

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

|                                  |   |                        |
|----------------------------------|---|------------------------|
| RUBY BELL, <i>et al.</i> ,       | ) |                        |
|                                  | ) |                        |
| Plaintiffs,                      | ) | No. 06 C 3520          |
| v.                               | ) |                        |
|                                  | ) | Judge Guzmán           |
| MICHAEL O. LEAVITT, Secretary of | ) |                        |
| Health and Human Services,       | ) | Magistrate Judge Levin |
|                                  | ) |                        |
| Defendant.                       | ) |                        |
|                                  | ) |                        |

**MEMORANDUM OF LAW IN OPPOSITION TO  
PLAINTIFFS' AMENDED MOTION FOR TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION**

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## PRELIMINARY STATEMENT

Plaintiffs, recipients of and applicants for Medicaid benefits under Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq., challenge the requirement that they provide certain documentation beyond a self-declaration to prove that they are citizens or nationals of the United States. The enhanced documentation requirements are mandated by Section 6036 of the Deficit Reduction Act, 42 U.S.C. § 1396b(x), effective on July 1, 2006. Although plaintiffs attempt to cast their complaint as a challenge to the Secretary of Health and Human Services' ("the Secretary" or "HHS") interpretation and implementation of Section 6036, in the form of a July 6, 2006, Interim Final Rule—the entire focus of their motion for emergency relief—even a cursory reading of that statutory provision demonstrates that their challenge is really to the statute itself and to the mandatory documentation requirements it prescribes. While the statute allows the Secretary to prescribe additional forms of documentation he will consider to be acceptable to demonstrate citizenship, the Secretary is plainly not required to do so and the additional types of documentation the Secretary has chosen to accept are within the Secretary's absolute discretion. Moreover, the Secretary has exercised that discretion in a manner that benefits plaintiffs, rather than even potentially injuring them, by exempting most of them from the new documentation requirements and allowing a wider range of permissible documentation for those not exempted.

However, despite the additional documentation allowable under the Interim Final Rule and the Rule's exemption of millions of Medicaid recipients, plaintiffs have requested emergency judicial intervention in the form of a temporary restraining order ("TRO") and preliminary injunction to prohibit only the implementation of the Rule. The plaintiffs' motion seeks no immediate injunctive relief against the operation of section 6036. Thus, if the Court were to grant plaintiffs' request and enjoin the Rule, the states would still be at risk of losing federal

matching funds from noncompliance with section 6036. And, given the limited documentation options or exemptions in the absence of the Rule, such an injunction would, according to the plaintiffs' theory of injury, pose a greater risk of a loss of benefits than would otherwise exist under the Rule.

Plaintiffs face no risk of injury from the Rule, which enures solely to their benefit. Moreover, the named plaintiffs have presented no evidence that they (or any other Medicaid beneficiary or applicant) face imminent termination or denial of Medicaid benefits based on the Rule's documentation requirements. Plaintiffs, accordingly, fail to establish any imminent injury, much less an irreparable one—a necessary prerequisite to the emergency injunctive relief they seek. Indeed, plaintiffs do not even claim that they cannot fulfill the documentation requirements set forth in the Rule which provides them alternative means of establishing citizenship beyond those listed in the statute itself. Nor do they claim that they have been notified by their State Medicaid agencies that their Medicaid benefits have been or will be terminated or (in the case of the plaintiff-applicants) that Medicaid benefits will be denied based on lack of the kinds of documentation described in the Rule.

Moreover, the Interim Final Rule provides that beneficiaries and applicants will be given reasonable time in which to document citizenship. And the Rule instructs states to provide special assistance to all persons who have difficulty in obtaining (or are unable to obtain) the requisite documentation through their own efforts. Finally, even if benefits are to be denied or terminated as a result of the documentation requirements mandated by Congress, plaintiffs will be afforded due process pursuant to Medicaid regulations: current beneficiaries are entitled to a fair hearing by the state before Medicaid benefits are terminated and applicants also have a right to hearing to contest a denial of their request for Medicaid benefits. Because of this due process,

no immediate, irreparable harm is possible.

Plaintiffs also cannot show any likelihood of success because the Interim Final Rule does not harm them. Instead, it allows them additional means of documenting citizenship beyond those specified in the statute itself. As noted above, the Secretary is under no obligation to allow *any* additional means of establishing citizenship beyond those listed in Section 6036 itself and his decision to do so (or not) is not reviewable. And plaintiffs cannot establish any likelihood of success in attacking the statute itself (and have not even attempted to do so in the present motion) because Section 6036 represents a rational exercise of Congress' spending powers that applies equally to any individual who declares himself to be a citizen of the United States, and because plaintiffs will be afforded due process of law. Section 6036 was enacted to ensure that those persons claiming Medicaid eligibility based (in part) on United States citizenship are, in fact, citizens, as the Medicaid statute has long required, and that very costly Medicaid benefits are extended only to those who are truly eligible for them. This rational justification clearly supports Congress's enactment of a facially neutral statute.

In addition, the public interest favors allowing Section 6036 to take effect as Congress envisioned and enabling the Secretary to effectuate Congress' mandate, aimed at ensuring that scarce Medicaid benefits are made available only to the intended beneficiaries who can demonstrate Medicaid eligibility through objective, verifiable means.

Having failed to establish any of the prerequisites for the emergency relief they seek, plaintiffs' request for a TRO or a preliminary injunction should be denied.

## STATUTORY AND REGULATORY BACKGROUND

### I. The Medicaid Program and Federal Financial Participation

The Medicaid program, established in 1965 as Title XIX of the Social Security Act, is a cooperative federal-state public assistance program that provides federal financial participation (“FFP”) (i.e., federal matching funds) to states that elect to pay for medical services on behalf of certain needy individuals.<sup>1</sup> See 42 U.S.C. § 1396 *et seq.*; Wilder v. Virginia Hosp. Ass’n, 496 U.S. 498, 502 (1990); Harris v. McRae, 448 U.S. 297, 301 (1980). Although participation in the Medicaid program is voluntary, once a state elects to participate, it must comply with the requirements of the Medicaid statute and with regulations promulgated by the Secretary. See Wilder, 496 U.S. at 502.

To qualify for federal matching funds, a participating state must submit to the Secretary, and have approved, a state “plan for medical assistance” that describes the nature and scope of the state program. 42 U.S.C. § 1396a(a). The Secretary “shall approve” any state plan that satisfies the requirements in the Act and regulations. *Id.* § 1396a(b). Upon approval of its plan, a state has considerable leeway in administering its Medicaid program. See Alexander v. Choate, 469 U.S. 287, 303 (1985); Alaska Dep’t of Health & Soc. Servs. v. Centers for Medicare & Medicaid Servs., 424 F.3d 931, 935 (9th Cir. 2005). For example, proposed amendments to state plans automatically go into effect unless they are disapproved by the Secretary within 90 days of submission (or the deadline is extended). 42 U.S.C. § 1396n(f)(2).

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<sup>1</sup> In general, the federal government reimburses states for their Medicaid expenditures based on a statutory formula tied to the per-capita income in each state. Under that formula, the federal financial participation is, at a minimum, 50% of a state’s costs. See 42 U.S.C. §§1396b(a)(1), 1396d(b); 42 C.F.R. § 433.10. In addition, the federal government pays at least 50% of the costs that a state incurs in administering its Medicaid program. See 42 U.S.C. §§1396b(a)(2)-(5), (7); 42 C.F.R. § 433.15.

CMS does not pre-approve State expenditures. See generally Bowen v. Massachusetts, 487 U.S. 879, 885 (1988) (describing process for withholding of FFP). Rather, the Secretary may use two procedures for withholding the federal government’s financial contribution: (1) monies can be withheld when a state’s administration of its Medicaid plan does not “substantially comply” with federal requirements; and (2) the Secretary may “disallow” claims for any item or class of items he believes does not justify FFP. Id. When the Secretary determines that a claim or portion of a claim is not allowable he “promptly sends the State a disallowance letter” detailing the legal and factual basis for the disallowance or deferral of payment, and providing notice of the State’s right to request review. 42 C.F.R. § 430.42. A State may seek administrative review of a disallowance (or a finding of substantial noncompliance). 42 U.S.C. § 1316(d); 42 C.F.R. § 430.42(b); 45 C.F.R. Part 16.

## **II. Citizenship Documentation Requirements**

### **A. Prior Law**

Prior to the enactment of Section 6036, 42 U.S.C. § 1320b-7(a) & (d) established a minimum citizenship verification eligibility requirement that there be a written declaration, made under penalty of perjury by the individual seeking benefits or, in some cases, another appropriate person,”stating whether the individual is a citizen or national of the United States, and, if that individual is not a citizen or national of the United States, that the individual is in a satisfactory immigration status.” See 42 U.S.C. § 1320b-7(a), (d)(1)(A). Nothing in the Act required everyone who met that minimum requirement be found eligible, nor did it prohibit additional state or federal requirements. Cf. 42 C.F.R. § 435.406(a)-(a)(1). At least four states (Montana, New Hampshire, New York and Texas) had enacted more stringent citizenship documentation requirements prior to federal enactment of Section 6036. See HHS, Office of the Inspector

General, “Self Declaration of U.S. Citizenship for Medicaid,” OEI-02-03-00190 (July 2005), at 9, cited in Pl. Mem. 6 (and attached to Pl. Mem. in Pl. Appx. at Tab 26).

**B. The New Documentation Requirements**

On February 8, 2006, the President signed into law the Deficit Reduction Act of 2005. PUB. L. NO. 109-171, 120 Stat. 4. As of July 1, 2006, section 6036 of the Act effectively establishes new documentation requirements for applicants for Medicaid benefits as well as for redeterminations of eligibility “in the case of individuals for whom the [new documentation requirement] was not previously met.” 42 U.S.C. § 1396b Note. The statute specifically requires “satisfactory documentary evidence of citizenship or nationality” to be demonstrated by such individuals in order for FFP to be available to a state for expenditures on behalf of such individuals. Id. § 1396b(x)(1). That evidence may be established by a United States passport, a Certificate of Naturalization, a Certificate of United States Citizenship, a valid State-issued driver’s license or other identity document described in section 274A(b)(1)(D) of the Immigration and Nationality Act, but only if the State issuing the license or such document requires proof of United States citizenship before issuance, or “[s]uch other document as the Secretary *may* specify, by regulation.” Id. § 1396b(x)(3)(B)(i)-(v) (emphasis added).

Alternatively, the statute allows a state to receive FFP where evidence of citizenship and nationality has been established by a two-part process. First, the applicant or recipient must provide a certificate of birth, a Certification of Birth Abroad, a United States Citizen Identification Card, a Report of Birth Abroad, or “such other document . . . as the Secretary *may* specify.” Id. § 1396b(x)(3)(C)(i)-(v) (emphasis added). That documentation must be combined with “[a]ny identity document described in section 274A(b)(1)(D) of the Immigration and Nationality Act” or “[a]ny other documentation of personal identity of such other type as the Secretary finds, by

regulation, provides a reliable means of identification.” Id. § 1396b(x)(3)(D)(i)-(ii). Section 6036 as enacted is self-executing, and does not require the Secretary to promulgate any regulations, although it does authorize him to do so.

On July 6, 2006, the Secretary, along with the Administrator of the Centers for Medicare and Medicaid Services (“CMS”) within HHS, promulgated an Interim Final Rule with Comment Period amending Medicaid regulations to implement section 6036. See “Interim Final Rule with Comment Period: Medicaid Program; Citizenship Documentation Requirements,” 71 Fed. Reg. 39214 (July 12, 2006). As the preamble to the Interim Final Rule explains, the Secretary has read section 6036 to exempt from the requirement that they present satisfactory documentary evidence of citizenship all American citizens who are “eligible for Medicaid and entitled to or enrolled in Medicare or eligible for Medicaid by virtue of receiving Supplemental Security Income (SSI) . . .”<sup>2</sup> Id. at 39216. The Interim Final Rule also permits states to forego the methods of documentation described infra by using a Social Security Administration (“SSA”) database, the State Data Exchange (“SDX”), which the Secretary has determined contains information sufficient to establish citizenship under section 6036. Id.

As to those Medicaid beneficiaries and applicants who are not exempt from section 6036, and whose citizenship states do not or cannot establish with SDX, the Interim Final Rule adopts a

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<sup>2</sup> According to an unverified analysis filed by plaintiffs, the Secretary’s interpretation embodied in the Interim Final Rule exempts millions of Medicaid beneficiaries who would otherwise be subject to the new documentation requirements. See Leighton Ku, “Revised Medicaid Documentation Requirement Jeopardizes Coverage for 1 to 2 Million Citizens,” Center on Budget and Policy Priorities, July 13, 2006, available at <http://www.cbpp.org/7-13-06health2.pdf> (cited in Pl. Mem. at 18 and attached thereto in Pl. Appx.); see also generally Bread for the City, et al. v. Jesberg, et al., Civ. No. 06-1197-ESH (D.D.C., dismissed August 4, 2006) (litigation challenging implementation of section 6036 in the District of Columbia that was voluntarily dismissed by plaintiffs due to issuance of the Interim Final Rule).

hierarchical interpretation of the two-step approach of the statute in which documentary evidence of citizenship and identity is sought first from a list of primary documents. See 71 Fed. Reg. at 39217-19. If an applicant or recipient presents evidence from the listing of primary documentation, no other information would be required. Id. When such evidence cannot be obtained, the state is directed to the next tiers of acceptable forms of evidence. Id. The documents for these tiers must be combined with an identity document from subparagraph (e) of the new rule in order to establish satisfactory documentation of citizenship and identity. Id.; 42 C.F.R. §§ 435.407, 436.407. Documents identified in section 6036 itself are all contained in the first two tiers of documents establishing citizenship, and the list of identity documents. The third and fourth tiers of citizenship documents are additional methods of documentation not listed in the statute that the Secretary has allowed under the Interim Final Rule. Compare id. to section 6036.

At the time of application or redetermination, the Interim Final Rule requires that states give an applicant or recipient a “reasonable opportunity” to present documents establishing U.S. citizenship or nationality and identity. 71 Fed. Reg. 39216. The preamble to the rule also advises states that an individual who is already enrolled in Medicaid will remain eligible if he or she continuously shows a good faith effort to present satisfactory evidence of citizenship and identity. Id. “The regulations permit exceptions from the[ir] time limits when an applicant or recipient in good faith tries to present documentation, but is unable to do so because the documents are not available. In these cases, the State must assist the individual in securing evidence of citizenship.” Id. If an applicant is denied benefits or a recipient’s benefits are revoked, the preamble explains that appeal rights and adequate and timely notice are required by existing regulations. Id. at 39217, citing 42 C.F.R. §§ 431.210 and 431.211.

## ARGUMENT

### III. Standard of Review of a Motion for Temporary Restraining Order and Preliminary Injunction

In this Circuit, “[t]he standards for a temporary restraining order and a preliminary injunction are identical.” Bernina of America, Inc. v. Fashion Fabrics Intern., Inc., No. 01-C-585, 57 U.S.P.Q.2d 1881, 2001 WL 128164, \*1 (N.D. Ill. February 9, 2001) (Guzman, J.) (quoting Frederick Atkins, Inc. v. Carson Pirie Scott & Co., Inc., No. 99 C 7838, 1999 WL 1249342, at \*1 (N.D. Ill. Dec. 13, 1999)). Thus, plaintiffs must show: (1) that they have a reasonable likelihood of success on the merits; (2) that no adequate remedy at law exists; and (3) that it will suffer irreparable harm if the preliminary injunction is denied. Platinum Home Mortgage Corp. v. Platinum Fin. Group, Inc., 149 F.3d 722, 726 (7th Cir.1998). The threshold consideration is the moving party’s likelihood of success on the merits. Id.

Moreover, as to irreparable harm, “[n]ot every conceivable injury entitles a litigant to a preliminary injunction. For example, speculative injuries do not justify this extraordinary remedy.” E. St. Louis Laborers’ Local 100 v. Bellon Wrecking & Salvage Co., 414 F.3d 700, 704 (7th Cir. 2005) (citations omitted). Accordingly, “a plaintiff cannot obtain” such extraordinary, emergency relief “by speculating about hypothetical future injuries.” Id. at 705-706. In addition, “[t]he only harm that is relevant to the decision to grant a preliminary injunction [or TRO] is irreparable harm.” In re Aimster Copyright Litigation, 334 F.3d 643, 655 (7th Cir. 2003), cert. denied, 540 U.S. 1107 (2004).<sup>3</sup>

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<sup>3</sup> When considering a motion for TRO, such harms are only those that would accrue between the court’s ruling on the motion for a TRO and the entry of any preliminary injunction. See Abbott Labs v. Mead Johnson & Co., 971 F.2d 6, 19 n.16 (7th Cir. 1992).

If the movant meets the first three conditions, “then the court must balance the harm to the movant if the injunction is not issued against the harm to the defendant if it is issued improvidently.” See Storck U.S.A. L.P. v. Farley Candy Co., 14 F.3d 311, 314 (7th Cir. 1994); see also, e.g., Abbott Labs v. Mead Johnson & Co., 971 F.2d 6, 12 (7th Cir. 1992). The balancing process also takes into consideration the consequences to the public interest of granting or denying preliminary relief. Storck, 14 F.3d at 314.

Because plaintiffs can demonstrate no likelihood of success on the merits of their claims, because they have failed to demonstrate more than speculative harm, and because the public interest weighs against an injunction, this Court should deny plaintiffs’ motion for temporary restraining order.

#### **IV. Plaintiffs Have No Likelihood of Success on the Merits of Their Claims**

##### **A. This Court Lacks Jurisdiction Over Plaintiffs’ Claims**

##### **1. The Claims of Plaintiffs Ruby Bell, Eddie Mae Binion, Alocia Brown, Rubby Trammell, Robert Patterson, Della Otis, and Kevin Harris Are Moot as a Result of the Promulgation of the Interim Final Rule**

As originally enacted by Congress, section 6036 exempts from its documentation requirements “an alien who is eligible for medical assistance under this subchapter” and “is entitled to or enrolled for benefits under any part of subchapter XVIII of this chapter [Medicare]” or “on the basis of receiving supplemental security income benefits [SSI] under subchapter XVI of this chapter.” 42 U.S.C. § 1396b(x)(2)(A)-(B). However, “because aliens are not citizens and cannot provide documentary evidence of citizenship,” CMS concluded that the reference to “aliens” in subsection (x)(2) was a “scrivener’s error.” 71 Fed. Reg. at 39215. Accordingly, CMS interpreted the statutory language of “alien” to apply instead to “individuals” when it published the Interim Final Rule. Id.

The result of this interpretation was to exempt individuals entitled to or enrolled in Medicare or currently receiving Medicaid by virtue of their receipt of SSI benefits, “a population which are by definition either aged, blind, or disabled, and thereby most likely to have difficulty obtaining documentation of citizenship,” from the documentation requirements of the statute. Id. at 39215-39216; see also Pl. Mem. 9 (“Individuals who are eligible for Medicare or who automatically qualify for Medicaid benefits because of their receipt of SSI . . . will not be subject to the documentation requirements.”). This change represents a significant departure from the state of the law at the time that the plaintiffs originally filed their Complaint. However, although the plaintiffs are not challenging the validity of this exemption, they have ignored the fact that it renders the claims of a number of their members moot, as they are no longer subject to the documentation requirements of the statute.

In their declarations attached to the First Amended Complaint, plaintiffs Ruby Bell, Eddie Mae Binion, Alocia Brown, and Ruby Trammell all declare themselves to be current recipients of Medicare. Plaintiffs Robert Patterson and Della Otis declare themselves to be current recipients of SSI who, in the states of California and North Carolina, are eligible for Medicaid based on their receipt of SSI. See California Medicaid & S-Chip Eligibility, at <http://www.hrsa.gov/reimbursement/states/California-Eligibility.htm>; North Carolina Medicaid & S-Chip Eligibility, at <http://www.hrsa.gov/reimbursement/states/North-Carolina-Eligibility.htm>. Accordingly, pursuant to the Interim Final Rule, all are exempt from the documentation requirements of section 6036, and they therefore face no risk of harm from the agency’s implementation of the statute.

In addition, plaintiff Kevin Harris declares himself to be a recipient of SSI in Illinois, a state that requires a separate application for Medicaid from SSI recipients. See Illinois Medicaid

& S-Chip Eligibility, at <http://www.hrsa.gov/reimbursement/states/Illinois-Eligibility.htm>.

However, in order to account for such a situation, the Interim Final Rule allows states to use the State Data Exchange (“SDX”) database to determine whether an individual has “already been found to be a citizen by the SSA . . . without using the hierarchical process for obtaining documents discussed in the regulation.” 71 Fed. Reg. at 39216. Accordingly, Harris does not face any threat of harm from compliance with the hierarchical documentation requirements of the Rule, as Illinois Medicaid officials may simply confirm his eligibility through the SDX database.

The only remaining named plaintiffs who have not declared that they are currently receiving either Medicare or SSI benefits are George Crawford, A.L., Mary West, Betty Jo Watkins, T.W., Jo. N., and Ja.N, and Jerome Windley. However, these plaintiffs have not demonstrated any likelihood of concrete injury resulting from the application of the Rule.

**2. The Remaining Plaintiffs Lack Standing Because They Have Failed to Allege Sufficient Facts Establishing Injury in Fact, Traceability, or Redressability**

As an element of the fundamental “case or controversy” requirement of Article III, plaintiffs “must establish that they have standing to sue.” McCConnell v. FEC, 540 U.S. 93, 225 (2003). There are three core requirements that must be demonstrated to establish standing: (1) “injury in fact, which is concrete, distinct and palpable, and actual or imminent”; (2) “a causal connection between the injury and the conduct complained of—the injury has to be fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] some third party not before the court”; and (3) “a substantial likelihood that the requested relief will remedy the alleged injury in fact.” McCConnell, 540 U.S. at 225-26 (internal quotations and citations omitted). The burden is on the plaintiffs to establish their standing. Warth v. Seldin, 422 U.S. 490, 501 (1975).

In order to demonstrate an injury in fact, the plaintiffs must prove that they have suffered an injury that is actual and imminent, as opposed to hypothetical or conjectural. Wernsing v. Thompson, 423 F.3d 732, 743 (7th Cir. 2005). This requirement prevents the standing inquiry from devolving into “an ingenious academic exercise in the conceivable.” Warth, 422 U.S. at 509 (quoting United States v. SCRAP, 412 U.S. 669, 688 (1973)). Accordingly, an allegation of “possible” future injury does not demonstrate injury in fact; the injury must be “certainly impending” to satisfy the requirements of Article III. Whitmore v. Arkansas, 495 U.S. 149, 158 (1990).

The plaintiffs allege that they “will experience significant financial, administrative and emotional harm” in the absence of injunctive relief. Pl. Mem. 37. However, the declarations of the remaining plaintiffs whose claims are not moot, i.e. those not currently receiving either Medicare or SSI, provide little support to establish the likelihood of this speculative allegation. The declarations of those plaintiffs currently receiving Medicaid benefits do not even indicate when a review of their benefits is expected, let alone whether a revocation of their benefits has been threatened based upon the documentation requirements of the Rule. And the declarations of the new applicants do not indicate whether they have been informed by state Medicaid officials that their documentation of citizenship is suspect, or that they are otherwise eligible for Medicaid in the absence of the Rule. Thus, it remains entirely speculative whether, at some unspecified point in the future, any of these plaintiffs will ultimately be denied benefits as a result of the Rule’s documentation requirements.<sup>4</sup> See Smith v. Wis. Dep’t of Agr., 23 F.3d 1134, 1142 (7th

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<sup>4</sup> The plaintiffs’ general allegation of “emotional harm” or stress resulting from the possibility that they may be unable to comply with the documentation requirements is insufficient to establish concrete injury. See Valley Forge Christian College v. Ams. United for Separation

(continued...)

Cir. 1994) (holding that no justiciable case or controversy exists when plaintiff has yet to suffer loss of permit or associated due process rights); Doe v. Blum, 729 F.2d 186, 189-90 (2d Cir. 1984) (rejecting standing for plaintiffs who failed to allege a denial of “services for want of a Medicaid identification card”); see also Impress Communications v. Unumprovident Corp., 335 F. Supp.2d 1053, 1060 (C.D. Cal. 2003) (holding that “anticipated denial of future benefits” due to improper health plan administration is “purely speculative”).

In fact, the limited nature of the declarations submitted by the remaining named plaintiffs makes it impossible for the Court to determine whether any individual bears a concrete risk of injury as a result of the Rule. The plaintiffs’ declarations generally allege that they do not have a passport or birth certificate and that they could not establish citizenship by affidavits from individuals with personal knowledge of their birth. However, these are only three of the many methods of documentation contained in the Interim Final Rule. For example, as defined by the Rule, allowable documentation of citizenship includes a “life, health, or other insurance record . . . that was created at least 5 years before the initial application date” for Medicaid, a “federal or state census record,” “institutional admission papers from a nursing facility, skilled care facility or other institution,” or a “medical record” created at least 5 years before the initial application for Medicaid. 71 Fed. Reg. at 39223-39224. Combined with a document demonstrating personal identity, these documents would establish citizenship. Id. The affidavits submitted by the

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<sup>4</sup>(...continued)

of Church and State, 454 U.S. 464, 485 (1982) (rejecting “psychological consequence presumably produced by observation of conduct with which one disagrees” as sufficient injury to satisfy Article III); Clay v. Fort Wayne Cmty. Schs., 76 F.3d 873, 877 n.4 (7th Cir. 1996) (rejecting “amorphous psychological injuries” as basis for standing). Nevertheless, as will be explained in detail below, the “emotional harm” that allegedly results from the stress of complying with new Medicaid requirements would be a direct result of the documentation requirements of section 6036, rather than the product of agency action.

plaintiffs do not establish (nor do plaintiffs claim) that such documents are unavailable.<sup>5</sup>

Moreover, when “an applicant or recipient in good faith tries to present documentation, but is unable to do so because the documents are not available,” the Interim Final Rule requires states to “assist the individual in securing evidence of citizenship.” *Id.* at 39216. Plaintiffs do not, and cannot, allege that a State’s efforts to help an applicant or recipient, including those who are incapacitated, would be unable to produce some means of establishing documentation of citizenship because they cannot predict the outcome of this as yet untested process. This deficiency renders the plaintiffs’ fear of injury entirely speculative.<sup>6</sup> *Cf. Plotkin v. Ryan*, 239 F.3d 882, 886 (7th Cir. 2001) (affirming dismissal of lawsuit for lack of standing based on “many

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<sup>5</sup> In fact, the declarations of the remaining named plaintiffs suggest that documents allowable under the Rule may in fact exist for each. For example, Art Heunkemeier declares for George Crawford that Crawford currently receives Veterans Benefits. Pl. Appx. at Tab 6. The Interim Final Rule allows military records to demonstrate citizenship under the secondary level, and the Rule permits states to cross match with other public assistance agencies to determine citizenship. 71 Fed. Reg. at 39223, 39224. A.L., by her mother Diane Bauknight, declares that she once had a copy of her birth certificate and that she has “adoption papers.” Pl. Appx. at Tab 7. If the state will not release the birth certificate and the adoption is not finalized, the Interim Final Rule allows “a statement from a State approved adoption agency that shows the child’s name and U.S. place of birth.” 71 Fed. Reg. at 39223. For the three minor children, T.W., Jo.N., and Ja.N., the Rule allows the use of written affidavits to establish their citizenship if no other documentation is available. *Id.* at 39224. Jerome Windley had both a birth certificate and a driver’s license at one point. Pl. Appx. at Tab 13. Although Windley declares that he cannot afford to search for further documents, he does not declare that even with state assistance he would be unable to relocate the documents.

<sup>6</sup> The plaintiffs’ declarations emphasize the speculative nature of their claims. The plaintiffs, even those who have submitted declarations after the Interim Final Rule was issued, do not declare that they cannot meet the requirements of the Rule. Instead, as the declaration of Betty Jo Watkins demonstrates, they declare that they “do not know how [they are] going to prove” citizenship. Pl. Appx. at Tab 11. That speculative fear, without some allegation that they are in fact at risk of losing benefits once the state evaluation process has taken its course, is insufficient to establish standing. *See Schmidling v. City of Chicago*, 1 F.3d 494, 499 (7th Cir. 1993) (“[A]nticipation, fervor of advocacy, speculation, or even fear is not enough by itself to establish standing.”).

outside unknown influences affecting all aspects of these standing concepts”).

However, even if the plaintiffs’ allegations were sufficient to demonstrate a concrete injury-in-fact, it is entirely speculative whether the injury is traceable to the Interim Final Rule or redressable by an order “prohibiting the defendant Secretary Michael Leavitt (“Secretary”) of the United States Department of Health and Human Services (“DHHS”) from implementing interim final regulations issued on July 6, 2006.” Pls.’ Am. Mot. for a T.R.O. and Prelim. Inj. at 1-2. The ultimate decision on revocation of existing Medicaid benefits or denial of an application for new benefits rests with state agencies. The federal government can reduce or terminate federal payments to a state for noncompliance with federal law, but the possibility that such sanctions would, at some point in the future, motivate a state to comply with federal mandates remains speculative until the states choose a course of action. See Trustees of the Masonic Hall and Asylum Fund v. Leavitt, slip op., 2006 WL 1686405 \*7 (N.D.N.Y. June 7, 2006) (“While [reducing or terminating federal payments] might persuade a state to alter its policies, this anticipated result is speculative rather than likely.”).

In fact, the amicus brief filed by the State of Illinois provides an insight into how one state will react in response to section 6036 and the Interim Final Rule, and this insight conclusively demonstrates the speculative nature of the named plaintiffs’ allegations of injury. In the brief, the State of Illinois does not state that those individuals who are unable to meet the citizenship documentation requirements of section 6036 will automatically be without medical benefits. Rather, the State of Illinois suggests that it will “run the risk of bearing the expense of providing benefits, without FFP, to those Medicaid applicants and recipients who cannot satisfy the documentation requirements promptly or at all.” Mem. of State Amici Curiae in Supp. of Pls.’ Am. Mot. for Prelim. Inj. (“Illinois Mem.”) at 12. If the possibility exists that the State of Illinois

will shoulder the burden for those residents of the State who, for some unexplained reason, are unable to meet the documentation requirements of section 6036 and the Interim Final Rule, then the risk of injury for those individuals is entirely speculative, if not nonexistent.<sup>7</sup>

In addition, as will be discussed in detail below, any injury that results from the new documentation requirements for proof of citizenship is a product of congressional command, not the Interim Final Rule. Section 6036 requires that an individual declaring to be a citizen or national of the United States present “satisfactory documentary evidence of citizenship or nationality.” 42 U.S.C. § 1396b(x)(1). So even if the Secretary is enjoined from implementing the Rule, states will still be at risk of forfeiting FFP based on noncompliance with the documentation requirements in the statute. In fact, because the documents expressly listed in the statute are much more limited than those contained in the Rule, and because the statute does not expressly exempt SSI and Medicare recipients from the documentation requirements, plaintiffs’ requested relief would, based upon their theory of injury, raise a greater risk of denial of benefits than the risk that currently exists under the Rule. Cf. Simpson v. Heckler, 630 F. Supp. 736, 739-40 (E.D. Pa. 1986) (describing potential coercive effect from withholding of federal Medicaid funding as speculative and noting that withholding of funds poses greater risk of injury to recipients).

Because the injury alleged by the plaintiffs is neither traceable to the Interim Final Rule nor redressable by its invalidation, the plaintiffs lack standing to challenge the letter.

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<sup>7</sup> It is important to note that neither Illinois nor any other state has intervened in this litigation, and the plaintiffs lack standing to assert injury allegedly suffered by Illinois. E.g., Warth, 422 U.S. at 499.

**3. Even if the Plaintiffs Have Alleged Sufficient Facts to Establish Article III Standing, Their Claims Are Not Ripe for Adjudication**

Closely related to the concept of standing is the requirement that the issues raised by the plaintiffs be ripe for resolution by this Court. “[C]ourts traditionally have been reluctant to apply [the injunctive and declaratory judgment remedies] to administrative determinations unless these arise in the context of a controversy ‘ripe’ for judicial resolution.” Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967), abrogated on other grounds, Califano v. Sanders, 430 U.S. 99 (1977). The underlying rationale for such skepticism is “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” Id. at 148-49. This rationale has been expressed through a two-part test that examines whether the issues are fit for judicial resolution and the relative hardship to the parties of withholding decision. Id. at 149.

Here it is apparent that this test weighs in favor of postponing judicial action until state Medicaid agencies have had the opportunity to evaluate the plaintiffs’ claims for continued or future benefits. The final decision on the plaintiffs’ eligibility for benefits lies in the hands of state agencies, but the plaintiffs have given no indication of how the states will respond to the proof of documentation (or lack thereof) that the plaintiffs ultimately submit. This uncertainty is magnified by the fact that there are several steps at the state level that stand between the named plaintiffs and any concrete injury.

First, the plaintiffs’ applications or current eligibility for benefits must be reviewed by state Medicaid officials to determine whether they have provided sufficient documentation of citizenship. Until that review actually occurs, they cannot know whether their benefits will be

terminated or their claims denied. See Hinrichs v. Whitburn, 975 F.2d 1329, 1333-34 (7th Cir. 1992) (holding that plaintiff's claim for benefits was not ripe because plaintiff failed to provide the state with an opportunity to exempt her from applicable eligibility requirements); see also Manufactured Home Communities Inc. v. City of San Jose, 420 F.3d 1022, 1033 (9th Cir. 2005) (holding that "there is no way of knowing whether a real case or controversy exists" because plaintiff chose not to engage in administrative process). Second, if this review results in either the denial or revocation of benefits, the plaintiffs would have recourse to an administrative appeals procedure that includes a federally mandated hearing.<sup>8</sup> See 42 C.F.R. §§ 431.205; 431.206(c)(1), (4). Until that hearing is conducted, the plaintiffs cannot predict with any certainty whether they will in fact be denied benefits. See Peachlum v. City of York, 333 F.3d 429, 434 (3d Cir. 2003) ("Where a dispute arises under circumstances that permit administrative review, as in the case here, final administrative determination is favored under the ripeness doctrine. . . . In many instances, a claim will be deemed unfit for adjudication until administrative appeals have been completed, because the administrative tribunal might work out the intricacies of an area of law in which it enjoys special expertise.").

Thus, if the Court were to interfere at this early state of the administrative proceedings before benefits have even been threatened to be terminated or denied as a result of plaintiffs' failure to document citizenship, then the Court will be deciding significant issues based upon "contingent future events that may not occur as anticipated, or indeed may not occur at all."

Oriental Health Spa v. City of Fort Wayne, 864 F.2d 486, 489 (7th Cir. 1988) (holding that

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<sup>8</sup> Illinois, for example, has established an extensive administrative appeals process that is accompanied by an express right of appeal to state court once administrative avenues for redress have been exhausted. See 305 ILL. COMP. STAT. ANN. 5/11-8 (2005); 305 ILL. COMP. STAT. ANN. 5/11-8.7 (2005).

challenge to licensing procedures is not ripe because plaintiff has not been threatened with revocation or suspension of license) (quoting Thomas v. Union Carbide Agr. Products Co., 473 U.S. 568, 580-581 (1985)). Such interference risks damaging the agency’s ongoing administration of the Medicaid program and the requirements contained within section 6036 based upon an abstract policy disagreement.

Moreover, as will be discussed below in the discussion of irreparable harm, the plaintiffs will not suffer hardship from postponement of judicial action. Those plaintiffs currently receiving Medicaid benefits will continue to do so at least until after their next annual redetermination of Medicaid eligibility, and, even then, cannot lose benefits until after a fair hearing and an adverse final decision. And new applicants will be no worse off than they ordinarily are while their applications are being considered. Because no tangible harm will occur until benefits are terminated or denied, there is no justification for judicial intervention at this time.

**4. The Administrative Exhaustion Doctrine Counsels in Favor of Postponing Judicial Review Until Plaintiffs’ Claims for Benefits Have Been Evaluated**

Delaying judicial review of the Interim Final Rule until the plaintiffs’ claims are ripe is also justified by the doctrine of exhaustion of administrative remedies. As explained by the Supreme Court, “[t]he doctrine provides ‘that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.’” McKart v. United States, 395 U.S. 185, 193 (1969) (quoting Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938)). The doctrine protects “executive and administrative autonomy” while also allowing for the development of a factual context for review. Id. at 194.

In the present case, claimants for Medicaid benefits are entitled to a fair hearing before any termination of benefits or final rejection of an application for benefits, and states are required to

establish an administrative appeals procedure for Medicaid applicants and recipients that includes such a hearing. See 42 C.F.R. §§ 431.205; 431.206(c)(1), (4); see also 71 Fed. Reg. at 39217 (“Notice and appeal rights must be given to the applicant or recipient if the State denies or terminates an individual for failure to cooperate with the requirement to provide documentary evidence of citizenship or identity. . . .”). Except in certain specified situations not alleged to be present here, plaintiffs’ benefits may not be terminated before their fair hearing is concluded. See 42 C.F.R. § 431.230.

Given the infancy of section 6036, the Interim Final Rule, and the states’ responses thereto, the exhaustion doctrine counsels in favor of postponing judicial action until state agencies have had the opportunity to evaluate the plaintiffs’ claims in light of the statute and the Rule. Cf. Nehring v. First DeKalb Bancshares, Inc., 692 F.2d 1138, 1142 (7th Cir. 1982) (holding that judicial action prior to administrative review would weaken agency’s uniform application of law). If the state hearing process were to result in one of the named plaintiffs receiving benefits, then the Court could avoid resolution of that individual’s constitutional claim. See Rosenthal & Co. v. Bagley, 581 F.2d 1258, 1261 (7th Cir. 1978) (“The final administrative determination may be favorable to the plaintiff, in which case the constitutional issue sought to be decided collaterally would become moot and no court would have to decide it.”); see also Ticor Title Ins. Co. v. FTC, 814 F.2d 731, 740 (D.C. Cir. 1987) (holding that “because the plaintiff might prevail on nonconstitutional grounds before the administrative agency,” exhaustion supports avoidance of “the needless decision of a constitutional question”).

This avoidance of unnecessary resolution of constitutional questions has particular appeal in the due process context, as the process that the plaintiffs are due may in fact be provided by the hearing to which they are entitled. See Delzer Construction Co. v. United States, 487 F.2d 908,

909 (8th Cir. 1973) (“Appellees claim that their livelihood is being stripped from them in violation of their due process rights, yet they have not carried through to the hearing stage which is theirs by right . . . . If the hearing is actually held, the present controversy may resolve itself in any number of ways.”). If the process provided by the state Medicaid agency is insufficient, then the record established by the hearing would aid the Court in making such a determination.

**B. The Agency’s Decision to Designate Additional Documents to Satisfy the Citizenship Documentation Requirements Is Committed to Agency Discretion**

The agency’s designation of certain documents in the Interim Final Rule that may be used to establish citizenship under section 6036 is not justiciable under the APA. Section 701(a)(2) of the APA states that the Act does not apply when “agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). The Supreme Court has explained that this “narrow exception” applies “in those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply.’” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 79-752, at 26 (1945)), abrogated on other grounds, Califano v. Sanders, 430 U.S. 99 (1977).

Section 6036, codified at 42 U.S.C. § 1396b(x), sets forth specific types of documents that constitute “satisfactory documentary evidence of citizenship or nationality.” For example, the statute states that such evidence may include a United States passport, a Certificate of Naturalization, a Certificate of United States Citizenship, or a State-issued driver’s license or other identity documents described in section 274A(b)(1)(D) of the Immigration and Nationality Act where the State issuing the license or documents requires proof of United States citizenship or verifies a valid social security number prior to issuance. Id. § 1396b(x)(3)(B)(i)-(iv). In addition, citizenship may be established pursuant to this subsection by “[s]uch other document *as the*

*Secretary may specify*, by regulation, that provides proof of United States citizenship or nationality and that provides proof of United States citizenship or nationality and that provides a reliable means of documentation of personal identity.”<sup>9</sup> Id. § 1396b(x)(3)(B)(v) (emphasis added).

Thus, the structure of the statute is such that certain essential documents establishing citizenship, nationality, and personal identity are expressly identified in each subsection. These express categories of documents are then accompanied by a general grant of authority to the Secretary to identify additional documents that establish citizenship, nationality, and personal identity if the Secretary chooses to do so. Because the statute expressly provides for certain documents that would satisfy the documentation requirements in the absence of agency regulations, it is wholly operative without such action. The Secretary, *may*, however, expand upon the listed documents if he so chooses. Plaintiffs are in no sense persons “aggrieved” by the Secretary’s discretionary allowance of additional means of documenting citizenship, 5 U.S.C. § 706, since the only possible effect of the Interim Final Rule would be to allow them something beyond the options for documenting citizenship provided in the statute alone.

To the extent that the plaintiffs challenge the Secretary’s decision not to include additional documents (such as personal certification of citizenship) to establish citizenship or nationality in the Interim Final Rule, the precatory language of the statute demonstrates that Congress intended

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<sup>9</sup> The remainder of the statute operates in the same manner as subsection (B). Certain documents are expressly identified by Congress in the statute, and the Secretary is then authorized to specify certain additional documents by regulation, see 42 U.S.C. § 1396b(x)(3)(D)(ii) (“Any other documentation of personal identity of such other type as the Secretary finds, by regulation . . .”), or certain other documents without need for regulation, see id. § 1396b(x)(3)(C)(v) (“Such other document . . . as the Secretary may specify . . .”). To date, the Secretary has specified additional documents only by regulation.

to place the decision regarding the need for additional documentation and the form that such documentation would take in the hands of the Secretary. The statutory language states that the Secretary *may* designate additional documents by regulation. This language is permissive rather than mandatory, allowing additional designations but not requiring them. Accordingly, the language is strong evidence of the fact that the decision over which documents to designate is lodged in the unreviewable discretion of the Secretary. See Scalise v. Thornburgh, 891 F.2d 640, 644 (7th Cir. 1989) (holding that statutory language imposes no mandatory duty on Attorney General to issue regulations because “it merely states that he is authorized to do so”); Arnow v. United States Nuclear Reg. Comm’n, 868 F.2d 223, 233-34 (7th Cir. 1989) (describing language in statute that “license *may* be revoked for any material false statement” as permissive wording demonstrating Congress’s decision to entrust agency with “wide, unreviewable discretion in the area of agency enforcement”); Town of Beverly Shores v. Lujan, 736 F. Supp. 934, 939-40 (N.D. Ind. 1989) (holding that permissive language in statute confers broad discretion on Secretary); see also Collins Music Co. v. United States, 21 F.3d 1330, 1335 (4th Cir. 1994) (holding that “may” language in statute was precatory—the use of which “makes it impossible to ascertain a standard against which the action or inaction of [the agency] can be measured”).

Moreover, the challenged statute provides no law for the Court to apply to evaluate the plaintiffs’ challenge. The statute simply states that the Secretary may specify additional documents that demonstrate citizenship or nationality. The statute is silent regarding what types of additional documents the Secretary may allow, and it provides no factors for evaluating whether any expanded types of documentation are lawful. In the absence of such factors guiding the Court’s evaluation of the plaintiffs’ claim, the issue is discretionary in nature. See Jaymar-Ruby, Inc. v. FTC, 651 F.2d 506, 511 (7th Cir. 1981) (“Other than requiring that such information

be maintained in confidence and be used only for official law enforcement purposes, the statute is silent on what factors should be considered by the Commission in reaching its decision.”).

Given the structure of section 6036 and the permissive language of the statute, there is no basis for the Court to evaluate what additional documents should be designated by the Secretary. That decision is lodged entirely within the agency’s discretion.

**C. Plaintiffs Have Not Established a Likelihood of Success on Their Due Process, APA or Equal Protection Claims**

Plaintiffs couch their claims as under the APA and the Due Process Clause but, at bottom, their case reduces to a substantive disagreement with Congress on a matter of public policy. Plaintiffs want to continue to demonstrate their citizenship only through their own sworn statements, as under prior law. But Congress has chosen to implement the DRA’s documentation requirements for Medicaid redeterminations and new applications occurring on or after July 1, 2006. 42 U.S.C. §§ 1396b(i)(22),(x) & 1396b Note (effective date of July 1, 2006). Such a substantive disagreement cannot give rise to plaintiffs’ due process claim; “[t]he procedural component of the Due Process Clause does not ‘impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.’” Atkins v. Parker, 472 U.S. 115, 129 (1985) (quoting Richardson v. Belcher, 404 U.S. 78, 81 (1971)); see Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915); Marusic Liquors, Inc. v. Daley, 55 F.3d 258, 263 (7th Cir. 1995). Similarly, because any action the Secretary has taken was well within his statutory authority, plaintiffs have demonstrated no likelihood of success on their APA claim.

## 1. Plaintiffs' APA Claim Is Without Merit

Review of agency action under the APA is “highly deferential.” Israel v. U.S. Dept. of Agriculture, 282 F.3d 521, 526 (7<sup>th</sup> Cir. 2002); see also Ambach v. Bell, 686 F.2d 974, 981 (D.C. Cir. 1982) (APA review is “highly deferential . . . [and] presumes the agency’s action to be valid.” (citations omitted)). Plaintiffs claim they can show the Interim Final Rule is somehow “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” See 5 U.S.C. § 706(2)(A). But the Court must accord special deference to the Secretary’s interpretation of a statute that Congress has authorized him to implement. See ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 324 (1994); Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981); cf. Wisconsin Dep’t of Health & Family Servs. v. Blumer, 534 U.S. 473, 497 & n.13 (2002) (“We have long noted Congress’ delegation of extremely broad regulatory authority to the Secretary in the Medicaid area.”). Indeed, as plaintiffs admit, see Pl. Mem. 18 (stating the Interim Final Rule is due Chevron deference), the Secretary’s interpretation of section 6036, embodied in the Interim Final Rule, is entitled to great deference, as it represents the agency’s interpretation of a statute it administers. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-843 & n.11 (1984) (court must uphold agency’s interpretation if construction is permissible under the statute; court need not conclude that agency construction was the only one it permissibly could have adopted or even the reading the court would have reached); United States v. Mead Corp., 533 U.S. 218, 229 (2001) (Chevron deference applies where “Congress delegated authority to the agency generally to make rules carrying the force of law”); Krzalic v. Republic Title Co., 314 F.3d 875, 879 (7<sup>th</sup> Cir. 2002) (““legislative rules and formal adjudications are always entitled to Chevron deference””) (quoting Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 3.5 at 6-7 (4<sup>th</sup> ed. Supp. 2003)); see also Aluminum Co. of America v. Central Lincoln People’s Util.

Dist., 467 U.S. 380, 389 (1984) (giving “substantial deference” to administrative construction where, as here, the “subject under regulation is technical and complex”). By authorizing the Secretary to issue regulations under section 6036, Congress made “an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.” Chevron, 467 U.S. at 843-44. Accordingly, the Secretary’s “regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” Id. at 844.

Such deference is not even necessary for the Secretary to prevail in this case, however, since the Secretary’s interpretation and actions are plainly consistent with section 6036. “The new [Medicaid Act] provision under section 6036 . . . effectively requires that the State obtain satisfactory documentation of a declaration of citizenship.” 71 Fed. Reg. at 39215. The documentation requirement is included in 42 U.S.C. § 1396b(i), which “provides, in relevant part, that the federal government will not reimburse states for” that which the provision lists. Miller by Miller v. Whitburn, 10 F.3d 1315, 1317 n.2 (7th Cir. 1993) (construing § 1396b(i)). With the amendment made by section 6036, the Medicaid Act now prohibits the Secretary from providing a state with FFP “with respect to amounts expended for medical assistance for 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 benefits under this title, unless” they meet the new documentation requirements. See 42 U.S.C. § 1396b(i)(22). Thus, the statute changed the basis on which states may receive FFP for medical benefits to many individuals claiming citizenship. The Interim Final Rule instructs states as to what they must do if they wish to maintain full eligibility for FFP under the Medicaid Act, as amended. See 71 Fed. Reg. at 39215.

Moreover, Congress has authorized the Secretary to require that states apply the new documentation requirements as a matter of eligibility to promote efficient administration of the

Medicaid program under state plans. See, e.g., 42 U.S.C. § 1396a(a)(4) (a state plan must “provide . . . such methods of administration . . . as are found by the Secretary to be necessary for the proper and efficient operation of the plan”). Cf. McRae, 448 U.S. at 309 (when “Congress chooses to withdraw federal funding for a particular service, a State is not obliged to continue to pay for that service as a condition of continued federal financial support of other services.”); Pereira by Pereira v. Kozlowski, 996 F.2d 723, 726 (4th Cir. 1993) (“it was manifestly reasonable for Congress to promote the integrity of state coverage by effectively requiring standardized procedures through its control of the fisc.”) (construing 42 U.S.C. § 1396b(i)).

In the Interim Final Rule, the Secretary alerted states that, if its Medicaid beneficiaries’ claims are to be eligible for FFP, they must meet the new requirements. As to what those requirements are, the Interim Final Rule closely follows the statute while exercising the Secretary’s discretionary authority. He has employed that authority only to *expand*, not contract, the options available for states and beneficiaries to satisfy section 6036. As explained supra, the Interim Final Rule exempts millions of Medicaid beneficiaries and applicants who, in the absence of the Secretary’s interpretation as embodied in the rule, would be subject to the new documentation requirements. See 71 Fed. Reg. at 39216. The Secretary has expanded the options for states and citizens by, inter alia, permitting states to use the federal SDX database to establish beneficiaries’ and applicants’ citizenship. Id. The Secretary has also gone beyond the strict requirements of section 6036 to use third- and fourth-tier evidence of citizenship, such as records from insurance providers, hospitals, the census, and qualifying written affidavits. Id. at 39223-24; 42 C.F.R. §§ 435.407(c)-(d), 436.407(c)-(d). As discussed supra, it is unclear how these regulations that plaintiffs ask the Court to enjoin harm plaintiffs (or how they are harmed at all); indeed, plaintiffs in a similar civil action challenging implementation of section 6036 in the

District of Columbia voluntarily dismissed their claims after the issuance of the Interim Final Rule. Bread for the City, et al. v. Jesberg, et al., Civ. No. 06-1197-ESH (D.D.C. 2006) (dismissed pursuant to Fed. R. Civ. P. 41 August 4, 2006); see also Susan Levine, Challenge to Citizenship Rule Dropped; Residents' Coverage No Longer in Jeopardy, Attorneys Say, Washington Post, August 5, 2006, at B3 (“A federal lawsuit against the city's implementation of a new Medicaid rule ended yesterday afternoon after lawyers for vulnerable District residents concluded that their health and nursing home coverage no longer was at risk.”), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/04/AR2006080401551.html>.

Plaintiffs do not complain of the Secretary's actions exempting most of them from the new requirements, and making it easier for others to qualify; rather, they complain that he has not gone as far as they would like. But the Secretary was not required to expand states' or citizens' options *at all*, nor was he required to issue *any* regulations.<sup>10</sup> Plaintiffs' argument that the Secretary “easily could” do various things plaintiffs would prefer, Pl. Mem. 21, is irrelevant under Chevron and its progeny. See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., --- U.S. ----, 125 S. Ct. 2688, 2699 (2005) (where “the implementing agency's construction is reasonable, Chevron requires a federal court to accept the agency's construction of the statute, even if the

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<sup>10</sup> Congress stated that the Secretary “may” identify additional documents by regulation, and in some cases without regulation. See 42 U.S.C. §§ 1396b(x)(3)(B)(v); (x)(3)(C)(v); (x)(3)(D)(ii) (each stating the Secretary “may” issue regulations or, in some cases, otherwise specify other acceptable documentation). Congress was aware when drafting Section 6036 how to instruct that something “shall” be done. See Section 6036(b) (the new documentation requirements “shall apply” as of July 1, 2006), codified at 42 USCA § 1396b Note. Congress' instruction that the Secretary “may,” not “shall,” issue regulations was plainly meaningful. See, e.g., Bates v. United States, 522 U.S. 23, 29-30 (1997) (“where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”).

agency’s reading differs from what the court believes is the best statutory interpretation.”)<sup>11</sup>

Plaintiffs also criticize the Secretary for suggesting a hierarchy of reliability, but every document that Congress listed in the statute is contained in the first two, a priori reliable categories; a beneficiary or applicant who has a document or appropriate set of documents listed in Section 6036 can submit them immediately and be found eligible, without the need to look for lesser documents. Compare section 6036 with Interim Final Rule (same documents listed that establish citizenship and identity; same documents listed that establish citizenship *or* identity; additional, but non-preferred, documents listed by the Secretary as acceptable when the statutory documents are unavailable). It is well within the Secretary’s discretion, and hardly inappropriate, to prefer the documents identified by Congress. See Schweiker v. Gray Panthers, 453 U.S. 34, 50 n.22 (1981) (where “Congress itself already had considered the ‘relevant factors’ . . . the Secretary need not do more.”). Similarly, it is well within the Secretary’s broad statutory discretion to require states to use documents establishing citizenship *or* identity only where a single document that establishes *both* is unavailable, to improve program efficiency. See 42 U.S.C. § 1396a(a)(4) (state plan must “provide . . . such methods of administration . . . as are found by the Secretary to

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<sup>11</sup> Plaintiffs are mistaken when they argue that section 1137(d)(1)(A) of the Social Security Act, codified at 42 U.S.C. § 1320b-7, does not apply to “the beneficiaries of foster care or adoption assistance agreements pursuant to Title IV-E in states in which a separate Medicaid application is not made for these children.” Pl. Mem. 30. Title 42 U.S.C. § 1320b-7 establishes, inter alia, a citizenship verification requirement. Id. § 1320b-7(d)(1)(A). That requirement imposes eligibility conditions on beneficiaries under *all* state Medicaid programs. Id. § 1320b-7(b)(2). Nothing in the statute exempts Title IV-E beneficiaries whose eligibility for Medicaid is derivative, as plaintiffs seem to imply; section 1137(d)(1)(A) of the Social Security Act, 42 U.S.C. § 1320b-7, still directs states to subject such individuals to the Act’s eligibility requirements, including the citizenship verification requirement. Accordingly, they are also subject to section 6036. See 42 U.S.C. § 1396b(i)(C)(22) (applying the new documentation requirements of section 6036 to those required to declare their citizenship pursuant to section 1137(d)(1)(A) of the Social Security Act).

be necessary for the proper and efficient operation of the plan”).

Plaintiffs also argue, in direct conflict with the statutory language, that the requirement applying 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’ . . . would allow the Secretary to . . . demand documentation from [only] those particular recipients” whose citizenship appears suspect under pre-section 6036 regime. Pl. Mem. 19-20, quoting section 6036 (first bracketing plaintiffs’, second supplied). Even if, arguendo, plaintiffs are correct that this is permissible, it certainly is not required since the statute does not require *any* regulations, or that the Secretary accept *any* documentation other than those listed in section 6036. Under Chevron, plaintiffs’ various suggested “alternative interpretations” of the statute are irrelevant. In any event, plaintiffs’ various suggestions would not be permissible readings of the statute, which provides that the new requirement applies to individuals seeking redetermination when (as plaintiffs admit) the new documentation requirement “was not previously met.” Section 6036(b), codified at 42 U.S.C. § 1396b note; see also H.R. CONF. REP. 109-362, at 342 (2005) (“The provision would apply to determinations of initial eligibility for Medicaid made on or after July 1, 2006, and to redeterminations made after such date in the case of individuals for whom the *new documentary requirements* were not previously met.”) (emphasis added). Since Congress required beneficiaries to have met the *new* requirements, plaintiffs’ suggestion that it could be satisfied when they merely met the *preexisting* requirement of self-attestation, under penalty of perjury, is meritless. Cf. Nat’l Public Radio, Inc. v. F.C.C., 254 F.3d 226, 230 (D.C. Cir. 2001) (the Court must “presume that Congress meant precisely what it said”).

Just as plaintiffs find illusory conflict between Section 6036 and the Interim Final Rule, they seek to sow conflict between the statute and other provisions of the Medicaid Act where none

exists. For example, plaintiffs claim that the Act contains an “express prohibition on the denial of benefits to citizens.” Pl. Mem. 21; see also id. 25. Plaintiffs cite 42 U.S.C. § 1396a(b)(3) for this unfounded proposition, but (as they acknowledge in a parenthetical) that provision deals with the Secretary’s approval of state plans. It merely establishes that the Secretary “shall not approve any plan which imposes, as a condition of eligibility for medical assistance under the plan . . . any *citizenship* requirement which excludes any citizen of the United States.” Id. (emphasis added). Therefore, that provision prevents the Secretary from approving a state plan with a *citizenship* requirement that, e.g., would mandate citizenship of a particular state as well as the United States or, for that matter, a state plan that requires a beneficiary to be a citizen of another country. It does not, as plaintiffs’ argument implies,<sup>12</sup> grant an affirmative right to every American citizen to receive assistance under Medicaid. And it says nothing about documentation requirements.

Plaintiffs are also mistaken when they argue “Congress has made eligible for Medicaid any citizen who signs the declaration under 42 U.S.C. [§] 1320b-7.” Pl. Mem. 25. Congress has done nothing of the sort; § 1320b-7 (a) & (d) established a *minimum* citizenship verification eligibility requirement that there be a written declaration, made under penalty of perjury by the individual seeking benefits or, in some cases, another appropriate person, “stating whether the individual is a citizen or national of the United States, and, if that individual is not a citizen or national of the United States, that the individual is in a satisfactory immigration status.” See 42 U.S.C. § 1320b-7(a), (d)(1)(A). Nothing in the Act required that everyone who met that minimum requirement be found eligible, nor did it prohibit additional state or federal requirements. Cf. 42 C.F.R. § 435.406(a)-(a)(1) (state “agency must provide Medicaid to *otherwise eligible* residents of the

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<sup>12</sup> In one of their few citations to authority, amici offer the same misinterpretation of 42 U.S.C. § 1396a(b)(3). See Illinois Mem. 6.

United States who are . . . [c]itizens.”). Indeed, Montana, New Hampshire, New York and Texas already have in place more stringent citizenship documentation requirements. See HHS, Office of the Inspector General, “Self Declaration of U.S. Citizenship for Medicaid,” OEI-02-03-00190 (July 2005), at 9 (filed in Pl. Appx. at Tab 26). And even, arguendo, if the statute had previously required states to determine citizenship based on the sworn, self-declaration alone, Congress has changed that requirement. Plaintiffs’ argument largely ignores the existence of the newer, more specific statute. Cf. United States v. Estate of Romani, 523 U.S. 517, 530-531 (1998) (concluding “that a specific policy embodied in a later federal statute should control [the Court’s] construction of” an earlier statute, “even [where] it had not been expressly amended.”).

Finally, plaintiffs argue that the portion of Section 6036 directing the Secretary to establish an outreach program “[a]s soon as practicable after” enactment of the DRA, see Section 6036(c), codified at 42 U.S.C. § 1396b Note, somehow made such a program a necessary condition precedent to enforcement of the new documentation requirements. Pl. Mem. 35-37. Even if this were so, it would not now prevent enforcement of Section 6036: as described in the Declaration of Richard Fenton filed herewith (and contrary to plaintiffs’ assertions), the Secretary actually has begun such an outreach program. See generally Second Fenton Decl., filed herewith. And CMS did begin outreach as soon as was practicable. See id. ¶ 10 (“[I]t was not practicable to conduct useful outreach earlier since CMS and FCHPG required time subsequent to enactment of the DRA to interpret the provisions of the DRA, including section 6036. Furthermore, it was difficult to conduct greater outreach before CMS issued the interim final rule because the agency’s interpretation of the new requirements had not yet been finalized and announced.”). There are no grounds for the Court to reject this explanation. See Legal Services of Northern California, Inc. v. Arnett, 114 F. 3d 135, 140 (9th Cir. 1997) (noting that the statute’s terms that legal services be

provided to senior citizens “to the maximum extent feasible” in accord with their need left the court “ill-equipped” to determine how that could be accomplished); cf. Ohio v. E.P.A., 997 F. 2d 1520, 1531-32 (D.C. Cir. 1993) (“maximum extent practicable” language in statute did not trump stated goal of statute).<sup>13</sup>

## 2. Plaintiffs’ Due Process Claim Is Without Merit

To establish a due process violation, a plaintiff “must show: ‘(1) a protected property or liberty interest, and (2) that [it] was deprived of that interest by government action and without due process of law.’” Baja Contractors, Inc. v. City of Chicago, 830 F.2d 667, 675-77 (7<sup>th</sup> Cir. 1987) (quoting Cunningham v. Adams, 808 F.2d 815, 820 (11th Cir. 1987)). But the Supreme Court has warned that a property interest deserving procedural due process protection does not necessarily give rise to substantive rights; “the analogy drawn in Goldberg[v. Kelly], 397 U.S. 254 (1970)] between social welfare and ‘property’ . . . cannot be stretched to” limit Congress’ power to make substantive changes in, e.g., the Medicaid Act. Richardson v. Belcher, 404 U.S. 78, 81

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<sup>13</sup> Regardless, plaintiffs’ reading of the statute is simply erroneous. As plaintiffs acknowledge, see Pl. Mem. 36, Congress instructed the Secretary to establish an outreach program “as soon as practicable,” with no date certain and, in particular, not necessarily by the July 1 date that governs implementation of the rest of Section 6036; Congress’ choice not to apply that implementation date to the outreach program is significant. “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” Hohn v. United States, 524 U.S. 236, 250 (1998) (quoting Bates, 522 U.S. at 29-30, and Russello v. United States, 464 U.S. 16, 23 (1983) (other internal quotation marks omitted)). Plaintiffs nonetheless suggest Congress’ description of the targets of an outreach program as those “who are likely to be affected” by the new requirements (Section 6036(c), codified at 42 U.S.C. § 1396b Note) “demonstrates,” Pl. Mem. 36, that Congress required the outreach program be established prior to July 1 (even, presumably, if the Secretary found that was not “practicable”). It is just as likely that the verb tense indicates those who would be affected would be affected months subsequent to Congress’ enactment of Section 6036(c). In any event, Congress in no sense required the existence of an outreach program as a precondition to requiring compliance with the documentation requirements of section 6036.

(1971).

Thus, existing recipients of benefits under statutory entitlement programs have no substantive property right that guarantees them continued receipt of those benefits. In Atkins v. Parker, 472 U.S. 115 (1985), for example, the Court rejected food stamp recipients' challenge to a legislative reduction in the amount of their benefits. The Court rejected the notion that the reduction in benefits adversely affected the recipients' property rights, holding that the prior "entitlement did not include any right to have the program continue indefinitely at the same level, or to phrase it another way, did not include any right to the maintenance of the same level of property entitlement." Id.; see also Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41 (1986); Logan v. Zimmerman Brush Co., 455 U.S. 422, 432-433 (1982); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174 (1980) ("railroad benefits, like social security benefits, are not contractual and may be altered or even eliminated at any time"); Hisquierdo v. Hisquierdo, 439 U.S. 572, 575 (1979) ("Congress may alter, and even eliminate, [benefits] at any time"); Flemming v. Nestor, 363 U.S. 603, 610 (1960) ("[t]o engraft upon the Social Security system a concept of 'accrued property rights' would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands").

Just as the recipients of statutory benefits lack a substantive property interest in the continued receipt of their benefits, individuals who have applied for benefits, but have not been awarded them, have no vested or substantive right to benefits which might be awarded in the future. Thus, legislation that affects unadjudicated entitlement claims does not "take [] away or impair[] vested rights acquired under existing laws." Landgraf v. Usi Film Prods., 511 U.S. 244,

269 (1994) (citation omitted). Congress, accordingly, was (and is) free to end the Medicaid program, or curtail it, or, as here, amend it with new requirements that bear on an individual's right to receive benefits. As to individual beneficiaries, however, assuming arguendo for the purposes of the pending TRO motion that plaintiffs currently receiving Medicaid benefits have a property interest in future receipt of these benefits, "it has become a truism that 'some form of hearing' is required before the owner is finally deprived of a protected property interest." Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982) (quoting Board of Regents, 408 U.S. at 570-71 n. 8 (emphasis in original)). "The amount and timing of the process due when a deprivation of liberty or property (in the constitutional sense of these terms) is alleged varies with circumstances." Chicago United Industries, Ltd. v. City of Chicago, 445 F.3d 940, 944 (7<sup>th</sup> Cir. 2006) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)). "In general, something less than a full evidentiary hearing is sufficient prior to adverse administrative action." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545 (1985).

There has been no suggestion (and there would be no basis for any suggestion) that the Secretary's Medicaid regulations providing due process are constitutionally deficient in any way; accordingly, section 6036 as it will impact state plans and plan amendments approved by the Secretary will not run afoul of the due process protections. See 42 C.F.R. § 431.205(d) (requiring that a State Medicaid agency's hearing system "must meet the due process standards set forth in Goldberg v. Kelly, 397 U.S. 254 (1970), and any additional standards specified in this subpart"). Nor, at this stage, is there any reason to believe any state will run afoul of due process. According to the preamble to the Interim Final Rule, "[n]otice and appeal rights must be given to the

applicant or recipient [<sup>14</sup>] if the State denies or terminates an individual for failure to cooperate with the requirement to provide documentary evidence of citizenship or identity. . . .” 71 Fed. Reg. at 39217 (also explaining that “[f]ailure to cooperate . . . consists of failure . . . after being notified, to present the required evidence or explain why it is not possible to present such evidence of citizenship or identity.”). Moreover, the Interim Final Rule requires states to afford beneficiaries or applicants a “reasonable opportunity period” consistent with the Secretary’s regulations. *Id.* at 39216, citing 42 C.F.R. § 435.911. It is premature to judge the pertinent standards for state enforcement of the new documentation requirements since plaintiffs have neither pointed to nor criticized any such state standards. Nonetheless, plaintiffs do complain that the 45 to 90 day initial limit on applicants’ “reasonable opportunity” to meet the documentation requirements under 42 C.F.R. § 435.911 is too short, but as they are aware “[t]he regulations permit exceptions from the time limits when an applicant or recipient in good faith tries to present documentation, but is unable to do so because the documents are not available. In these cases, *the State must assist the individual in securing evidence of citizenship.*” 71 Fed. Reg. 39214, 39216 (emphasis added). *Cf.* Pl. Mem. 13 (noting the good faith exception but criticizing it as “not defined”). It is, again, premature to criticize a time limit with a “good faith” exception until the states have an opportunity to craft their adjudicatory procedures, in accord with the federal

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<sup>14</sup> Applicants for Medicaid are also guaranteed appeal rights consistent with any due process protections. *See* 42 C.F.R. § 431.200 *et seq.*; *id.* § 435.912 (regarding notice of initial decision and hearing rights). However, we note that “[t]he Supreme Court has ‘never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause.’” *Dehainaut v. Pena*, 32 F.3d 1066, 1074 (7th Cir. 1994) (quoting *Lyng v. Payne*, 476 U.S. 926, 942 (1986)). Rather, due process-protected “[e]ntitlement arises only after benefits have been received or granted.” *Norflo Holding Corp. v. City of Chicago*, No. 00 C 6208, 2002 U.S. Dist. LEXIS 4965, 19-20 (N.D. Ill. March 25, 2002). The Court need not consider this question since, again, the Secretary’s regulations require that states provide due process to Medicaid applicants as well as recipients.

regulatory command that they comply with due process.<sup>15</sup>

Yet plaintiffs claim the (uncertain and unspecified) “procedures are unfair.” Pl. Mem. 30. This assertion is unsupported by the law, as described supra, as well as plaintiffs’ own arguments. As to applicants, who may not receive Medicaid benefits while they are given time to meet the new documentation requirements,<sup>16</sup> plaintiffs give short shrift to the Secretary’s guarantees of a “reasonable opportunity,” instead offering citation-free speculation that the time allotted “will produce terminations of Medicaid before the recipient[s] . . . have had a chance to produce whatever documentation it is in their power to produce.” Pl. Mem. 28. As discussed infra, such unsubstantiated speculation of harm that may occur is insufficient to justify entry of emergency injunctive relief.

### **3. Plaintiffs’ Equal Protection Claim Is Without Merit.**

Plaintiffs have also amended their Complaint and request for injunctive relief to include an equal protection claim against the Interim Final Rule. According to the plaintiffs, the Rule violates their Fifth Amendment rights by failing to provide them with the same benefits that are provided to non-citizens under 42 U.S.C. § 1320b-7(d)(4), which provides Medicaid applicants

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<sup>15</sup> Plaintiffs claim that allowing citizen applicants time to meet the new documentation requirements means that, “[d]espite having met the statutory eligibility requirement with regard to citizenship, their applications and their health care will be delayed or denied.” Pl. Mem. 14. Plaintiffs fail to note that such applicants, in plaintiffs’ scenario, will have failed (at least so far) to meet the new documentation requirement; and that they will be afforded due process. See 42 C.F.R. Subpart E (“Fair Hearings for Applicants and Recipients”). Even under current law, applicants for Medicaid benefits do not receive such benefits before their eligibility has been determined.

<sup>16</sup> Consistent with other applicable provisions of the Social Security Act, states may provide applicants with benefits retroactive to their date of application. See, e.g., Tenn. Comp. R. & Regs. 1200-13-12-.03(1) (providing that “[e]nrollment shall be deemed complete retroactive to the date of the original application, if that application is approved.”).

who declare themselves to be in “satisfactory immigration status” a reasonable opportunity to document such status. During that period, and during subsequent verification of such documentation by the former Immigration and Naturalization Service, benefits may not be delayed, denied, reduced, or terminated. Id. In contrast, under the Interim Final Rule, plaintiffs argue that “individuals who declare themselves to be citizens *must* be denied or *may* be terminated from Medicaid in the absence of supporting documentation *regardless* of whether a reasonable opportunity period has elapsed.” Pl. Mem. 32. This argument drastically misconstrues the mandates of the Rule.

The Interim Final Rule explicitly states that “[a]t the time of application or redetermination, the State must give an applicant or recipient, who . . . claims to be a citizen, a reasonable opportunity to present documents establishing U.S. citizenship.” 71 Fed. Reg. at 39216. During that period, current recipients “will remain eligible until determined ineligible as required by Federal regulations at § 435.930.” Id. Current recipients of Medicaid will therefore continue to receive benefits during the reasonable opportunity period, and perhaps even beyond that time, unless the recipient is not attempting to provide documentation in good faith. Id. And new applicants will not have their claims “denied” during the reasonable opportunity period; they will simply not receive benefits until documentation has been provided. Id. Thus, the only “distinction” between the Rule and 42 U.S.C. § 1320b-7(d)(4) is that new applicants who declare themselves to be in “satisfactory immigration status” may receive Medicaid before documentation of status is verified.

However, the source of this alleged distinction is not agency action but rather the congressional mandate in section 6036. Unlike 42 U.S.C. § 1320b-7(d), in which Congress expressly authorized benefits to be granted pending documentation and verification, section 6036

forbids federal payments “with respect to amounts expended for medical assistance for an individual who declares under section 1320b-7(d)(1)(A) of this title to be a citizen or national of the United States for purposes of establishing eligibility for benefits” unless “there is presented satisfactory documentary evidence of citizenship or nationality” for that individual. 42 U.S.C. § 1396b(i)(22), (x). Thus, section 6036 expressly prohibits the Secretary from absolving the States of liability for FFP during the “reasonable opportunity” period, as the Secretary has no authority to provide FFP when documentation is lacking. The fact that the distinction alleged by the plaintiffs is a product of congressional action is fatal to their request for injunctive relief, which seeks only to enjoin implementation of the Interim Final Rule.

Even if an equal protection claim against section 6036 were presently before the Court, however, that claim would lack merit. “. . . Congressional allocations of scarce welfare resources, which are accorded a ‘strong presumption of constitutionality . . . .’, can only be overturned where there is ‘unmistakable evidence of punitive intent’ against the group that is disadvantaged by the allocation.” Milner v. Callahan, 980 F. Supp. 935, 937 (N.D. Ill. 1997) (quoting Schweiker v. Wilson, 450 U.S. 221, 230 (1981), and Flemming v. Nestor, 363 U.S. 603, 619 (1960)), aff’d, 148 F.3d 812 (7th Cir. 1998). This great degree of deference to congressional action in the public benefits context is based in large part on the “difficult responsibility” faced by public officials in “allocating limited public welfare funds among the myriad of potential recipients.” Dandridge v. Williams, 397 U.S. 471, 487 (1970).

Here, there is no indication on the face of section 6036 that the statute contains *any* classification among groups, let alone one based on invidious intent to discriminate against a suspect class. Section 6036 applies to *all* individuals who certify that they are citizens of the United States. As the legislative history explains, Congress’s intent in section 6036 was to

prevent a loss of Medicaid funds due to fraudulent declarations of citizenship; i.e. non-citizens who falsely declare themselves to be citizens. See H.R. REP. NO. 109-276, at 553 (2005) (explaining that the purpose of section 6036 is to “reduce the number of individuals receiving Medicaid benefits who are not lawfully in the United States”). Thus, section 6036 applies equally to citizens, aliens in satisfactory immigration status, and illegal aliens who declare themselves to be citizens, whether or not that declaration is in fact a truthful description of an applicant’s immigration status. Even if the burden of this requirement has the greatest impact on citizens, that impact, without further proof of discriminatory intent, is insufficient support for an equal protection claim. See Tucker v. United States Dep’t of Commerce, 958 F.2d 1411, 1413-14 (7th Cir. 1992) (holding that equal protection forbids only “*intentional* discrimination”); Lindley v. Sullivan, 889 F.2d 124, 132 n.6 (7th Cir. 1989) (“The [plaintiffs] have demonstrated at most a discriminatory *impact* on infertile beneficiaries. Such a showing will not sustain a Fifth Amendment equal protection challenge to the statute.”); Milner, 980 F. Supp. at 937.

If, as plaintiffs allege, there were a discriminatory classification created by section 6036, it would certainly be an unusual one. Plaintiffs’ equal protection claim is based on the theory that Congress intended to disadvantage United States citizens relative to aliens through the passage of section 6036. Typically, equal protection challenges involving classifications based on alienage in the public benefits context have targeted laws that disadvantage *aliens*, a class that is in a far weaker political position than citizens of the United States. See, e.g., Mathews v. Diaz, 426 U.S. 67 (1976); City of Chicago v. Shalala, 189 F.3d 598 (7th Cir. 1999); see also Soskin v. Reinertson, 353 F.3d 1242 (10th Cir. 2004). Nevertheless, even when aliens are the group disadvantaged by congressional action, the Seventh Circuit has evaluated the constitutionality of the classification under a rational basis standard of review. City of Chicago, 189 F.3d at 604-05;

see also Vaughn v. Sullivan, 906 F. Supp. 466, 475 (S.D. Ind. 1995) (“Nor is there a fundamental constitutional right to receive Medicaid benefits.”), aff’d, 83 F.3d 907 (7th Cir. 1996).

Rational basis is a highly deferential standard. See Lindley, 889 F.2d at 12. It is “‘not a license for courts to judge the wisdom, fairness, or logic of legislative choices.’” City of Chicago, 189 F.3d at 605 (quoting Heller v. Doe, 509 U.S. 312, 319 (1993)). Congress need not actually articulate the rational basis for its decision; rather, a statute “‘must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.’” Id. at 606 (quoting Heller, 509 U.S. at 320). Similarly, congressional action is valid under the rational basis test even when “‘there is an imperfect fit between means and ends.’” Id. (quoting Heller, 509 U.S. at 321).

Congress enacted section 6036 with the intent to reduce fraud and preserve scarce Medicaid resources. See H.R. REP. NO. 109-276, at 553 (2005). In order to achieve cost savings, it was perfectly rational for Congress to act on an incremental basis by targeting fraud resulting from false declarations of citizenship.<sup>17</sup> See City of Chicago, 189 F.3d at 608 (“In effectuating the governmental goal of cost savings, Congress had to start somewhere and ‘must be allowed leeway to approach a perceived problem incrementally.’”) (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 316 (1993)); see also Turner v. Glickman, 207 F.3d 419, 425 (7th Cir. 2000) (“[W]e find nothing in the equal protection guaranties that would inhibit Congress’s ability to

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<sup>17</sup> Whether or not Congress was “correct” in deciding that section 6036 was necessary to combat fraudulent declarations is irrelevant to the equal protection analysis. See, e.g., Vaughn v. Sullivan, 83 F.3d 907, 913 (7th Cir. 1996) (holding that state’s choice to allocate benefits, whether “[w]rong or not, . . . could not be called irrational”); Lindley, 889 F.2d at 132 (“[W]e certainly have no authority to invalidate social legislation as ‘unwise or inartfully drawn.’ . . . [P]ractical problems needing rough accommodations may sometimes bring about illogical or unscientific results.”).

attempt various means of reducing welfare fraud, nor that would require Congress to address every aspect of the problem at this time.”). And while Congress might have felt it wise in 2000 to award benefits to aliens in lawful immigration status while verification of such status was pending with the former INS, Congress was free to decide that such resources were not available to those declaring citizenship in 2006.

Moreover, section 6036 is a rational attempt to correct a preexisting distinction in the Medicaid system that favored citizens over aliens. Prior to the passage of section 6036, citizens were allowed to simply declare citizenship under penalty of perjury while aliens in satisfactory immigration status were required to provide documentation of such status. See 71 Fed. Reg. at 39215 (“Aliens who declare they are in a satisfactory immigration status have been required by section 1137(d) of the Act to present documentation of satisfactory immigration status since the declarations were first implemented. Individuals who declared they were citizens did not have to do anything else to support that claim. . . .”). While Congress’s solution to this imbalance may not have placed all parties on identical footing, its corrective attempt is justified despite the allegedly discriminatory byproduct.<sup>18</sup> See Milner v. Apfel, 148 F.3d 812, 814 (7th Cir. 1998) (“Legislatures are permitted to correct a problem incrementally even though by doing so they create arbitrary distinctions until correction is complete.”).

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<sup>18</sup> Plaintiffs focus on the advantage that applicants who declare themselves in satisfactory immigration status have over applicants who declare themselves citizens. However, many aspects of section 6036 and the Final Interim Rule provide benefits to “citizen” declarants that are not otherwise available. For example, the Rule requires that states assist applicants who cannot locate documentation. 71 Fed. Reg. at 39216. In these cases, states must allow exemptions from the normal “reasonable opportunity” period. Id. The difficulty in weighing these advantages versus the disadvantage alleged by the plaintiffs demonstrates why courts have been reluctant to interfere with incremental legislative attempts to resolve a problem that incidentally burden a particular group. Cf. Milner, 148 F.3d at 814.

There is certainly no evidence that Congress, in enacting section 6036, had an invidious intent to discriminate against citizens of the United States in favor of aliens. The law applies equally, regardless of alienage, to any individual who declares United States citizenship. Accordingly, the plaintiffs' equal protection claim is meritless.

**D. Any Argument by Plaintiffs That the Statute Is Unconstitutional Is Barred by Laches**

Section 6036 was enacted on February 8, 2006, with an effective date of July 1, 2006. Plaintiffs waited to seek extraordinary, emergency relief until (literally) the eve of its enforcement, June 30, 2006. Plaintiffs' motion for emergency relief does not seek any relief against the statute itself,<sup>19</sup> but to the extent their complaint does, see Second Am. Compl. ¶¶ 2, 60, such a claim is barred by laches.

“To establish laches, a defendant must show an unreasonable lack of diligence on behalf of the moving party and prejudice to the non-moving party arising from that lack of diligence.” Ocean Atlantic Woodland Corp. v. DRH Cambridge Homes, Inc., 2003 Copr.L.Dec. P 28,688, No. 02 C 2523, 2003 WL 22225594, \*4 (N.D. Ill. September 24, 2003) (Guzman, J.) (citing Hot Wax v. Turtle Wax, 191 F.3d 813, 822 (7th Cir. 1999)) accord Kansas v. Colorado, 514 U.S. 673, 687 (1995) (laches requires lack of diligence by the movant, and prejudice to the opponent). Because plaintiffs waited to seek emergency, equitable relief against enforcement of the statute for nearly five months – until its enforcement was a matter of Congressional mandate – they acted

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<sup>19</sup> The proposed order lodged by plaintiffs (see Docket Entry No. 46) would prevent operation not only of the Interim Final Rule, but also of section 6036 itself, even though plaintiffs have not sought any relief against the statute in the motion for emergency relief. Because plaintiffs have not yet moved for any relief against section 6036, the Court has no occasion to enter an order that would bar its operation. Cf. United States v. Morrison, 529 U.S. 598, 607 (2000) (Congressional enactments enjoy a presumption of constitutionality).

without reasonable diligence.

Any unnecessary delay . . . may be viewed as inconsistent with a claim that plaintiff is asserting great injury or, in the case of preliminary injunctive relief, that there is an urgent need for immediate relief and that a judgment would be rendered ineffective unless some restraint is imposed on defendant pending an adjudication on the merits.

11A Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2946 (West 1995 & Supp.). And the United States is prejudiced by plaintiffs' unreasonable delay: the Secretary has invested resources to ready CMS and the states for enforcement beginning on the effective date, July 1. Moreover, any equitable relief on the late schedule necessitated by plaintiffs' delay will be extraordinary and immediate.

Plaintiffs unreasonably delayed seeking relief against Section 6036 until the eve of its enforcement, and that delay prejudiced the government. Accordingly, laches bars an injunction against the statute.<sup>20</sup>

#### **V. Plaintiffs Have Not Established Irreparable Harm**

Plaintiffs attempt to justify the need for immediate injunctive relief by asserting that they will "suffer financial harm" as well as "emotional and psychological stress based on a fear of losing Medicaid benefits." Pl. Mem. 33. Plaintiffs do not adduce any evidence to establish that the effort of searching for documents or the "stress" of applying for Medicaid could be severe enough to constitute "irreparable" harm. See Hamlyn v. Rock Island County Metropolitan Mass Transit Dist., 964 F.Supp. 272, 275 (C.D. Ill. 1997) (denying injunctive relief based on alleged emotional harm where "[p]laintiff . . . failed to present any credible medical evidence of

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<sup>20</sup> We do not now raise laches as a defense to all of plaintiffs' claims, only their petition for emergency relief. Alternatively, even if plaintiffs' silence and inaction did not, alone, bar them from seeking relief here, it at least tips the balance of equities decidedly against them. See Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-07 (1959) (request for injunctive relief speaks to equitable power of court).

psychological harm.”) (citing Pollis v. New Sch. for Social Research, 829 F.Supp. 584, 597 (S.D.N.Y. 1993) (no irreparable harm found where plaintiff failed to present any medical or psychological evidence to support claim of emotional distress from forced retirement)); see also Sampson v. Murray, 415 U.S. 61, 90 (1974) (“The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.”) (quoting Virginia Petroleum Jobbers Ass’n v. FPC, 259 F.2d 921, 925 (1958)); Davis v. Francis Howell School Dist., 104 F.3d 204, 206-07 (8th Cir. 1997) (holding that family stress does not constitute irreparable harm). In any event, the financial and emotional stress of searching for citizenship documentation will be alleviated by the fact that states are required by the Interim Final Rule to assist plaintiffs, in particular those individuals with disabilities, in searching for documents. 71 Fed. Reg. at 39216, 39219.

Moreover, plaintiffs have done nothing to establish they will suffer any harm during the period of the TRO they seek, and that is the only relevant harm when adjudicating a petition for a TRO. Abbott Labs, 971 F.2d at 19 n.16. Those plaintiffs that are currently receiving Medicaid benefits have not alleged when their annual review will occur; they certainly have not alleged it will occur anytime soon. In addition, they face no risk of having their Medicaid benefits terminated until well after that point. There are a number of protections against immediate withdrawal of benefits, including the right to a fair hearing. See 42 C.F.R. §§ 431.205; 431.206(c)(1), (4).

Finally, even if the Court were to issue an injunction against the Interim Final Rule and whatever effect it might have on states, the states would still be forced to abide by the requirements of section 6036. Accordingly, plaintiffs would still face heightened documentation requirements and the corresponding threat of harm with an injunction in place. Enjoining the

Interim Final Rule, which provides *additional* means by which the documentation requirements may be met, would only harm plaintiffs and other Medicaid beneficiaries or applicants.

## **VI. The Balance of Equities Favors the Secretary**

While plaintiffs have not established that they will suffer any harm, the government will be harmed by an injunction that prevents efficient implementation of a statutory command of Congress. Indeed, the arguments of amici curiae establish that, even if plaintiffs were in danger of losing benefits under the new documentation requirements (which, again, plaintiffs have not established), states likely would not take any action against them. See Illinois Mem. 12 (claiming “many States . . . will run the risk of bearing the expense of providing benefits, without FFP, to those Medicaid applicants and recipients who cannot satisfy the documentation requirements promptly or at all.”).

By the same token, the public interest is in carrying out Congressional intent that only those who are truly eligible for scarce public resources and benefits receive such benefits, and in protecting against the danger of fraudulent certifications of citizenship that motivated Congressional action.<sup>21</sup> See Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515 (1937)

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<sup>21</sup> Plaintiffs argue that the Report by the Office of Inspector General for HHS concerning fraud in the Medicaid program proves that the balance of the harms favors the plaintiffs. See Pl. Mem. at 39 (citing HHS, Office of the Inspector General, “Self Declaration of U.S. Citizenship for Medicaid,” OEI-02-03-00190 (July 2005), attached to Pl. Mem. in Pl. Appx. at Tab 26.) However, contrary to the plaintiffs’ assertions, the OIG report found that the practice of permitting self-declarations of citizenship posed vulnerabilities to the Medicaid program that have resulted in verified instances of fraud. In fact, the report noted that “[o]nly one State report[ed] conducting an audit looking at self-declaration of U.S. citizenship, and it found vulnerabilities.” Id. at 13. In Oregon, an audit conducted by the State found that the State provided “full Medicaid benefits” to 25 out of 812 “noneligible noncitizens.” Id. The State’s audit report further estimated that the “risk could result in an annual cost of about \$2 million.” Id.

Taking this evidence, and other evidence of vulnerabilities into account, the OIG Report  
(continued...)

(statutory policy of Congress “is in itself a declaration of the public interest which should be persuasive” to courts); cf. H.R. REP. NO. 109-276, at 553 (2005).

## VII. Plaintiffs Seek an Improper Remedy

Plaintiffs request not only to enjoin the Interim Final Rule, but to prevent any retroactive application thereof *even if it is later found enforceable*. Pl. Mem. 41. Plaintiffs cite no authority for such an extraordinary request, and there can be none. CMS cannot be ordered to provide federal payment if the Medicaid statute does not authorize payment for such services. See Georgia v. Heckler, 768 F.2d 1293, 1297-98 (11th Cir. 1985) (citing 45 Fed. Reg. 24878 (April 11, 1980)); see also OPM v. Richmond, 496 U.S. 414, 424, 432 (1990) (Appropriations Clause bars federal courts from ordering payment of money from the Treasury unless federal statute authorizes payments). Nonetheless, the relief plaintiffs seek would preclude CMS from disallowing payment for services to beneficiaries plainly precluded by statute. Thus, plaintiffs ask this Court to interfere with CMS’s responsibility to review state compliance with Medicaid requirements and subsequently to determine the allowability of specific State claims for FFP. Such a remedy would be wholly improper.

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<sup>21</sup>(...continued)

found that “[b]y their nature, self-declaration policies have inherent vulnerabilities in that they can allow applicants to provide false statements of citizenship. As such, it is vital to have protections in place to prevent such practices. Based on the descriptive information we collected from States, we conclude that existing safeguards at the point of entry into Medicaid and during posteligibility quality control could allow false statements of citizenship to go undetected.” Id. at 18. Such proof of vulnerabilities and instances of fraud provide ample proof of the harm that could occur to Medicaid finances during the pendency of a preliminary injunction.

While CMS believed that existing post-eligibility controls were sufficient to protect against such vulnerabilities, id. at 27, Congress chose to require in section 6036 that documentation be established as a condition for receipt of matching funds. This difference does not disprove either that fraud exists or that Congress’s solution is the one that CMS is bound to follow. Cf. Gray Panthers, 453 U.S. at 50 n.22 (where “Congress itself already had considered the ‘relevant factors’ . . . the Secretary need not do more.”).

## CONCLUSION

Accordingly, for all the foregoing reasons, the Court should deny plaintiffs' amended Motion for Temporary Restraining Order and Preliminary Injunction.

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