IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

NANSEMOND INDIAN NATION, a federally recognized Indian Tribe, *et al.*

Plaintiffs,

v.

COMMONWEALTH OF VIRGINIA, *et al*.

Defendants.

Civil Action No. 2:25-cv-00195

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS UNDER RULES 12(B)(1) AND 12(B)(6)

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INTRODUCTION

Plaintiffs are trying to reframe a dispute over Virginia's administration of the Medicaid program—as to which they lack any cause of action in federal court—into a conspiracy at the highest levels of the Commonwealth to violate their supposed federal rights. And Plaintiffs are trying to establish that they have a right to unfettered access to federal and state Medicaid dollars with no oversight by the administrator of those dollars: Virginia. Their theory of tribal hegemony is as dangerous as it is unprecedented. Tribal sovereignty cases deal with the scope of a tribe's ability to order its own affairs on its own land. Here, Fishing Point's complaints all relate to how Virginia is administering a federal and state spending program—Medicaid—that arises outside the tribe's operation of its own affairs. There is no right—for a tribe or otherwise—to receive federal and state dollars with no oversight by the lawful administrator of those dollars. Plaintiffs' claims should be dismissed.[1]

Plaintiffs fail to address the various defects in the Complaint identified in Defendants' Motion, including the preclusion of claims against various defendants for sovereign immunity and the lack of any clearly established federal rights. And their response concedes that they must withdraw their claims against the Commonwealth of Virginia, the Office of the Secretary of Health and Human Resources, and the Department of Medical Assistance Service. Plaintiffs also disclaim any challenge to Governor Youngkin's legislative activity.

None of Plaintiffs' high-level—and, at times, internally contradictory—grievances with the valid policy decisions made by Defendants warrants any relief. Beyond the fact that Plaintiffs still uniformly fail to establish that the causes of action under which they purport to sue exist, they

[1] There are processes to challenge Virginia's administration of Medicaid but they are administrative, not judicial. Fishing Point is availing itself of this process currently.

also fail to show that there is any enforceable right as to which they have standing. And even if there were such a right, they fall far short of establishing any alleged violation of those rights here were clearly established.

The Court should grant the Motion to Dismiss.

ARGUMENT

I. The Eleventh Amendment Bars Plaintiffs' Claims Against Defendants.

Plaintiffs have conceded that their claims against the Commonwealth, Office of the Secretary of Health and Human Resources ("OSHHR"), and the Department of Medical Assistance Services ("DMAS") should be withdrawn. Opp. Br. 3. In doing so, they are "narrowing the suit" and proceeding only against the individual defendants in the suit. *See id.* Therefore, the remaining claims against the individual defendants are addressed below.

A. Governor Youngkin remains an improper defendant in his official capacity.

Plaintiffs seek to bring suit against Governor Youngkin in his official capacity. But Plaintiffs do not dispute that *Ex parte Young* does not enable suit against a governor simply because governors have general authority over law enforcement in their state. Rather, Plaintiffs must show that Governor Younkin is somehow specifically responsible for enforcing Virginia's Medicaid program as it relates to them. *McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010) (citation omitted). But they fail to allege anything that, even credited factually, can make that showing.

To begin with, Plaintiffs concede that they are not challenging Governor Younkin's "act of signing of the budget itself." Opp Br. 6. They make this concession likely to avoid the absolute immunity attendant to that action. *See* ECF No. 27 at 11-12 (establishing Governor Youngkin's entitlement to legislative immunity).

Plaintiffs turn instead to the claim that Governor Younkin can remain in the suit due to his alleged "direct involvement in the implementation and enforcement of the challenged Medicaid

reimbursement scheme." Opp. Br. 5. Plaintiffs' principal support for this argument is the existence of a SharePoint folder labelled "Governor's Confidential Working Papers," which they contend shows Governor Youngkin's "ongoing executive direction in operationalizing the policy." Opp. Br. 6. But that sort of bare allegation of a document folder that allegedly contains the Governor's Confidential Working Papers does not mean that the Governor himself had a "special relation" or duty in regard to the enforcement of any challenged act. Nor does the Complaint allege anything more than an "impl[ication]" that the materials were prepared for the Governor's use. *See* Compl. ¶ 134. It does not allege that Governor Youngkin even saw the materials or relied on them in any way. *See id.* This sort of conjecture is not enough to clear the Rule 12(b)(6) standard. *Dance v. City of Richmond Police Dep't*, Case No. 3:09-CV-423-HEH, 2009 U.S. Dist. LEXIS 80389, at *14 (E.D. Va. Sep. 2, 2009) ("Conjecture and speculation are insufficient to satisfy the pleading requirements of Rule 12(b)(6).").

The *Ex parte Young* exception does not exist so that plaintiffs may sue everyone in the chain of command who they believe had a hand in a disagreeable policy decision. *See King v. Youngkin*, 122 F.4th 539, 548 (4th Cir. 2024); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001). *Ex Parte Young* is a narrow exception that allows plaintiffs to enjoin the official that is actually implementing the government action, 122 F.4th at 548, thereby giving complete relief. A court does not issue an injunction to enjoin a governor from "consult[ing] with agencies," as Plaintiffs now contend. Opp. Br. 6. It issues an injunction to enjoin the official responsible for the policy itself. *See Gilmore*, 252 F.3d at 331 (agreeing that the Governor should be dismissed as a party because he did not have "a specific duty to enforce the challenged statutes"). Merely being "the top official of the state's executive branch" is insufficient. *See id.*

B. Secretary Kelly is also improperly a defendant to this action.

Plaintiffs make no attempt to rebut the argument that sovereign immunity compels dismissal of Secretary Kelly as a defendant.[2] Like Governor Youngkin, she has only high-level oversight of Virginia's Medicaid program. *See* Compl. ¶ 364(c) (alleging that "Defendant Kelly, in his [sic] leadership role overseeing DMAS and the state's broader Medicaid program, directly participated in the decision to maintain the pended status of Fishing Point's claims and failed to take corrective action." (emphasis added)). Again, "general authority" does not suffice. *King*, 122 F.4th at 548.

II. Qualified Immunity Prevents Plaintiffs from Establishing any Claims Against the Individual Defendants in their Personal Capacities.

Throughout their opposition, Plaintiffs announce that the alleged violations at issue in this case were clearly established. Opp. Br. 28, 29. But Plaintiffs fail to identify a factually analogous case that establishes any relevant violation as being clearly established. As a rule, qualified immunity "shields [defendants] from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Reichle v. Howards*, 566 U.S. 658, 664 (2012). Determining the entitlement to qualified immunity entails "(1) identify[ing] the right allegedly violated, (2) consider[ing] whether at the time of the alleged violation the right was clearly established, and (3) determin[ing] whether a reasonable person in [the official's] position would have known that his actions would violate that right." *Love-Lane v. Martin*, 355 F.3d 766, 783 (4th Cir. 2004).

Here, Plaintiffs ignore that a "clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he or she is doing violates that right."

[2] Secretary Kelly was only named as a defendant in her official capacity.

Adams v. Ferguson, 884 F.3d 219, 226 (4th Cir. 2018) (cleaned up). Though courts "must identify the specific right the plaintiff alleges was infringed at a high level of particularity," *Atkinson v. Godfrey*, 100 F.4th 498, 505 (4th Cir. 2024) (internal citation omitted), Plaintiffs seek to try Defendants by arguing high-level principles. Opp. Br. 7 (declaring, without citation, Plaintiffs' opinion that any "official reasonably familiar with Medicaid" would not have taken the actions here); *id.* at 28-30 (discussing Plaintiffs' opinions of what any "official reasonably versed in Medicaid law would know").

Plaintiffs also rely on their self-described "extensive factual allegations" to show that any right was clearly established. *See* Opp. Br. 29. But for the right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate[,]" as "viewed with reference to the particular facts of the case." *Atkinson*, 100 F.4th at 505–06 (citations omitted). Plaintiffs fail to present any legal authority establishing their asserted rights as clearly established.

Nor do Plaintiffs give particularized attention to what the specific actions each defendant took that were allegedly clearly established as being unlawful. For example, Plaintiffs give scant attention to why the alleged violations committed by Governor Youngkin were clearly established. They instead, improperly, lump all the individual defendants together. Opp. Br. 28-30. Governor Youngkin is alleged to have permitted DMAS to draft state plan amendments ("SPAs") and authorized DMAS to pend reimbursement claims. Opp. 5-6. Yet Plaintiffs have not cited a case establishing that those actions violated any rights. *See generally* Opp. Br.

As to Director Roberts and Chief Deputy Lunardi, they are also entitled to qualified immunity because—as further described below and in Defendants' opening brief—none of the alleged violations (to the extent there are violations at all) were clearly established. *See D.C. v.*

Wesby, 583 U.S. 48, 63-64 (2018) ("courts must not 'define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced'").

In short, because "[n]either the Supreme Court, [the Fourth Circuit], the highest court of the state where the conduct occurred nor a consensus of other circuit courts of appeals have determined that conduct similar to that of the [Defendants]" violates federal rights, "the right[s] alleged to be violated w[ere] not clearly established." *Atkinson*, 100 F.4th at 501. Thus, the Court should dismiss Governor Youngkin, Director Roberts, and Chief Deputy Lunardi in their personal capacity based on qualified immunity.

III. Plaintiffs' Fail to State a Claim for Relief Under the Supremacy Clause.

A. The Supremacy Clause is not a cause of action.

Plaintiffs' response to Defendants' argument that there is no cause of action for a violation of the Supremacy Clause is to claim that Count I of the Complaint no longer says what it says.[3] Opp. Br. 7 (contending that Plaintiffs are "not su[ing] 'under' the Supremacy Clause"). They now claim to seek to proceed under the allegedly "long-standing equitable doctrine that permits federal courts to enjoin state laws preempted by federal law." *Id.* Yet four pages later, Plaintiffs also claim that "Count I adequately pled that Defendants' actions violate the Supremacy Clause." Opp. Br. 11. So, at this point, it is unclear whether Plaintiffs are claiming that they are suing under the Supremacy Clause, or not.[4]

[3] Count I of the Complaint is titled as a violation of the "Supremacy Clause" and it nowhere alleges any other cause of action. *See* Compl. pg. 97-106. Paragraph 304 of the Complaint even describes, without citation, Plaintiffs' understanding of what a "claim under the Supremacy Clause requires[.]" *Id.* ¶ 304.

[4] Defendants noted in their opening brief that Plaintiffs had failed to cite any state law that was in conflict with federal law. *See* ECF No. 27 at 15-17. Plaintiffs' opposition confirms that there is no offending state law as it nowhere attempts to identify any state law in conflict with the

If they are indeed proceeding under the Supremacy Clause, as the Complaint states, that is prohibited. "[T]he Supremacy Clause is not the source of any federal rights . . . and certainly does not create a cause of action." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-25 (2015) (internal quotations and citation omitted). Courts across the Fourth Circuit have adhered to that clear rule. For example, the plaintiff in *Kobe v. Buscemi* contended that "defendants' failure to comply with the requirements of the Medicaid Act violated the Supremacy Clause[.]" *Kobe v. Buscemi*, 821 F. App'x 180, 187 (4th Cir. 2020). But, citing *Armstrong*, the Fourth Circuit affirmed the trial court's rejection of that claim because there is no such cause of action. *See id.*

Plaintiffs also contend that trial courts have "full equitable jurisdiction" unless Congress has restricted that jurisdiction. Opp. Br. 9. That argument fairs no better than the attempt to bring a claim under the Supremacy Clause itself. Although equity may provide potential *relief*, it does not supply a cause of action. *See*, *e.g.*, *Hendrix v. Napolitano*, 77 F. Supp. 3d 188, 196 (D.D.C. 2015) ("Equitable relief, however, is a form of relief and not a cause of action.").

Plaintiffs also cite *Porter v. Warner Holding Co.* for the idea that courts "presume full equitable jurisdiction applies unless a statute expressly or by necessary implication restricts it." Opp. Br. 9 (citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 397 (1946)). Here, as *Armstrong* recognized, "the sole remedy Congress provided for a State's failure to comply with Medicaid's

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constitution or federal law. Instead, they point to actions of individuals, not an offending law. *See* Opp. Br. 11 ("Count I adequately pled that *Defendants' actions* violate the Supremacy Clause because *those actions directly* conflict with controlling federal law." (emphasis added)), *id.* at 12 (discussing Defendants' actions in "plac[ing] unlawful obstacles in the path of a federally recognized Tribal provider"). Plaintiffs cannot simultaneously contend there is a Supremacy Clause violation, but fail to point to what portion of the Code of Virginia, or the Virginia Administrative Code, offends federal law. *See* U.S. Const. Art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *see also Armstrong*, 575 U.S. at 324 (Courts "must not give effect to state laws that conflict with federal laws."). Thus, the Court should dismiss this claim.

requirements . . . is the withholding of Medicaid funds by the Secretary of Health and Human Services." *Armstrong*, 575 U.S. at 328. Accordingly, this Court does not have the equitable jurisdiction to provide another remedy for a state's noncompliance with Medicaid's requirements.

Plaintiffs also argue that *Air Evac EMS, Inc. v. Cheatham* establishes that the Fourth Circuit has "clarif[ied]" that "an implied Supremacy Clause cause of action [is] unnecessary" to award injunctive relief if "the claim rest[s] firmly on *Ex parte Young*'s established equitable principles." *See* Opp. Br. 10 (citing 910 F.3d 751 (4th Cir. 2018)). Contrary to Plaintiffs' briefing, *Air Evac* does not provide clarity on the procedural mechanism needed to bring claims relating to the Supremacy Clause. 910 F.3d 751. Nor does it consider, much less address, *Armstrong*'s rule that the "Supremacy Clause is not the source of any federal rights[.]" 575 U.S. at 324-25. And specifically, as to Medicaid, *Air Evac* did nothing to touch *Armstrong*'s determination about the methods of Medicaid enforcement against the states. The complexity of Medicaid, combined with § 1396c's already-established method of enforcement, meant that private enforcement was not recognized in *Armstrong*. Plaintiffs ignore all of that in inviting this Court to take on the role of a Medicaid administrator.

IV. The Interference with ISDEAA Contract Count Fails to State a Claim.

Count II of the Complaint is for interference with the Indian Self-Determination and Education Assistance Act ("ISDEAA") contract. *See* Compl. at pg. 106. But once again, Plaintiffs seek to amend their Complaint through their opposition brief by claiming their claim is actionable under 42 U.S.C. § 1983, Opp. Br. 13, even though they also seek to generate their own elements for what consists of a cause of action for interference with an ISDEAA claim. *See* Compl. ¶ 326.

Even if such a claim did exist (and it does not), it is without merit. To start, ISDEAA authorizes actions against the *federal* government for claims arising under the statute. *See* 25 U.S.C. § 5331(a). It does not authorize actions against state governments or state actors. *See*

Alexander v. Sandoval, 532 U.S. 275, 290 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."). Plaintiffs ignore this, Opp. Br. 13-15, but it dooms their claim here as all Defendants are state actors.

Moreover, Plaintiffs persist in contending that federal law "comprehensively regulates Tribal Health Programs," Opp. Br. 13-14, at the cost of ignoring how Medicaid is a program jointly run by federal and state governments. *See Wisconsin Dept. of Health and Fam. Services v. Blumer*, 534 U.S. 473, 495 (2002) ("The Medicaid statute . . . is designed to advance cooperative federalism. . . .When interpreting other statutes so structured, we have not been reluctant to leave a range of permissible choices to the States, at least where the superintending federal agency has concluded that such latitude is consistent with the statute's aims."); *Pharm. Rsch. & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 74 n.6 (1st Cir. 2001) ("Nor is the doctrine of 'field' preemption relevant, as Medicaid is a cooperative federal and state program."), *aff'd sub nom. Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003).

Plaintiffs rely on two cases to support this proposition. Opp. Br. 13 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *White Mt. Apache Tribe v. Bracker*, 448 U.S. 136 (1980)). But neither case mentions Medicaid at all, much less suggests that federal law "comprehensively" regulates Indian healthcare. *See Mescalero Apache Tribe*, 462 U.S. 324 (discussing hunting and fishing on an Indian reservation); *White Mt. Apache Tribe*, 448 U.S. 136 (discussing a logging company).

Nor does Plaintiffs' citation to *Blessing v. Freestone*, 520 U.S. 329 (1997) save Count II from dismissal. Opp. Br. 15. To start, *Blessing* relates to claims under Section 1983, while Count II seeks to proceed under ISDEAA. *Compare Blessing*, 520 U.S. at 340 (discussing Section 1983), *with* Compl. at pg. 106 (proceeding under ISDEAA). In any event, *Blessing* itself makes clear that

"to seek redress through § 1983 . . . a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing*, 520 U.S. at 340 (emphasis in original); *see also Planned Parenthood S. Atl. v. Kerr*, 95 F.4th 152, 156, 160 (4th Cir. 2024). And because Plaintiffs fail to establish the federal *right*, they cannot shoe-horn in a claim under ISDEAA—a federal *law*.

At bottom, Plaintiffs seek to improperly transform several federal *laws* into enforceable *rights*. Opp. Br. 13-15. And they do so by declaring in broad swathes that the provisions they seek to proceed under are federal rights, as *Blessing* would define the term, without undertaking the analysis needed for each. *See id.* Defendants have already explained why the provisions under which Plaintiffs seek to proceed do not support their claims. *See* Motion at 19-21, 25-29. Either way, Plaintiffs still fail to identify what the "conflicting state regulation" is. Opp. Br. 13. They do not identify a single provision of the Code of Virginia or Virginia Administrative Code that offends federal law. *See id.* at 13-15. There is none. *See* ECF No. 27 at 19-21.

V. The Infringement on Tribal Sovereignty Claim Cannot Proceed.

A. Plaintiffs' claim of tribal sovereignty is unmoored from any statute or case permitting it to move forward as a cause of action.

Plaintiffs defend their infringement on tribal sovereignty claim by pointing to "constitutional and federal law backdrop" and the "umbrella" of federal law. Opp. Br. 16-19. They even contend that "[o]ne need not find a specific statutory section to invoke this claim[.]" *Id.* at 17. Yet they cannot muster a single case in which any court anywhere in the United States has permitted such a claim to move forward. *See id.* at 16-19.

They ask this Court to provide a "holistic backstop." *Id.* at 19. But federal courts do not exist to operate as a "holistic backstop" whenever plaintiffs cannot identify a cause of action. Rather, "[t]o sue someone, you must have a cause of action." *Keen v. Helson*, 930 F.3d 799, 800 (6th Cir. 2019); *Cawthorn v. Amalfi*, 35 F.4th 245, 257 (4th Cir. 2022) ("it is the plaintiff—not the

defendant—who must have a cause of action to seek relief in federal court"). "And you only have a cause of action under a federal statute if the statute's text provides you one." *Helson*, 930 F.3d at 800. Plaintiffs effectively concede no such statutory text exists here, and therefore the claim should be dismissed for this reason alone.

B. The tribal sovereignty claim also fails because tribal sovereignty is not a blank check to disregard the laws and administration of the Medicaid program.

As best Defendants can discern, Plaintiffs claim that: (1) Defendants sought to "dictate" who Plaintiffs can serve at the threat of nonpayment and (2) "sought to impose state administrative controls." *See* Opp. Br. 17. The first contention fails because while 25 U.S.C. § 1680c(c)(2) allows tribes to decide to serve non-AI/AN beneficiaries, it does not require any particular reimbursement structure if tribes do so. Plaintiffs identify none. The second is even less tethered to the law because states are specifically empowered to administer Medicaid. *See* 42 U.S.C. § 1396a(a)(5) (requiring a state plan to "provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan"); *K.C. v. Shipman*, 716 F.3d 107, 112 (4th Cir. 2013) ("each state must 'provide for the establishment or designation of a single State agency to administer or to supervise the administration' of its Medicaid program"). Plaintiffs' position amounts to wanting Medicaid dollars but asserting that any administration of those dollars by Virginia is preempted. But that is not how Medicaid works, and it would lead to the highly irresponsible outcome where federal and state dollars are being committed to Plaintiffs with no ability to oversee whether Plaintiffs were appropriately utilizing those funds.

Tribal sovereignty is not a general license to preempt state regulation with which the tribe may disagree. This is particularly the case where federal law has granted the states authority to administer a federally funded program within their borders. Rather, tribal sovereignty means that "tribes retain sovereign interests in activities" on their reservations. *Nevada v. Hicks*, 533 U.S.

353, 392 (2001) (O'Connor, J., concurring in part and dissenting in part). And they retain an "inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members," *Montana v. United States*, 450 U.S. 544, 564 (1981).

Therefore, Count III fails to state a claim, and this Court should dismiss it.

VI. Plaintiffs' § 1983 Claim is not Actionable Against any Defendant.

A. *Parens patriae* does not confer standing on the Nation.

The Nation claims that it has standing to enforce 42 U.S.C. §§ 1396(a)(8) and 1396a(a)(23)(A) itself and as *parens patriae*. Opp. Br. 20-22. Not so. "The concept of *parens patriae* (translated 'the father of the country') gives a state standing to sue when the state seeks to protect a quasi-sovereign interest." *In re Edmond*, 934 F.2d 1304, 1310 (4th Cir. 1991). "The state must be more than a 'nominal party without a real interest of its own,' . . . it 'must articulate an interest apart from the interests of particular private parties[.]'" *Id.* at 1310. It stems from "the common-law concept of the 'royal prerogative.'" *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 600 (1982).

The Nation cannot invoke *parens patriae* to sue under Section 1983. "An Indian tribe 'may not sue under § 1983 to vindicate' a 'sovereign right,' such as its right to be free of state regulation and control." *Chemehuevi Indian Tribe v. McMahon*, 934 F.3d 1076, 1082 (9th Cir. 2019). "Nor can the Tribe assert its members' individual rights as parens patriae in a § 1983 action." *Id.* "To assert parens patriae standing, the Tribe would have to 'articulate an interest apart from the interests of particular private parties,' i.e., 'be more than a nominal party,' and 'express a quasi-sovereign interest.'" *Id.* "That requirement is inconsistent with a § 1983 action: quasi-sovereign interests are not individual rights." *Id.*; *see also* 6 Fed. Proc., L. Ed. § 11:300 ("neither a foreign nation nor an Native American tribe is a 'person' who can bring suit under Section 1983"). The

Supreme Court itself has prevented a tribe from suing under Section 1983. *Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 712 (2003). It did so after noting that "Section 1983 was designed to secure private rights against government encroachment[.]" *Id.*

Plaintiffs' allegations also fall short of invoking *parens patriae*. To start, their opposition is once again unmoored to the allegations in the Complaint. For example, in the Opposition, Plaintiffs' claim that "its members are being systematically denied access to medically necessary care[.]" *See* Opp. Br. 21.[5] But in the Complaint, Plaintiffs allege that they "continue to provide uninterrupted care to both AI/AN and non-AI/AN Medicaid patients[.]" Compl. ¶ 10. Either way, Plaintiffs plead themselves out of being able to bring a claim under *parens patriae* by acknowledging that they are trying to sue to "prevent harm to its citizens' collective welfare[.]" Opp. Br. 21. By doing so, they concede they are not suing to enforce any individual right actionable under Section 1983.

B. Plaintiffs fail to show other entitlement to sue or enforceable right.

Beyond the misplaced *parens patriae* contentions, no statute confers rights that Plaintiffs may enforce under Section 1983. Medicaid exists for the benefit of the sick and infirm, not healthcare providers. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 332 (2015) ("We doubt, to begin with, that providers are intended beneficiaries (as opposed to mere incidental beneficiaries) of the Medicaid agreement, which was concluded for the benefit of the infirm whom the providers were to serve, rather than for the benefit of the providers themselves."). And though Plaintiffs cite *Health and Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166 (2023) with

[5] Only three pages later, Plaintiffs appear to reverse course and say that there is only the "threat[]" of access being "cut off." Opp. 24.

frequency, that case does not stand for the proposition that Plaintiffs may sue for any of the claimed violations. Rather, it merely stands for the proposition that "federal statutes have the potential to create § 1983-enforceable rights" when "Congress has 'unambiguously conferred' 'individual rights upon a class of beneficiaries' to which the plaintiff belongs." *Id.* at 183. "Notably, it must be determined that 'Congress intended to create a federal right' *for* the identified class, not merely that the plaintiffs fall 'within the general zone of interest that the statute is intended to protect.'" *Id.* As further described below, Plaintiffs fail to establish that they have enforceable rights under Section 1983 for a multitude of reasons.

1. Plaintiffs have no § 1983 claim for "reasonable promptness."

Plaintiffs raise an issue with Defendants' handling of 42 U.S.C. § 1396a(a)(8). Opp. Br. 22-23. Section 1396a(a)(8) directs that a state plan "provide that all individuals wishing to make application for medical assistance . . . shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals." *Id.* Plaintiffs claim Defendants did not act with "reasonable promptness" under the statute by pending claims. *See id.*

But Plaintiffs cannot sue under this provision because it is meant to benefit individuals. *See St. Anthony Hosp. v. Whitehorn*, 132 F.4th 962, 973 (7th Cir. 2025); *see Virginia Hosp. & Healthcare Ass'n v. Roberts*, 671 F. Supp. 3d 633, 653 (E.D. Va. 2023) (no enforceable right when Medicaid "provisions are phrased in terms of beneficiaries, not providers"); *Prestera Ctr. for Mental Health Servs., Inc. v. Lawton*, 111 F. Supp. 2d 768, 775 (S.D. W.Va. 2000) ("Cases that have found § 1983 enforceable rights for Medicaid *beneficiaries* are clearly inapposite" in cases involving providers.).

Plaintiffs fail to show how Defendants' merely pending claims flouts this provision in any way. Opp. Br. 22-23. That failure not only underscores the deficiency of this claim but also Defendants' entitlement to qualified immunity.

2. Plaintiffs' claim for "Free Choice of Provider" seeks to generate a new right that does not exist and contravenes Plaintiffs' complaint.

Plaintiffs then challenge Defendants under 42 U.S.C. § 1396a(a)(23)(A). Opp. Br. 23-24. But, if anyone, § 1396a(a)(23)(A) confers rights on Medicaid beneficiaries. *See Kerr*, 95 F.4th at 160; *Doe v. Kidd*, 501 F.3d 348, 356-60 (4th Cir. 2007). That provision confers no rights on Plaintiffs, especially not one that is clearly established. *Virginia Hosp. & Healthcare Ass'n v. Roberts*, 671 F. Supp. 3d 633, 653 (E.D. Va. 2023).

Even still, Plaintiffs stop short of showing that any Medicaid beneficiary has been unable to choose Fishing Point to receive healthcare services. Opp. Br. 23-24. They pled in their Complaint that beneficiaries are receiving "uninterrupted care." Compl. ¶ 10. Plaintiffs are "bound by the allegations contained in [their] complaint and cannot, through the use of motion briefs, amend the complaint." *Zachair, Ltd. v. Driggs*, 965 F. Supp. 741, 748 n.4 (D. Md. 1997). Either way, rather than being patient-focused—like § 1396a(a)(23)(A) is—Plaintiffs focus on their own coffers. Opp. Br. 24 (discussing Fishing Point's finances).

3. Defendants met, and exceeded, all tribal consultation requirements.

Finally, Plaintiffs seek to generate an enforceable right to sue for allegedly failing to engage in tribal consultation. Opp. Br. 24-27. But Plaintiffs' response suffers from several errors.

First, Plaintiffs fail to cite a single case or statute establishing that the tribal consultation that Virginia did engage in was insufficient. Opp. Br. 24-27. In failing to do so, they have failed to show a violation that was clearly established at the time of violation.

Second, though Plaintiffs couch their argument in charged language, their own Complaint establishes that Defendants did all the consultation required of them. Plaintiffs had notice of DMAS's intent to seek SPAs. Compl. ¶ 4 (conceding that Defendants did communicate with Plaintiffs about policy decisions). And the exhibits to the Complaint are replete with evidence of

sufficient tribal consultation.[6] Even Plaintiffs' opposition seems to (perhaps inadvertently) concede these steps suggest tribal consultation. Opp. Br. 25 (arguing that "notice" and "comment periods" are required in tribal consultation).

How Plaintiffs can contend that both comment periods are required (which did occur) and that Defendants also acted "unilaterally" in providing a proposed SPA for comment is logically unsound. Opp. Br. 27. Nor do Plaintiffs explain how issuing a SPA for comment (which can necessarily be retracted upon consideration of those comments) also means that the decisions are "finalized and implemented[.]" *Id.* In any event, Plaintiffs fail to show how the process was insufficient—or how simply providing a proposed SPA for comment could cause "destabliz[ation] of clinic finances" or "administrative chaos." Opp. Br. 27.

Third, a requirement to engage in tribal *consultation* is different from a requirement to acquire tribal *approval*. *See* ECF No. 1-5. Plaintiffs conflate their disagreement with a potential policy choice as a deficient process. Opp. 24-27. But because they have neither shown an enforceable right to enforce their conception of tribal consultation, nor any case establishing that the process engaged in here was insufficient, this claim fails.

CONCLUSION

The Court should dismiss the Complaint with prejudice.

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[6] *See*, *e.g.*, ECF Nos. 1-32 (email from Chief Deputy Lunardi following up on a discussion with Fishing Point), 1-70 (March 24, 2025 letter to Plaintiffs about a proposed SPA amendment that "encourage[ed]" them to let DMAS "know if [they had] any comments or questions"), 1-58 (February 18, 2025 letter from DMAS extending the tribal comment period), 1-55 (December 20, 2024 letter from DMAS about a proposed SPA amendment, encouraging tribal engagement in the process), 1-54 (notice of the proposed SPA amendment that "specifically solitict[ed] input from stakeholders, providers, and beneficiaries, on the potential impact of the proposed changes discussed in [the] notice" along with giving the name, phone number and email of DMAS's policy division director).

Dated: June 6, 2025

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

VIRGINIA OFFICE OF THE SECRETARY OF HEALTH AND HUMAN RESOURCES

VIRGINIA DEPARTMENT OF MEDICAL ASSISTANCE SERVICES

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CERTIFICATE OF SERVICE

I certify that on this 6th day of June, 2025, a true and correct copy of the foregoing was served on all registered counsel of record via Notice of Electronic Filing through the Court's CM/ECF system.

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