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

Civil Action No. 5:17-cv-00025-FL

PHIL BERGER and TIM MOORE, Plaintiffs, v. THOMAS E. PRICE, M.D., in his official capacity as Secretary of Health and Human Services, *et al.*, Defendants.	)	**FEDERAL DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS**

INTRODUCTION

Plaintiffs' opposition brief imagines that state legislators can sue federal officials over their compliance with federal law, and that federal courts may adjudicate those suits before the officials actually do anything. But all their talk of *ultra vires* action by North Carolina officials cannot obscure the fact that nothing has happened here, certainly nothing that could support a federal lawsuit. Federal courts do not possess the authority to determine the abstract legality of purely hypothetical executive acts. Rather, the Constitution limits the judicial power to resolving the legal rights of litigants in actual controversies.

To be sure, it once seemed that the North Carolina Department of Health and Human Services ("NC HHS") might imminently submit a Medicaid-expanding state plan amendment ("SPA"). And the former Secretary said that she would act quickly if and when she received it. This court temporarily restrained the submission or consideration of such an amendment, but that order expired more than three months ago, and still there has been no submission. Nor has there been any indication that such a submission—the necessary predicate for any possible action by the Secretary—is now likely. And even if NC HHS submitted its proposed state plan amendment tomorrow, it would have no effect until it was approved by the Secretary.

Under these circumstances, even assuming plaintiffs had standing to represent the North Carolina General Assembly or their own interests in this case (which they do not), they have obviously suffered no injury and there is no agency action to review. This court cannot enjoin the Secretary from considering a potential state plan amendment, if it ever arrives, on the thin fiction that the *former* Secretary's statement about the pace of processing amounted to a pre-approval that continues to bind the *current* Secretary even after a change in Administration.

Plaintiffs lack standing to sue and have not stated an even remotely plausible claim for relief. Their complaint must therefore be dismissed.

ARGUMENT

I. This case must be dismissed for lack of standing.

A. Plaintiffs lack authority to press their claims.

Plaintiffs allege violations of the Social Security Act, the Administrative Procedure Act, and the U.S. Constitution, but they cannot explain where they get the authority to bring those claims, either on behalf of the General Assembly or on their own behalf as individual state legislators. Although plaintiffs undertook this suit to vindicate their view that "North Carolina law prohibits anyone other than the General Assembly from seeking to expand the State's Medicaid program," ECF No. 52 at 13, their claims against the Secretary purport to be grounded in federal law. Because the leaders of the General Assembly have no standing to bring claims about federal officials' compliance with federal law, their complaint must be dismissed.

The Speaker and the President Pro Tempore first assert the authority to bring this case on behalf of the General Assembly. *Id.* at 2 (arguing that "Plaintiffs are the proper representatives of the General Assembly and its institutional interests"). North Carolina law controls the question of who can represent North Carolina institutions in legal matters. The Supreme Court has long recognized that "a State has a cognizable interest in the continued enforceability of its laws that is harmed by a judicial decision declaring a state law unconstitutional" and may therefore "designate agents to represent it in federal court" so that it can "vindicate that interest or any other." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664 (2013) (internal quotation omitted). Although "[t]hat agent is typically the State's attorney general," "state law may provide for other officials to speak for the State in federal court." *Id.* As plaintiffs note, the Supreme Court in

Karcher v. May found that New Jersey law authorized "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." 484 U.S. 72, 82 (1987); *accord Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (noting that *Karcher* "recognized that state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests").[1]

North Carolina law confers upon plaintiffs a similar authority to defend the validity of State law. A State statute "jointly" grants the Speaker and the President Pro Tempore "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* N.C. Gen. Stat. § 120-32.6(b) (authorizing the General Assembly to hire counsel to represent it "[w]henever 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").[2] In addition to the right of intervention granted by N.C. Gen. Stat. § 1-72.2, the North Carolina Supreme Court and the lower courts of North Carolina have allowed the Speaker and the President Pro Tempore to jointly serve as defendants in cases where the validity of North

[1] *Karcher* involved a federal constitutional challenge to a New Jersey law allowing public school students to observe a moment of silence at the beginning of each day; when the State's attorney general refused to defend its constitutionality, the legislative leaders intervened "on behalf of the legislature," as New Jersey law entitled them to do. 484 U.S. at 82.

[2] The Speaker and President Pro Tempore recently exercised that authority to defend the constitutionality of North Carolina's prohibitions on same-sex marriage. *Fisher-Borne v. Smith*, 14 F. Supp. 3d 699, 703–04 (M.D.N.C. 2014) (granting intervention); *Fisher-Borne v. Smith*, 14 F. Supp. 3d 695, 698 (M.D.N.C. 2014) (finding that prohibitions violate Fourteenth Amendment); *see also City of Greensboro v. Guilford County Bd. of Elec.*, 2017 WL 1294848, at *3 (M.D.N.C. Apr. 3, 2017) (noting that "[l]egislative leaders within the General Assembly appear to have standing to intervene" in a challenge to the constitutionality of a state statute).

Carolina law is challenged. *See, e.g.*, *State v. Berger*, 781 S.E.2d 248 (N.C. 2016) (Speaker and President Pro Tempore named as defendants in state constitutional challenge to North Carolina statute); Mem. of Order on Cross-Motions for Summ. J., *Cooper v. Berger*, No. 16 CVS 15636 (N.C. Super. Ct. Mar. 17, 2017) (same), available at https://goo.gl/0NO5wz. And the Speaker and President Pro Tempore have brought a declaratory judgment case in this district court, seeking to affirm the validity of a state statute. *See* Compl., *Berger v. U.S. Dep't of Justice*, No. 16-cv-240 (E.D.N.C. filed May 9, 2016).

Under North Carolina law, it is clear that the Speaker and President Pro Tempore may jointly intervene in or defend cases in which some provision of North Carolina constitutional or statutory law is alleged to be invalid; they may also be able to jointly bring declaratory judgment actions regarding the validity of such provisions. If this were a case in which N.C. Session Law 2013-5 or any other provision of North Carolina law was challenged—because it was alleged to be unconstitutional or preempted by federal law, for example—then the legislative leaders could be proper parties. But this is a very different case. The Secretary has not suggested that any provision of North Carolina law is invalid, and the validity of North Carolina law is not at issue in this case (at least with respect to the Secretary). Instead, the Speaker and the President Pro Tempore have alleged that the Secretary—a federal official—is about to violate federal law. Plaintiffs assert standing to represent the interests of the General Assembly in seeking to stop those allegedly impending violations. But plaintiffs have identified no source of delegated authority to bring such a suit. They have cited not a single case in which plaintiffs' authority to bring affirmative claims is recognized, nor any case in which they have been allowed to assert the North Carolina General Assembly's interest (if any) in the vindication of federal law.

The Speaker and the President Pro Tempore do not, as they claim here, have comprehensive authority "to represent the interests of the General Assembly" however they see fit. ECF No. 52 at 5; *see also id.* at 6 (arguing that plaintiffs "are authorized under North Carolina law to litigate the institutional interests of the bodies they represent"); *id.* at 7 (arguing that plaintiffs "have the authority to represent, defend, and vindicate the institutional interests of the General Assembly"). The Speaker and the President Pro Tempore argue that the authorities supporting their power to defend the validity of state law stand for "the more general proposition . . . that North Carolina law authorizes the Speaker of the House and President Pro Tempore to represent the interests of the General Assembly." *Id.* at 9. But plaintiffs have cited nothing to support that "more general proposition." Their case against the Secretary is about alleged violations of federal law, not the validity of any provision of North Carolina law, and plaintiffs therefore have no authority to bring it on behalf of the General Assembly.

Nor may plaintiffs bring it on their own behalf as individual legislators. Plaintiffs invoke a line of Third Circuit cases holding that state legislators may sometimes defend their individual prerogatives, but they do not explain how such prerogatives could be threatened by the Secretary's alleged violations of federal law. ECF No. 52 at 10–11. Although plaintiffs assert that the "State Defendants seek to entirely circumvent the General Assembly," *id.* at 10, and that "the Governor and the North Carolina Department of Health and Human Services would usurp Plaintiffs' authority," *id.* at 11, threats posed by the State Defendants obviously cannot support plaintiffs' claims *against the Secretary*. Plaintiffs have no more authority to bring this suit on their own behalf than they do to press it on behalf of the General Assembly. Their claims against the Secretary must therefore be dismissed.

B. Even if plaintiffs had the authority to bring a claim, they have alleged no actual or imminent injury.

Plaintiffs' "complaint simply fails to allege facts upon which subject matter jurisdiction can be based."[3] To establish the "irreducible constitutional minimum" of Article III standing, a plaintiff must allege an injury that is "actual or imminent." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs argue that they have alleged an imminent injury by asserting that the Secretary "intend[s] to . . . accept[] Governor Cooper's . . . submission and expand[] North Carolina's Medicaid program." Compl. ¶ 27. Yet we know that no submission has been made or accepted, despite the expiration of the temporary restraining order more than three months ago. NC HHS has been free to submit a proposed state plan amendment since January 28, but has not done so. Perhaps it never will. It is difficult to see how the intention of the former Secretary to accept a hypothetical state plan amendment presents an imminent injury.

And even when plaintiffs filed suit, they offered no basis for their conclusion that the hypothetical state plan amendment was effectively pre-approved. Such "conclusory statements," under the *Iqbal*/*Twombly* standard, are not presumed to be true. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). Rather than accepting the conclusion that the Secretary intends to

[3] *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). In such cases, "all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration." *Id.*; *accord Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009). After *Twombly* and *Iqbal*, it is clear that a plaintiff cannot survive a 12(b)(6) motion on the basis of "'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)) (alterations in original). As all but one circuit to consider the question has recognized, this standard applies to 12(b)(1) motions with equal force. *See Silha v. ACT, Inc.*, 807 F.3d 169, 174 (7th Cir. 2015); *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243–44 (3rd Cir. 2012); *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011); *Román–Oliveras v. P.R. Elec. Power Auth.*, 655 F.3d 43, 45 n. 3, 49 (1st Cir. 2011); *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008); *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007). *But see Maya v. Centex Corp.*, 658 F.3d 1060, 1067–69 (9th Cir. 2011).

approve a future submission, the court must look to its factual basis, which is threadbare indeed. The only fact plaintiffs offer in support of their conclusion—the *former* Secretary's statement that HHS would "process the governor's proposal as expeditiously as possible when we get it," Compl. ¶ 27—does not raise the assertion to the level of plausibility. A statement of intent to act quickly, even if it were still operative, is not a commitment to act in favor of the applicant. Plaintiffs appear to believe that "I will act quickly" means "I will approve your submission." But when one pays for expedited processing—of a passport application, for example—she should not also expect guaranteed approval. Speed and substance are separate concerns.

And even if the court were to accept plaintiffs' faulty premise, it cannot ignore the fact that the Secretary who made the statement is no longer in a position to act—expeditiously or otherwise—on any proposed state plan amendment that NC HHS may eventually submit. Whether or not the former Secretary "intend[ed] to approve [North Carolina's proposed state plan amendment] before she le[ft] office on January 20, 2017," *id.*, she did not do so. Plaintiffs offer no basis to conclude that the current Secretary shares that alleged intent. At bottom, a single statement about expedited consideration by a former officeholder does not establish a live controversy over which this court can exercise subject matter jurisdiction.

II. Plaintiffs have failed to state a claim on which relief can be granted.

Plaintiffs' claims under the Medicaid statute and the APA are essentially made in the alternative: if they can be brought under the APA, then plaintiffs have no need to bring them directly under the statute. But to state a claim under the APA requires "final agency action," 5 U.S.C. § 704—that is, action which "signals the consummation of an agency's decisionmaking process and gives rise to legal rights or consequences." *COMSAT Corp. v. Nat'l Science Found.*, 190 F.3d 269, 274 (4th Cir. 1999) (citing *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

Neither physical receipt of a proposed state plan amendment nor review and consideration of that proposal is final agency action—and there has not been even that much activity with respect to the allegedly forthcoming proposal. So, as with their allegation of injury, plaintiffs' claim to final agency action depends entirely on their argument that the former Secretary "made crystal clear that [she] would approve [the] planned SPA," ECF No. 52 at 22, when she said that she would "process the governor's proposal . . . expeditiously," Compl. ¶ 27. For the reasons explained above, that conclusion simply does not follow: "process . . . expeditiously" does not imply "approve." It may indicate that the agency's decisionmaking process will be accelerated, but it does not "signal[] the consummation" of that process, nor "give[] rise to legal rights or consequences." *COMSAT*, 190 F.3d at 274. Because plaintiffs have failed to allege any final agency action, their APA claim must be dismissed.

Plaintiffs argue that, even so, they can maintain essentially identical claims under the Medicaid statute itself, relying on this court's equitable jurisdiction. But if plaintiffs wishing to challenge non-final agency action had easy recourse to judicial review outside of the APA, it would be simple enough to find the cases that took this path. Plaintiffs have not cited any. Instead, they rely on a single case, *Armstrong v. Exceptional Child Center, Inc.*, in which the Supreme Court made a general reference to "[t]he power of federal courts of equity to enjoin unlawful executive action." 135 S. Ct. 1378, 1385 (2015). *Armstrong* involved allegations that an Idaho agency had not set its Medicaid reimbursement rates in accordance with 42 U.S.C. § 1396a(a)(30)(A). Because the case was brought against a state agency, no APA claim was available; the Court held that equitable jurisdiction was foreclosed by the "sheer complexity associated with enforcing" the statutory provision and "the express provision of an administrative remedy" elsewhere in the statute. 135 S. Ct. at 1385.

Absent some other statutory right of action, when a federal agency is involved the APA provides the primary means of judicial review. The Fourth Circuit recognizes "a nonstatutory exception to the [APA] § 704 finality requirement in cases in which agencies act outside the scope of their delegated powers and contrary to 'clear and mandatory' statutory prohibitions." *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 233 (4th Cir. 2008) (discussing *Leedom v. Kyne*, 358 U.S. 184 (1958)). But that exception "is properly invoked only where the absence of federal court jurisdiction over an agency action 'would wholly deprive' the aggrieved party 'of a meaningful and adequate means of vindicating its statutory rights.'" *Id.* (quoting *Bd. of Governors, Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991)). Plaintiffs have not identified any route to judicial review apart from the APA and this "nonstatutory exception" to it, and they cannot satisfy the exception. First, a claim that the Secretary "*would* indeed act clearly beyond the bounds of [his] authority" in approving the proposed SPA, ECF No. 52 at 19 (emphasis added), is an admission that he has not yet done so. Agency action reviewed under this exception need not be final within the meaning of the APA, but there must be actual agency action for a court to review—not just potential action. *See MCorp*, 502 U.S. at 42–44.

And second, if plaintiffs had standing they would have "a meaningful and adequate means of vindicating" any "statutory rights" that they may have—they could file an APA suit as soon as an actual SPA was approved, alleging the violation of some federal statutory or constitutional provision, and seek emergency injunctive relief if they were genuinely facing irreparable harm. To the extent that plaintiffs' dispute is a simply a matter of North Carolina separation-of-powers law, as it appears to be, their state-law rights could likely be vindicated in state court at any time.

Because plaintiffs have not satisfied the "nonstatutory exception" to the APA's finality requirement, they cannot invoke this court's equitable jurisdiction and their claims under the Medicaid statute must be dismissed.

Finally, plaintiffs have not stated any plausible constitutional claims. The Tenth Amendment is not violated when the Secretary receives a proposed SPA and reviews it to determine whether it satisfies the statutory requirements for approval, which is what plaintiffs ask this court to enjoin him from doing. Plaintiffs argue that the Secretary has no authority to decide that NC HHS is empowered to submit a proposed state plan amendment, ECF No. 52 at 24, but it is not the Secretary who has done so; instead, the North Carolina General Assembly made that decision when it passed a law designating the North Carolina Department of Health and Human Services to make such submissions. N.C. Gen. Stat. § 108A-54(a), (b). Nor have plaintiffs stated a claim under the Guarantee Clause. Plaintiffs assert that the Secretary would offer North Carolina a prohibited "unavoidable command" were he to receive a Medicaid-expanding state plan amendment from NC HHS and consider it. ECF No. 52 at 26 (quoting *Virginia v. United States*, 74 F.3d 517, 524-25 (4th Cir. 1996), in turn quoting *New York v. United States*, 505 U.S. 144, 185 (1992)). But to receive and review a submission from a state agency (which the Secretary has not even done) is most certainly not to issue a command to the State. If the Guarantee Clause is ever justiciable, the mere threat that a federal agency will consider a submission voluntarily made by a branch of state government is not enough to trigger it. Plaintiffs' constitutional claims must also be dismissed.

Dated: May 12, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2017, I caused the foregoing document to be filed electronically with the Clerk of Court through the CM/ECF System for filing, and served on counsel registered to receive CM/ECF notifications in this case.

/s/ James Bickford
James Bickford