UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

THE STATE OF TEXAS; TEXAS HEALTH AND HUMAN SERVICES COMMISSION,	§	
Plaintiffs,	§	
v.	§	
	§	Case No. 6:21-cv-00191-JCB
CHIQUITA BROOKS-LASURE, in her official capacity as Administrator of the Centers for Medicare & Medicaid Services, *et al.*,	§	
Defendants.	§	

PLAINTIFFS' RESPONSE TO DEFENDANTS' PARTIAL MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

In seeking judgment on the pleadings under Rule 12(c), the Centers for Medicare & Medicaid Services and other federal defendants (collectively "CMS") repeat many of the arguments that this Court has already rejected. First, CMS insists that it is not bound by the terms of the January 15 extension of Texas's demonstration project, and the accompanying Standard Terms and Conditions; thus, it is not a violation of § 706(1) of the Administrative Procedure Act to refuse to comply with them. Second, CMS insists that—assuming it can ever be estopped from going back on its word—it is not estopped from rescinding the January 15 extension because Texas should have known that the extension was never valid to begin with. And third, CMS argues that it has not imposed an unlawful condition on Texas's receipt of federal funding, either because Texas knew when it agreed to participate in Medicaid in 1962 that the federal government might seek to coerce Texas into expanding Medicaid coverage to new populations, or because CMS's actions are not coercive because Texas can just switch back to an outdated fee-for-service model—notwithstanding evidence in the record that the infrastructure to make that switch no longer exists.

Even where CMS's arguments do not parrot arguments that were already rejected, the motion is meritless. The Rule 12(c) standard is demanding, and CMS has not met it. Rather, Texas has more than sufficiently pleaded the three claims at issue, and bolstered them with strong factual support. The motion should be denied.

BACKGROUND

The Court is familiar with the facts. Rather than recount them here, the State incorporates its facts and evidence from its Amended Complaint and motion for a preliminary injunction. ECF No. 54 ¶¶ 34–115; ECF No. 11 at 2–14.

LEGAL STANDARD

Federal courts "evaluate a motion for judgment on the pleadings by employing 'the same standard as a motion to dismiss under Rule 12(b)(6).'" *Hajer v. Ohio Sec. Ins. Co.*, 505 F. Supp. 3d 646, 649 (E.D. Tex. 2020) (Barker, J.) (quoting *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2018)). Under that standard, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

A party seeking judgment on the pleadings bears a heavy burden because "Rule 12(c) motions are 'disfavored and rarely granted' in this Circuit." *Priester v. Long Beach Mortg. Co.*, No. 4:16-cv-449, 2017 WL 835074, at *4 (E.D. Tex. Mar. 3, 2017) (quoting *Boyd v. Dall. Indep. Sch. Dist.*, No. 3:08-cv-0426-M, 2009 WL 159243, at *1 (N.D. Tex. Jan. 21, 2009)) (citing *Sosa v. Coleman*, 646 F.2d 991, 993 (5th Cir. 1981)). As such, "[a]ll questions of fact and any ambiguities in the current controlling substantive law must be resolved in the plaintiff's favor." *Union Pac. R.R. Co. v. City of Palestine*, 517 F. Supp. 3d 609, 621–22 (E.D. Tex. 2021) (quoting *Lewis v. Fresne*, 252 F.3d 352, 357 (5th Cir. 2001)).

In reviewing a Rule 12(c) motion, the court considers the complaint and any "documents that are 'referred to in the plaintiff's complaint and are central to [its] claim.'" *Hajer*, 505 F. Supp. 3d at 649 (quoting *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000)).

ARGUMENT

As this Court has already concluded that Texas is likely to succeed on its APA claims, ECF No. 47, Defendants move for judgment on the pleadings on Texas's claims based on agency

inaction, equitable estoppel, and the Spending Clause. Texas has sufficiently pleaded these claims.

I. Texas Has Properly Stated a Claim Based on Agency Inaction Under 5 U.S.C. § 706(1)

CMS first argues that Texas has not adequately alleged that § 706(1) requires it to comply with the terms of the January 15 extension and its Special Terms and Conditions ("STCs"). This argument is wrong for many of the same reasons recognized by this Court when it awarded Texas a preliminary injunction.

"To state a claim under section 706(1), the plaintiff must plead 'that an agency failed to take a discrete agency action that it is required to take.'" *Chuttani v. U.S. Citizenship & Immigration Servs.*, No. 3:19-cv-02955-X, 2020 WL 7225995, at *2 (N.D. Tex. Dec. 8, 2020) (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004)). The plaintiff must allege specific facts that demonstrate two conditions: "(1) that an agency has a nondiscretionary duty to perform some action under law, and (2) that the agency has failed to perform said action." *Id.* at *2; *see also Mendoza-Tarango v. Flores*, 982 F.3d 395, 399–401 (5th Cir. 2020).

Texas's claim meets those two requirements. *First*, CMS has a nondiscretionary duty to comply with the January 15 extension and the accompanying STCs. CMS does not dispute that, in general, Medicaid waivers are binding on both parties. Nor could it. "It is an elemental principle of administrative law that agencies are bound to follow their own regulations." *Rabbers v. Comm'r of Soc. Sec. Admin.*, 582 F.3d 647, 654 (6th Cir. 2009) (quoting *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 545 (6th Cir. 2004)); *see also, e.g.*, *Env't Integrity Project v. U.S. EPA*, 969 F.3d 529, 535–36 (5th Cir. 2020); *Klamath-Siskiyou Wildlands Ctr. v. Gerritsma*, 638 F. App'x 648, 652 (9th Cir. 2016). Rather, CMS contends that it is not required to follow the terms of this particular Medicaid waiver because, it says, the January 15 extension was void. This Court already rejected that contention in its preliminary-injunction order. ECF. No. 47 at 13–20.

Second, CMS is not performing that nondiscretionary duty. Indeed, CMS continues to insist

that it is not required to take actions in compliance with the STC's—notwithstanding that it has been ordered to "treat Texas's demonstration project . . . as currently remaining in effect." *Id.* at 26. Despite that order, CMS continues to drag its feet in negotiating and approving Texas's directed-payment programs ("DPPs"). Texas has properly pleaded a claim under § 706(1) to compel that withheld action.

Defendants make three arguments why this claim should nonetheless be dismissed: (1) certain procedural requirements imposed by the extension and STCs are not required by regulation, (2) those procedural requirements are not sufficiently "discrete," and (3) performing certain substantive requirements contemplated by the STCs remains within the discretion of the agency. Each argument is baseless.

A. The Procedural Requirements are Legally Required

CMS opens with the argument that it need not comply with the procedural requirements of the STCs because the January 15 extension is void for lack of compliance with notice-and-comment requirements, or, alternatively, that the extension was subsequently voided by the April 16 letter. Nothing, CMS insists, obliges it to follow the extension except the Court's preliminary injunction. ECF No. 67 at 3–4. But CMS's argument glosses over the *reason* for that injunction: that the rescission was unlawful. In effect, CMS argues that it is not legally obligated to follow the terms of the extension it unlawfully rescinded because it unlawfully rescinded them.

CMS tries to justify its position by asserting (*id.*) that the original extension was void. But this Court already held this extension *was not* void when it issued its preliminary injunction over the very same objections CMS reiterates now. *See* ECF No. 47 at 13–20. In its order, the Court explained that "no evidence shows that CMS meaningfully considered reliance interests around the final approval of the demonstration program that CMS rescinded," *id.* at 19, and further that CMS failed "to consider alternatives that might have vindicated the notice-and-comment interests

animating the rescission while retaining the existing policy." *Id.* at 20. In essence, CMS asks the Court to reconsider its preliminary injunction without providing any new justification.

Assuming such a request is even proper, CMS ignores the 12(c) standard. At the pleading stage, the Court must take all allegations as true and view them in the light most favorable to Texas. *See Hajer*, 505 F. Supp. 3d at 649. As this Court has already concluded, Texas has already shown a likelihood of success on the merits that the January 15 extension is not void, that the April 16 letter was invalid, and that CMS is bound to the terms of the extension to which it agreed.

B. The Procedural Requirements are Discrete

CMS is also wrong to argue that the procedural requirements are not discrete. ECF No. 67 at 4–6. The actions § 706(1) may compel must be "discrete" and "circumscribed." *Norton*, 542 U.S. at 62. The actions here are: the STCs impose clear, specific, and legally binding obligations, which can and should be enforced. *See generally* ECF No. 29-1, Ex. C.

For decades, it has been "clear that section 706(1) applies to the situation where a federal agency refuses to act in disregard of its legal duty to act." *EEOC v. Liberty Loan Corp.*, 584 F.2d 853, 856 (8th Cir. 1978). To be sure, a plaintiff must identify a "discrete action" that the agency has failed to take. *Norton*, 542 U.S. at 63. But whether an action is "discrete" is determined by the purpose of the rule: namely to "preclude[] the kind of broad programmatic attack [the Supreme Court] rejected in *Lujan v. National Wildlife Federation*, 497 U.S. 871[] (1990)." *Norton*, 542 U.S. at 64. In other words, a plaintiff may not ask the Court "to enter general orders compelling compliance with broad statutory mandates," thereby "injecting the judge into day-to-day agency management." *Id.* at 66–67; *see also NAACP v. Bureau of the Census*, 945 F.3d 183, 189 (4th Cir. 2019) (citing 5 U.S.C. § 551(13)). For this reason, agency-inaction claims fail where they are based on an agency's general noncompliance with a statutory mandate. *See, e.g.*, *City of New York v. U.S. Dep't of Def.*, 913 F.3d 423, 432–33 (4th Cir. 2019); *Gardner v. U.S. Bureau of Land Mgmt.*,

638 F.3d 1217, 1221–22 (9th Cir. 2011).

The actions at issue here easily fall within that rule. Texas is not challenging the broad, programmatic standards associated with § 1115 waivers. As Texas has described extensively elsewhere, it challenges the specific rescission of—and failure to abide by the terms of—a waiver that was already approved and upon which it already detrimentally relied. ECF No. 11 at 8–9.

CMS counters that the "ongoing process through which [it] works collaboratively with Texas to consider, negotiate, and potentially approve requests for directed-payment programs" cannot possibly be a discrete agency action because it is not an agency rule, order, or other action listed in the APA definitions. ECF No. 67 at 5. That is wrong: the approval of a state demonstration project is a specific agency action granting the State a "license." *See* 5 U.S.C. § 551(13); *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 983 (9th Cir. 2006). Further, agency compliance with a demonstration project and the STCs constitutes "relief." *See* 5 U.S.C. § 551(11). And if CMS took some action adverse to the State, that would be a "sanction." 5 U.S.C. § 551(10).

Moreover, Texas is not relying, as CMS seems to suggest (ECF No. 67 at 4–5), on a general statutory command to monitor state demonstration projects. Texas is instead relying on specific obligations that are clearly set forth by the STCs. Indeed, the Court recognized those specific obligations in its Order to Clarify Sanctions Standards, ECF No. 40, and explained what would happen should CMS fail to comply with those obligations. And it is well-established that "an action called for in a plan" to which an agency agreed "may be compelled when the plan merely reiterates duties the agency is already obligated to perform, or perhaps when language in the plan itself creates a commitment binding on the agency." *Norton*, 542 U.S. at 71.

Simply put, CMS exaggerates the implications of Texas's claim. Texas is not trying to ensure that CMS complies with all of its general statutory and regulatory obligations. *Contra*

Village of Bald Head Island v. U.S. Army Corps of Eng'rs, 714 F.3d 186, 194 (4th Cir. 2013) (plaintiff improperly asked the court to inject "itself into the role of monitoring whether the Corps had complied with vague, undefined corrective measures"). It seeks no "wholesale improvement" of the Medicaid system "by court decree." *Lujan*, 497 U.S. at 891. Rather, all Texas wants is for CMS to comply with the January 15 extension and the STCs. That request is discrete, circumscribed, and entirely appropriate.

C. The Substantive Requirements are Legally Required and Nondiscretionary

CMS cannot escape by arguing (ECF No. 67 at 6–9) that the procedural requirements of the STCs are not properly within the scope of § 706(1) because the substantive outcome—namely the approval of the DPPs—is "not the sort of 'ministerial or non-discretionary act' that can be compelled under § 706(1)." *Id.* at 6.

This argument deliberately misidentifies the relief Texas seeks—namely that CMS comply with the STCs to which it agreed. As Texas has exhaustively explained—and this Court has ordered, *see* ECF No. 47 at 13–20—CMS is legally required to follow those terms. *See Env't Integrity Project*, 969 F.3d at 535–36; *Rabbers*, 582 F.3d at 654; *Klamath-Siskiyou Wildlands Ctr.*, 638 F. App'x at 652. The overall size of the DPPs is a component of those terms because (among other reasons) it is baked into the budget-neutrality provisions of the larger extension. As explained elsewhere, Texas and CMS discussed the size of the DPPs at length in advance of the January 15 extension. *See* ECF No. 54 ¶ 83 (citing ECF No. 29-1 ¶ 15; *id.*, Exs. G–H). Further, the STCs included an Attachment U, which provided the estimated without waiver per member per month expenditures and PHP-CCP amounts. *Id.* CMS has no discretion to deviate from this settled aspect of the STCs. CMS makes three arguments in response. Again, none has merit.

First, CMS protests (ECF No. 67 at 6–7) being required to follow the STCs, observing that DPP applications must satisfy various regulatory requirements, *see* 42 C.F.R. § 438.6, and warning

that the relief Texas seeks will force it to approve DPPs that violate federal regulations. Not so. Indeed, as CMS notes, the STCs state that DPP applications cannot be approved absent regulatory compliance. ECF No. 67 at 7 (citing STC 29). But CMS cannot use supposed non-compliance as a pretext to mask policy disagreements. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2572, 2575–76 (2019). That is precisely what CMS did here. CMS's supposed conflict does not infringe on any discretionary function. And even if it did, CMS has not identified any particular concern that Texas's DPP applications will fail to comply with the pertinent regulations. CMS's concern is purely abstract and fails to demonstrate why it cannot be required to negotiate the DPPs according to the terms set forth by the STCs.

Second, CMS contends (ECF No. 67 at 7–8) that the Court cannot grant relief on Texas's agency-inaction claim because the STCs only require CMS to "consider" the DPPs, and it has no obligation to "approve" them at all. This argument is unavailing because it equates the January 15 extension to nothing more than a promise to continue negotiations. But Texas and CMS entered into the STCs with certain aspects of the DPPs—and particularly their size—already agreed upon as part of the larger extension. *See* ECF No. 54 ¶ 83. Several details remained, such as how the funds would be distributed and what oversight would be required. The parties agreed to finalize those details later, according to a predetermined timeline. *See id.* ¶ 84 (citing ECF No. 29-1, Ex. C, at 31–33). Critically, the STCs expressly provide that subsequent negotiations will be subject to terms to which the parties have already agreed. *See* ECF No. 29-1, Ex. C, at 32 ("[T]he state and CMS will work collaboratively towards consideration of approval of state requests and will adhere to the milestones outlined in the subsequent STCs."). The STCs contemplate a finite negotiation process on several limited topics, ultimately concluding with the approval of the DPPs. They do not contemplate the open-ended discussion described by CMS.

If CMS were really under no obligation to take concrete steps towards approval of the DPPs, the January 15 extension and the STCs would be meaningless. CMS could simply disapprove every proposed DPP for any arbitrary reason, rendering Texas's demonstration project entirely ineffective, and indefinitely postponing its implementation. Instead, CMS approved the extension and entered into the STCs, and it committed to reaching an agreement with Texas executing the specific details of those general terms.

Third, CMS insists (ECF No. 67 at 8) that it was entitled to back out of even this larger agreement because it retained "authority to deny the requested payments because they are not approvable." But the only aspect of the DPPs that CMS has identified that could even conceivably meet that requirement is the DPPs' overall size. But the parties agreed to that figure in the STCs. *See* ECF No. 54 ¶¶ 193–94. Erroneously pointing to 42 C.F.R. § 438.6, CMS asserts that it cannot be made to acknowledge the predetermined size of the DPPs because that regulation requires it to consider size in determining whether to approve the payments. ECF No. 67 at 9. But CMS fails to explain why approving DPPs of a size *already agreed to* would be improper. CMS also points to 42 C.F.R. § 438.4 and § 438.5, saying that it is required to ensure the actuarial soundness of the payments. But CMS has not shown that it has performed an actuarial analysis that shows the DPPs to be actuarially unsound.

The substantive negotiation obligations are required by the STCs. And CMS's course of behavior in negotiating the DPPs demonstrates that nothing in the STCs poses an obstacle to finalizing an agreement, even though that process involves some discretionary components. CMS refuses to comply with its obligations under the STCs to reach a final agreement on Texas's DPPs. It can be made to do so under § 706(1).

II. Texas Has Properly Alleged Equitable Estoppel

CMS can also be estopped from rescinding its previous agreement. Though estoppel

against the government is rare, the Supreme Court explains that it can apply against the federal government when the "public interest in ensuring that the Government can enforce the law free from estoppel [is] outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government." *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60–61 (1984). The purpose of equitable estoppel is to "prevent injustice" by prohibiting a party "from claiming a right to the detriment of the other party who was entitled to rely" on the first party's conduct. 28 Am. Jur. 2d Estoppel & Waiver § 27. In short, "To say to [Texas], 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Heckler*, 467 U.S. at 61 n.13 (quoting *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970)). This case is the perfect application of that doctrine: Texas has more than adequately pleaded an equitable estoppel claim. CMS's related counterargument that Texas cannot seek a monetary remedy through equitable estoppel—either because it falls outside the scope of estoppel in this context or outside the APA's waiver of sovereign immunity—is without merit.

A. Texas Has Pleaded a Claim for Equitable Estoppel

Though it is rare for a State to seek to estop the federal government, Texas has adequately pleaded that such relief is appropriate here. As applied to a claim by a private party, the Fifth Circuit has said that the elements of equitable estoppel are:

> (1) [T]hat the party to be estopped was aware of the facts; (2) that the party to be estopped intended his act or omission to be acted upon; (3) that the party asserting estoppel did not have knowledge of the facts; and (4) that the party asserting estoppel reasonably relied on the conduct of the other to his substantial injury.

Ingalls Shipbuilding, Inc. v. Off. of Workers' Compensation Programs, 976 F.2d 934, 938 n.13 (5th Cir. 1992) (citing *Mangaroo v. Nelson*, 864 F.2d 1202, 1204 (5th Cir. 1989)). In addition, when a private party asserts equitable estoppel against the government, it must show "more than

mere negligence, delay, inaction, or failure to follow an internal agency guideline." *Mangaroo*, 864 F.2d at 1204–05 (quoting *Fano v. O'Neill*, 806 F.2d 1262, 1265 (5th Cir. 1987)). Instead, the government must have engaged in "some sort of 'affirmative misconduct.'" *United States v. Marine Shale Processors*, 81 F.3d 1329, 1349 (5th Cir. 1996) (quoting *Fano*, 806 F.2d at 1265–66); *see also Taylor v. U.S. Treasury Dep't*, 127 F.3d 470, 474 (5th Cir. 1997).

1. Assuming the same standard applies when one government brings an estoppel claim against another, CMS's conduct satisfies those elements. *First*, CMS knew of the facts that form the basis of the claim. ECF No. 23 at 15–20. Indeed, it insists that "[t]he record clearly demonstrates that Texas's asserted basis for exemption from the public notice and comment obligation fails to satisfy the requirements of § 431.416(g)" and therefore that CMS "materially erred in granting Texas's [exemption] request." *Id.* at 16; *see also* ECF No. 54 ¶ 191.

Second, CMS intended for its representations to be acted upon. Indeed, CMS encouraged Texas to apply for a public-notice exemption and approved both the exemption and the demonstration-project extension. ECF No. 54 ¶ 192. And the extension letter itself states that it is effective immediately. *See* ECF No. 1-2, Ex. B, at 1. As Texas has explained elsewhere, by definition, Texas would have had to begin implementing that policy immediately to comply with CMS requirements.

Third, this Court has already held that—contrary to CMS's repeated insistence (*e.g.*, ECF No. 67 at 12)—Texas had no knowledge that the exemption was invalid, or even that CMS considered it to be so. *See* ECF No. 47 at 17–18. That conclusion is amply supported by allegations in the operative complaint, where Texas clearly explains that it believed that its request for a public-notice exemption was proper. ECF No. 54 ¶¶ 190–92 (citing ECF No. 1-2, Ex. A); *Id.* ¶ 193 (citing ECF No. 1-5 ¶¶ 12–13; ECF No. 1-6 ¶¶ 6–7).

Fourth, Texas reasonably relied on CMS's actions. As explained by the Court in its preliminary-injunction order, "In short, given the complex nature of a Medicaid plan, the State's and third parties' reliance on the January final approval was immediate, extensive, and reasonably so." ECF No. 47 at 15. Finally, CMS engaged in affirmative misconduct when it deliberately led Texas to rely on a public-notice exemption it knew to be invalid. This is a textbook case for equitable estoppel.

2. CMS counters (ECF No. 67 at 12) that Texas nonetheless fails to meet the standard for estopping a government because it has not "alleged any affirmative misconduct on the part of the government in approving the exemption from notice-and-comment." But affirmative misconduct in this context does not equate to illegal conduct—particularly in the *malum in se* sense that the government seems to suggest. CMS committed the necessary affirmative misconduct when the CMS Administrator—the top agency official in this context—unequivocally represented that Texas's extension application was valid, *see* ECF No. 1-2, Ex. B, and only months after the new administration began did it purport to rescind its approval even though Texas was relying on the representation at all times, *see* ECF No. 1-2, Ex. D.

In the equitable-estoppel context, the standard for affirmative misconduct is "only moderately demanding." *Griffin v. Reich*, 956 F. Supp. 98, 107 (D.R.I. 1997). And it does not require a defendant to commit some criminal or tortious act: affirmative misconduct may be "an affirmative act or misrepresentation or concealment of a material fact." *VRC, L.L.C. v. City of Dallas*, No. 3:03-cv-02450-B, 2004 WL 2958385, at *6 (N.D. Tex. Dec. 21, 2004) (citing *In re DePaolo*, 45 F.3d 373, 377 (10th Cir. 1995)). The government must "intentionally or recklessly mislead the estoppel claimant," *Marine Shale Processors*, 81 F.3d at 1350, or engage in a "pattern of false promises." *Mukherjee v. INS*, 793 F.2d 1006, 1009 (9th Cir. 1986).

If a direct misrepresentation from the CMS Administrator about whether Texas satisfied the requirements for a form of relief that CMS has discretion to grant is not "recklessly mislead[ing]," it is entirely unclear what is. *Marine Shale Processors*, 81 F.3d at 1350. CMS contends otherwise (ECF No. 67 at 13), insisting that Texas is presumed to know the law, and that reliance on a "government employee's misstatement of that law is not reasonable." But that principle applies to the representations of *ordinary* agency employees and is based on the understanding that such employees cannot bind the agency in light of "clear and unambiguous" law to the contrary. *United States v. Perez-Torres*, 15 F.3d 403, 407 (5th Cir. 1994); *see also United States v. Guy*, 978 F.2d 934, 937–38 (6th Cir. 1992). As the Court has explained, "The Centers for Medicare & Medicaid Services (CMS) is the agency administering the Medicaid program on behalf of the Secretary." ECF No. 47 at 11 (quoting *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 650 n.3 (2003)). In her capacity as head of CMS, Administrator Verma not only *can* bind the agency, it *is her job* to bind the agency. *Id.* She applied the discretionary elements of 42 C.F.R. § 431.416(g), and determined, on behalf of HHS and CMS, that those elements warranted a public-notice exemption. To the extent that her letter to HHSC was patently incorrect, as CMS contends, it must constitute an affirmative misrepresentation.

At this stage, the State is not required to *prove* that CMS engaged in affirmative misconduct—it need only plead facts supporting that conclusion. *See Fano*, 806 F.2d at 1265–66. It has assuredly done so, as the level of deception present here is greater than was required in similar cases. *See, e.g.*, *id.* (INS "willfully" delayed in processing plaintiff's visa application); *Mauting v. INS*, 16 F. App'x 788, 791 (9th Cir. 2001) (INS issued decision without valid "legal or factual basis"); *Kennedy v. United States*, 965 F.2d 413, 418, 421 (7th Cir. 1992) (IRS repeatedly misadvised plaintiff, giving him "false hope"); *Watkins v. U.S. Army*, 875 F.2d 699, 707–08 (9th

Cir. 1989) (U.S. Army "affirmatively misrepresented" its records and regulations).

B. Texas Does Not Seek a Money Remedy

CMS tries to avoid this conclusion by arguing (ECF No. 67 at 9–11) that Texas cannot assert equitable estoppel because that doctrine does not apply to cases in which the plaintiff seeks a money remedy. Texas does not dispute that the Supreme Court has held that equitable remedies like "estoppel cannot grant respondent a money remedy that Congress has not authorized." *Wright v. Allstate Ins. Co.*, 415 F.3d 384, 387 (5th Cir. 2005) (quoting *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 426 (1990)). But Texas does not seek a money remedy, so the general rule against equitable estoppel does not apply.

In assessing whether equitable relief is available, the Supreme Court has expressly recognized that cases that *involve* money are not necessarily cases *for* money damages: "Our cases have long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief." *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988). In other words: "The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" *Id.*; *accord Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1330 (2020) (reaffirming *Bowen* where claim relates to the prospective calculation of Medicaid reimbursements). Texas has sought entirely prospective, equitable relief.

Here, Texas does not bring a claim "for the payment of money" damages. *Richmond*, 496 U.S. at 427. Rather, it seeks to estop CMS from arguing that the April 16 letter is valid, and to enforce the terms of the January 15 extension and the accompanying STCs. Those are specific, equitable remedies that do not themselves require the payment of retrospective monetary damages, which are not permitted under a theory of equitable estoppel. *See Cohen v. Allstate Ins. Co.*, 924

F.3d 776, 780 (5th Cir. 2019); *Gowland v. Aetna*, 143 F.3d 951, 954–55 (5th Cir. 1998); *United States v. Cushman & Wakefield, Inc.*, 275 F. Supp. 2d 763, 768–70 (N.D. Tex. 2002). Of course, one result of enforcing the STCs may (and should) be approval of the DPPs, which will result in the payment of funds. "[T]hat a judicial remedy may require [CMS] to pay money" to Texas, however, "is not a sufficient reason to characterize" the requested relief as a money remedy. *Bowen*, 487 U.S. at 893.

CMS would expand the rule barring estoppel claims for money damages to *any* case where federal funds are remotely involved. But its own authority does not go that far. Most of the cases it cites involve claims for an award of monetary damages from the federal government (or sought to prevent the federal government from recovering one). *See Cohen*, 924 F.3d at 780 (plaintiff asserted equitable estoppel to collect flood insurance from a contract guaranteed by the federal government); *Gowland*, 143 F.3d at 954–55 (same); *Cushman & Wakefield*, 275 F. Supp. 2d at 768–70 (defendant asserted equitable estoppel to bar the federal government from recovering on its fraud and unjust enrichment claims). In the others, the court did not actually address equitable estoppel. *See Campo v. Allstate Ins. Co.*, 562 F.3d 751, 758 n.46 (5th Cir. 2009) (plaintiff asserted equitable estoppel, but the court did not address it); *Rosas v. U.S. Small Bus. Admin.*, 964 F.2d 351, 360 (5th Cir. 1992) (plaintiff asserted *promissory* estoppel). And expanding the rule now would be inconsistent with the Supreme Court's holding that equitable remedies can be used in a "suit seeking to enforce [a] statutory mandate itself"—even where that mandate "happens to be one for the payment of money." *Bowen*, 487 U.S. at 900.

C. Sovereign Immunity Does Not Apply

Finally, CMS makes a related argument that because Texas is seeking monetary relief, Texas's equitable-estoppel claim falls outside the scope of the APA's waiver of sovereign immunity. ECF No. 67 at 13–14. This argument is meritless because the APA waives the federal

government's sovereign immunity for all "actions seeking non-monetary relief against federal government agencies." *Cambranis v. Blinken*, 994 F.3d 457, 462 (5th Cir. 2021) (citing *Ala.-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 488 (5th Cir. 2014)); *see also Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 475 n.27 (5th Cir. 2020) (en banc) (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) ("What our cases demonstrate is that, in a proper case, relief may be given in a court of equity to prevent an injurious act by a public officer.")).

The APA's sovereign-immunity waiver applies here because, as discussed above, Texas's claim for equitable estoppel is not seeking money damages. Equitable estoppel is markedly different than other causes of action, like promissory estoppel, for which some courts have held sovereign immunity has not been waived. *See Jablon v. United States*, 657 F.2d 1064, 1068–70 (9th Cir. 1981). Indeed, federal courts regularly address equitable-estoppel claims on the merits based on § 702's waiver of sovereign immunity. *See, e.g.*, *Bensman v. U.S. Forest Serv.*, 408 F.3d 945, 963–64 (7th Cir. 2005); *Berman v. United States*, 264 F.3d 16, 19–21 (1st Cir. 2001); *Double J. Land & Cattle Co. v. U.S. Dep't of the Interior*, 91 F.3d 1378, 1380, 1382 (10th Cir. 1996); *Sydnor v. Off. of Pers. Mgmt.*, 336 F. App'x 175, 181–82 (3d Cir. 2009). And the Supreme Court has held that claims seeking to enforce a particular statutory mandate fall within the APA's waiver of sovereign immunity even if they result in some form of monetary relief so long as they do not seek money damages, *Bowen*, 487 U.S. at 900, and are prospective in nature, *Me. Cmty. Health Options*, 140 S. Ct. at 1330. For the reasons discussed above, the relief that Texas seeks satisfies these requirements.

III. Texas Has Properly Stated a Claim Based on the Spending Clause

Texas's complaint also meets the requirements of a Spending Clause claim. *Contra* ECF No. 67 at 14–17. As the Fifth Circuit reiterated just last year, a lawful exercise of the Spending

Clause power must satisfy five elements:

> (1) [A] federal expenditure must benefit the general welfare; (2) any condition on the receipt of federal funds must be unambiguous; (3) any condition must be reasonably related to the purpose of the federal grant; (4) the grant and any conditions attached to it cannot violate an independent constitutional provision; and (5) the grant and its conditions cannot amount to coercion as opposed to encouragement.

Gruver v. La. Bd. of Supervisors for LSU Agric. & Mech. Coll., 959 F.3d 178, 182 (5th Cir. 2020) (citing *South Dakota v. Dole*, 483 U.S. 203, 207–08, 210 (1987)). Texas has explained that the April 16 letter was designed to force Texas to adopt the federal Medicaid expansion. Under *National Federation of Independent Business v. Sebelius*, such a ploy is unconstitutional in at least two ways: it is impermissibly coercive, and it imposes a condition on Texas's receipt of Medicaid funds that could not be anticipated when Texas agreed to participate in the program decades ago. 567 U.S. 519, 580 (2012) ("*NFIB*") (quoting *Dole*, 483 U.S. at 211). CMS cannot avoid that conclusion by asserting that because *its* actions violated the Spending Clause rather than Congress's, there is no Spending Clause problem. CMS approves § 1115 plans through power granted from Congress, and Congress cannot delegate coercive power that it does not have.

A. The Challenged Action is Coercive

Neither Congress nor CMS had power to coerce Texas in this manner. Under well-established principles of cooperative federalism, the federal government can offer "mild encouragement" for States to adopt federal policies, but it cannot threaten. *Dole*, 483 U.S. at 211. A federal action is unlawfully coercive if it "pass[es] the point at which 'pressure turns into compulsion.'" *NFIB*, 567 U.S. at 580 (quoting *Dole*, 483 U.S. at 211). Though the line is fuzzy, courts agree that encouragement crosses the line to an unconstitutional threat when the intended impact "is so significant to the States' overall operations as to leave it with no real choice but to agree." *New York v. Dep't of Justice*, 951 F.3d 84, 115 (2d Cir. 2020).

1. We know that Texas's Spending Clause claim meets the *NFIB* test for what constitutes an unconstitutional threat because it involves the *exact same threat* as *NFIB*: the loss of Medicaid funding. *See generally NFIB*, 567 U.S. at 538–43; *see also New York v. U.S. Dep't of Health & Human Servs.*, 414 F. Supp. 3d 475, 570 (S.D.N.Y. 2019) (the regulation at issue "threatens not a small percentage of the States' federal health care funding, but literally *all* of it"). The Amended Complaint explains that the Defendants wanted to pressure Texas into adopting the Affordable Care Act's Medicaid Expansion. *See* ECF No. 54 ¶ 197 (citing ECF No. 1-2, Ex. E). Unable to persuade Texas by legitimate means, it turned to a threat: adopt the expansion, or lose the federal government's approval of Texas's demonstration project, which represents over 90% of Texas's Medicaid funding. *Id.* ¶¶ 42–72, 100, 196–97. That potential loss would be catastrophic. *See* ECF No. 11 at 12–14; *see also* ECF No. 47 at 9 (noting that the purported recission "has huge consequences given the size of Texas's Medicaid program."). Texas stands to lose $30 billion, or roughly one quarter of the State's annual budget. ECF No. 54 ¶¶ 199–200. It hardly needs to be explained that the latter figure would be "so significant to [Texas's] overall operations as to leave it with no real choice but to agree." *New York*, 951 F.3d at 115.

2. CMS argues (ECF No. 67 at 15–16) that the April 16 letter is not actually coercive because if Texas's demonstration project were indeed terminated, Texas would simply return to "the normal 'without waiver' requirements of its Medicaid State Plan." Under that plan, CMS assures the Court, Texas would receive roughly half of the federal funds it currently receives.

First, as CMS well knows, Texas cannot comply with the requirements under the default plan. As explained in the Amended Complaint, Texas has operated under its demonstration project since 2011. Over 90% of its Medicaid program, and its entire Medicaid infrastructure, is built around using this demonstration project as part of a decades-long transition away from a fee-for-

service delivery model. *See* ECF No. 54 ¶¶ 42–72. To argue that Texas could instantly redesign its Medicaid system to comply with entirely different requirements strains credibility.

Second, even if Texas *could* somehow flip a switch and move from its tailored demonstration project to the default plan, CMS admits it would still lose roughly half of its Medicaid funds. That equates to $15 billion, or roughly one-eighth of the State's annual budget. *See id.* ¶¶ 199–200. This amount is still coercive. In *NFIB*, the impermissible threshold was ten percent: "The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion." 567 U.S. at 582. Even granting CMS's best-case scenario, Texas will still be deprived of more funds (12.5% of its annual budget) than were at issue in *NFIB*. *Compare Bourgoin v. Sebelius*, 296 F.R.D. 15, 20 n.5 (D. Me. 2013) (coercive, 22% of annual budget), *with New York*, 951 F.3d at 116 (not coercive, 0.1% of annual budget). The April 16 letter is objectively coercive with respect to its financial implications.

B. The Challenged Action Unfairly Surprises the State

What is more, the letter is *subjectively* coercive in the sense that it was *designed* to be coercive. In determining whether a government action is coercive, the "manner in which" the pertinent action is "structured" is critical. *Mayhew v. Burwell*, 772 F.3d 80, 90–91 (1st Cir. 2014) (quoting *NFIB*, 567 U.S. at 584). The federal government may not "surpris[e]" the State, like by imposing new conditions "post-acceptance." *Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 179 (D.C. Cir. 2015) (per curiam) (quoting *NFIB*, 567 U.S. at 584). That is exactly what happened here. The Amended Complaint explains that the April 16 letter was expressly designed "to push [Texas] state officials toward accepting the Affordable Care Act's Medicaid expansion." ECF No. 54 ¶ 99 (quoting ECF No. 1-2, Ex. E); *see also id.* ¶ 96. The letter also impermissibly surprised Texas by purporting to rescind its demonstration project after CMS unconditionally

approved it. The federal government may not "surpris[e]" a State with "post-acceptance" conditions. *NFIB*, 567 U.S. at 584. It may not "retroactively" impose "unexpected and burdensome" new terms. *City of Los Angeles v. Barr*, 929 F.3d 1163, 1175 (9th Cir. 2019). But that is exactly what CMS has done here.

CMS insists (ECF No. 67 at 16–17) that there is no element of unfair surprise. As a preliminary matter, Texas is not required to show that CMS's actions constitute unfair surprise. That is simply one of several ways to show that an action is coercive. *See NFIB*, 567 U.S. at 584–85. Regardless, this remarkable contention ignores Texas's complaint. As the complaint alleges, CMS attempted to rescind the demonstration-project extension after it approved the extension, and expressly led Texas to believe that it was valid.

CMS contends that unfair surprise is absent here because Congress did not amend the Medicaid statutes and CMS did not amend the Medicaid regulations. As such, CMS asserts, Texas was on notice of all statutory and regulatory obligations. ECF No. 67 at 16–17. This argument fails because it assumes the *only* way to wrongfully surprise a State is to amend the pertinent statute or regulation. Not so. The essential question is whether the action at issue "substantively transform[s] the existing regulatory regime." *New York*, 414 F. Supp. 3d at 571. Any agency action having that effect is just another means to achieve an unconstitutional end.

CMS materially changed the substance of its agreement with Texas when it attempted to rescind Texas's demonstration project extension—and functionally to threaten Texas Medicaid itself—to compel Texas to accept the Medicaid expansion. It first encouraged Texas to seek a public-notice exemption. Texas did so. CMS then assured Texas that the exemption and its demonstration project were valid. ECF No. 54 ¶ 192 (citing ECF No. 1-2, Exs. B, K). Texas then relied on CMS's representations, and on the STCs—especially on the agreement that the DPPs

would be of a certain determined size. *Id.* ¶¶ 83–84. For those reasons, Texas abandoned an opportunity to extend the multi-billion-dollar DSRIP program and expended significant resources to implement new components of the demonstration project. *Id.* ¶¶ 193–94. Then CMS changed its mind, revoked its approval, and told Texas either to redesign its entire Medicaid payment infrastructure in a matter of months or agree to its conditions. That is coercion.

C. Congress Cannot Delegate Unconstitutionally Coercive Power

CMS asserts (ECF No. 67 at 14–15) that its rescission of the demonstration project *cannot* violate the Spending Clause because it is not a statute. This argument misses the point: at least until recently, the federal "government [wa]s acknowledged by all, to be one of enumerated powers." *M'Culloch v. Maryland*, 17 U.S. 316, 405 (1819). The Spending Clause *empowers* Congress to create programs like Medicaid. *Id.*; U.S. Const. art. I, § 8, cl. 1. But that does not mean that only Congress is subject to the limits of the Spending Clause; "[t]he Constitution's express conferral of some powers makes clear that it does not grant others." *NFIB*, 567 U.S. at 534. Thus, Congress has no power to pass an act that seeks to coerce the States to adopt a preferred policy. *See Dole*, 483 U.S. at 206–10. As the federal government has not invoked a uniquely executive power to justify its actions here, CMS can only take action with regard to demonstration projects because 42 U.S.C. § 1315 delegates CMS the power to authorize State demonstration projects and to issue regulations on applications for and renewals of those demonstration projects.

And Congress has no power to delegate to an executive agency power it does not have—including to coerce States to take the federal government's preferred action. *See, e.g.*, *Miss. Comm'n on Envtl. Quality*, 790 F.3d at 177–78 (Congress cannot delegate coercive power to EPA); *New York*, 414 F. Supp. 3d at 565–67 (Congress cannot delegate coercive power to HHS); *Jindal v. U.S. Dep't of Educ.*, CV No. 14-534-SDD-RLB, 2015 WL 5474290, at *10–11 (M.D. La. Sept. 16, 2015) (Congress cannot delegate coercive power to the Department of Education).

The statutes and regulations cited above are unconstitutional as applied to Texas because CMS has used them to threaten Texas's federal funding in violation of the Spending Clause. As explained above, the intended effect of CMS rescinding its prior approval of the public-notice exemption pursuant to 42 C.F.R. § 431.416(g) was to force Texas into adopting the ACA Medicaid expansion. It is unconstitutional to use those statutes and regulations as CMS has.

CONCLUSION AND PRAYER

Plaintiffs State of Texas and Texas Health and Human Services Commission respectfully request that the Defendants' Partial Motion for Judgment on the Pleadings be denied.

Dated October 18, 2021

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on October 18, 2021, this brief was filed with the Court's CM/ECF system, which automatically serves a copy on all counsel of record.

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