be granted is not inextricably intertwined with our jurisdictional analysis under *Ex parte Young* and the Eleventh Amendment. Simply put, Rule 12(b)(6) and the *Ex parte Young* doctrine are two distinct inquiries requiring the application of different standards.").

Unable to seek pendent jurisdiction, the Secretary urges the Court to include the merits of the § 1983 enforcement question as part of the Eleventh Amendment

analysis. Accordingly, he asks the Court to hold that plaintiffs cannot proceed under *Ex parte Young* unless they first allege and prove that they have a federal statutory right enforceable against the defendant under 42 U.S.C. § 1983. (Br. for Appellant at 35, 23-26, 36-44.) This argument lacks merit because the Supreme Court has already decided that interlocutory appeals of Eleventh Amendment issues will not be broadened to reach the merits of the defendant's defenses to liability.

Verizon establishes the "straightforward inquiry" that is to be applied. *See* 535 U.S. 635, 645. In *Verizon*, the circuit court had conducted the same type of analysis that the Secretary urges here when it discussed the possible defects in the plaintiffs' claims as part of an "evaluat[ion of] federal interests served by permitting a federal suit" against individual state officials. *Bell Atl. Md., Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 295 (4th Cir.), *vacated sub nom. Verizon*, 535 U.S. 635 (2002). The circuit court had concluded that, because the merits of the claim were questionable, the state's "dignity interest in immunity from suit outweighed the federal interests served by permitting the suit to go forward. " *Id.* Reversing, the Supreme Court held, "The inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." 535 U.S. at 646. Rather, *Verizon* makes clear that jurisdiction exists under *Ex parte Young* even when it is an open question whether any federal law has been violated or,

indeed, whether any federal law applies at all. *Id.* (acknowledging that court of appeals had found that the challenged state action "was probably *not* inconsistent with federal law after all").

McCarthy v. Hawkins, 381 F.3d 407 (5th Cir. 2004) is also on point. In that case, the state Medicaid director appealed the district court's denial of Eleventh Amendment immunity and then argued that the appellate court needed first to decide whether the lower court had properly held that the Medicaid due process provision, 42 U.S.C. § 1396a(a)(3), was privately enforceable under § 1983. *Id.* at 412. The plaintiffs and the United States, which had intervened on behalf of the plaintiffs, responded that the State of Texas was impermissibly seeking to broaden the scope of the interlocutory appeal by inviting the court to reach the merits of the plaintiffs' claims and the defendants' defenses to liability. *Id.* at 412. The Fifth Circuit agreed with the plaintiffs, stating:

> Texas's broad understanding of the scope of this interlocutory appeal is not only unprecedented, more importantly, it flies in the face of the Supreme Court reasoning in *Verizon*…. Although couched in terms of sovereign immunity, the State's argument … is entirely devoted to attacking the district court's ruling that Plaintiffs can state an actionable claim under § 1983 to enforce § 1396a(a)(3)…. [T]his argument centers on the merits of Plaintiffs' § 1983 claim, not their use of *Ex parte Young* … [W]e will confine ourselves to the question whether Plaintiffs have properly demonstrated jurisdiction under *Ex parte Young*.

Id. at 415, 416-17. The Fifth Circuit's conclusions are sound.[4]

When "stripped of their Eleventh Amendment gloss," *id.* at 415, the Secretary's arguments are attacking the merits of the Medicaid recipients' claim rather than their reliance on *Ex parte Young* to establish jurisdiction. The Court need only apply the straightforward inquiry of *Verizon* to find that the recipients are proceeding properly under *Ex parte Young*. The rule could hardly be otherwise: if a district court must satisfy itself that the plaintiff has a good cause of action in order to have *jurisdiction* under *Ex parte Young*, then *any* denial of a 12(b)(6) motion by a state defendant necessarily would raise an Eleventh Amendment issue that would be subject to review on an interlocutory appeal.

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[4] Counsel cites *United States v. Georgia*, 546 U.S. 151 (2006) in an attempt to distinguish *McCarthy*. (Br. of Appellant at 25-26.) The *Georgia* Court, by necessity, assessed the federal statute as part of the Eleventh Amendment review because it was deciding whether Congress acted within the scope of § 5 of the Fourteenth Amendment when it abrogated the Eleventh Amendment and created a private right of action for damages against the state in the Americans with Disabilities Act. *Id.* at 158-59 (citing *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997) (establishing a "congruence and proportionality" test to decide if a congressional enactment is within § 5 of the Fourteenth Amendment)). *United States v. Georgia* did not instruct that "courts must first determine if the plaintiff has stated a claim that the alleged conduct actually violated the statute at issue." (Br. of Appellant at 26.) Rather, *Georgia* charged the lower courts, in cases involving abrogation of sovereign immunity, to assess whether the complaint alleges conduct violating Title II of the ADA that also violates the Fourteenth Amendment and, if not, whether the abrogation is nevertheless valid. 546 U.S. at 159.

Finally, as part of his Eleventh Amendment/§ 1983 argument, the Secretary asks the Court to dismiss this case because the Supreme Court has said that agreements pursuant to Spending Clause enactments are "in the nature of a contract." (Br. of Appellant at 41-44.) He makes an analytical jump to then argue that the Medicaid Act, as a Spending Clause enactment, *is* a contract and that Medicaid recipients are third-party beneficiaries who cannot enforce the contract. (*Id.*) This argument was suggested by Justice Scalia in his concurring opinion in *Blessing v. Freestone*, 520 U.S. 329, 349-50 (1997); however, Justice Scalia has since clarified that references to the "contractual nature" of Spending Clause legislation do "not imply … that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise." *Barnes v. Gorman*, 536 U.S. 181, 188 n.2 (2002). Significantly, the Fourth Circuit rejected a similar argument by the Secretary in *Antrican*, and it should do so again here. *Antrican*, 290 F.3d at 188 (rejecting argument that Medicaid, as Spending Clause legislation, is not "supreme" law); *see also, e.g., Westside Mothers v. Haveman*, 289 F.3d 852, 858 (6th Cir. 2002), *cert. denied*, 537 U.S. 1045 (2002) (finding Supreme Court "is using the term 'contract' metaphorically…. It did not limit the remedies to common law contract remedies or suggest[] that normal federal question doctrines do not apply").

The Court should reject Secretary Cansler's attempt to reconstruct *Ex parte Young.*

II. SUBSTITUION OF LANIER CANSLER AS DEFENDANT DID NOT MAKE *EX PARTE YOUNG* INAPPLICABLE OR THE CASE MOOT.

The Secretary argues that his appearance in the case provides the basis for dismissal, both on the grounds that he is not the proper defendant under *Ex parte Young* and because his appearance made the case moot. (Br. of Appellant at 12-15, 54-55.) There are a number of grounds for rejecting these claims.

First, these arguments are untimely. Secretary Cansler was substituted as Defendant on January 29, 2009 (J.A. 193), over six weeks *before* the District Court ruled on the pending motions to dismiss based on sovereign immunity and mootness. (J.A. 218.) The Defendant did not, however, supplement his pending motions or otherwise argue that Secretary Cansler's appearance required dismissal. The District Court denied Defendant Cansler's motions to dismiss. (J.A. 196- 218, Order.)

Second, these assertions ignore Federal Rule of Civil Procedure 25 and the reasons why Rule 25 reads as it does today. Under Rule 25, where a public officer is a party to an action in his official capacity and, during its pendency resigns or otherwise ceases to hold office, "the action does not abate and the officer's successor is *automatically substituted as a party."* Fed. R. Civ. P. 25(d)(1) (emphasis added); Fed. R. App. P. 43(c)(1) (appellate version of the rule).

Secretary Cansler was, thus, automatically substituted as the defendant when Dempsey Benton left office.

Nevertheless, the Secretary says the Medicaid recipients needed to amend their complaint to add allegations that the illegal conduct would be continued by Secretary Cansler. (Br. for Appellant at 14-15.) To the contrary, Rule 25 was rewritten over 45 year ago precisely to eliminate the type of pleading requirement that the Secretary seeks to impose. Prior to 1961, when a public official left office, the opposing party needed to make a timely application with the court showing that there was a substantial need for the litigation to continue. *See* Fed. R. Civ. P. 25, advisory committee note of 1961. This requirement was eliminated, however, because it "rarely serve[d] any useful purpose and foster[ed] a burdensome formality." *Id.* Significantly, when it amended the rule, the advisory committee stated that substitution does not affect sovereign immunity or the Eleventh Amendment. *Id.; see also Am. Civil Liberties Union v. Finch*, 638 F.2d 1336, 1341-42 (5th Cir. 1981) (rejecting defendant's interpretation of substitution under Appellate Rule 43(c)(1) and Civil Rule 25(d)(1) as creating an Eleventh Amendment bar in official capacity case seeking injunctive and declaratory relief).

Moreover, a review of the Amended Complaint reveals that it does, in fact, include averments that are more than sufficient to obtain injunctive relief against the successor official: While sometimes referring to "Defendant" and at other

times referring to "DHHS," it is clear that the complaint is focusing on the actions and practices of the public agency. (J.A. 9-38, Am. Compl. ¶¶ 29-158.) *See also, e.g.*, J.A. 7; Am. Compl. ¶ 1 (alleging lack of due process protections when Medicaid services are denied, reduced or terminated by the North Carolina Department of Health and Human Services and that Defendant and his agents have engaged in a pattern and practice of serious due process violations); J.A. 8, Am. Compl. ¶ 2 (alleging that DHHS and its agent, ValueOptions, have denied, reduced and terminated coverage in violation of federal due process laws since July 2006 and these practices were either dictated or ratified by DHHS); J.A. 45, Am. Compl. Prayer for Relief) *See also* J.A. 203-05; Order at 8-10 (discussing complaint's allegations of ongoing violations).

As the District Court held in a slightly different context:

> As North Carolina's 'single state agency,' it is the duty of HHS, and defendant as Secretary of HHS, to ensure that North Carolina's Medicaid program is administered in compliance with federal law.… 'The law demands that the designated single state Medicaid agency must oversee and remain accountable for uniform statewide utilization review procedures….'

(J.A. 207-08; Order at 12-13 (quoting *J.K. v. Dillenberg*, 836 F. Supp. 694, 699 (D. Ariz. 1993).) The Secretary says he does not make final decisions on Medicaid

administrative appeals (Br. of Appellant at 54) but, as Secretary, he is responsible for assuring that these decisions comply with federal law.[5]

Finally, Secretary Cansler has offered no assertion, let alone evidence or district court findings, that any changes in the allegedly illegal practices have been initiated under Secretary Cansler, what the specific changes are, or that the violations will not continue to occur in the future. (Br. of Appellants at 54-55.) To the contrary, he passionately continues to deny that his challenged practices violate the law. *See, e.g.*, Br. of Appellant at 44 ("Plaintiffs' contentions that … they are being denied due process on an ongoing basis are wholly frivolous."); *id.* at 51 ("[P]laintiffs herein have no legitimate claim of entitlement to any future medical assistance requiring prior approval"); *id.* at 52 ("Plaintiffs … have not been deprived of anything without due process.").

Granted, this case might be different if the conduct alleged in the Medicaid recipients' complaint were personal to Dempsey Benton, *see Spomer v. Littleton*, 414 U.S. 514, 520 (1974); if the complaint gave no indication that a successor would continue the allegedly illegal practices, *id.*; or if, after trial, the recipients failed to prove that the DHHS practices violate federal law. Indeed, these were the

[5] This case is not just about final decisions on appeal. (*See* J.A. 9-38, Am. Compl., ¶¶ 29-158.)

deciding factors in the cases cited by the Secretary. (Br. for Appellant at 12-14.)[6] However, the Medicaid recipients did not file this case against "any random state official." *Pennington Seed, Inc. v. Produce Exch. No. 299*, 457 F.3d 1334, 1342 (Fed. Cir. 2006). Rather, they seek to end ongoing practices by the state Medicaid agency and, thus, name the responsible public official, in his official capacity, as the defendant. (J.A. 11, Am. Compl. ¶ 12.) The complaint does all it needs to do to bring this case under *Ex parte Young*, and Secretary's Cansler appearance did not make the case moot.

III. THE ENACTMENT OF A TEMPORARY STATE LAW IN 2009 DID NOT MAKE THIS CASE MOOT.

This section responds to the Secretary's argument that state legislative enactments after the District Court's Order have caused the case to become moot.

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[6] *See Mayor of Phil. v. Educ. Equal. League*, 415 U.S. 605, 613, 622-23 (1974) (holding district court erred in ordering relief against new mayor when court hearing and "the entire case" were devoted exclusively to personnel policies of predecessor); *Am. Civil Lib. Union*, 638 F.2d at 1346-47 (remanding to allow plaintiffs to amend complaint after finding "no basis for construing the complaint to allege by implication" that the challenged activities were part of a state practice); *Kincaid v. Rusk*, 670 F.2d 737, 742 (7th Cir. 1982) (finding case moot where trial did not demonstrate new sheriff continued to enforce predecessor's policies); *Tara Enter. v. Humble*, 622 F.2d 400, 401-02 (8th Cir. 1980) (same, where uncontroverted evidence showed successors affirmatively disavowed any intent of following predecessors' policies); *Hirsch v. Green*, 382 F. Supp. 187 (D. Md. 1974) (where state official was replaced after ruling on summary judgment, court found plaintiff's job dispute did not continue against successor); *Lewis v. Delaware Dep't of Pub. Instruc.*, 986 F. Supp. 848, 854 (D. Del. 1997) (granting summary judgment where evidence in record was personal to predecessor and did not establish successor was continuing alleged intentional race discrimination).

The Medicaid recipients will address the Secretary's attempt to appeal the lower court's denial of his previous mootness argument in Section V, below.

A. The standard for mootness

Where, as here, the defendant is arguing mootness based on intervening events, these events must have "completely and irrevocably eradicated the effects of the alleged violation." *Co. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (citations omitted). *See Adarand Constr., Inc. v. Slater*, 528 U.S. 216, 224 (2000) ("[M]ootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought."); *Church of Scientology of California v. United States,* 506 U.S. 9, 12 (1992) (citation omitted) (mootness requires an event that makes it "impossible for the court to grant any effectual relief whatever"). Even if all violations have ceased, the defendant also must show that "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)); *see also, e.g., Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S.701, 702, 719 (2007) (citing *Friends of the Earth* and finding case was not moot).

In a class action, the defendant must show that the case is moot as to the putative class members, not merely the named plaintiffs. *See, e.g., Co. of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980); *Olson v. Wing*, 281 F.Supp.2d 476, 483-84 (E.D.N.Y. 2003) (Medicaid class action not moot even though named plaintiff's benefits were continued by defendant pending appeal because allegedly unconstitutional acts against plaintiff's proposed class continued). *Cf. Preiser v. Newkirk*, 422 U.S. 395, 404 (1975) (Marshall, J., concurring) (finding inmate's case moot after he was transferred back to his original facility "only because for some reason respondent did not file this case as a class action").

Clearly, the standard for finding a case moot is "stringent," *Concentrated Phosphate*, 393 U.S. at 203, and "the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness." *Friends of the Earth*, 528 U.S. at 189. The case before the Court is clear cut, and the Secretary's arguments regarding the effect of the 2009 state law should be rejected.

B. The 2009 state law

The Secretary asks the Court to find the case moot based on two enactments by the N.C. General Assembly after the date of the District Court Order. (Br. of Appellant at 15-19, Add. 29-34, 37.)

The first 2009 N.C. enactment added minor amendments to a temporary Medicaid appeals law enacted in 2008 that expires on June 30, 2010. The 2009 amendments shorten the advance notice of action period to ten days, authorize telephone hearings, and make some provision for admission of new evidence at administrative hearings. (*Id.*, Add. 31-32.) Comparing the allegations of wrongdoing in the Amended Complaint against the limited provisions of the new state law, it is clear that the bulk of the practices challenged in the complaint are not addressed by, and simply have nothing to do with, the 2009 amendment. For example, the legislation says nothing about the process required before notice of the Department's decision is provided to a recipient, while the Medicaid recipients have alleged that twelve different practices in the initial decision-making process violate due process. (*Compare* Br. of Appellant, Add. 29-34 *with* J.A. 36-39, Am. Compl. ¶¶ 118-27.) The provision regarding new evidence is relevant to this case, but the Secretary is apparently interpreting it to allow DHHS to continue to limit the issue on appeal to a past period of time, rather than to include the recipient's current need for the service—a practice which is being challenged by the Medicaid recipients. (*Cf.* Br. of Appellant at 17 *with* J.A. 42-43, Am. Compl. ¶¶ 148-53.)

For the most part, this temporary state law, enacted in 2008 (reviewed by the District Court) and then amended in minor ways in 2009, codifies pre-existing requirements of the U.S. Constitution, the federal Medicaid Act and regulations,

and state regulations. *See* N.C. Session Law 2008-118 (J.A. 172-75, Br. of Appellant Add. 29-34); 10 NCAC 22H .0101, .0104; 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.200-431.250; *Goldberg v. Kelly*, 397 U.S. 254 (1970).

Significantly, this case is not challenging a state law or regulation; rather, it concerns the ongoing policies and practices of DHHS. That the Secretary is now subject to another layer of legal duties in the form of a temporary state law does not render moot the Medicaid recipients' allegations that DHHS is systematically violating federal constitutional and statutory due process requirements. The District Court's assessment of the effects of the 2008 state legislation applies with equal force to the 2009 changes:

> Legislation that merely touches upon issues involved in litigation does not … render an action moot…. While the new legislation may supercede certain state regulations pertaining to North Carolina's Medicaid program, plaintiffs are not challenging these or any other regulations or statutes. Rather, plaintiffs' challenge is to the practices and procedures utilized by defendant and his agent…. In large part, the new legislation simply codifies protections already afforded by the federal and state laws that plaintiff alleges, and defendant denies, are being violated.

(J.A. 211, Order at 16.) Moreover, because the recipients challenge agency practices and not a state statute or published regulation, the cases cited by the Department, which involve facial challenges to the legality of a statute or regulation, are inapplicable here. *See* cases cited in Br. for Appellant at 15, 18-19.

Furthermore, as he did before the District Court, the Secretary repeatedly asserts the legality of the challenged conduct to the Court, thus directly

contradicting his argument that the case is moot. For example, despite a provision in the temporary state law requiring, as do federal due process laws, that terminated or reduced services be continued pending an appeal, the Secretary continues to cite the agency's description of continuation of services pending appeal as a "voluntary practice." Br. of Appellant at 4 (citing J.A. 99-100, ¶ 8); *see also* Br. of Appellant at 44-51 (vigorously contesting Plaintiffs' claim that they have a due process-protected property interest in continuing Medicaid services pending appeal when reauthorization of existing services is denied). Clearly, the state law enactment has not put an end to the controversy. Under the controlling standards, the case is not moot. *See, e.g., Doe v. Kidd*, 501 F.3d 348, 354 (4th Cir. 2007) ("Viewing the facts in the light most favorable" to the plaintiff, the Medicaid officials' conduct had not ceased by their own admissions; therefore, the issues presented "continue to be live and the parties continue to have a legally cognizable interest in the outcome") (citation omitted). *Cf. Parents Involved in Cmty. Sch.*, 551 U.S. at 702 (finding lack of absolute clarity that challenged practices had ceased where defendant "vigorously defends" the constitutionality of its actions); *Honig v. Doe*, 484 U.S. 305, 321 (1988) (finding case was not moot where state's arguments gave Court every reason to believe that, absent an injunction, plaintiff would face a substantial threat of adverse action in the future); *United States v. Gov't of Virgin Islands*, 363 F.3d 276, 285 (3d Cir. 2004) (finding government's

"continued defense of the validity and soundness of the contract prevents the mootness argument from carrying much weight").

Finally, *assuming arguendo* that the state law did address all of the Medicaid recipients' claims, the respite would be short-lived. The law sunsets on July 1, 2010. *See* Sec. 10.15A(h6) (J.A. 175). At that time, the pre-existing North Carolina statute and regulations will once again become the applicable state law. *See* N.C. Gen. Stat. 150B-23 *et seq.*; 10 NCAC 22H .0101-.0105. Such a temporary measure cannot possibly establish mootness. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (noting that a citywide moratorium would not moot otherwise valid claim for injunctive relief, because moratorium by its terms was not permanent); *Carpenter v. Dep't of Transp*., 13 F.3d 313, 314 n.1 (9th Cir. 1994) (finding case was not moot where programmatic change cited by defendant was only temporary); *see generally Hunt v. Cromartie*, 526 U.S. 541, 545 n.1 (1999) (action by North Carolina residents not moot where state's new congressional redistricting plan provided for reversion to old plan upon favorable ruling from Supreme Court). Clearly, the limited, temporary due process provisions do not establish mootness.

While the Secretary's first argument is based on a state statute that will expire on July 1, 2010, his other argument rests upon a provision that does not take effect until June 30, 2010. As noted by the Secretary, in 2009, the state legislature

enacted a provision that requires recipients of one specified service, Community Support Services, to be transitioned to other Medicaid services by June 30, 2010. (Br. for Appellants, Add. 37). In addition to not yet being effective, this provision has no impact on the ongoing due process violations affecting the many other Medicaid-covered services that the three named plaintiffs and the proposed class need for their mental health and developmental disabilities. (*See, e.g.*, J.A. 8, 30, Am. Compl. ¶¶ 2, 90.) Moreover, how the required transition will occur and the extent to which the Secretary's ongoing illegal practices will affect this process remains to be seen. In sum, the Secretary has not met his heavy burden of establishing that this case has become moot.

IV. THE COURT SHOULD REFUSE TO RECONSIDER THE DISTRICT COURT'S DETERMINATIONS ON THE REMAINING ISSUES.

Secretary Cansler's Brief is asking the Court to exercise pendent appellate jurisdiction over almost all of the District Court's Order, in particular the denial of the motions to dismiss based on standing, mootness, and lack of an enforceable right under 42 U.S.C. § 1983.[7] In addition to standing and mootness, the Secretary is also asking this Court to rule that the Medicaid recipients have neither a cognizable property interest nor any due process rights that are being violated. The Court should refuse to hear these non-immunity issues for a number of reasons.

[7] The problems with the Secretary's § 1983 arguments were discussed in Section I.B., above, and will not be repeated here.

A. Federal Rule of Appellate Procedure 3

The Notice of Appeal designated the District Court's denial of Eleventh Amendment immunity. (J.A. 320; Notice of Appeal.) While it alluded to possible pendent claims, no specific claims were identified in the Notice or any amended Notice. To the extent that his non-immunity arguments are viewed as pendent claims, the Secretary did not follow the requirement of Federal Rule of Appellate Procedure 3 that the Notice of Appeal "must … designate the judgment, order, or part thereof being appealed…." Fed. R. App. P. 3(c). "Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review." *Smith v. Barry*, 502 U.S. 244, 248 (1992). While Rule 3 should be "liberally construed" so that "mere technicalities should not stand in the way," the Court "may not waive the jurisdictional requirements ... even for good cause shown …, if it finds that they have not been met." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316-17 (1988) (internal quotation omitted); *see also Canady v. Crestar Mortgage Corp.*, 109 F.3d 969, 974 (4th Cir. 1997). Here, the omission of the pendent matters was not a mere technicality or "an excusable mistake." *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1374 (11th Cir. 1983). The Court should find that it lacks jurisdiction over these additional issues.

B. Certification under 28 U.S.C. § 1292(b)

The Secretary also did not follow the process for appealing issues that are not subject to the collateral order doctrine. *See* 28 U.S.C. § 1292(b); Fed. R App. P. 5(a). Interlocutory orders may be certified for immediate appeal when the appeal is deemed pivotal by the district court. *See* 28 U.S.C. § 1292(b). These certification procedures are critical to ensuring that the courts of appeal hear only appropriate cases. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474 n.25 (1978) (citing legislative history that § 1292(b) serves the "double purpose of providing the Appellate Court with the best informed opinion that immediate review is of value, and at once protects appellate dockets against a flood of petitions in inappropriate cases"); *id* at 474-75 (noting that § 1292(b) serves the "dual purpose of ensuring that such [appellate] review will be confined to appropriate cases and avoiding time-consuming jurisdictional determinations in the court of appeals"). The Secretary did not comply with the prescribed process to certify any additional issues. Hearing these issues now would be inconsistent with the arrangement that § 1292 mandates.

C. Pendent appellate review

Finally, the issues are not appropriate for immediate review. "Pendent appellate jurisdiction is an exception of limited and narrow application driven by consideration of need, rather than of efficiency." *Rux v. Republic of Sudan*, 461

F.3d 461, 475 (4th Cir. 2006); *see also Burlington Northern*, 509 F.3d at 1093 (stating that the requirements are "narrowly construed, setting a very high bar"). Accordingly, the Fourth Circuit will only address non-final orders that are "inextricably intertwined" with the Eleventh Amendment immunity claim, or when "review of the former decision [is] necessary to ensure meaningful review of the … immunity question." *Antrican v. Odom*, 290 F.3d at 191 (citing *Swint v. Chambers Co. Comm'n*, 514 U.S. 35, 50-51 (1995) and *Taylor v. Waters*, 81 F.3d 429, 437 (4th Cir. 1996)); *see also Rux*, 461 F.3d at 475 (collecting cases, including *Antrican*, and stating that "since *Swint*, this Court has consistently limited its application of pendent appellate jurisdiction to the[se] two circumstances"); *Moore v. City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995) (stating that inextricably intertwined means "coterminous with, or subsumed in, the claim before the court on interlocutory appeal—that is, when the appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well"). *See Swint*, 514 U.S. at 50 (noting that a rule loosely allowing pendent jurisdiction would encourage parties to parlay collateral orders into "multi-issue interlocutory appeal tickets").

The standing, mootness, and property interest/due process arguments raised by the Secretary are not appropriate for pendent review. They require application of entirely different legal principles and standards from the Eleventh Amendment

and, in many respects, would require the Court to decide the facts of the case before they have been developed through discovery and trial.

In *Antrican*, the Secretary appealed the District Court's denial of his motion to dismiss based on the Eleventh Amendment. He also asked the Court to exercise pendent jurisdiction over his arguments that the Medicaid recipients lacked standing because they were receiving Medicaid services. The Fourth Circuit held "[t]hese issues are not 'inextricably intertwined' with North Carolina's Eleventh Amendment immunity claims, nor is consideration of these issues 'necessary to ensure meaningful review of the … immunity question.'" 290 F.3d at 191. This precedent controls here and means that the standing issues are not properly before the Court. For additional authority refusing to exercise pendent jurisdiction over standing issues, *see, e.g.*, *Summit Med. Assocs. v. Pryor*, 180 F.3d 1326, 1335 (11th Cir. 1999) (refusing pendent jurisdiction because the Eleventh Amendment immunity issue and the merits of standing are neither "inextricably intertwined" nor "necessary to ensure meaningful review" of one another); James W.M. Moore, *Moore's Federal Practice Third Edition* § 101.35 (2009) ("In general, a determination of standing is not subject to immediate appellate review in and of itself. The issue … does not fit within the collateral order doctrine because a motion to dismiss on justiciability grounds is not effectively unreviewable on appeal from final judgment."); *cf. Burlington Northern*, 509 F.3d at 1093 (finding

sovereign immunity and exhaustion claims are not inextricably intertwined and refusing to exercise pendent appellate jurisdiction to review whether district court properly denied defendant's motion to dismiss for failure to exhaust remedies).

In sum, the Secretary must meet a very high bar for the Court to exercise pendent jurisdiction over the district court's rulings on matters that do not involve the Eleventh Amendment. That bar has not been met here.

V. SHOULD IT CONSIDER THE ISSUES, THE COURT SHOULD AFFIRM THE DISTRICT COURT ORDER ON STANDING, MOOTNESS, AND DUE PROCESS PROPERTY INTEREST.

A. The Medicaid recipients have standing

The Secretary argues that the Medicaid recipients do not have Article III standing because they "bypass[ed] a seemingly adequate administrative process," Br. for Appellant at 20, and have suffered no injury, *Id.* at 20-22. These arguments ignore the allegations of the Amended Complaint and lack legal support.

The Amended Complaint does not describe Medicaid recipients who are voluntarily bypassing an adequate administrative review process. Rather, the allegations set forth systemic due process violations in the administrative process that have caused and are causing the Plaintiffs and others to experience severe harm that cannot be cured through an administrative appeal, including reductions in services for which no appeal rights are given (J.A 24, Am. Compl. ¶ 65), improper interruptions in payment for services (J.A. 27, 33-34, Am. Compl. ¶¶ 76,

106), and the lack of a meaningful hearing and termination of services without notice after the appeal is completed, regardless of outcome. (J.A. 27, 42-43, Am. Compl. ¶¶ 75, 148-150.)

The Secretary asserts, without any citation to the record, that "all plaintiffs are receiving the medical assistance they have requested" and that "no plaintiff has been denied the right to a full and fair review of an adverse decision." (Br. of Appellant at 22.) In fact, the Medicaid recipients have clearly alleged otherwise. D.T.M. lost his Medicaid services as a result of multiple due process violation by DHHS. (J.A. 19, Am. Compl. ¶ 43). He then tried to utilize the Department's administrative appeal process, but his appeal was dismissed because the Defendant refused to provide him with a meaningful, *de novo* hearing. (J.A. 18-19, Am. Compl. ¶¶ 40-41) E.C.'s services were reduced without any written notice or opportunity to appeal as a result of "misinformation, discouragement, and intimidation," and his services were not fully restored to the prior level of twenty-five hours per week despite his use of the administrative appeal process when his services were reduced a second time. (J.A. 24-25, 27, Am. Compl. ¶¶ 65-68, 75.) K.T. appealed the termination and reduction of her services, but this did not prevent DHHS from illegally interrupting authorization for her clinicians to continue providing services to her. (J.A. 30-35, Am. Compl. ¶¶ 89-116.) All three Medicaid recipients are threatened with further denials of due process and further

termination or reduction of their remaining services in the future. (J.A. 8-9, Am. Compl. ¶ 3.)[8]

The Secretary appears to be arguing that, after their services were cut, the Medicaid recipients had a duty to keep asking DHHS for the same services over and over again. In fact, D.T.M. did make repeated requests. (J.A. 16-21, Am. Compl. ¶¶ 33-51.) Because the Department told him that an appeal would not address his current need for the service or provide him with any services in the future (J.A. 18-19, Am. Compl. ¶¶ 39-41), filing additional appeals would have been futile. Plaintiff E.C. alleges that he was prohibited by the Department from asking for services again while his administrative appeal was pending (J.A. 42-43, Am. Compl. ¶¶ 149-50), even though the Department's policy prohibits E.C., on appeal, from obtaining any services he had not already received *and* requires that E.C.'s services end without any notice as soon as his appeal is completed, even if he wins his appeal. (J.A. 27, 36-37, Am. Compl. ¶¶ 75, 148-150.)

[8] The Secretary submitted evidence to this Court that was not before Judge Howard when he decided the motions to dismiss. The Medicaid recipients have a filed a motion to exclude this evidence. However, even if they were appropriate for consideration at this stage, the DHHS documents confirm many of the alleged facts. *See, e.g.*, J.A. 262-64 (DHHS letter confirming dismissal of D.T.M.'s appeal after hearing officer refused to permit a meaningful hearing); J.A. 292 (E.C.'s final agency decision that only a past period of time was at issue in his appeal); J.A. 305-06 (authorization for K.T's services to continue pending appeal not provided by DHHS until eighty-four days after appeal was requested). *See also Lujan*, 504 U.S. at 570 n.5 (stating that standing is determined as of the date of filing, not based on evidence of later events).

In these circumstances, requiring recipients to continue to try to use a flawed administrative process "serves no purpose and resembles more a scene from Kafka than a constitutional process." *Gray Panthers v. Schweiker*, 652 F. 2d 146, 168 (D.C. Cir. 1980). As the District Court recognized in rejecting this same argument below (J.A. 208-10, Order at 13-15), exhaustion of administrative remedies is not required prior to challenging violations under 42 U.S.C. § 1983, *see Patsy v. Bd. of Regents*, 457 U.S. 496 (1982), particularly where it is the administrative process itself that is being challenged. *See Delong v. Houston*, No. 00-CV-4332, 2000 WL 1689077, at *2 (E.D. Penn. Oct. 26, 2000) (Medicaid's legislative history indicates Congress required states to establish administrative hearings, but does not support the conclusion that Congress intended to require recipients always to use them before going to court); *Jones v. Blinziner*, 536 F. Supp. 1181, 1202 (D. Ind. 1982) (noting Medicaid's administrative hearing process would not remedy agency's systemic practices).

The cases cited by the Secretary do not support the principle that Medicaid recipients are required to exhaust a fatally flawed administrative process before having Article III standing to pursue a due process claim. (Br. of Appellant at 19-20.) In *Zinermon v. Burch*, 494 U.S. 113 (1990), the Supreme Court upheld the *reversal* of the district court's dismissal of due process claims, holding that post-deprivation remedies were not sufficient and that sufficiency of the state's process

was an issue requiring a decision on the merits. *Shavitz v. Guilford Co. Bd. of Educ*., 270 F. Supp. 2d 702 (M.D.N.C. 2003); *rev'd on other grounds*, 100 Fed. Appx. 146 (4th Cir. 2004), which was decided at summary judgment and not on a motion to dismiss, held only that the plaintiff must have been harmed by the process he challenges, which all three Plaintiffs here have clearly alleged. The circuit court in *Dwyer v Reagan*, 777 F. 2d 825 (2d Cir. 1985), *reversed* the lower court's dismissal of due process claims, holding that allegations—similar to those by D.T.M here—that the plaintiff requested but was denied a hearing required a determination on the merits. In *Alvin v. Suzuki*, 227 F.3d 107 (3d Cir. 2000), the plaintiff did not challenge the adequacy of the administrative appeal process and did not properly seek to use that process. In *McDaniels v. Flick*, 59 F.3d 446 (3d Cir. 1995) and *Riggins v. Bd. of Regents*, 790 F.2d 707 (8th Cir. 1986), the courts reached *the merits* of the plaintiffs' claims but rejected them after a trial on the specific facts of those cases. Finally, *Ashley v NLRB*, 255 Fed. Appx. 707 (4th Cir. 2007) was not filed under § 1983. Moreover, in reaching its decision to require exhaustion, the *Ashley* Court distinguished *Mathews v. Eldridge*, 424 U.S. 319 (1976), which, like this case, concerns benefits under the Social Security Act. 255 Fed. Appx. at 710 n.2. *Mathews* held that recipients were not required to exhaust administrative remedies prior to a due process challenge to the adequacy of the process itself. 424 U.S. at 329.

The Plaintiffs have met the requisites for Article III standing. The Court should affirm the District Court's denial of the Secretary's motion to dismiss.

B. The temporary 2008 legislation did render the case moot.

The Secretary asks the Court to reverse the District Court's finding that the case did not become moot after the North Carolina legislature enacted temporary Session Law 2008-118, § 3.13 (effective July 1, 2008-July 1, 2010). (Br. of Appellant at 11, 16, 17-18.) After reviewing the 2008 state law, the District Court concluded that the Defendant had not met his "heavy burden" for establishing mootness. (J.A. at 210-12; Order at 15-17.) Along with its own assessment, the District Court incorporated the reasons set forth in Plaintiffs' Response to Defendant's Motion to Dismiss for Lack of Jurisdiction (Mootness). (J.A. 177-191.) For the reasons stated and incorporated by the District Court, and for the reasons stated in Section III, above, there is no reason for this Court to disturb the lower court's sound decision that the 2008 statute did not make this case moot.

C. The Medicaid recipients have adequately alleged a due process violation.

According to the Secretary, Medicaid recipients have no property right in the receipt of Medicaid services that is protected by due process. (Br. of Appellant 46-51.) This argument has been consistently rejected for more than 45 years. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Supreme Court noted that termination of public benefits "pending resolution of a controversy over eligibility may deprive

an eligible recipient of the very means by which to live while he waits." *Id.* at 264. Thus, the Court held that such individuals (which include the Medicaid recipients in this case) are entitled, under due process, to an evidentiary hearing before benefits can be discontinued. Such recipients must also be given an "opportunity to be heard ... at a meaningful time and in a meaningful manner." *Id.* at 267. These principles

> require that a recipient have timely and adequate notice detailing the reasons for a proposed termination.... The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.... Welfare recipients must ... be given an opportunity to confront and cross-examine the witnesses relied on by the department ... [and] ... the recipient must be allowed to retain an attorney if he so desires... And, of course, an impartial decision maker is essential.

Id. at 268-71. *See* 42 C.F.R. § 431.205(d) (Medicaid regulations explicitly incorporating requirements of *Goldberg*). *See also, e.g., O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 787 (1980) (Medicaid recipient has right protected by due process to continued Medicaid benefits to pay for services from qualified provider of his choice); *Granato v. Bane*, 74 F.3d 406 (2d Cir. 1996); *Catanzano v. Dowling*, 60 F.3d 113 (2d Cir. 1995); *Ortiz v. Eichler*, 794 F.2d 889 (3d Cir. 1986); *Featherston v. Stanton*, 626 F.2d 591 (7th Cir. 1980); *Jonathan C. v. Hawkins*, No. 9:05-CV-43, 2007 WL 1138432 (E.D. Tex. Apr. 16, 2007); *Ladd v. Thomas*, 962 F. Supp. 284 (D. Conn. 1997); *Perry v. Chen*, 985 F. Supp. 1197 (D. Ariz. 1996); *Mayer v. Wing*, 922 F. Supp. 902 (S.D.N.Y. 1996); *Haymons v.*

Williams, 795 F. Supp. 1511 (M.D. Fla. 1992); *Moffitt v. Austin*, 600 F. Supp. 295 (W.D. Ky. 1984); *Greenstein v. Bane*, 833 F. Supp. 1054 (S.D. N.Y. 1993).[9]

The Secretary also contends that the Medicaid recipients have no due process rights because Medicaid is "time-limited." (Br. of Appellant at 48.) He cites no authority to support this assertion, and it is contradicted by the voluminous authority cited above. Undoubtedly, the state agency has the right to conduct periodic utilization reviews to assure that recipients continue to meet the requirements for receiving Medicaid payments for the services they are receiving. *See* 42 C.F.R. §§ 435.916(a), 440.230(d). However, these periodic reviews in no way convert these recipients to Medicaid applicants or their Medicaid entitlement into a time-limited benefit that is not protected by due process. To the contrary, the Medicaid Act requires the state agency to furnish Medicaid promptly to all eligible individuals, 42 U.S.C. § 1396a(a)(8), and the state agency must "continue to furnish Medicaid regularly to all eligible individuals *until they are found to be ineligible*." 42 C.F.R. §435.930(b) (emphasis added).

[9] The Secretary's Brief incorrectly refers to the Medicaid recipients as applicants. (Br. of Appellant at 49.) Even if he were correct, this would not matter for purposes of whether there is a property right protected by due process. *See, e.g., Hamby v. Neal*, 368 F.3d 549 (6th Cir. 2004); *Ortiz*, 794 F.2d 889; *Jonathan C.*, 2007 WL 1138432, at *42-44 (and cases cited therein). *See generally Mallette v. Arlington Co. Emp. Supp. Ret. Sys.*, 91 F.3d 630, 637-39 (4th Cir. 1996) (rejecting applicant/recipient distinction in applying due process protections in administration of public benefits statutes).

Lacking support in the Medicaid context, the Secretary's brief relies for the most part on decisions concerning programs other than Medicaid. (Br. of Appellant at 48-49.) These programs and cases are clearly distinguishable. *Kaplan v. Chertoff*, 481 F. Supp. 2d 370 (E.D. Pa. 2007), concerned the due process rights of non-citizen immigrants whose entitlement to SSI benefits was explicitly time-limited by Congress; *see Shvartsman v. Apfel*, 138 F.3d 1196 (7th Cir. 1998) (same, regarding entitlement to Food Stamps). *Holman v. Block*, 823 F.2d 56 (4th Cir. 1987) also concerned the Food Stamp program which, unlike Medicaid, contains a time-limited entitlement in the statute at 7 U.S.C. § 2020(e)(10). And in *Holman*, this Court specified there is a protected property interest in the right to seek recertification of Food Stamp benefits. *Id.* at 59, n.5. *Riccio v. Co. of Fairfax*, 907 F.2d 1459 (4th Cir. 1990), is inapposite because, there, the court found on the merits that the pre-deprivation procedures followed by the government were constitutionally adequate. Meanwhile, *Mundell v. Bd. of Co. Comm'rs*, No. 05-cv-00585-REB-MJW, 2007 WL 128805 (D. Colo. Jan. 12, 2007) rejected an individual's claim that defendants had violated his constitutional due process rights where the individual raised no objection to the lack of a pre-deprivation hearing, did not contend that the post-deprivation hearing was inadequate, and had already obtained reinstatement of his Medicaid eligibility through an administrative hearing before the lawsuit was filed. *See* 2007 WL

128805 (D. Colo. Jan. 12, 2007). That is not the situation that the Medicaid recipients describe in the Amended Complaint.

The Medicaid recipients have an enforceable property interest in Medicaid benefits which is protected by the Due Process Clause of the U.S. Constitution. [10]

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the District Court and allow this case to proceed.

Respectfully submitted,

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Dated: November 13, 2009 *Counsel for Appellees*

[10] DHHS's argument that there is no property interest in procedures alone (Br. of Appellant at 51-52) is academic because the recipients have a due process protected property interest in the Medicaid benefits they receive. DHHS's argument that the recipients had to exhaust the administrative process in order to state a due process claim (*Id.* at 52-54) is addressed in Section V.A., above.

CERTIFICATE OF COMPLIANCE WITH Rule 32(a)

I certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because contains 12,789 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type style requirement of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface, using Microsoft Word, in Times New Roman, 14-point font.

This the 13th day of November, 2009.

/s/ Jane Perkins
Jane Perkins
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CERTIFICATE OF SERVICE

I certify that on this 13th day of November 2009, I filed the foregoing Brief of Appellees with the Clerk of Court using the CM/ECF electronic filing system, with notification to be sent through this system to the Defendant-Appellant's attorneys, and that I served two copies of this brief upon these attorneys by first class mail, postage prepaid, addressed to:

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