NO. 427A16 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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ABRONS FAMILY PRACTICE AND URGENT CARE, P.A., NASH OB-GYN ASSOCIATES, P.A., HIGHLAND OBSTETRICAL-GYNECOLOGICAL CLINIC, P.A., CHILDREN'S HEALTH OF NORTH CAROLINA, P.A., CAPITAL NEPHROLOGY ASSOCIATES, P.A., HICKORY ALLERGY & ASTHMA CLINIC, P.A., and WESTSIDE OB-GYN CENTER, P.A., Individually and on Behalf of All Others Similarly Situated, Plaintiff-Appellees, v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES and COMPUTER SCIENCES CORPORATION, Defendant-Appellants.	)	From Wake County

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AMICI CURIAE BRIEF OF THE AMERICAN MEDICAL ASSOCIATION, THE NORTH CAROLINA ACADEMY OF FAMILY PHYSICIANS, THE NORTH CAROLINA HOSPITAL ASSOCIATION, THE NORTH CAROLINA HEALTH CARE FACILITIES ASSOCIATION, AND THE NORTH CAROLINA MEDICAL SOCIETY

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ABRONS FAMILY PRACTICE AND URGENT CARE, P.A., NASH OB-GYN ASSOCIATES, P.A., HIGHLAND OBSTETRICAL-GYNECOLOGICAL CLINIC, P.A., CHILDREN'S HEALTH OF NORTH CAROLINA, P.A., CAPITAL NEPHROLOGY ASSOCIATES, P.A., HICKORY ALLERGY & ASTHMA CLINIC, P.A., and WESTSIDE OB-GYN CENTER, P.A., Individually and on Behalf of All Others Similarly Situated,	)	From Wake County
Plaintiff-Appellees,	)	
v.	)	
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES and COMPUTER SCIENCES CORPORATION,	)	
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INTRODUCTION

The American Medical Association, North Carolina Academy of Family Physicians, North Carolina Hospital Association, North Carolina Health Care Facilities Association, and North Carolina Medical Society (collectively "Provider Associations") submit this amici curiae brief in support of Plaintiff Providers and in opposition to the efforts by the North Carolina Department of Health and Human Services ("DHHS") and its contractor, Computer Sciences Corporation ("CSC"), to evade judicial review of its colossal failure to implement a new Medicaid Management Information System ("MMIS"). This case matters not only to the Provider Associations' members—providers of health care services that serve Medicaid recipients—but also to the Medicaid recipients themselves and the federal and State taxpayers who fund the Medicaid program.

In this case, DHHS and CSC seek the extension of two doctrines—exhaustion of administrative remedies and sovereign immunity—beyond any existing North Carolina Supreme Court precedent. DHHS and CSC are attempting to use this case to preclude Medicaid providers from challenging a state agency and its contractors' failure to comply

with federal and State law and their development and implementation of a defective system to reimburse Medicaid providers. This state agency and its contractor have caused providers and the Medicaid system significant and ongoing damage.

Although this case presents several significant legal issues, the Provider Associations address two that are critical to Medicaid providers and the recipients they serve: (1) the inapplicability of the exhaustion of administrative remedies to the facts in this case, and (2) the waiver of sovereign immunity through DHHS's contracts with Medicaid providers.

A decision that results in the dismissal of Plaintiff Providers' claims would be devastating for Medicaid providers who have greatly suffered from the failed implementation of a new MMIS program and would leave them without meaningful recourse. If the Court reaches the result sought by DHHS and CSC, it would wreak havoc on all regulated entities subject to the powerful and sometimes arbitrary and unlawful force of state actions.

INTERESTS OF AMICI

The Amici Provider Associations represent hundreds of thousands of providers of Medicaid services throughout North Carolina and, in the case of the American Medical Association, the entire United States.

The American Medical Association ("AMA") is the largest professional association of physicians, residents, and medical students in the United States. AMA members practice in all states, including North Carolina, and all fields of medical specialization. The AMA was founded in 1847 to promote the science and betterment of public health. AMA members participate in the Medicaid program in every state.

The AMA submits this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition of the AMA and the medical societies of every state and the District of Columbia, formed to represent the views of organized medicine in the courts.

The North Carolina Academy of Family Physicians ("NCAFP") is a nonprofit professional association representing over 4,000 family physicians, family medicine residents, and medical students across

North Carolina. Founded in 1948, the NCAFP represents the state's largest medical specialty and is a constituent chapter of the American Academy of Family Physicians.

The mission of the NCAFP is to advance the specialty of family medicine in order to improve the health of patients, families, and communities in North Carolina. The majority of NCAFP's members participate in the North Carolina Medicaid Program.

The North Carolina Hospital Association ("NCHA") is a statewide trade association representing 130 hospitals and health systems in North Carolina. The NCHA is an advocate before the General Assembly, the courts, and executive agencies on issues of interest to hospitals and the patients they serve.

Virtually all of the NCHA's member hospitals participate in the Medicaid program and therefore interact with the NCTracks system. Although the NCHA and many of its members worked with DHHS to attempt to mitigate the massive claims billing and reimbursement issues associated with NCTracks, it has an interest on behalf of all hospitals and health systems in ensuring that the appropriate remedies

are available to all providers for these types of issues with the Medicaid program.

The North Carolina Health Care Facilities Association ("NCHCFA") is a not-for-profit trade association organized under the laws of North Carolina. NCHCFA represents more than ninety percent of the non-profit and proprietary skilled nursing facilities ("SNFs") throughout North Carolina. NCHCFA's members provide quality long-term and post-acute care to tens of thousands of North Carolinians. On a given day, over sixty percent of the patients in North Carolina's SNFs are receiving financial assistance from North Carolina's Medicaid program.

NCHCFA is committed to helping its member SNFs provide quality care and also to facilitating growth and innovation in long-term and post-acute care services in North Carolina. NCHCFA advocates on behalf of its members in many different forums regarding all aspects of long-term and post-acute care policy.

The North Carolina Medical Society ("NCMS") is a not-for-profit professional membership association organized under the laws of North Carolina since 1849. NCMS is the largest physician organization in

North Carolina, representing over 10,000 licensed physicians, physician assistants, medical interns and residents, medical students, and retired physicians. The philosophy and purpose of NCMS is to promote medical science, medical knowledge, and the highest standards of medical care in North Carolina.

NCMS unifies doctors across North Carolina in all specialties and work settings on issues related to, *inter alia*: the physician-patient relationship, health and insurance regulation, and patient safety. More specifically, NCMS and its member physicians devote significant advocacy resources to promote the efficient and sustainable operation of North Carolina's Medicaid and Health Choice programs. Since the launch of NCTracks in 2013, NCMS's direct advocacy efforts with Medicaid have centered on securing improvements for the new MMIS system and assisting physician members with the system's cumbersome credentialing, claims filing, and payment requirements.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE EXHAUSTION OF ADMINISTRATIVE REMEDIES DOCTRINE DOES NOT APPLY TO THIS CASE.

This Court has long recognized the judicial doctrine that a plaintiff must ordinarily exhaust available administrative remedies before seeking judicial intervention by the courts. *See, e.g.*, *Marion Mfg. Co. v. Bd. of Comm'rs of McDowell Cty.*, 189 N.C. 99, 126 S.E. 114, 116 (1925). Courts have also long found an exception to the judicially created exhaustion requirement when the administrative remedies would be futile or inadequate. *See, e.g.*, *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 222, 517 S.E.2d 406, 411 (1999). The North Carolina Court of Appeals has required a plaintiff to plead in its complaint the inadequacy and futility of administrative remedies. *See Huang v. N.C. State Univ.*, 107 N.C. App. 710, 715, 421 S.E.2d 812, 815 (1992) (citing *Snuggs v. Stanly Cty. Dep't of Pub. Health*, 310 N.C. 739, 740, 314 S.E.2d 528, 529 (1984)). Complying with this requirement, Plaintiff Providers have specifically pled the inadequacy and futility of administrative remedies in this case. (R pp 88–90)

DHHS and CSC challenge the Court of Appeals' examination of the adequacy of the administrative remedies. The Court of Appeals concluded on the record presented that the administrative remedies were inadequate. Because the Plaintiffs seek money damages, class certification, and a declaratory judgment that would apply to existing and future claims, the Court of Appeals correctly decided that the administrative remedies supposedly offered by DHHS would fail to provide the relief sought. (R pp 88–90)

Nevertheless, DHHS and CSC seek to impose an absolute exhaustion requirement by arguing that Plaintiffs must actually use the administrative remedies before pleading that they are inadequate and futile. Essentially, DHHS and CSC demand that the Providers attempt to go down the road that has a "dead end" sign before concluding that the road is actually a dead end.

A. As Concluded by the Court of Appeals, No Administrative Remedies Were Available to Plaintiff Providers.

Any analysis of the exhaustion doctrine must begin with a fair and accurate characterization of the claims made and the relief sought. Contrary to the dissenting opinion below and the DHHS's and CSC's

New Briefs, this case does not simply revolve on the denial of claims payment for Medicaid services rendered.

The named plaintiffs are eight medical practices that experienced serious and ongoing problems with the implementation of the new MMIS known as NCTracks, "inflicting millions of dollars in damages upon North Carolina's Medicaid providers." (R pp 52, 53) This "disaster" has resulted in providers suffering catastrophic losses, causing some providers to no longer accept Medicaid patients or even close their practices. (R p 53)

The plaintiffs are not merely seeking the reversal of a few denied or underpaid claims. Such relief would be insufficient to remedy the damage that has already occurred and the damage that is ongoing. Instead, plaintiffs seek "damages, declaratory relief, and injunctive relief arising out of Defendants' wrongful conduct." (R p 53) This wrongful conduct includes:

- CSC's negligent design, development, and implementation of NCTracks (R pp 61–64);
- CSC's failure to test the system before making it operational (R pp 69–71);
- DHHS's decision to "go live" before the system was ready (R pp 71–75); and

- DHHS's and CSC's operational deficiencies and negligent and reckless operation after the system went live (R pp 65–66, 75–78).

A careful reading of Plaintiffs' Amended Complaint shows that Defendants' wrongful actions were not limited to or even focused on claim denials or underpayments. Although some of the alleged unlawful and negligent conduct certainly led to improperly denied or underpaid claims for the individual Plaintiffs, it has also caused damage to the Plaintiffs' businesses, including losses associated with the time value of money and

> salaried employee time diverted to addressing the problems imposed by NCTracks; hiring of additional employees; additional wages and overtime paid for employees to contend with NCTracks; interest on loans taken to cover cash flow shortages due to non-payment of reimbursements; lost clinical time; lost profits for services they have been unable to perform; and similar harm to the Plaintiffs' businesses.

(R pp 79, 86)

DHHS and CSC also fail to acknowledge that Plaintiffs were not merely trying to recover damages caused to their businesses but also the harm suffered by putative class members. (R pp 79–87) The damage caused to the class of affected Medicaid providers includes

hundreds of providers and thousands of claims. Similarly, DHHS's application of an improper methodology to Medicare Crossover claims has caused underpayments on a systemic and ongoing basis. (R pp 80–81) Other subclasses include providers that were deprived of fees and incentive payments due to not being treated as a Pregnancy Medical Home, providers that were not reimbursed in compliance with the Affordable Care Act, and erroneous and arbitrary processing of reimbursement of certain injections and vaccines. (R pp 82–84) Another group of providers was not even able to submit claims because NCTracks has prevented the submission of patient consents and prior authorizations. (R pp 84–86) There is no administrative process for claims that could not be submitted.

DHHS and CSC also ignore the fact that the purported administrative remedies do not provide any relief to underpayments and payment denials on a prospective basis. If the Court accepted their argument, every time the provider was underpaid, it would have to bring an administrative appeal, which would likely cost more than the underpayment. (R p 89) DHHS and CSC would be able to continue to act unlawfully and negligently.

Providers have also had to unnecessarily pay re-credentialing fees on top of the underpayments, payment denials, and damages to their businesses. (R pp 86–87) There is no administrative process to appeal these incorrect fees.

In the Amended Complaint, Plaintiffs specifically plead the inadequacy and futility of administrative procedures, including:

- the lack of administrative procedures to compel DHHS and CSC to follow Medicaid reimbursement requirements;
- the lack of administrative procedures to award damages beyond the reimbursement denials and underpayments;
- the lack of administrative procedures to restore the improper re-credentialing fees;
- the lack of administrative procedures to compel NCTracks to even process claims or permit claims and supporting documentation to be submitted by providers; and
- the failure of DHHS to issue a final determination by DHHS in order to use any administrative remedy.

(R pp 88–90)

DHHS and CSC both rely upon the ability of providers to resubmit claims, submit a manual adjustment request, request reconsideration under 10A NCAC 22J, file a petition for contested case hearing in the Office of Administrative Hearings pursuant to N.C. Gen. Stat. § 150B-23, and submit a petition for declaratory ruling pursuant to N.C. Gen.

Stat. § 150B-4. Although some of these processes may be helpful to providers in isolated instances where a specific claim is denied or underpaid, none of these administrative procedures were available to providers to address the systemic and ongoing problems with NCTracks or to obtain the relief sought in the Amended Complaint.

As the Court of Appeals correctly concluded:

> [T]he trial court erred . . . by treating the Remittance Statement as notice of a final agency decision, by including a reconsideration review as a mandatory administrative review, by suggesting that a provider has the legal duty to ensure that DHHS complies with its own obligations, and by substituting an imprecise and subjective standard for the statutory and regulatory deadlines that apply to review of a final agency decision.

Abrons Family Practice & Urgent Care, PA v. N.C. Dep't of Health & Human Servs., 792 S.E.2d 528, 539 (N.C. Ct. App. 2016).

B. The Statutory Administrative Remedies Would Be Futile and Inadequate.

"The doctrine of exhaustion of administrative remedies . . . is, like most judicial doctrines, subject to numerous exceptions." *McKart v. United States,* 395 U.S. 185, 193 (1969); *see Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016). This Court has previously determined that the exhaustion requirement does not apply when the administrative

remedies are inadequate. *See Meads v. N.C. Dep't of Agric.,* 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998).

1. *A showing of futility only requires a well-pleaded complaint.*

DHHS and CSC's arguments rely upon this Court looking beyond the complaint so that it is "carefully scrutinized 'to ensure that the claim for relief [is] not inserted for the sole purpose of avoiding the exhaustion rule.'" *Jackson for Jackson v. N.C. Dep't of Human Res.,* 131 N.C. App. 179, 187, 505 S.E.2d 899, 904 (quoting *Huang v. N.C. State Univ.*, 107 N.C. App. 710, 715, 421 S.E.2d 812, 816 (1992)). Notably, this Court has never imposed such an overreaching analysis to complaints in which the futility or inadequacy of administrative remedies doctrine is specifically pled in the complaint.

In *Lloyd v. Babb*, 296 N.C. 416, 251 S.E.2d 843 (1979), this Court stated: "A pleading that alleges inadequacy of administrative remedy states a claim upon which equitable relief may be granted if the circumstances warrant it." *Id.* at 426–27, 251 S.E.2d at 851 (emphasis supplied). The Court should return to this pleadings standard and reject the Court of Appeals' efforts in cases like *Jackson* and *Huang* to

pierce the complaints and characterize claims to determine whether, in fact, administrative remedies would be adequate.

2. *Even if the complaint is "carefully scrutinized," the purportedly available administrative remedies would be futile and inadequate.*

As discussed above, Plaintiffs' complaint sets forth claims and seeks relief beyond the administrative remedies offered under the Administrative Procedure Act. These are not mere ways of avoiding the exhaustion remedies but legitimate and important issues that cannot be addressed through any administrative process.

First, Plaintiff Providers seek money damages, which an Administrative Law Judge has no authority to award. *See* N.C. Gen. Stat. § 150B-33. "[T]he doctrine does not apply where a plaintiff seeks damages and the administrative remedies are non-monetary in nature." *Philips v. Pitt Cty. Mem'l Hosp. Inc.*, 222 N.C. App. 511, 522, 731 S.E.2d 462, 470 (2012). Plaintiff Providers are not only seeking money for the denied or underpaid reimbursement claims; they are also seeking monetary damages for business loss, improperly paid fees, and the time value of money because of DHHS's and CSC's actions. (R pp 79, 86–87)

Plaintiff Providers also seek class certification and relief for a large number of providers and problems with the NCTracks system. (R pp 90–95) In *Lloyd*, this Court determined that the plaintiffs' claim for equitable relief could proceed in court because the available administrative remedy would have required the plaintiffs to individually challenge the voting rights of between 6,000 and 10,000 persons, and, therefore, would not provide an effective remedy. 296 N.C. at 426–27, 251 S.E.2d at 851.

Similarly, Plaintiff Providers here seek relief for past harm and ongoing damages for a large group of providers. In *Lloyd*, the Court noted that the administrative "challenge procedure might correct past wrongs by removing from the voting rolls those who had been improperly registered." The administrative process "could do nothing, however, to halt ongoing improprieties nor could it prevent future ones." *Id.* at 428, 251 S.E.2d at 852.

Plaintiff Providers also bring a constitutional claim in their Amended Complaint. "Because it is the province of the judiciary to make constitutional determinations, any effort made by [Plaintiffs] to have the constitutionality of the [Defendants' actions] determined by

the [Office of Administrative Hearings] would have been in vain." *Meads,* 349 N.C. at 670, 509 S.E.2d at 174.

Finally, Plaintiff Providers are seeking class certification. The Administrative Procedure Act does not contain any authority for class certification. *Cf.* N.C. Gen. Stat. Ch. 150B, Art. 3.

All of these claims and relief are beyond what any administrative remedy affords. The inadequacy of the administrative remedies is not speculative but is self-evident from a review of the Amended Complaint and the limited statutory authority under the Administrative Procedure Act. Accordingly, because of the inadequacy and futility of the administrative remedies, Plaintiff Providers were not required to pursue them before seeking judicial relief.

C. The Declaratory Judgment Sought in This Case Did Not Require Plaintiff Providers to First Seek a Petition for Declaratory Ruling.

The dissenting opinion below suggests that Plaintiff Providers should have first sought a declaratory ruling under N.C. Gen. Stat. § 150B-4 as an administrative remedy. This provision in the Administrative Procedure Act permits an aggrieved person to request "a declaratory ruling as to the validity of a rule or as to the applicability to

a given state of facts of a statute administered by the agency or of a rule or order of the agency." N.C. Gen. Stat. § 150B-4.

Plaintiff Providers' Amended Complaint does not challenge the validity of a rule or the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency. Plaintiff Providers seek a declaratory judgment that DHHS is violating federal Medicaid reimbursement rules. These rules are neither a "statute administered by [DHHS]" nor "a rule or order of [DHHS]." *Id.*

Although the declaratory ruling process under N.C. Gen. Stat. § 150B-4 may be a helpful way to challenge an agency's rule or its interpretation of its rule, this process is not applicable to Plaintiff Providers' case.

D. Only Statutory Administrative Remedies Require Exhaustion.

Most of the "administrative remedies" referenced by DHHS and CSC are not statutorily mandated and are therefore not subject to any exhaustion requirement.

This Court has recognized that, "as a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before

recourse may be had to the courts." *Presnell v. Pell*, 298 N.C. 715, 721 (1979) (emphasis supplied); *see Craig v. Faulkner*, 151 N.C. App. 581, 583 (2002). This Court has never recognized an exhaustion requirement for non-statutory administrative processes.[1]

However, Defendants primarily rely upon non-statutory administrative processes to attempt to evade judicial review. DHHS and CSC argue that Plaintiff Providers were required to resubmit claims, call the CSC Call Center, and request reconsideration reviews under 10A NCAC 22J before filing the complaint. The Trial Court based its dismissal on the Plaintiff Providers' failure to request reconsideration reviews under 10A NCAC 22J, which is a DHHS-created regulation.

An agency alone, however, cannot create administrative processes that must be exhausted. If the exhaustion doctrine were interpreted to include non-statutory administrative processes, it would create a perverse incentive for state agencies to create a byzantine

[1] Similarly, the United States Supreme Court has looked to the "paramount importance" of Congressional intent in determining whether a statute had imposed an administrative exhaustion requirement. *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 501 (1982); *see Darby v. Cisneros*, 509 U.S. 137, 144–45 (1993); *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992).

administrative review process. Rather than encouraging efficiency, it would encourage the opposite.

The only applicable administrative remedies created by the legislature are under the Administrative Procedure Act. As already established, the statutory administrative remedies are inadequate, futile, or inapplicable. Because they were not created by the legislature, all of the non-statutory processes (resubmission of claims, calls to the call center, adjustment requests, and reconsideration requests) have no bearing on the exhaustion requirement.

E. DHHS's Failure to Provide Appeal Rights Waives Any Exhaustion Defense.

The record shows that providers received no written instructions telling providers "how to resolve these issues other than the Remittance Statements, which instruct providers to log on to NCTracks (which doesn't have an appeal feature), to call the automated voice system, or to call the CSC Call Center." (R pp 365–66) The Remittance Statements do not provide any notice of administrative remedies. (R p 433) DHHS and CSC do not challenge these facts but instead argue that the administrative appeal rights are provided in the Provider Claims and Billing Assistance Guide.

As an initial matter, reference to an un-promulgated document violates State law. *See* N.C. Gen. Stat. §§ 150B-18, 150B-23(f). Moreover, even if the Billing Guide could somehow be incorporated without reference into the Remittance Statements, the Billing Guide states that reconsideration review can only be requested after "final adjudication of a payment denial." (R p 365) Thus, providers "have never received any written notice regarding DHHS's action on reimbursement claims that would indicate that such action is final." (R pp 365–66, 372, 386, 390)

The bedrock of administrative law is notice and the opportunity to be heard. *See Goldberg v. Kelly*, 397 U.S. 254, 261 (1970). The North Carolina Administrative Procedure Act is explicit that any notice of agency action "shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition." N.C. Gen. Stat. § 150B-23(f). Thus, even if DHHS and CSC could convince this Court that there was an administrative process available to providers and that providers should have been aware of it, the lack of adequate notice violates the Administrative Procedure Act. *See, e.g.*, *Orange County v.*

N.C. Dep't of Transp., 46 N.C. App. 350, 377, 265 S.E.2d 890, 908 (1980) ("While it is generally said that ignorance of the law is no excuse for a failure to comply with the law, such a rule does not apply where the citizen is, as a matter of practicality, denied a reasonable means for finding out what the law is in the first place.").

Ironically, DHHS and CSC demand that Plaintiff Providers first exhaust administrative remedies without providing them notice of these administrative remedies. The trial court excused DHHS's failure and imposed on Plaintiff Providers a requirement that they attempt to use administrative remedies before filing a complaint, even though there was no notice of these administrative remedies. Indeed, according to the trial court's own acknowledgement, the "Remittance Statements, regulations, and Billing Guide . . . create a very confusing and difficult process for providers to determine why claims have been denied and how to appeal denials." (R p 509)

DHHS and CSC seek this Court's adoption of the Supreme Court of Georgia's decision in *Georgia Department of Behavioral Health & Developmental Disabilities v. United Cerebral Palsy of Georgia., Inc.*, 298 Ga. 779, 784 S.E.2d 781 (2016). In this Georgia case, Medicaid

providers specifically challenged the Medicaid program's failure to provide adequate notice of changes. The Georgia court concluded that this defective-notice claim had to first be raised through the administrative appeals process. This case is easily distinguishable because Plaintiff Providers' claims are not merely based on defective notices.

DHHS suggests that, even when notice is not provided, exhaustion is required in North Carolina, citing *Edward Valves, Inc. v. Wake County*, 343 N.C. 426, 435, 471 S.E.2d 342, 347 (1996); *Copper ex rel. Copper v. Denlinger*, 363 N.C. 784, 788, 688 S.E.2d 426, 428 (2010). *Copper* and *Edward Valves, Inc.* involve procedural due process and substantive due process claims respectively.[2]

In this case, Plaintiff Providers do not raise procedural or substantive due process claims. Their grievances center on the NCTracks "disaster" that has caused and is causing damages to their medical practices and the Medicaid recipients they treat.

The Court of Appeals in this case found that Plaintiff Providers were not required to exhaust administrative remedies for which DHHS

[2] *Edward Valves* held that administrative remedies are not required to be exhausted when asserting a substantive due process claim.

had failed to provide notice of any appeal rights. *Abrons*, 792 S.E.2d at 534. It did not state that their procedural due process claims could proceed without exhaustion of administrative remedies. The policy rationale behind the Court of Appeals' decision is important and obvious: if a state agency wants to enforce the exhaustion of administrative remedies before judicial review, it must provide notice of such administrative remedies.

If a state agency is permitted to raise an exhaustion defense when it failed to provide any notice of administrative appeal rights, the state agencies will take advantage of the following playbook: *Make arbitrary decisions. Don't tell aggrieved parties how to challenge those decisions. When people hurt by an agency challenge the agency in court, tell those people that they needed to challenge those decisions through an administrative process. When they try to go back and use that administrative process, tell them it is too late or that they cannot get the relief they seek. In short, frustrate people into submission.*

To avoid this unfair and inefficient result, this Court should reject the holding of the Court of Appeals' decision in *Jackson for Jackson v. N.C. Dep't of Human Res.*, 131 N.C. App. 179, 505 S.E.2d 899 (1998). In

that case, plaintiff argued that defendants "did not provide plaintiff with information with respect to administrative remedies during the period in which [a Medicaid recipient] was being denied care." *Id.* at 183, 505 S.E.2d at 902. Despite the lack of notice, the Court of Appeals required that the Medicaid recipient exhaust administrative remedies. *Id.* at 185–86, 505 S.E.2d at 903.

Instead, this Court should reach the same result it reached in *Davidson County v. City of High Point*, 321 N.C. 252, 362 S.E.2d 553 (1987). In that case, Davidson County argued that the courts were without jurisdiction because the City of High Point had failed to pursue administrative remedies. *Id.* at 260, 362 S.E.2d at 558. At the time, the County had not provided notice of any administrative remedies or even informed them of the problem. *Id.*, 362 S.E.2d at 558. This Court concluded: "The County cannot now be heard to assert that the City should have pursued administrative remedies for a problem it was unaware existed." *Id.*, 362 S.E.2d at 558. DHHS and CSC could not even tell providers what the administrative remedies were. (R pp 409–14) Similarly, Plaintiff Providers should not be required to pursue

administrative remedies that Plaintiff Providers were not even aware existed.

F. The Rationale Behind the Exhaustion Doctrine Is Not Present in This Case.

At its core, the exhaustion doctrine is about efficiency. Grafting DHHS's "try it before you plead it" imposition on to the already demanding exhaustion doctrine would lead to inefficiency, not efficiency. State agencies and the challenging parties would be forced to go through a futile administrative process before determining that the only way to obtain the relief sought is to go to court.

Another policy rationale behind the exhaustion doctrine is to permit the administrative agencies to apply their purported expertise to the facts at hand and develop a record for further judicial review. The claims in this case would not benefit from such development.

DHHS all but admits this by failing to provide notice of any administrative rights to actually bring the claims set forth in the complaint. DHHS's failure to provide notice of administrative appeal rights is contrary to the Administrative Procedure Act on which DHHS relies for its exhaustion defense and should be fatal to that defense. If the exhaustion doctrine is meant to encourage parties to first seek

administrative review before petitioning the courts, then state agencies must be similarly required to notify affected entities of their right to administrative review. Otherwise, agencies will have a perverse incentive to fail to provide notice of administrative appeal rights, inducing aggrieved parties to go directly to court—and then swooping in with the exhaustion defense. If the Court truly wants to encourage the use of administrative remedies, then the starting point must be a requirement that agencies notify affected persons of those administrative remedies to be able to use the exhaustion doctrine as a defense.

II. THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES WAIVED SOVEREIGN IMMUNITY WHEN IT ENTERED INTO CONTRACTS WITH PLAINTIFF PROVIDERS.

DHHS argued to the trial court that it is immune from this lawsuit because it is sovereign. The trial court and the Court of Appeals both chose not to address this issue. This Court appropriately decided to review the sovereign immunity issue.

This Court should reject DHHS's argument that sovereign immunity bars this suit. The Provider Participation Agreements are contracts and therefore waive sovereign immunity. DHHS's argument

is contrary to legal precedent, its co-defendants' position in this case, and DHHS's own position in other cases. This case presents an important opportunity for this Court to confirm, once and for all, that the Provider Participation Agreements are contracts and therefore outside sovereign immunity.

A. Sovereign Immunity is Waived When the State Enters into Contracts.

It is well settled in North Carolina that the State or its agencies waive sovereign immunity by entering into a contract. *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423–24 (1976); *see also Ferrell v. Dep't. of Transp.*, 334 N.C. 650, 654, 435 S.E.2d 309, 312–13 (1993); *Carl v. State*, 192 N.C. App. 544, 550, 665 S.E.2d 787, 793 (2008).

A contract need not contain magic words or particular language for a state to waive its defense of sovereign immunity. Rather, a waiver of sovereign immunity is implied when a state or its agency enters into a valid contract. *See Whitfield v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414 (1998); *Smith*, 289 N.C. at 313–14, 222 S.E.2d at 420–21; *Welch Contracting, Inc. v. N.C. Dep't of Transp.*, 175 N.C. App. 45, 51, 622 S.E.2d 691, 695 (2005). When a State waives its sovereign immunity by contracting with a private entity "it occupies the same

position as any other litigant, and a plaintiff has the same right that he would have to sue as an ordinary person." *Carl*, 192 N.C. App. at 550, 665 S.E.2d at 793 (citing *Lyon & Sons, Inc. v. N.C. State Bd. of Educ.*, 238 N.C. 24, 27–28, 76 S.E.2d 553, 556 (1953)).

"With respect to a motion to dismiss based on sovereign immunity, the question is whether the complaint specifically allege[s] a waiver of governmental immunity." *Sanders v. State Personnel Comm'n*, 183 N.C. App. 15, 19, 644 S.E.2d 10, 13 (2007) (quotation omitted) (emphasis supplied). Here, the complaint alleges and CSC confirms that DHHS entered into contracts with Plaintiff Providers by executing the Provider Participation Agreements. (R pp 96, 108) By entering into these Agreements, DHHS waived sovereign immunity as to all matters concerning these Agreements. (R pp 96–97)

B. Provider Participation Agreements Are Contracts.

DHHS's only argument in favor of maintaining sovereign immunity is that the Provider Participation Agreements are not contracts. DHHS's position is contradicted by the four corners of the Agreements, CSC's position in this case, and DHHS's own enforcement of these Agreements.

1. *The Medicaid Participation Agreement, on its face, is a contract.*

In an attempt to defeat Plaintiff Providers' pleading that DHHS waived its immunity through contract, DHHS argues that the relationship between the parties is "one created solely by federal and State statutes," and not by contract. This argument must fail because the relationship between Plaintiff Providers and DHHS was created by the execution of the Provider Participation Agreements. If Plaintiff Providers had not entered into these Agreements with DHHS, Plaintiff Providers would have no right to participate in the Medicaid program as a provider of Medicaid services or be reimbursed for Medicaid services. *See* 10A NCAC 22N.0102 ("[E]ach provider shall sign a participation agreement with the Division of Medical Assistance and shall not be reimbursed for services rendered prior to the effective date of the participation agreement."). Thus, providers who do not execute a Medicaid Participation Agreement cannot be reimbursed for services provided to Medicaid eligible individuals.

As a corollary, DHHS cannot enforce any of the mandates under the Medicaid Participation Agreement or even the requirements of federal or State Medicaid law or regulation if a provider has not entered

into a Medicaid Participation Agreement. In short, but for the execution of the Agreement, DHHS has no more authority to require a provider to render Medicaid services than it does to someone walking down the street.

The Provider Participation Agreements contain all of the features a court would expect to see in a contract. The Agreements are described as being "entered into between" DHHS and an individual provider. (R p 114) The Agreements reference "breach" and "lawsuits" involving this agreement. (R pp 114–15) The Agreements include termination provisions, assignment clauses, a release of liability, waiver, survival provision, an effective date, and a savings clause.[3] (R pp 114–21)

Moreover, the North Carolina Supreme Court has determined that "it is a well recognized principle of law in North Carolina that the laws in force at the time of the execution of a contract become part of the contract." *Wise v. Harrington Grove Community Ass'n*, 357 N.C. 396, 406, 584 S.E.2d 731, 739 (2003) (citing *Pike v. Wachovia Bank & Tr. Co.*, 274 N.C. 1, 16, 161 S.E.2d 453, 465 (1968). Parties are thus,

[3] The savings clause makes clear that even if the Provider Participation Agreements contain provisions that are contrary to federal or State law, the rest of the Agreement remains enforceable. (R p 121)

"presumed to contract in reference to the existing laws; indeed, they are presumed to have in mind all the existing laws relating to the contract." *Poole & Kent Corporation v. C.E. Thurston & Sons, Inc*., 286 N.C. 121, 129, 209 S.E.2d 450, 455 (1974). Thus, DHHS is required to abide by federal and State Medicaid statutes and regulations as a part of their contractual obligation to Plaintiff Providers. The Amended Complaint alleges DHHS failed to do so, and thus DHHS breached the contract.

DHHS's argument that its relationship with Plaintiff Providers is based in statute and not contract must fail. The Medicaid Participation Agreement is a contract and, by executing such an agreement, DHHS waived sovereign immunity.

2. *Several courts have previously held that the Provider Participation Agreements are contracts.*

Many courts have already held that the Medicaid Participation Agreement is a contract. *See State v. Beatty*, 64 N.C. App. 511, 513, 308 S.E.2d 65, 66 (1983); *Pearson v. C.P. Buckner Steel Erection Co.*, 126 N.C. App. 745, 754, 486 S.E.2d 723, 729 (1997) (Wynn, J., concurring); *Briarcliff Haven, Inc. v. Dep't of Human Res. of Ga.*, 403 F. Supp. 1355, 1358 (N.D. Ga. 1975); *Bel Air Assoc. v. N.H. Dep't of Health & Human Servs.*, 960 A.2d 707, 710–11 (N.H. 2008).

Despite these holdings, DHHS continues to raise the shield of sovereign immunity as a way of avoiding liability for its breaches or at least as a way of delaying such liability. By couching the argument as one under "sovereign immunity," DHHS has often been permitted to immediately appeal any denial of a motion to dismiss, thus delaying courts from reaching the merits. That is why it is important for this Court to unambiguously conclude that the Provider Participation Agreements waive DHHS's sovereign immunity, and Medicaid providers can sue DHHS for breaches of these contracts.

3. *DHHS's own contractor recognizes that the Provider Participation Agreements are contracts.*

CSC—DHHS's own contractor—recognizes the contractual relationship between DHHS and Medicaid providers, including Plaintiffs. Specifically, CSC's economic loss rule argument depends on CSC asserting that the relationship between DHHS and providers is "contractual in nature." CSC's New Br. 30. CSC's position is at odds with DHHS's position on sovereign immunity and characterization of the Provider Participation Agreement as something other than a contract.

4. *DHHS enforces Provider Participation Agreements as contracts.*

Most alarmingly, contrary to the position DHHS takes in this case, DHHS regularly treats Provider Participation Agreements as contracts and enforces its contractual provisions against providers for any alleged breach. *See, e.g.*, *Powell's Med. Facility v. N.C. Dep't of Health & Human Servs.*, No. COA13–166, 2013 WL 5962917 (N.C. Ct. App. Nov. 5, 2013) (unpublished); *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Dep't of Health & Human Servs.*, 201 N.C. App. 70, 79, 685 S.E.2d 562, 569 (2009). Conveniently, DHHS treats the Provider Participation

Agreements as contracts when they can be used to enforcement contract provisions, but, in cases like this one, DHHS abandons the Provider Participation Agreements and seeks the cloak of sovereign immunity. DHHS cannot have it both ways.

CONCLUSION

For the foregoing reasons and based on such reasoning, this Court should affirm the Court of Appeals' decision as to the exhaustion of administrative remedies, conclude that DHHS has waived sovereign immunity by entering into Provider Participation Agreements with Plaintiff Providers, and remand the case for entry of an order consistent with such conclusions.

This the 26th day of May 2017.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date filed and served a copy of the foregoing **AMICI CURIAE BRIEF OF THE AMERICAN MEDICAL ASSOCIATION, NORTH CAROLINA ACADEMY OF FAMILY PHYSICIANS, NORTH CAROLINA HOSPITAL ASSOCIATION, NORTH CAROLINA HEALTH CARE FACILITIES ASSOCIATION, AND NORTH CAROLINA MEDICAL SOCIETY** upon the parties and counsel of record by email addressed as follows:

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