IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Civil Action No. 5:17-CV-25-FL

PHIL BERGER, et al.,	)	
Plaintiffs,	)	**PLAINTIFFS' RESPONSE TO**
v.	)	**FEDERAL DEFENDANTS'**
	)	**MOTION TO DISMISS**
THOMAS E. PRICE, M.D., et al.,	)	
Defendants.	)	

Federal Defendants' Motion to Dismiss studiously sidesteps Plaintiffs' central legal contention: by accepting State Defendants' illegal State Plan Amendment (SPA), Federal Defendants would violate the Social Security Act. North Carolina law expressly forbids State Defendants from expanding the State's Medicaid program without the consent of the General Assembly. As a consequence, Federal Defendants' acceptance of that *ultra vires* SPA would violate no fewer than three provisions of 42 U.S.C. § 1396a(a): the SPA does not come from the State, it cannot take effect throughout the State, and it cannot guarantee the requisite financial participation from the State. On the merits, Federal Defendants claim, in passing, that they may accept an SPA, no matter how brazenly *ultra vires* it may be, so long as it is submitted by the State's designated Medicaid agency. But that is not what the statute says. The plain text of the Social Security Act prohibits Federal Defendants from accepting an SPA that cannot satisfy the requirements of Section 1396a(a), and Federal Defendants fail to explain why those requirements would be satisfied by State Defendants' SPA.

Rather than grappling with Plaintiffs' central legal claim, Federal Defendants train their efforts on arguing that this Court cannot enjoin their actions, no matter how illegal they may be.

Federal Defendants argue that Plaintiffs lack standing, but they fail to treat with the many North Carolina state cases establishing the prerogative of the President Pro Tempore of the North Carolina Senate and the Speaker of the North Carolina House of Representatives to represent the institutional interests of the General Assembly. Federal Defendants also claim that Plaintiffs have no cause of action for their statutory claims, but federal courts generally may enjoin agency action taken in excess of delegated authority. In any event, Plaintiffs plainly have a cause of action to enjoin Federal Defendants from violating the Tenth Amendment and the Guarantee Clause.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO MAINTAIN THIS ACTION.

Federal Defendants have moved to dismiss the Complaint under Rule 12(b)(1) on the ground that Plaintiffs lack standing. They principally contend that Plaintiffs, as the leaders of their respective houses of the North Carolina legislature, do not have the authority to press this suit. *See* Federal Defendants' Combined Memorandum in Support of Their Motion to Dismiss and Opposition to a Preliminary Injunction at 6–10 (Apr. 7, 2017), Doc. 47-1 ("Federal MTD"). Neither the governing law nor the facts of this case support Federal Defendants' argument.

A. Plaintiffs Have Authority To Bring this Suit.

Federal Defendants claim that Plaintiffs have not asserted a "legally protected" interest because they seek only the "vindication of the rule of law." Federal MTD at 7. This argument fails principally because, under North Carolina law, Plaintiffs are the proper representatives of the General Assembly and its institutional interests.

1. State legislative bodies have standing to vindicate their duly enacted laws and institutional interests, either by appearing in Court themselves or through an authorized representative such as the Speaker of the House and President Pro Tempore of the Senate. The

Supreme Court established this principle in *Karcher v. May*, 484 U.S. 72, 82 (1987), where it held that the Speaker of the New Jersey General Assembly and the President of the New Jersey Senate had standing both to defend a state law in the District Court and to appeal to the Third Circuit the District Court's decision declaring that law invalid. The Supreme Court held that those officials had standing because the Supreme Court of New Jersey "ha[d] granted applications of the Speaker of the General Assembly and the President of the Senate to intervene as parties-respondent on behalf of the legislature in defense of a legislative enactment." *Id.* Based on this state court decision, the Supreme Court of the United States concluded that "the New Jersey Legislature had authority under state law to represent the State's interests in both the District Court and the Court of Appeals," and thus had standing to litigate the case. *Id*. *See also Hollingsworth v. Perry,* 133 S. Ct. 2652, 2665 (2013) (explaining that the officers in *Karcher* only "lost standing" when they ceased to be "state officers, acting in an official capacity"); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (stating that under *Karcher*, "state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests").

The Supreme Court reaffirmed this principle in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2664 (2015). There, the Supreme Court held that a State legislature had standing to sue as plaintiffs and vindicate an "institutional injury," where the legislature challenged a voter referendum that allegedly stripped the legislature of its prerogative to conduct redistricting. The Supreme Court held that the legislature had standing because it is "an institutional plaintiff asserting an institutional injury," emphasizing that the legislature was authorized to represent itself under State law because it "commenced this action after authorizing votes in both of its chambers." *Id.*

These cases control the standing analysis in this case. Federal Defendants seek to distinguish *Karcher* on the ground that this case does not involve a challenge to a "state statute," and they claim *Karcher* "never suggested that New Jersey legislators could challenge contemplated federal actions that they believed would denigrate state laws." Federal MTD at 8–9. *Karcher*, like this case, involved a federal cause of action: the plaintiffs there sued under 42 U.S.C. § 1983 for violations of the Establishment Clause. *See Karcher*, 484 U.S. at 75. In holding that the legislators had standing both to defend the State law in the district court and to appeal an adverse judgment in the Court of Appeals, the Supreme Court recognized the right of the Speaker of the House and President of the Senate to litigate federal actions where those actions implicate the institutional prerogatives of the legislature, including the validity of the legislature's duly-enacted laws.

Federal Defendants also suggest that *Karcher* is distinguishable because the legislators there participated as defendants, not plaintiffs. Federal MTD at 8–9. But *Arizona State Legislature* upheld the standing of a legislature to initiate litigation as a plaintiff, and in *Raines v. Byrd*, 521 U.S. 811, 829 (1997), the Supreme Court suggested that the legislator-plaintiffs in that case would have had standing if they were authorized representatives of the legislature. Moreover, the legislators in *Karcher* had standing not only to intervene as defendants but also to appeal the District Court's adverse decision, and parties need Article III standing to appeal no less than to initiate suit. *See, e.g.*, *Hollingsworth*, 133 S. Ct. at 2662; *Arizonans for Official English*, 520 U.S. at 64. Because the legislators in *Karcher* had standing to appeal, they necessarily would also have had standing to maintain the action in the first place.

Federal Defendants seek to distinguish *Arizona State Legislature* on the ground that the legislature there passed an authorizing resolution. Federal MTD at 9. But there was no such

resolution in *Karcher*, yet the Court found standing. *Arizona State Legislature* holds that a resolution is *sufficient* authorization under state law, but *Karcher* makes clear that such a resolution is by no means *necessary*.

2. *Karcher* and *Arizona State Legislature* establish that the Court should look to state law to determine whether Plaintiffs have the power to represent the institutional interests of the General Assembly in court. Here, North Carolina law authorizes Plaintiffs to represent the institutional interests of the General Assembly.

North Carolina courts have entertained lawsuits and appeals where the Speaker of the House and President Pro Tempore of the Senate were the sole parties representing the interests of the General Assembly. For example, in *State v. Berger*, 368 N.C. 633, 781 S.E.2d 248 (2016), the Governor challenged the validity of three administrative commissions and named as defendants the Speaker, President Pro Tempore, and the members of only one of those three administrative commissions. When the Governor prevailed in the trial court, the Supreme Court of North Carolina entertained an appeal brought *solely* by the Speaker and President Pro Tempore with respect to the two commissions whose commissioners were not named as defendants. 368 N.C. at 638, 781 S.E.2d at 252. The Supreme Court of North Carolina then entered judgment against the Speaker and President Pro Tempore, holding that the statutes were unconstitutional. 368 N.C. at 649, 781 S.E.2d at 258.

The North Carolina Supreme Court's decision to entertain that appeal is dispositive of the question before this Court because in North Carolina, no less than in the federal system, parties need standing to appeal an adverse trial court decision. *See, e.g.*, *Culton v. Culton*, 327 N.C. 624, 625, 398 S.E.2d 323, 324 (1990); *Gaskins v. Blount Fertilizer Co.*, 260 N.C. 191, 194–95, 132 S.E.2d 345, 347 (1963); *Diaz v. Smith*, 724 S.E.2d 141, 144, 219 N.C. App. 570, 573–74 (2012);

Selective Ins. Co. v. Mid-Carolina Insulation Co., 484 S.E.2d 443, 445, 126 N.C. App. 217, 219 (1997). Because a party needs standing to appeal, the North Carolina Supreme Court recognized in *State v. Berger* that the Speaker and President Pro Tempore, appearing (as they do here) in their official capacities, are authorized under North Carolina law to litigate the institutional interests of the bodies they represent. If the Speaker and President Pro Tempore have standing to represent the institutional interests of the General Assembly in an appellate court, it follows *a fortiori* that they also have standing to do so as plaintiffs in a trial court.

State v. Berger is not the only State court decision affirming Plaintiffs' authority to defend the institutional interests of the General Assembly. Only three months ago, Governor Cooper filed a complaint in State court challenging the validity of certain state laws and naming only two defendants: the Speaker of the House and the President Pro Tempore of the Senate. *See* Amended Complaint, *Cooper v. Berger*, No. 16 CVS 15636 (N.C. Super. Ct. Jan. 10, 2017), https://goo.gl/gb7unA. Governor Cooper's motion for a temporary restraining order in that case even stated that "President Berger and Speaker Moore ***are collectively referred to herein as 'Defendants' or the 'General Assembly,'*** " Complaint, Motion for Temporary Restraining Order, and Motion for Preliminary Injunction ¶ 9, *Cooper v. Berger*, No. 16 CVS 15636 (N.C. Super. Ct. Dec. 30, 2016), https://goo.gl/NfErFf (emphasis added), recognizing the identity of interests under North Carolina law between the officials and the bodies they represent. What is more, the three-judge State court in *Cooper v. Berger* permanently enjoined some of the challenged statutes, and in the course of doing so, expressly concluded that it had jurisdiction over the case because "*[a] present and real controversy exists between the parties as to the constitutionality of the challenged Session Law*." Memorandum of Order on Cross-Motions for Summary Judgment at 8, *Cooper v. Berger*, No. 16 CVS 15636 (N.C. Super. Ct. Mar. 17, 2017), https://goo.gl/0NO5wz (emphasis

added).[1] That three-judge State court, like the North Carolina Supreme Court in *State v. Berger*, thus plainly understood the Speaker and President Pro Tempore to have the authority to represent, defend, and vindicate the institutional interests of the General Assembly.

In separate litigation, the North Carolina executive branch has even suggested to this Court that the Speaker and President Pro Tempore have standing to sue as plaintiffs to uphold the validity of a North Carolina statute. On May 9, 2016, President Pro Tempore Berger and Speaker Moore filed an action in this court seeking a declaration that a North Carolina statute did not violate federal law. *See* Complaint for Declaratory Relief, *Berger v. Department of Justice*, No. 16-cv-240 (E.D.N.C. May 9, 2016), ECF No. 1. That same day, the Governor of North Carolina filed a similar declaratory judgment action in this court. *See* Complaint for Declaratory Judgment, *McCrory v. United States*, No. 16-cv-238 (E.D.N.C. May 9, 2016), ECF No. 1. When Berger and Moore moved to consolidate those two actions, counsel for Governor McCrory represented that he "do[es] not object to being co-parties with Pro Tempore Berger and Speaker Moore in this litigation," thus indicating that Berger and Moore are proper plaintiffs. *See* Response of Governor McCrory & Secretary Perry Regarding Motion to Consolidate Filed by Phil Berger and Tim Moore at 2, *Berger v. Department of Justice*, No. 16-cv-240 (E.D.N.C. May 25, 2016), ECF No. 13.

The Federal Defendants argue that *State v. Berger* and *Cooper v. Berger* are inapposite because they involved the validity of *state statutes*, not federal causes of action. But this argument is foreclosed by *Karcher*, 484 U.S. at 82, where the Supreme Court held the Speaker and President

[1] *See also* Order Allowing Motion for Preliminary Injunction at 1, 3–4, *Cooper v. Berger*, No. 16 CVS 15636 (N.C. Super. Ct. Jan. 6, 2017) (preliminary injunction order finding jurisdiction and preliminarily enjoining certain statutes). A copy of this preliminary injunction order is attached to Plaintiffs' Joint Response to Defendants' Motions to Dissolve TRO and Reply in Support of Plaintiffs' Motion for a TRO/Preliminary Injunction (Jan. 23, 2017), Doc. 30 ("Response to Motion to Dissolve"), as Exhibit 3, Doc. 30-3.

of state legislative houses had standing to litigate that federal case based solely on a prior state supreme court decision permitting those officers to defend a challenged *state statute*. *See In re Forsythe*, 91 N.J. 141, 144 (1982).

Federal Defendants also attempt to distinguish *State v. Berger* and *Cooper v. Berger* on the ground that the Speaker and President Pro Tempore appeared as defendants rather than plaintiffs. But Federal Defendants entirely ignore *Berger v. Department of Justice*, where they appeared as Plaintiffs. Moreover, the Speaker and President Pro Tempore had standing to appeal in *State v. Berger*, and as noted, plaintiffs need standing to appeal no less than to file a complaint. In any event, Federal Defendants propose a distinction without a difference. The relevant question is simply whether State law authorizes the legislators to represent the interests of the legislative body. *See Arizona State Legislature*, 135 S. Ct. at 2664; *Raines*, 521 U.S. at 829; *Karcher*, 484 U.S. at 82. Here, the North Carolina cases just cited establish that the Speaker of the House and President Pro Tempore of the Senate may represent the interests of the General Assembly in litigation, and that is so regardless of which side of the *v.* they appear upon.

3. The North Carolina statute books confirm this background principle of North Carolina law. One statute provides that:

> Whenever the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the subject of an action in any court, if the General Assembly hires outside counsel to represent the General Assembly in connection with that action, the General Assembly shall also be deemed to be a client of the Attorney General for purposes of that action as a matter of law.

N.C. GEN. STAT. § 120-32.6(b). This statute makes clear that the General Assembly may appear on its own behalf in any case that concerns (as this case does) the force and effect of a State statute. This statute also recognizes that the General Assembly must act through the Speaker and President Pro Tempore, for it grants those two officials the power to designate which counsel shall appear

as lead counsel for the General Assembly. *Id.* § 120-32.6(c). Federal Defendants suggest that this statute is irrelevant because this case does not involve "the validity or constitutionality of an act of the General Assembly," *see* Federal MTD at 9, but this case falls squarely within the ambit of the statute, for State Defendants have asserted, albeit without citation to text or precedent, that the North Carolina statute relied on by Plaintiffs would be unconstitutional if interpreted to bar their submission of the proposed Medicaid expansion. *See* Memorandum in Support of State Defendants' Motion to Dismiss at 6, 27 n.11 (Feb. 16, 2017), Doc. 39 ("State Defendants' MTD") (arguing that interpreting North Carolina statutes to bar unilateral executive submission of Medicaid-expansion SPA—as they plainly do—would violate North Carolina Constitution).

Another North Carolina statute provides the exact same intervention right that existed as a matter of state judicial precedent in *Karcher*. That statute provides that the Speaker and President Pro Tempore, "as agents of the State, shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution." N.C. GEN. STAT. § 1-72.2. *See also Fisher-Borne v. Smith*, 14 F. Supp. 3d 699, 703–04 (M.D.N.C. 2014) (allowing intervention by the President Pro Tempore and Speaker based on this statute). This statute is consistent with the more general proposition, established by the foregoing authorities, that North Carolina law authorizes the Speaker of the House and President Pro Tempore to represent the interests of the General Assembly.

4. Federal Defendants claim that even if Plaintiffs are authorized to represent the institutional interests of the General Assembly, they still lack standing under *Raines*. Federal MTD at 9–10. *Raines* held that the legislators in that case lacked standing, but only because they appeared in their individual capacity, such that the particular injury in that case was "wholly

abstract and widely dispersed." 521 U.S. at 829. Although an individual legislator will in some circumstances lack standing to uphold the legislature's duly-enacted laws, Supreme Court precedent—beginning with *Raines* itself—makes clear that *the legislature* undoubtedly has standing to sue based on that injury, whether in its own name or through authorized representatives. In *Raines*, for example, the Supreme Court emphasized that the legislators had "not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit." *Id.* As discussed, in this case Plaintiffs *are* "authorized to represent their respective Houses of [the General Assembly] in this action." *Id.* This case thus falls under the rule of *Karcher* and *Arizona State Legislature* rather than *Raines*. Indeed, *Arizona State Legislature* rejected the exact same argument that Defendants now advance, holding that *Raines* did not preclude standing in that case because the institutional interest of the entire legislature—and not simply the interest of an individual legislator—was before the court. 135 S. Ct. at 2664.

5. Even if Plaintiffs were appearing only in their capacity as individual legislators, they would still have standing. The *Raines* rule does not apply where "the challenged actions in th[e] case[ ] left the plaintiffs with no effective remedies in the political process" and "nullif[ied] a legislator's vote," and where the defendants acted to entirely "circumvent the Legislature . . . ." *Russell v. DeJongh*, 491 F.3d 130, 135–36 (3d Cir. 2007). Here, State Defendants seek to entirely circumvent the General Assembly, which has the sole authority to authorize the submission of an SPA to expand Medicaid eligibility. This case thus presents facts dissimilar to those in *Russell*, where a legislator lacked standing to challenge the appointment process for judges, because the challenged process bestowed upon the legislators themselves the power to reject the nominees. *See id.* at 135–36. Instead, this case is more like *Dennis v. Luis*, 741 F.2d 628 (3d Cir. 1984), where the Third Circuit held that members of the Virgin Islands legislature had standing to assert their

right to provide advice and consent to the governor on appointments, using language that applies similarly to this case: "Since the right to [seek Medicaid expansion] has been vested only in members of the legislature, and since only members of the legislature are bringing this action, the allegation that this right has been usurped by the Governor and [State Defendants] are sufficiently personal to constitute an injury in fact, thus satisfying the minimum constitutional requirements of standing." *Id.* at 631. By submitting the proposed SPA, the Governor and the North Carolina Department of Health and Human Services ("N.C. HHS") would usurp Plaintiffs' authority, and Plaintiffs have standing to defend that authority.

B. Plaintiffs Have Alleged an Actual or Imminent Injury.

Federal Defendants argue that Plaintiffs have not alleged an actual or imminent injury. Federal MTD at 10. In a facial challenge to the Court's subject matter jurisdiction—the only type of challenge that Federal Defendants make—"the facts alleged in the complaint are taken as true, and the motion [under Rule 12(b)(1)] must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction." *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009). The Complaint alleges that State Defendants plan to submit a request to expand the State's Medicaid program, and that Federal Defendants "intend to . . . accept[ ] Governor Cooper's illegal submission and expand[ ] North Carolina's Medicaid program." Complaint for Declaratory and Injunctive Relief ¶ 25–27 (Jan. 13, 2017), Doc. 1 ("Compl."). Taking these facts as true, Plaintiffs undoubtedly alleged an imminent injury. Indeed, but for this Court's entry of a temporary restraining order, it is all but certain that State Defendants would have submitted, and Federal Defendants would have approved, an expansion of the State's Medicaid program.

To be sure, circumstances have changed since the filing of the Complaint. There is a new Presidential administration, and with it new personnel at the defendant agencies who have not

made public statements similar to those of former Secretary Burwell. Indeed, Plaintiffs are seeking to convince Federal Defendants that it would be unlawful to approve State Defendants' SPA. These developments, however, do not undermine Plaintiffs' standing, because "[t]he Court views questions of standing at the time of filing of the complaint, and the doctrine admits of no exceptions." *Payne v. TR Assocs., LLC*, 880 F. Supp. 2d 702, 706 (E.D.N.C. 2012) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 191 (2000)); *see also, e.g., Pashby v. Delia*, 709 F.3d 307, 316 (4th Cir. 2013) ("Standing is determined at the commencement of a lawsuit."). The question rather is one of mootness and, here, Federal Defendants have not even suggested that the case is moot. This failure is unsurprising, given the "formidable burden" a party bears to show that any claimed "voluntary compliance" moots a case, *Friends of the Earth*, 528 U.S. at 190, and given the fact that Federal Defendants to date have not yet even retracted Ms. Burwell's statement, much less affirmatively stated that they will reject State Defendants' SPA.[2]

II. PLAINTIFFS HAVE STATED A CLAIM AGAINST FEDERAL DEFENDANTS.

Federal Defendants also argue that Plaintiffs have failed to state a claim under Rule 12(b)(6) for any of their claims. For the following reasons, Federal Defendants' arguments fail.

A. Federal Defendants Would Violate the Social Security Act By Accepting State Defendants' Illegal State Plan Amendment.

In their motion to dismiss, Federal Defendants do not seriously dispute that they would in fact violate the Social Security Act were they to accept North Carolina's illegal SPA. Instead, Federal Defendants' motion focuses almost entirely on the argument that, regardless of the legality

[2] In the introduction to their brief, Federal Defendants assert that, for the same reasons that Plaintiffs lack standing, their claims are not ripe. Federal MTD at 2. This "perfunctory and undeveloped" argument is "waived," *Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 396 n.* (4th Cir. 2014), and in any event, it fails on the merits for the same reason Plaintiffs have standing.

of their actions, this Court lacks the authority to review those actions. On the merits, Federal Defendants offer only the conclusory assertion that "it is beyond doubt that under the Medicaid statute, the Secretary is authorized to accept and consider a state plan amendment submitted by a state's designated Medicaid agency." Federal MTD at 13 n.2. *See also id.* at 17–18 (N.C. HHS is the designated State agency to submit SPAs, and "the Secretary generally does not wade into state-law disputes about N.C. HHS's authority to make any particular submission"). Although the point is mostly undisputed for purposes of the motion to dismiss, it is worth emphasizing why State Defendants have no authority to submit their proposed SPA and why Federal Defendants would violate the Social Security Act were they to accept Federal Defendants' illegal SPA.

North Carolina law prohibits anyone other than the General Assembly from seeking to expand the State's Medicaid program. One statute provides that "[n]o department, agency, or institution of this State shall attempt to expand the Medicaid eligibility standards provided in S.L. 2011-145, as amended, or elsewhere in State law, unless directed to do so by the General Assembly." N.C. Session Law 2013-5, § 3. Another statute provides that only "[t]he General Assembly shall determine the eligibility categories and income thresholds for the Medicaid and NC Health Choice programs," N.C. GEN. STAT. § 108A-54(f). That same statute endows N.C. HHS with the power to administer the State's Medicaid program "*except for eligibility categories and income thresholds*," N.C. GEN. STAT. § 108A-54(e)(4) (emphasis added), and N.C. HHS's authority to seek amendments to the State Medicaid plan is expressly cabined by the General Assembly's authority to determine eligibility standards, *see id.* § 108A-54.1A(a) (N.C. HHS "is expressly authorized and required to take any and all necessary action to amend the State Plan and waivers in order to keep the program within the certified budget, *except as provided in G.S. 108A-54(f).*" (emphasis added)). North Carolina law also provides that the Secretary must ensure that

the Medicaid program's "total expenditures, net of agency receipts, do not exceed the authorized budget for the Medicaid program." *Id.* § 108A-54(e)(1).

As Federal Defendants do not dispute, State Defendants' planned submission of an SPA expanding the State's Medicaid program would run afoul of these state laws. The submission would plainly constitute an "attempt to expand the Medicaid eligibility standards" by an entity that has not been "directed to do so by the General Assembly." *See* N.C. Session Law 2013-5, § 3. State Defendants' planned submission would also violate the General Assembly's reservation of the power to "determine [Medicaid] eligibility categories and income thresholds," *see* N.C. GEN. STAT. § 108A-54(f), and its directive that N.C. HHS cannot seek State plan amendments that would usurp this power, *see id.* § 108A-54.1A(a).

By accepting this illegal SPA, Federal Defendants would violate three separate provisions of the Social Security Act. *First*, the Social Security Act demands that a "State plan" must come from *the State itself*. 42 U.S.C. § 1396a(a). For example, an aspiring Medicaid beneficiary or a Justice of the North Carolina Supreme Court cannot submit an amendment to expand the State's coverage, and the Secretary of the United States Department of Health and Human Services ("HHS") cannot accept an amendment from such an individual. N.C. HHS's proposed SPA is no more valid than these hypothetical submissions. To be sure, as Federal Defendants emphasize, *see* Federal MTD at 13 n.2, N.C. HHS is authorized to act on behalf of the State of North Carolina. But that authorization is expressly subject to the limits on its statutory authority set out in, *inter alia*, N.C. GEN. STAT. § 108A-54. That statute expressly states that the "General Assembly," not N.C. HHS, "shall determine the eligibility categories and income thresholds for the Medicaid . . . program[ ]," *id.* § 108A-54(f), and it authorizes N.C. HHS to "[e]stablish and adjust all program components" of Medicaid "within the appropriated and allocated budget," "*except for eligibility*

categories and income thresholds," *id.* § 108A-54(e)(4) (emphasis added). The General Assembly could not have been clearer about the limitations it was placing on N.C. HHS's authority. In addition, North Carolinians have unambiguously determined, through their elected representatives in the General Assembly, that North Carolina will *reject* "the Medicaid expansion provided in the Affordable Care Act," N.C. Session Law 2013-5, § 3, and N.C. HHS has no authority to contravene the State's decision in this regard. Because State Defendants have no authority to submit the proposed SPA, that SPA does not come from "the State," and Federal Defendants have no authority to accept it.

Second, the Social Security Act requires that an SPA must "provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them." 42 U.S.C. § 1396a(a)(1). State Defendants' *ultra vires* SPA cannot satisfy this requirement because any rules seeking to enforce that SPA would be invalid. State law provides that "[t]he Medicaid Program shall be administered and operated in accordance with this Part and the North Carolina Medicaid State Plan and Waivers, as periodically amended by the Department of Health and Human Services *in accordance with G.S. 108A-54.1A* and approved by the federal government." N.C. GEN. STAT. § 108A-54(c) (emphasis added). General Statute 108A-54.1A(a), in turn, authorizes N.C. HHS to amend the State Plan "except as provided in G.S. 108A-54(f)"—the provision that expressly reserves the determination of eligibility categories to the General Assembly. Because the proposed SPA does not accord with General Statute 108A-54.1A, it will be a legal nullity, and the county departments of social services that administer Medicaid in North Carolina will not only not be bound to follow it, but will be affirmatively bound to disregard it. In other words, because State Defendants lack statutory authority under state law either to propose or implement the proposed State Plan Amendment, the new eligibility standards it purports to adopt

will not be mandatory on the county departments of social services that are charged with administering them, in violation of Section 1396a(a)(1). *See, e.g.*, Compl. ¶¶ 47–51. Accordingly, Federal Defendants cannot accept this invalid SPA.

Third, the Social Security Act requires an SPA to "provide for financial participation by the State equal to not less than 40 per centum of the non-Federal share of the expenditures under the plan . . . ." 42 U.S.C. § 1396a(a)(2). State Defendants' *ultra vires* SPA cannot meet this requirement because State Defendants are expressly prohibited from using appropriated funds to "[e]stablish and adjust . . . eligibility categories and income thresholds," N.C. GEN. STAT. § 108A-54(e)(4), and they generally must operate within the budget authorized for the Medicaid program, *id.* § 108A-54(e)(1), which does not account for the proposed State Plan Amendment's expansion of eligibility. What is more, having gone out of its way to forbid the expansion of eligibility under the Affordable Care Act, the General Assembly has no plan to pass a law appropriating additional funds to cover an unlawful expansion. The proposed SPA thus violates Section 1396a(a)(2), and Federal Defendants have no authority to accept it.

Federal Defendants seek to wash their hands of all this by emphasizing that N.C. HHS is North Carolina's designated Medicaid agency. They claim that regardless of whether the SPA is lawfully submitted, "the Secretary *generally* does not wade into state-law disputes about N.C. HHS's authority to make any particular submission." Federal MTD at 18 (emphasis added); *see also id.* at 13 n.2. But the Secretary of HHS *does* sometimes inquire into State law, and Federal Defendants' careful caveat that the Secretary only "generally" does not inquire into State law seems to concede the point. For example, less than two years ago, the Centers for Medicare and Medicaid Services ("CMS") relied on state law to disapprove a State Plan Amendment proposed by North Carolina. The State Plan Amendment would have altered eligibility requirements for

North Carolina's optional state supplement program for people who are 65 years or older or who have disabilities. *See* Letter from Andrew M. Slavitt, Acting Administrator, CMS, to Robin Gary Cummings, Deputy Secretary for Health Services, N.C. HHS (Apr. 29, 2015), https://goo.gl/OYD1x7. CMS explicitly considered how the proposed amendment would operate under state law in reaching the conclusion that it would violate the comparability requirements described in Section 1902(a)(17) of the Act. *Id.*

The Social Security Act plainly requires an inquiry into the validity of a submission under the Social Security Act itself, and that inquiry necessarily requires some inquiry into State law. For example, how can Federal Defendants confirm that an SPA grants "an opportunity for a fair hearing before the State agency," 42 U.S.C. § 1396a(a)(3), or confirm that "the State has in effect laws under which . . . the State is considered to have acquired the rights" covered individuals have to certain payments made by third parties, *id.* § 1396a(a)(25)(H), unless they consult State law? Likewise, Federal Defendants cannot determine whether an SPA was submitted by the State itself, *id.* § 1396a(a), whether the SPA will be in effect throughout the State, *id.* § 1396a(a)(1), and whether the SPA will provide the required amount of State participation, *id.* § 1396a(a)(2), without assessing the underlying State law issues. The Act provides that "[a] State plan for medical assistance *must*" satisfy each of the foregoing requirements, *id.* § 1396a(a) (emphasis added), and it only permits HHS and CMS to "approve any plan which fulfills the conditions specified in subsection (a)," *id.* § 1396a(b). All three of the requirements at issue here are, of course, mandatory on State Defendants, *see Antrican v. Odom*, 290 F.3d 178, 188 (4th Cir. 2002), and more than that, they define the limits of the Secretary's authority, meaning that the Secretary lacks authority to approve the proposed State Plan Amendment and would violate federal law by doing so, *see* 42 U.S.C. §§ 1316(a), 1396a(b). The Act thus demands an inquiry by both the submitting State agency

and the federal government into whether those conditions are satisfied with respect to each and every SPA. At a minimum, Federal Defendants cannot blind themselves to the SPA's illegality where, as here, the illegality is plain and the issue is squarely presented to them.

B. Plaintiffs Have Stated a Claim Under the Social Security Act.

In moving to dismiss Plaintiffs' claims under the Social Security Act, Federal Defendants do not vigorously defend the legality of their planned acceptance of the SPA. Instead, they train their efforts on arguing that, regardless of whether their actions are lawful, Plaintiffs lack a cause of action. This argument fails because the Court has equitable authority to enjoin Federal Defendants from violating federal law. As the Supreme Court has only recently reaffirmed, federal courts possess an inherent equitable power "to enjoin unlawful executive action." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015).

To be sure, the Court's inherent equitable power to enjoin unlawful executive action is subject to "express and implied statutory limitations." *Id*. But Federal Defendants do not identify any such statutory limitations, and none exist.[3] Rather, Federal Defendants argue that Plaintiffs do not meet the requirements for jurisdiction under *Leedom v. Kyne*, 358 U.S. 184 (1958). But *Leedom* is inapplicable. As one of Defendants' principal authorities recognizes, *Leedom* provides a "limited exception to jurisdiction-stripping" statutes in certain circumstances. *Scottsdale Capital Advisors Corp. v. Financial Indus. Regulatory Auth., Inc.*, 844 F.3d 414, 419 (4th Cir. 2016). But since there is no jurisdiction stripping here, no exception is necessary. Indeed, Federal Defendants fail even to argue that there is any statute that generally strips this Court of jurisdiction to review claims for

[3] State Defendants have argued that the Social Security Act itself "implicitly precludes private enforcement" of the State Plan requirements at issue here, *see* State Defendants' MTD at 26, but Plaintiffs have demonstrated that this argument lacks merit, *see* Plaintiffs' Response to State Defendants' Motion to Dismiss at 23–25 (Mar. 9, 2017), Doc. 41.

violations of the Social Security Act.[4]

Even if *Leedom* applied, this Court would still have jurisdiction because Plaintiffs meet its requirements. Federal Defendants argue that the *Leedom* exception to finality does not apply here because Plaintiffs cannot establish that Federal Defendants have "acted clearly beyond the boundaries of [their] authority." Federal MTD at 12 (quoting *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 234 (4th Cir. 2008)). But as explained in Part II.A, *supra*, Federal Defendants would indeed act clearly beyond the boundaries of their authority in accepting State Defendants' illegal SPA.

Federal Defendants also argue that *Leedom* does not apply because, absent review, Plaintiffs will not be deprived "of a meaningful and adequate means of vindicating [their] statutory rights." Federal MTD at 13 (quoting *Long Term Care Partners*, 516 F.3d at 233). This inquiry turns on whether withholding review at this time will "caus[e] irreparable harm." *Westinghouse Elec. Corp.*

[4] While Federal Defendants do not argue that the APA itself strips this Court of its inherent equitable authority when the APA's final agency action requirement is not met (assuming for the moment that no final agency action is involved here, *but see infra* Part II.C), one of the cases it cites, *Long Term Care Partners, LLC v. United States*, 516 F.3d 225 (4th Cir. 2008), does apply *Leedom* in that context. *Long Term Care Partners* cannot be considered to have resolved this issue, however, as the Fourth Circuit made clear that the plaintiff "concede[d] that it based its case before the district court solely on *Leedom*," and the court therefore deemed arguments inconsistent with that litigating decision to be waived. *See id.* at 237. Thus, the *Long Term Care Partners* court had no opportunity to decide whether the APA is the sort of jurisdiction-stripping statute that implicates *Leedom* in the first place. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."). Furthermore, the court expressly assumed without deciding that the APA's final agency action requirement is nonjurisdictional, *see Long Term Care Partners*, 516 F.3d at 232, ruling out the possibility of any *sub silentio* holding to the contrary. Finally, a recent Fourth Circuit decision clarifies that the *Leedom* decision was not one about "temporal concern[s]" such as "exhaustion," or "when . . . a plaintiff may bring a claim," but rather arose in the context of a plaintiff seeking to evade application of a statute that took jurisdiction out of the district court and vested it in the court of appeals. *Scottsdale Capital Advisors*, 844 F.3d at 419 & n.3, 420. In other words, *Leedom* is relevant for plaintiffs seeking to avoid "congressional jurisdiction-stripping provisions," *id.* at 420, of the sort that are not at issue here.

v. Schlesinger, 542 F.2d 1190, 1209 (4th Cir. 1976).

In this case, the submission and approval of the illegal SPA will cause Plaintiffs to suffer immediate and irreparable harm, for two separate reasons. First, the submission and approval of the SPA would effectively annul a duly enacted state law, which constitutes *per se* irreparable harm. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); *New Motor Vehicles Bd. v. Orrin W. Fox. Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, C.J., in chambers); *Aid for Women v. Foulston*, 441 F.3d 1101, 1119 (10th Cir. 2006); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997); *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 652–53 (M.D.N.C. 2016).

Second, Plaintiffs are likely to suffer irreparable harm because the submission and approval of the SPA will likely trigger the expenditure of unrecoverable State funds, as Plaintiffs have alleged. *See* Compl. ¶ 29. Defendants' own submissions in this case demonstrate that this allegation is imminently plausible. Cindy Mann, a former deputy administrator of the federal Centers for Medicare and Medicaid Services, conceded that implementation of a new State plan "often require[s] changes to information technology systems, the development of new forms and notices, and/or changes in staffing to deploy new policies." Declaration of Cindy Mann ¶ 8 (Jan. 16, 2017), Doc. 15. And Dave Richard, a former director and deputy secretary of N.C. HHS, explained that implementation of a new plan will require the State to "alert the counties [and] address eligibility determinations," among other preliminary steps. Declaration of Dave Richard ¶ 8 (Jan. 16, 2017), Doc. 16. Each preparatory action identified by Ms. Mann and Mr. Richard would need to be undertaken before the SPA's effective date, and accomplishing them would require State officials to expend resources. Those start-up expenditures will be unrecoverable and therefore constitute irreparable harm.

In sum, this Court has equitable authority to enjoin Federal Defendants' illegal actions, and *Leedom* does not hold otherwise.

C. Plaintiffs Have Stated a Claim Under the Administrative Procedure Act.

Federal Defendants argue Plaintiffs are unlikely to succeed on the merits of their APA claim because there has been no final agency action. Federal MTD at 15–16. True enough, review under the Administrative Procedure Act extends only to final agency action, 5 U.S.C. § 704, and Federal Defendants have not yet formally approved the proposed State Plan Amendment. But as Plaintiffs have previously explained, *see* Response to Motion to Dissolve at 15–17, the finality requirement is satisfied here. The Supreme Court has recently emphasized that the finality requirement must be given a "pragmatic" rather than rigid construction. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016). Consistent with *Hawkes*, the Fourth Circuit has recognized that judicial review of an agency action that has not been formally finalized is appropriate where, as here, the agency "[f]or all practical purposes" has reached a final agency action. *See, e.g.*, *Arch Mineral Corp. v. Babbitt*, 104 F.3d 660, 666 (4th Cir. 1997); *Fort Sumter Tours, Inc. v. Andrus*, 564 F.2d 1119, 1123 (4th Cir. 1977) ("final agency action" requirement does not demand "the issuance of a formal administrative order enforceable against a person or class of persons," and judicial review if appropriate where "the issues have become sufficiently crystallized to warrant judicial resolution"); *see also Hawkes*, 136 S. Ct. at 1814 (agency action was "final" where the agency "for all practical purposes 'has ruled definitively' " on the matter).

In this case, former Secretary Burwell signaled that she had already decided what action to take on North Carolina's proposal by promising to "process the [North Carolina] governor's proposal as expeditiously as possible when we get it." Compl. ¶ 27. That was the state of play when Plaintiffs filed their Complaint, and the allegations in the Complaint are what must control

resolution of Federal Defendants' motion to dismiss. The Secretary's statements make it clear that, at the time the Complaint was filed, Federal Defendants had already reached a determination marking "the consummation of [their] decisionmaking process." *See Bennett v. Spear*, 520 US. 156, 177–78 (1997) (quotation marks omitted). Thus "[f]or all practical purposes . . . the decision ha[d] been made," *Arch Mineral*, 104 F.3d at 666; *see also Hawkes*, 136 S. Ct. at 1814, and the finality requirement is satisfied.

Federal Defendants seek to distinguish *Arch Mineral* and *Fort Sumter* on the ground that those cases "involved review of some actual agency action" such as the issuance of a letter or the statement of an agency's bargaining position during contract negotiations. Federal MTD at 16. But here too Federal Defendants made crystal clear that they would approve State Defendants' planned SPA. The right to judicial review does not turn on whether that definitive statement comes in the form of a letter, press release, or other public (or private) statement. Under these circumstances—when "the action giving rise to [the] controversy is final and not dependent upon future uncertainties or contingencies"—the court may proceed with its review. *Arch Mineral*, 104 F.3d at 666. This is especially proper where, as here, there is no need for a detailed factual record to judge the lawfulness of the agency action.

Federal Defendants also suggest that *Arch Mineral* and *Fort Sumter* have been abrogated by *Bennett v. Spear*, but this is simply not so. *Arch Mineral* and *Fort Sumter* are entirely consistent with *Bennett*, as indicated by the fact that the Fourth Circuit has relied upon those cases since *Bennett*. *See, e.g.*, *Pashby v. Delia*, 709 F.3d 307, 317 (4th Cir. 2013); *Long Term Care Partners*, 516 F.3d at 237 n.13; *Traficanti v. United States*, 227 F.3d 170, 176 n.2 (4th Cir. 2000); *West Virginia Highlands Conservancy, Inc. v. Babbitt*, 161 F.3d 797, 800 (4th Cir. 1998).

D. Plaintiffs Have Stated a Claim Under the Tenth Amendment.

Federal Defendants argue that Plaintiffs have failed to state a claim under the Tenth Amendment because North Carolina has designated N.C. HHS to make SPA submissions, and so Federal Defendants need not inquire into N.C. HHS's authority to submit the SPA at issue here. Federal MTD at 17–18.

As an initial matter, the most notable part of this argument is that which is left unsaid: Federal Defendants do not dispute that forcing a non-consenting State to accept the Affordable Care Act's Medicaid expansion would violate the Tenth Amendment. Nor could they contest this point. The conditions that accompany the Medicaid expansion require State consent. The Supreme Court made this clear in *NFIB v. Sebelius*, where it held that the Medicaid expansion was unduly coercive because it did not give States a *bona fide* choice as to whether to accept the expansion. As Chief Justice Roberts explained, "[t]he legitimacy of Congress's exercise of the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the contract." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (opinion of Roberts, C.J.) (quotation marks omitted). And the question of *how* a State consents to a proposed government contract is quintessentially one of State law. It is up to *North Carolina*—not the federal government—to determine whether its Governor, its legislature, or the two of them jointly, is the body responsible for deciding, on behalf of the State, whether to accept the Medicaid expansion. The Constitution does not contain an enumerated power permitting the *federal government* to determine which institution under State law has the power to determine whether to accept federal government payments under the Spending Clause. And even if the Constitution did give the federal government such a power, Congress has not enacted a statute pursuant to that power allowing Federal

Defendants to decide which body of State government is responsible for accepting the conditions that accompany federal Medicaid spending.

Here, North Carolina law makes absolutely clear that only *the General Assembly* may decide whether the State will participate in the federal government's expanded Medicaid program. *See, e.g.*, N.C. Session Law 2013-5, § 3; N.C. GEN. STAT. §§ 108A-54(f), (e)(1), (e)(4); *see also supra* Part II.A. Federal Defendants have no more power to decide that the Governor is the appropriate representative of the State than they could choose to accept an expansion application from the North Carolina Supreme Court, the mayor of Raleigh, or an aspiring Medicaid beneficiary. Yet that is precisely what Federal Defendants are poised to do.

Federal Defendants thus violate the Tenth Amendment by seizing from the State the power to decide which State governmental unit is responsible for accepting the Medicaid expansion. Indeed, the Supreme Court has already made clear that the Federal Government lacks the power to decide the internal workings of the State governments. For example, in *Coyle v. Smith*, 221 U.S. 559 (1911), the Court held that the federal government lacks the power to determine where a State capitol should be located. Justice Lurton, writing for the Court, explained that "[t]he power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers," *id.* at 565, and Congress had no enumerated constitutional power to decide where the State capital should be located, *id.* at 566. Here, a federal Government decision to ignore State law and impose millions of dollars of spending obligations upon the State would be equally unlawful, and it would violate the Tenth Amendment. *See also Nixon v. Missouri Mun. League*, 541 U.S. 125, 140 (2004) ("[F]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and

read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement [that the case law] requires.").

Federal Defendants cannot wash their hands of this Tenth Amendment violation simply because N.C. HHS is the entity authorized to submit State Plan Amendments. As discussed *supra* at Part II.A, Federal Defendants' task under the Social Security Act is to understand how an SPA would operate under State law—and then determine whether those State law requirements comply with federal law and regulations. And, of course, it is commonplace for the adjudication of a federal constitutional right to turn on the scope or meaning of State law. *See, e.g.*, *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 675 (2010) (First Amendment challenge turns on meaning of State institution's internal policies); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975) (First Amendment overbreadth challenge turns on scope and meaning of State law); *National Pharmacies, Inc. v. Feliciano-de-Melecio*, 221 F.3d 235, 241 (1st Cir. 2000) (Commerce Clause challenge turns on scope and meaning of Puerto Rico law). By forcing a non-consenting State to unwillingly accept the Medicaid expansion, Federal Defendants would violate the Tenth Amendment.

E. Plaintiffs Have Stated a Claim Under the Guarantee Clause.

In moving to dismiss Plaintiffs' Guarantee Clause claim, Federal Defendants suggest in passing that the claim is not justiciable and then offer the conclusory assertion that "the acceptance of a state plan amendment submitted by the designated state Medicaid agency simply does not threaten to upend republican governance in the state of North Carolina." Federal MTD at 18. Federal Defendants are wrong to suggest that the Guarantee Clause is not justiciable. And forced participation in a federal program is the very heartland of cases that fall within the ambit of the Guarantee Clause's protection.

The Guarantee Clause of the Constitution provides: "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. CONST. art. IV, § 4. Republican government has many features, but "the distinguishing feature of that form is the right of the people to . . . pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves." *Duncan v. McCall*, 139 U.S. 449, 461 (1891). In *New York v. United States*, 505 U.S. 144 (1992), the Supreme Court opened the door to judicial resolution of certain claims based on the Guarantee Clause. New York argued that a federal statute intended to induce states to participate in a federal nuclear waste disposal program violated the Guarantee Clause. The Court questioned authority suggesting that the political question doctrine categorically bars justiciability of Guarantee Clause claims, pointed favorably to an older long line of precedent treating such claims as justiciable, and concluded that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." *Id.* at 185. The Court determined, however, that the challenged statute did not violate the Guarantee Clause because it offered New York "a legitimate choice rather than issuing an unavoidable command." *Id*. Central to the Court's analysis was the fact that the statute did not rob New York of its power to *decline* to participate in a costly federal program. New York and other states "retain[ed] the ability to set their legislative agendas" and "remain[ed] accountable to the local electorate." *Id.* Relying on *New York*, the Fourth Circuit has recognized that "any justiciable claim under [the Guarantee Clause] will focus on 'whether [the challenged federal action] offers the States a legitimate choice rather than . . . an unavoidable command' " to participate in the federal program at issue." *Virginia v. United States*, 74 F.3d 517, 524–25 (4th Cir. 1996) (quoting *New York*, 505 U.S. at 185) (quotation marks omitted). *See also Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (narrowing the scope of the political question doctrine); *id.* at 202

(Sotomayor, J., concurring in part and concurring in the judgment) (explaining that the majority narrowed the political question doctrine).

By setting aside the legislature's "legitimate choice" not to participate in a burdensome federal program, *New York*, 505 U.S. at 185, Federal Defendants would strike at the very core of North Carolinians' right to organize their government along republican principles whereby their decisions about State expenditures are made through their duly elected representatives in the State's legislature. Approval of State Defendants' SPA would not merely deny North Carolina the opportunity to make a "legitimate choice," *Virginia*, 74 F.3d at 524, but also would override the legitimate choice that the people's elected representatives have *already* made on this issue. An approval of the SPA based on the Governor's naked misrepresentation of his own authority would "alter[ ] the form or the method of functioning of [state] government," *New York*, 505 U.S. at 186, in a manner contrary to the "distinguishing feature" of republican government: "the right of the people to . . . pass their own laws in virtue of the legislative power reposed in representative bodies." *Duncan*, 139 U.S. at 461. If the Secretary approves a Medicaid expansion to which the legislature has not consented and which is specifically prohibited by North Carolina law, it can no longer be said that the North Carolina legislature "retain[s] the ability to set [its] legislative agendas." *New York*, 505 U.S. at 185. Stripping the people's representatives of their power in this manner would be a paradigmatic denial of republican government, and the Court can and should act to stop it.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Federal Defendants' motion to dismiss.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 2017, I caused the foregoing document to be filed electronically with the Clerk of the Court through the CM/ECF system, and served on counsel registered to receive CM/ECF notifications in this case.

/s/Michael W. Kirk
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