

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT**

CONNECTICUT ASSOCIATION	:	
OF HEALTH CARE FACILITIES, INC.,	:	
	:	
Plaintiff,	:	CASE NO. 3:10-CV-136 (PCD)
	:	
v.	:	June 10, 2010
	:	
MICHAEL P. STARKOWSKI, in his official	:	<b>COURT ACTION REQUESTED</b>
capacity as Commissioner of Social Services,	:	<b>PRIOR TO JUNE 15, 2010</b>
	:	
Defendant.	:	

**PLAINTIFF’S EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL**

Pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, Plaintiff Connecticut Association of Health Care Facilities, Inc. (“CAHCF”) respectfully moves for an injunction pending CAHCF’s appeal from this Court’s ruling entered on June 3, 2010, which denied CAHCF’s Motion for a Preliminary Injunction. As explained more fully by the memorandum of law filed in support of this motion, the unique circumstances presented by this case satisfy the four-factor test for granting such relief. CAHCF has styled this pleading as an “emergency” motion because, without a court order granting an injunction pending appeal, most Medicaid-participating nursing facilities in Connecticut will continue to receive Medicaid payments that are, as this Court expressly acknowledged, substantially below the actual cost of providing care. Because the Eleventh Amendment would preclude this Court from awarding CAHCF’s members retrospective money damages in the event the United States Court of Appeals for the Second Circuit reverses this Court’s decision denying CAHCF’s Motion for a Preliminary Injunction, CAHCF members continue to face the threat of substantial irreparable harm.

The Federal Rules of Appellate Procedure provide that a party “must ordinarily move first in the district court” for an order “granting an injunction while an appeal is pending.” Fed. R.

**ORAL ARGUMENT NOT REQUESTED**

App. P. 8(a). Therefore, CAHCF has complied with Rule 8(a) by first asking this Court to enter an injunction pending appeal prior to seeking such relief from the Second Circuit. Given the time-sensitivity of this matter, CAHCF respectfully requests that the Court rule on this motion prior to June 15, 2010. On June 9, 2010, CAHCF informed opposing counsel of CAHCF's intent to file this emergency motion asking for a ruling prior to June 15, 2010.

WHEREFORE, CAHCF requests that the Court enter an order in the form attached hereto, which enjoins Defendant Michael P. Starkowski and his agents from implementing section 32 of Public Act 09-5 during the pendency of CAHCF's appeal to the Second Circuit.

Dated: June 10, 2010

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 10, 2010, a copy of Plaintiff's Emergency Motion for an Injunction Pending Appeal and the Memorandum of Law in Support of Plaintiff's Emergency Motion for an Injunction Pending Appeal were filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Malcolm J. Harkins III  
Malcolm J. Harkins III (phv03822)  
PROSKAUER ROSE LLP

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Defendant.	:	

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S  
EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL**

Plaintiff Connecticut Association of Health Care Facilities, Inc. (“CAHCF”) respectfully submits this Memorandum of Law in Support of Plaintiff’s Emergency Motion for an Injunction Pending Appeal. Because of the time-sensitivity of this matter and the fact that the Court is already familiar with this litigation, CAHCF will not burden the Court with a lengthy recitation of this case’s procedural background. Of relevance here, the Court denied CAHCF’s Motion for a Preliminary Injunction in an opinion issued on June 3, 2010. *See Conn. Ass’n of Health Care Facilities, Inc. v. Rell*, No. 3:10-cv-136 (PCD), 2010 WL 2232693 (D. Conn. June 3, 2010) (“*CAHCF I*”). That motion was based on the assertion made by CAHCF and its *amici curiae* that Connecticut’s payment system for Medicaid-participating nursing facilities, as amended by section 32 of Public Act 09-5, conflicts with the requirements of 42 U.S.C. § 1396a(a)(30)(A). Section 1396a(a)(30)(A) provides that States must “assure that [Medicaid] payments are consistent with efficiency, economy, and quality of care,” among other things.

CAHCF has filed an interlocutory appeal of this Court’s ruling pursuant to 28 U.S.C. § 1292(a)(1) and will prosecute that appeal as expeditiously as possible. The Federal Rules of

Appellate Procedure provide that a party “must ordinarily move first in the district court” for an order “granting an injunction while an appeal is pending,” unless doing so would be “impracticable.” Fed. R. App. P. 8(a). Therefore, prior to seeking interim relief from the Second Circuit, CAHCF has complied with Rule 8(a) by first asking this Court to enter an injunction pending appeal.

## **ARGUMENT**

Rule 62(c) of the Federal Rules of Civil Procedure provides that when an appeal is taken from an interlocutory order denying an injunction, “the court in its discretion may . . . grant an injunction during the pendency of the appeal on terms for bond or other terms that secure the opposing party’s rights.” Courts consider four factors when deciding whether to grant an injunction pending appeal: (1) whether the movant will suffer irreparable harm absent an injunction; (2) whether a party will suffer substantial injury if an injunction is issued; (3) “whether the movant has demonstrated ‘a substantial possibility, although less than a likelihood, of success’ on appeal”; and (4) “the public interests that may be affected.” *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994) (quoting *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1993)). These factors are applied on a sliding scale. For example, the necessary “level” or “degree” of possibility of success will vary according to the Court’s assessment of the other factors. *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (citing *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

### **I. CAHCF’S MEMBERS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION PENDING APPEAL**

The issue of irreparable harm has already been thoroughly addressed by the parties’ briefing on CAHCF’s Motion for a Preliminary Injunction. In short, the law of this Circuit provides that where, as here, the Eleventh Amendment precludes a federal court from awarding retroac-

tive money damages should the movant ultimately succeed on the merits of its legal claims, the risk of pecuniary harm to the movant constitutes irreparable harm. *See* Pl.’s Mem. at 37-39 [Doc. No. 15-2] (discussing *United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1983) (per curiam)); Pl.’s Consolidated Reply & Opp’n at 2, 35 [Doc. No. 49] (same).

In seeking a preliminary injunction, CAHCF used a sample of seven member-facilities to illustrate that many CAHCF members have suffered and will continue to suffer irreparable harm because: (1) section 32 causes most Medicaid-participating nursing facilities to be paid by Medicaid substantially less than the cost of providing services; and (2) the Eleventh Amendment precludes this Court from awarding those facilities retroactive money damages should the Court ultimately conclude that section 32 is null and void because it conflicts with § 1396a(a)(30)(A). In addition, the unchallenged expert testimony submitted by CAHCF demonstrated that, even for the 116 nursing facilities in Connecticut whose Medicaid-allowable costs are at or below the median of all providers—the State’s own historical standard for judging “efficiency”—section 32 causes 81 percent to be paid less than their Medicaid-allowable costs. Lubarsky Decl. ¶ 33 (Pl.’s App. 4:879a); *see also CAHCF I*, 2010 WL 2232693, at \*11 (observing that CAHCF’s “strongest argument is that even according to the state’s own calculations, the new reimbursement rates are significantly lower than costs”).

Accordingly, CAHCF’s members have suffered and will continue to suffer irreparable harm in the absence of an injunction pending appeal. *See, e.g., Conn. Hosp. Ass’n v. O’Neill*, 863 F. Supp. 59, 61 (D. Conn. 1994) (finding that, where the “gap between plaintiffs’ Medicaid costs and the state’s reimbursement continues to widen at an alarming rate,” the plaintiff-hospitals were faced with the threat of irreparable harm because “the Eleventh Amendment bars retrospective monetary relief”).

**II. IN COMPARISON TO THE IRREPARABLE HARM THAT HAS BEEN AND WILL CONTINUE TO BE SUFFERED BY CAHCF MEMBERS, THE STATE WILL NOT SUFFER ANY IRREPARABLE HARM IF THE COURT ISSUES AN INJUNCTION PENDING APPEAL**

In the context of this motion, the balance of hardships favors CAHCF and its members. If the Court denies the requested injunction and the Second Circuit ultimately reverses this Court's decision denying CAHCF's Motion for a Preliminary Injunction, CAHCF members will have no meaningful recourse with respect to past payments that should have been made by the State. In contrast, if the Court grants the requested injunction and the Second Circuit ultimately affirms this Court's decision denying CAHCF's Motion for a Preliminary Injunction, state officials can recoup any additional amounts that were paid to CAHCF members during the pendency of CAHCF's appeal by simply withholding those amounts from future Medicaid payments. *See* Conn. Agencies Regs. § 17-311-53(d) ("Whenever a facility has received past Medicaid overpayments, the department may recoup the amount of such Medicaid overpayments from the monthly Medicaid payments to the facility regardless of any intervening change in ownership."); *Conn. Hosp. Ass'n v. O'Neill*, 891 F. Supp. 693, 694 (D. Conn. 1995) (describing Connecticut Medicaid officials' recoupment of excess amounts from hospitals' future Medicaid payments following appellate decision overturning preliminary injunction entered by this Court).

The imposition of an injunction pending appeal would not substantially injure the State. As the Superior Court for the Judicial District of Hartford explained earlier this year after it struck down other portions of Public Act 09-5:

The court does not find any risk of irreparable harm to [Commissioner Starkowski] if it does not order a stay [pending appeal]. The budgetary process is a complex vehicle, and it is not clear that other DSS programs would be affected. *See* Affidavit of Representative Toni E. Walker, co-chair of the Human Services Committee and member of the Appropriations Committee of the General Assembly ("When DSS actual program expenditures exceed allocated funds, the DSS does not automatically reduce services or benefits in other programs that it admin-

isters.”). As stated by Rep. Walker, “[t]here are a variety of administrative and legislative procedures to address the effects of expenditures by state agencies in excess of budgeted amounts” in addition to the alteration of DSS programs. In fact, Rep. Walker also explained that “[t]he DSS actual program expenditures frequently exceed budget predictions and funds allocated in the state budget.”

*Pham v. Starkowski*, No. HHD-CV09-5034410-S, slip op. at 4-5 (Conn. Super. Ct. Hartford Jan. 8, 2010) (copy attached as Exhibit A). Accordingly, this factor also counsels in favor of an injunction pending appeal.

### **III. CAHCF POSSESSES A SUBSTANTIAL POSSIBILITY OF SUCCESS ON APPEAL**

In addressing the likelihood-of-success element in the context of deciding a motion for an injunction pending appeal, a district court must be “mindful of the difficulty inherent in assessing the correctness of its own ruling.” *Bridgeport Guardians, Inc. v. Delmonte*, 620 F. Supp. 2d 337, 341 (D. Conn. 2009). “A court that is called on to evaluate the correctness of its own ruling in order to properly weigh this factor is of course at some disadvantage, and one way to counteract its diminished detachment is to ‘turn to external, preferably objective, indicia of the accuracy of’ the earlier determination.” *Id.* at 339 (quoting *Hayes v. City Univ. of N.Y.*, 503 F. Supp. 946, 963 (S.D.N.Y. 1980)). Such indicia include the “standard of review that will govern the appeal,” *Hayes*, 503 F. Supp. at 963, as well as the extent to which the district court’s ruling involves “an unsettled area of law,” *Bridgeport*, 620 F. Supp. 2d at 341; *see also Cooper v. U.S. Postal Serv.*, 246 F.R.D. 415, 419 (D. Conn. 2007) (granted motion under Rule 62(c) in case involving “thorny” legal issues of first impression); *Cayuga Indian Nation of N.Y. v. Pataki*, 188 F. Supp. 2d 223, 253 (N.D.N.Y. 2002) (“[B]ecause of the difficulties of the issues presented, it would be foolhardy to predict that there is no likelihood of success on appeal.”) (internal quotation marks omitted). Both indicia are present in this case.

When reviewing a district court's denial of a motion for a preliminary injunction, the Second Circuit reviews the district court's legal holdings *de novo*. *County of Nassau, N.Y. v. Leavitt*, 524 F.3d 408, 414 (2d Cir. 2008). Therefore, the Second Circuit will not defer to this Court's legal holdings when it adjudicates CAHCF's appeal. Even those other aspects of this Court's ruling will undergo thorough appellate review. Second Circuit precedent provides that a "district court has abused its discretion if it has (1) 'based its ruling on an erroneous view of the law,' (2) made a 'clearly erroneous assessment of the evidence,' or (3) 'rendered a decision that cannot be located within the range of permissible decisions.'" *Bridgeport Guardians v. Delmonte*, 602 F.3d 469, 473 (2d Cir. 2010) (quoting *Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008)). In cases such as this one, the Second Circuit does not "blindly defer to the trial court's choice" where the appellate record "contains all the materials upon which the district court's decision hinged" and the trial court's decision was "not based on its observations in the courtroom or its superior opportunity to get a feel of the case." *United States ex rel. Drake v. Norden Sys., Inc.*, 375 F.3d 248, 254 (2d Cir. 2004).

Moreover, it cannot be denied that this case presents several important legal questions that remain unresolved in the Second Circuit. For example, this Court acknowledged that the Second Circuit has not yet decided whether § 1396a(a)(30)(A) imposes any requirement on States to actually consider efficiency, economy and quality of care prior to setting Medicaid payment rates. *See CAHCF I*, 2010 WL 2232693, at \*8. This Court also acknowledged that its decision that no such procedural requirement exists conflicts with the law of the Eighth and Ninth Circuits. *Id.* ("The circuit courts that have addressed the issue are split as to whether [§ 1396a(a)(30)(A)] includes procedural requirements for rate setting or whether it only requires states to meet a substantive result. The Eighth and Ninth Circuits have found that in order [to]

show compliance with [§ 1396a(a)(30)(A)], a state must provide evidence that it specifically considered the statutory factors and relied on cost studies when setting the appropriate rate.”).

Therefore, these objective indicia demonstrate that CAHCF possesses a substantial possibility of success on appeal.

#### **IV. AN INJUNCTION PENDING APPEAL IS IN THE PUBLIC INTEREST**

Fourth and finally, a court deciding a motion for an injunction pending appeal must consider “the public interests that may be affected.” *LaRouche*, 20 F.3d at 72. Like irreparable harm, the question whether an interim injunction will further the public interest has already been thoroughly addressed by the parties during briefing on CAHCF’s Motion for a Preliminary Injunction. *See* Pl.’s Mem. at 39 n.15 [Doc. No. 15-2]; Pl.’s Consolidated Reply & Opp’n at 42-46 [Doc. No. 49].

In the appellate context, however, the public interest is even more acutely in favor of an injunction. This case is about more than just money; it is about the survival of an entire industry that provides essential services to this State’s most frail and elderly citizens. That fact was made clear during a public hearing held by the General Assembly’s Human Services Committee, in which the following colloquy took place between Representative Toni E. Walker, co-chair of the committee, and the chief rate-setting official for the Connecticut Department of Social Services:

REP. WALKER: So the question then I go to is that section 16 [of Senate Bill 843] which talks about the rebasing of the rate—the increase—we have a very fragile industry here and for a variety of reasons; costs, our reimbursement rates, I mean some obviously some other issues that have happened in there but this impact is not—is this going to impact the number of nursing homes that are going to end up closing also? Have we looked at that long-term?

GARY RICHTER: Well I think there’s going to be pressure on the whole system. Clearly an increase would probably avoid problems for some homes. We do have a safety valve in the statute related to interim rates for facilities in financial distress.

...

REP. WALKER: I just see a perfect storm coming here. Baby boomers are aging. People are having many more illnesses and they're ending up in nursing homes or they need long-term care. . . . [H]ere we have the fragile industry sort of shaking in their boots because they're not sure whether they're going to make it day to day.

So I just think that we need to look at this whole process that we're doing for long-term care and for [the] elderly because I think we're going to end up in an emergency state within the next year or two. . . .

Mar. 3, 2009 Hr'g Tr. at 64-65 (Pl.'s App. 1:101a-03a). For example, the unchallenged evidence before this Court indicates that with each passing month, the seven representative nursing facilities lose \$385,180.38 in funds that can never be recovered because of the Eleventh Amendment. *See* Pl.'s App. 868a.

Nor is the public interest furthered if a public official is allowed to "run out the clock" on appeal, only to have a successful appellant return on remand to a case that has been largely mooted by the passage of time. Section 32's stranglehold on Connecticut's payment system will expire on June 30, 2011. Although CAHCF will seek an expedited briefing scheduling and oral argument in the Second Circuit, there is no guarantee that the Second Circuit will act in time for a favorable ruling to have practical meaning in this case. A Second Circuit decision issued just last month illustrates the foregoing risk in stark terms. *See County of Nassau, N.Y. v. Sebelius*, --- F.3d ---, No. 09-3193-cv, 2010 WL 2025524 (2d Cir. May 24, 2010) (copy attached as Exhibit B).

In *County of Nassau*, several plaintiffs challenged federal officials' interpretation of legislation governing the distribution of health care grants for localities disproportionately affected by the HIV/AIDS epidemic. *See id.* at \*1-2. The plaintiffs asked for but were denied a preliminary injunction. *See id.* at \*2. The plaintiffs then filed an interlocutory appeal and a motion for an injunction pending appeal. In doing the latter, however, the plaintiffs did not argue that irreparable harm was threatened by the possibility that federal officials would expend all of the

grant funds appropriated by Congress during the pendency of the plaintiffs' appeal. *See id.* at \*6 n.4. The Second Circuit eventually denied the plaintiffs' motion for an injunction pending appeal. *See id.*

Four months later, the court of appeals heard oral argument. The Second Circuit eventually reversed the district court's decision seven months later, finding that the district court had erred in concluding the plaintiffs lacked a substantial likelihood of success on the merits. *See County of Nassau, N.Y. v. Leavitt*, 524 F.3d 408, 419 (2d Cir. 2008). On remand, federal officials successfully moved to dismiss the case on mootness grounds, arguing that because the appropriated funds had already been spent, the Federal Government's sovereign immunity precluded the district court from awarding any relief. "Despite the seemingly harsh result," the Second Circuit reluctantly affirmed the district court's dismissal order. *County of Nassau*, 2010 WL 2025524, at \*1.

The public interest favors meaningful judicial relief, not pyrrhic victories in the form of declaratory judgments and injunctions with little real-world significance. *See, e.g., Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852-53 (9th Cir. 2009) (granting injunction pending appeal because the "interest of preserving the Supremacy Clause is paramount"). In order to ensure that meaningful judicial relief can be afforded in this case, the Court should grant an injunction pending appeal.

## **V. CAHCF SHOULD NOT BE REQUIRED TO POST SECURITY**

Rule 62(c) provides that this Court may grant an injunction pending appeal "on terms for bond or other terms that secure the opposing party's rights." In seeking a preliminary injunction, CAHCF demonstrated that it should not be required to post a bond under well-established Second Circuit precedent. *See* Pl.'s Mem. at 39 [Doc. No. 15-2] (discussing *Pharmaceutical Soc'y of the State of N.Y., Inc. v. N.Y. Dep't of Soc. Servs.*, 50 F.3d 1168, 1174-75 (2d Cir.

1995)). By failing to provide any argument to the contrary, Commissioner Starkowski conceded this point. *See* Pl.'s Consolidated Reply & Opp'n at 46 n.13 [Doc. No. 49]. Therefore, no bond should be required in this instance either.

### CONCLUSION

For the foregoing reasons, good cause exists to grant an injunction pending CAHCF's appeal to the Second Circuit.

Dated: June 10, 2010

Respectfully submitted,

By:           /s/ Malcolm J. Harkins III            
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**EXHIBIT A**

Docket No. HHD CV 09 5034410 S : SUPERIOR COURT  
HONG PHAM, Individually and on : JUDICIAL DISTRICT OF  
behalf of herself and all others : HARTFORD  
similarly situated :  
V. :  
MICHAEL P. STARKOWSKI : January 8, 2010

**MEMORANDUM OF DECISION ON  
MOTION TO STAY**

The defendant Commissioner of the Connecticut Department of Social Services has appealed from this court's decision, dated December 18, 2009 granting permanent injunctive relief to the plaintiff class. The defendant now moves that enforcement of the permanent injunction be stayed pending the appeal. For the following reasons, the Motion is denied.

**I. Standards for Staying an Injunction Pending Appeal**

The standard used by the court in determining whether to stay a permanent injunction during the pendency of an appeal depends on whether the injunction is considered mandatory or prohibitory. Our Supreme Court has explained the difference as follows: "[a] prohibitory injunction is an order of the court restraining a party from the commission of an act. A mandatory injunction, on the other hand, is a court order commanding a party to perform an act." *Tomasso Brothers, Inc. v. October Twenty-Four, Inc.*, 230 Conn. 641, 652, 646 A.2d 133 (1994).

The difference between permanent and mandatory injunctions is important, because Conn. Gen. Stat. § 52-477 creates a presumption in favor of granting motions to stay mandatory injunctions pending appeal. The defendant claims that this injunction is

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mandatory, and thus requires a presumption in favor of granting the application to stay. The plaintiffs argue that the injunction is prohibitory because it merely preserved the status quo as of November 30, 2009, the date the plaintiffs filed suit.

The court finds that its December 18, 2009 injunction, which “permanently enjoins the defendant from enforcing §§ 55 and 64 of Spec. Sess. P.A. 09-05,” is prohibitory because on its face it prohibits, rather than compels, government action. Even if the court had found that the injunction was mandatory, this would have had no impact on its decision here, because the equities of the situation are such that any statutory presumption in favor of a stay of enforcement would be rebutted.

## **II. The Standard of Review**

Our rules of practice provide that some injunctions are automatically stayed during the pendency of an appeal. Practice Book § 61-11. Subject to certain exceptions listed in § 61-11(b), which are not relevant to this case, the automatic stay applies “[e]xcept where otherwise provided by statute or other law.” *Id.*, (a), (b). Permanent injunctions, both prohibitory and mandatory, fall into the “otherwise provided by statute or other law” exception to the automatic stay provisions of § 61-11. *Tomasso Brothers*, supra, 230 Conn. 655-58. Mandatory permanent injunctions are excluded from the automatic stay by virtue of § 52-477, and prohibitory permanent injunctions are excluded under our case law. *Tomasso Brothers*, supra, 656-58 (because permanent mandatory injunctions are expressly excluded from the automatic stay, and the reason to stay a mandatory injunction is stronger than the reason to stay a prohibitory injunction, permanent prohibitory injunctions are not automatically stayed pending appeal.)

Section 61-12 of the Practice Book picks up where § 61-11 leaves off. Under Practice Book § 61-11 (e), “Requests for stay pending appeal where there is no automatic stay shall be governed by Section 61-12”. Section 61-12, entitled “Discretionary Stays” applies to “noncriminal matters in which the automatic stay provisions of Section 61-11 are not applicable and in which there are no statutory stay provisions.” Section 61-12, therefore, governs stays of permanent prohibitory injunctions, which have no statutory stay provisions, but not stays of permanent mandatory injunctions, which are governed exclusively by § 52-477. Cf. *Tomasso Brothers, Inc.*, supra, 230 Conn. 656 n.18 (“The plain language of General Statutes § 52-477 applies only to permanent mandatory injunctions . . .”).

A motion for a stay of execution brought pursuant to § 61-12 is addressed to the sound discretion of the trial court. *In re Brommell G.*, 214 Conn. 454, 462, 572 A.2d 352 (1990). Such discretionary stays are guided by a “balancing of the equities” test. *Vandyke v. Vandyke*, Docket No. FA 06-4005795-S (Judicial District of Tolland, July 16, 2008). Although “[i]t is not possible to reduce all of the considerations involved in stay orders to a rigid formula,” our Supreme Court has identified four factors which the court may properly consider in balancing the results that may be caused to the respective parties: (1) the likely outcome of the appeal; (2) the irreparability of the prospective harm to the applicant if the stay is denied; (3) the effect of delay in implementation of the order upon the other parties if the stay is granted; and (4) the effect on the public interest. *Griffin Hospital v. Commission on Hospitals and Health Care*, 196 Conn. 451, 458-59, 493 A.2d 229 (1985). All four of the *Griffin Hospital* factors favor the plaintiffs.

**A. Likelihood of Success on Appeal**

In order to prevail on this issue, defendant must convince the court that he has a reasonable *probability* – not a reasonable *possibility* – of success on appeal. His arguments on this point, respectfully, contain nothing which he has not already, repeatedly presented to this court. It is by no means reasonably probable that defendant will prevail on the merits at the appellate level.

**B. Risk of Irreparable Harm to the Defendant**

DSS claims it will be harmed if the stay is denied because it will incur substantial financial and administrative burdens. In support, it offers the affidavit of the defendant Michael Starkowski, in which he indicates the legislature projected a savings of \$775,000.000 per month by the repeal of the State Medical Assistance for Noncitizens (SMANC) program. No funds are available or appropriated for the administration of the SMANC program. He further states that reinstatement of the plaintiffs into the SMANC program may force DSS to make administrative and budget cuts in other programs.

The court does not find any risk of irreparable harm to the defendant if it does not order a stay. The budgetary process is a complex vehicle, and it is not clear that other DSS programs would be affected. See Affidavit of Representative Toni E. Walker, co-chair of the Human Services Committee and member of the Appropriations Committee of the General Assembly (“When DSS actual program expenditures exceed allocated funds, the DSS does not automatically reduce services or benefits in other programs that it administers.”) As stated by Rep. Walker, “[t]here are a variety of administrative and legislative procedures to address the effects of expenditures by state agencies in excess of

budgeted amounts” in addition to the alteration of DSS programs. In fact, Rep. Walker also explained that “[t]he DSS actual program expenditures frequently exceed budget predictions and funds allocated in the state budget.”

While the current financial constraints of the state are significant, such concerns do not trump our federal constitution. “[A] State may not protect the public fisc by drawing an invidious distinction between classes of its citizens, so appellees must do more than show that denying free medical care to new residents saves money.” *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 261 (1974).

Lastly, the administrative burden claimed by the defendant is not compelling. DSS was able to do the necessary to get termination notices out to the plaintiff class and stop plaintiffs’ benefits within a ten-day period. This hardly suggests that it would be burdensome for the defendant to reverse the process.

### **C. Risk of Irreparable Harm to the Plaintiff Class**

It is well established that the denial of non-emergency Medicaid benefits to indigent, categorically needy individuals results in irreparable harm. See, e.g., *Olson v. Wing*, 281 F. Sup. 2d 476, 487 (E.D.N.Y. 2003). This is true despite the availability of emergency care. The United States Supreme Court has explained the problem as follows:

[The appellant] was an indigent person who required continued medical care for the preservation of his health and well being . . . even if he did not require immediate emergency care. The State could not deny [the appellant] care just because, although gasping for breath, he was not in immediate danger of stopping breathing altogether. To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health. Cancer, heart disease, or respiratory illness, if untreated for a year, may become all but irreversible paths to pain, disability, and even loss of life. The denial of medical care is all the more cruel in this context, falling as it does on indigents who are often

without the means to obtain alternative treatment.” (Internal quotation marks omitted.) *Memorial Hospital v. Maricopa County*, supra, 415 U.S. 250, 261 (1974).

The defendant concedes that “some members of the plaintiff class may be harmed if a stay is granted due to the absence of a source of, or the need to pay for, public health “insurance coverage,” and presents some hypothetical circumstances under which the extent of their harm “may in some cases be mitigated.” This hardly rebuts plaintiffs’ contention that every member of their class would be at risk of irreparable harm during any period when the injunction ordered by this court is stayed.

#### **D. The Public Interest**

The defendant argues that because the General Assembly passed Public Act 09-05, and because “[i]t is up to the legislature to determine policy questions,” this court should therefore defer to the General Assembly and stay its decision. While this court is mindful of the financial problems Connecticut currently faces, fiscal concerns do not trump the Constitution. In *Goldberg v. Kelley*, 397 U.S. 254, 264 (1970) the Supreme Court made it clear that providing for the needy through public assistance is in the public interest:

[B]y meeting the basic demands of subsistence, [public assistance] can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, [public assistance] guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.

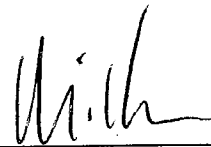
The court therefore finds that the public interest does not favor a stay of its

December 18, 2009 order.

**III. Conclusion**

For all of the above reasons, the Motion to Stay is denied.

It is so ordered.

A handwritten signature in cursive script, appearing to read "Miller", is written above a horizontal line.

Miller, J.

**EXHIBIT B**

--- F.3d ---, 2010 WL 2025524 (C.A.2 (N.Y.))  
 (Cite as: 2010 WL 2025524 (C.A.2 (N.Y.)))

**H**Only the Westlaw citation is currently available.

United States Court of Appeals,  
 Second Circuit.  
 COUNTY OF SUFFOLK, NEW YORK, Federation  
 Employment and Guidance Services, Inc., Long Is-  
 land Minority Aids Coalition, Inc., Thursday's Child,  
 Inc., Traci Bowman, Miriam Spaier, Jerome Knight,  
 and Donna Uysal, Plaintiffs,  
 County of Nassau, New York, Plaintiff-Appellant,  
 v.  
 Kathleen SEBELIUS, in her official capacity as Sec-  
 retary of Health and Human Services of the United  
 States Department of Health and Human Services,  
 Mary Wakefield, Ph.D., R.N., in her official capacity  
 as Administrator for the Health Resources and Ser-  
 vices Administration of the United States Department  
 of Health and Human Services, and United States  
 Department of Health and Human Services, Defen-  
 dants-Appellees.<sup>FN\*</sup>  
**Docket No. 09-3193-cv.**

Argued: April 19, 2010.  
 Decided: May 24, 2010.

**Background:** County and others brought action against United States Department of Health and Human Services (HHS), seeking additional federal funding under the Ryan White Comprehensive AIDS Resources Emergency Act. The United States District Court for the Eastern District of New York, [Joanna Seybert](#), J., [2007 WL 708321](#), denied plaintiffs' motion for preliminary injunction, seeking to continue county's status as eligible metropolitan area for purposes of funding under Act. Defendants appealed. The Court of Appeals, [524 F.3d 408](#), reversed and remanded. On remand, the United States District Court for the Eastern District of New York, [Seybert](#), J., dismissed plaintiffs' claims as moot, and plaintiffs appealed.

**Holdings:** The Court of Appeals, [Wesley](#), Circuit Judge, held that:

(1) county's claims for additional appropriations under the Act were moot, and  
 (2) county was not entitled to compensation from Judgment Fund.

Affirmed.

West Headnotes

**[1] Federal Courts 170B** 776

[170B](#) Federal Courts  
[170BVIII](#) Courts of Appeals  
[170BVIII\(K\)](#) Scope, Standards, and Extent  
[170BVIII\(K\)1](#) In General  
[170Bk776](#) k. Trial De Novo. [Most Cited Cases](#)  
 Court of Appeals review de novo the district court's conclusion that plaintiffs' claims are moot.


**[2] Federal Courts 170B** 12.1

[170B](#) Federal Courts  
[170BI](#) Jurisdiction and Powers in General  
[170BI\(A\)](#) In General  
[170Bk12](#) Case or Controversy Requirement  
[170Bk12.1](#) k. In General. [Most Cited Cases](#)

**Federal Courts 170B** 723.1

[170B](#) Federal Courts  
[170BVIII](#) Courts of Appeals  
[170BVIII\(I\)](#) Dismissal, Withdrawal or Abandonment  
[170Bk723](#) Want of Actual Controversy  
[170Bk723.1](#) k. In General. [Most Cited Cases](#)

Under the general rule of "mootness," courts' subject matter jurisdiction ceases when an event occurs during the course of the proceedings or on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party.

**[3] United States 393** 125(3)

[393](#) United States  
[393IX](#) Actions  
[393k125](#) Liability and Consent of United States to Be Sued

--- F.3d ---, 2010 WL 2025524 (C.A.2 (N.Y.))  
(Cite as: 2010 WL 2025524 (C.A.2 (N.Y.)))

[393k125\(3\)](#) k. Necessity of Waiver or Consent. [Most Cited Cases](#)  
Absent an unequivocally expressed statutory waiver, the United States, its agencies, and its employees, when functioning in their official capacities, are immune from suit based on the principle of sovereign immunity.

#### [\[4\] United States 393](#) [125\(5\)](#)

[393](#) United States

[393IX](#) Actions

[393k125](#) Liability and Consent of United States to Be Sued

[393k125\(5\)](#) k. Mode and Sufficiency of Waiver or Consent. [Most Cited Cases](#)  
The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as “money damages,” for purposes of Administrative Procedure Act provision providing for limited waiver of federal government's sovereign immunity for claims seeking relief other than money damages for legal wrong sustained because of agency action; rather, in this context, the term “money damages” refers to compensatory relief that functions as a substitute for lost property. [5 U.S.C.A. § 702](#).

#### [\[5\] United States 393](#) [125\(5\)](#)

[393](#) United States

[393IX](#) Actions

[393k125](#) Liability and Consent of United States to Be Sued

[393k125\(5\)](#) k. Mode and Sufficiency of Waiver or Consent. [Most Cited Cases](#)  
Sovereign immunity bars plaintiffs from seeking monetary compensation under provision of Administrative Procedure Act providing for limited waiver of federal government's sovereign immunity for claims of legal wrong sustained because of agency action. [5 U.S.C.A. § 702](#).

#### [\[6\] United States 393](#) [85](#)

[393](#) United States

[393VI](#) Fiscal Matters

[393k85](#) k. Appropriations. [Most Cited Cases](#)  
Pursuant to the Appropriations Clause, no money can be paid out of the Treasury unless it has been appro-

priated by an act of Congress; thus, in cases challenging an agency's expenditure of funds, the res at issue is identified by reference to the congressional appropriation that authorized the agency's challenged expenditure. [U.S.C.A. Const. Art. 1, § 9, cl. 7](#).

#### [\[7\] Federal Courts 170B](#) [13](#)

[170B](#) Federal Courts

[170BI](#) Jurisdiction and Powers in General

[170BI\(A\)](#) In General

[170Bk12](#) Case or Controversy Requirement

[170Bk13](#) k. Particular Cases or Questions, Justiciable Controversy. [Most Cited Cases](#)  
Congressional appropriations relating to funds sought by county pursuant to Ryan White Comprehensive AIDS Resources Emergency Act had been lawfully distributed and exhausted by United States Department of Health and Human Services (HHS) for fiscal years funds were sought, and thus county's claims for additional appropriations under the Act were moot, even though county brought action for disbursement of additional appropriations before HHS had exhausted the relevant appropriations, where county failed to seek preliminary injunction preventing HHS from disbursing those funds and county was unable to preserve status quo of parties and appropriations during course of litigation. Ryan White Comprehensive AIDS Resources Emergency Act of 1990, § 2 et seq., [42 U.S.C.A § 300ff et seq.](#)

#### [\[8\] United States 393](#) [125\(9\)](#)

[393](#) United States

[393IX](#) Actions

[393k125](#) Liability and Consent of United States to Be Sued

[393k125\(9\)](#) k. Nature of Action in General.

[Most Cited Cases](#)  
Use of money from Judgment Fund as substitute remedy to compensate county for losses it suffered during fiscal years in which United States Department of Health and Human Services (HHS) misclassified county as transitional grant area for purposes of disbursing appropriations under the Ryan White Comprehensive AIDS Resources Emergency Act would constitute “money damages,” and thus county was not entitled to compensation from Judgment Fund, since “money damages” were not recoverable under Administrative Procedure Act (APA) provision providing for limited waiver of federal government's

--- F.3d ---, 2010 WL 2025524 (C.A.2 (N.Y.))  
(Cite as: 2010 WL 2025524 (C.A.2 (N.Y.)))

sovereign immunity for claims of legal wrong sustained because of agency action, which county invoked to escape sovereign immunity bar, and HHS had not otherwise waived its sovereign immunity. [31 U.S.C.A. § 1304\(a\)](#); Ryan White Comprehensive AIDS Resources Emergency Act of 1990, § 2 et seq., [42 U.S.C.A § 300ff et seq.](#)

**[9] United States 393 85**

[393](#) United States

[393VI](#) Fiscal Matters

[393k85](#) k. Appropriations. [Most Cited Cases](#)

The “Judgment Fund” is a permanent, indefinite appropriation for the payment of judgments. [31 U.S.C.A. § 1304\(a\)](#).

**[10] United States 393 125(5)**

[393](#) United States

[393IX](#) Actions

[393k125](#) Liability and Consent of United States to Be Sued

[393k125\(5\)](#) k. Mode and Sufficiency of Waiver or Consent. [Most Cited Cases](#)

The Judgment Fund does not waive the government's sovereign immunity, and the legal basis for a judgment or award must be found elsewhere in the law. [31 U.S.C.A. § 1304\(a\)](#).

**[11] United States 393 82(1)**

[393](#) United States

[393VI](#) Fiscal Matters

[393k82](#) Disbursements in General

[393k82\(1\)](#) k. In General. [Most Cited Cases](#)

Congressional appropriations relating to Ryan White Comprehensive AIDS Resources Emergency Act were provided for in law and proper source of funds, in action alleging United States Department of Health and Human Services' (HHS) misclassification of county as transitional grant area for purposes of disbursing appropriations under Act deprived county of funding to which it was entitled, and thus, even if HHS had waived its sovereign immunity, county was not entitled to compensation from Judgment Fund, since Fund required that payment sought not be “otherwise provided for” by law. [31 U.S.C.A. § 1304\(a\)\(1\)](#); Ryan White Comprehensive AIDS Resources Emergency Act of 1990, § 2 et seq., [42](#)

[U.S.C.A § 300ff et seq.](#)

[Peter J. Clines](#), ([Rosanne M. Harvey](#), on the brief), Deputy County Attorneys, for Lorna B. Goodman, County Attorney, County of Nassau, Mineola, NY, for Plaintiff-Appellant.

[Thomas A. McFarland](#), ([Varuni Nelson](#), of counsel), Assistant United States Attorneys, for Benton J. Campbell, United States Attorney, Eastern District of New York, Central Islip, NY, for Defendants-Appellees.

Before [CABRANES](#), [WESLEY](#), and [LIVINGSTON](#), Circuit Judges.

[WESLEY](#), Circuit Judge:

\*1 In this action brought pursuant to [§ 702](#) of the Administrative Procedure Act, plaintiffs seek additional funding for fiscal years (“FYs”) 2007 and 2008 from a grant program administered by the Department of Health and Human Services (“HHS”) pursuant to the Ryan White HIV/AIDS Treatment Modernization Act of 2006. In a previous appeal relating to plaintiffs' application for a preliminary injunction, we held that they had demonstrated a likelihood of success on the merits. On remand, defendants moved to dismiss plaintiffs' claims, arguing that HHS had awarded the funds at issue to other grant recipients. The district court verified that the pertinent congressional appropriations had, in fact, been exhausted, and held that plaintiffs' claims are moot.

Despite the seemingly harsh result, we agree with the district court. Obligated, as we are, to avoid issuing advisory opinions, our authority is limited to “live” cases in which there remains a possibility that the court can grant some form of effectual relief. In an action such as this one, the scope of available relief is bookended by the government's sovereign immunity, on the one hand, and the Appropriations Clause of the Constitution, on the other. Where, as here, the congressional appropriations relating to the funds sought by private litigants have been lawfully distributed-and therefore exhausted-by a federal agency, courts lack authority to grant effectual relief in the context of an Article III case or controversy. Under such circumstances, any decision on the ultimate merits of the dispute would be merely advisory, and the claims at issue are moot. Accordingly, we affirm.

--- F.3d ---, 2010 WL 2025524 (C.A.2 (N.Y.))  
(Cite as: 2010 WL 2025524 (C.A.2 (N.Y.)))

## I. BACKGROUND

Congress passed the Ryan White Comprehensive AIDS Resources Emergency Act of 1990 (the “Ryan White Act,” or the “Act”), [Pub.L. No. 101-381, 104 Stat. 576](#), in order to make funding available for the development and administration of “cost efficient systems for the delivery of essential services to individuals and families with HIV disease.” [42 U.S.C. § 300ff.](#)<sup>FN1</sup> Part A of the Act, titled “Emergency Relief for Areas with Substantial Need for Services,” directed HHS to award grants to localities that qualified as “Eligible Metropolitan Areas,” or “EMAs.” [Pub.L. No. 101-381](#), pt. A, § 2601, 104 Stat. at 576; *see also* [42 U.S.C. § 300ff-11 \(1991\)](#) (original definition of “EMA”). HHS awarded grants to New York’s Nassau and Suffolk Counties (“Nassau-Suffolk”) as a single EMA in each year through FY 2006.

Fiscal year 2007 began on October 1, 2006. Almost three months later, on December 19, 2006, Congress amended the Ryan White Act by creating a second category of funding-eligible entities, referred to as “Transitional Grant Areas” or “TGAs,” which were to receive less funding than EMAs. Ryan White HIV/AIDS Treatment Modernization Act of 2006, [Pub.L. No. 109-415, § 107, 120 Stat. 2767](#), 2781; *see also* [42 U.S.C. § 300ff-19](#). The amendments took effect in FY 2007 and contained a sunset provision that repealed the Act effective October 1, 2009. *See County of Nassau, N.Y. v. Leavitt*, [524 F.3d 408, 416 \(2d Cir.2008\)](#).<sup>FN2</sup>

\*2 HHS typically begins to notify recipients of grants under Part A of the Ryan White Act on March 1 of each fiscal year. With respect to FY 2007, however, the agency informed Nassau-Suffolk on February 12, 2007 that it would be classified as a TGA, rather than an EMA, based on the 2006 amendments to the Act. On February 27, 2007, a group of plaintiffs that included Nassau-Suffolk commenced this action to challenge HHS’s decision pursuant to [§ 702](#) of the Administrative Procedure Act (“APA”), [5 U.S.C. § 702](#).<sup>FN3</sup> Plaintiffs argued that HHS had incorrectly classified Nassau-Suffolk as a TGA, and sought declaratory and injunctive relief directing the agency to return the entity to the EMA funding category. The district court denied plaintiffs’ application for a preliminary injunction on March 1, 2007. *County of Nassau, N.Y. v. Leavitt*, [No. 07 Civ. 816, 2007 WL 708321](#), at \*4 (E.D.N.Y. Mar. 1, 2007).

Following that decision, plaintiffs filed an interlocutory appeal with this Court, *see* [28 U.S.C. § 1292\(a\)\(1\)](#), as well as a motion for an injunction pending appeal, *see* [Fed. R.App. P. 8](#).<sup>FN4</sup> We denied the motion for injunctive relief on May 4, 2007. Almost a year later, however, we reversed the district court and held that plaintiffs had established a likelihood of success on the merits of their claims. *See Leavitt*, [524 F.3d at 419](#).

On remand, HHS conceded that Nassau-Suffolk was to be funded as an EMA in FY 2009, but defendants moved to dismiss plaintiffs’ claims relating to FYs 2007 and 2008 as moot. Defendants’ argument was simple: no relief was available because HHS had distributed the funds that were appropriated by Congress for those fiscal years to other EMAs. The district court expressed concern about the “extreme consequences of holding that Plaintiffs’ claims for the 2007 and 2008 fiscal years are moot,” and it denied the motion without prejudice in order to examine whether HHS had, in fact, exhausted the appropriations for FYs 2007 and 2008.

Defendants then submitted an April 16, 2009 declaration from Douglas H. Morgan, the director of the HHS division that administers the grant program. The affidavit stated that, with respect to FYs 2007 and 2008, “[n]o remaining ... funds appropriated by Congress ... are available for obligation by HHS.” Based on that submission, the district court dismissed plaintiffs’ claims as moot, reasoning that it “lack[ed] authority” to “create ... special funding or re-organize their scheduled distributions for the upcoming years.”

## II. DISCUSSION

[1] We review *de novo* the district court’s conclusion that plaintiffs’ claims are moot. [N.Y. Civil Liberties Union v. Grandeau](#), [528 F.3d 122, 128 \(2d Cir.2008\)](#). On appeal, plaintiffs mount a two-front attack on the lower court’s decision. First, they argue that “the absence of funding did not absolve the government of its statutory obligations” under the Ryan White Act, and that the district court “still had the authority and power to enter a judgment declaring [defendants] liable for the additional Ryan White [Act] funds that should have been awarded” in FYs 2007 and 2008. Second, plaintiffs contend that the district court also erred by holding that they could not seek compensa-

--- F.3d ---, 2010 WL 2025524 (C.A.2 (N.Y.))  
 (Cite as: 2010 WL 2025524 (C.A.2 (N.Y.)))

tion from the appropriation created by the Judgment Fund, [31 U.S.C. § 1304\(a\)](#). At bottom, however, both of these arguments fail to account for the limitations on this action resulting from the federal government's sovereign immunity and the Appropriations Clause. Accordingly, for the reasons set forth below, we hold that plaintiffs' claims are moot.

\*3 [2] Article III of the Constitution limits federal courts' authority—that is, our subject matter jurisdiction—to disputes involving “live cases and controversies.” *United States v. Quattrone*, 402 F.3d 304, 308 (2d Cir.2005). A number of justiciability doctrines govern the contours of this power; pertinent here is mootness, which concerns when and whether a case is “live.” Specifically, under the “general rule” of mootness, courts' subject matter jurisdiction ceases when “an event occurs during the course of the proceedings or on appeal ‘that makes it impossible for the court to grant any effectual relief whatever to a prevailing party.’ ” *Id.* (quoting *Church of Scientology v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992)).<sup>FNS</sup>

[3] An understanding of why plaintiffs' claims are moot requires an understanding of the scope of the relief that was available to them in the first instance in this action against HHS and federal employees in their official capacities. Absent an “unequivocally expressed” statutory waiver, the United States, its agencies, and its employees (when functioning in their official capacities) are immune from suit based on the principle of sovereign immunity. *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260-61, 119 S.Ct. 687, 142 L.Ed.2d 718 (1999). “This may leave some aggrieved parties without relief, but that is inherent in the doctrine of sovereign immunity.” *Adeleke v. United States*, 355 F.3d 144, 150-51 (2d Cir.2004).

In this case, plaintiffs escaped this bar by invoking § 702 of the APA, [5 U.S.C. § 702](#), in which Congress enacted a limited waiver of the federal government's sovereign immunity for claims of “legal wrong [sustained] because of agency action ... seeking relief other than money damages.” *Id.* The “agency action” plaintiffs challenge is HHS's February 2007 decision to reclassify Nassau-Suffolk as a TGA under the 2006 amendments to the Ryan White Act, and they argue that they are legally entitled to funding as an EMA during FYs 2007 and 2008. And, as the district

court understood, [§ 702](#) limited the scope of the available relief in such an action from its inception. Plaintiffs therefore could only seek relief “*other than money damages.*” *Id.* (*emphasis added*).<sup>FN6</sup>

[4][5] In this regard, careful attention must be paid to the meaning of “money damages” in [§ 702](#). “The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as ‘money damages.’ ” *Bowen v. Massachusetts*, 487 U.S. 879, 893, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988) (quoting [5 U.S.C. § 702](#)). Rather, in this context, the term “money damages” refers to compensatory relief that functions as a substitute for lost property. See *id.* at 895, 108 S.Ct. 2722; see also *Ward v. Brown*, 22 F.3d 516, 520 (2d Cir.1994). Thus, “sovereign immunity bars [plaintiffs] from seeking [monetary] compensation” under [§ 702](#). *Diaz v. United States*, 517 F.3d 608, 612 (2d Cir.2008). As such, [§ 702](#) only functions as an effective waiver of the government's sovereign immunity to the extent that plaintiffs seek to force HHS to return property to Nassau-Suffolk, where the *res* at issue is the funds appropriated by Congress for this grant program for FYs 2007 and 2008.

\*4 [6] Analytically speaking, the fungibility often associated with money obscures, to some extent, the distinction between: (1) relief that seeks to *compensate* a plaintiff for a harm by providing a *substitute* for the loss, which is unavailable in an action under [§ 702](#); and (2) relief that requires a defendant to transfer a specific *res* to the plaintiff. See *Diaz*, 517 F.3d at 612. But where the object of a plaintiff's claims is the public fisc, the Appropriations Clause of the Constitution puts things in perspective: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” [U.S. Const. art. I, § 9, cl. 7](#). In other words, “‘no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.’ ” *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990) (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321, 57 S.Ct. 764, 81 L.Ed. 1122 (1937)). Thus, in cases challenging an agency's expenditure of funds, the *res* at issue is identified by reference to the congressional appropriation that authorized the agency's challenged expenditure. To seek funds from another source is to seek compensation rather than the specific property the plaintiff aims to recover. A claim seeking the former type of relief

--- F.3d ---, 2010 WL 2025524 (C.A.2 (N.Y.))  
 (Cite as: 2010 WL 2025524 (C.A.2 (N.Y.)))

falls outside the scope of the waiver of sovereign immunity arising from § 702 of the APA.

To our knowledge, our sister Circuit in the District of Columbia is the only federal appellate court that has confronted this juxtaposition of sovereign immunity and the Appropriations Clause under the circumstances presented by this case.<sup>FN7</sup> In *City of Houston v. Department of Housing & Urban Development*, 24 F.3d 1421 (D.C.Cir.1994), Houston challenged the decision of the Department of Housing and Urban Development (“HUD”) to reduce its FY 1986 community development block grant. Before Houston commenced the action, however, two events occurred: (1) HUD awarded the funds at issue to other grant recipients, thereby exhausting the relevant FY 1986 appropriation; and (2) the FY 1986 appropriation authorizing the grants expired and therefore lapsed.<sup>FN8</sup> See *id.* at 1425. The D.C. Circuit held that these events served as “two independent grounds” for dismissing Houston’s claims. *Id.* at 1427. “[T]o avoid having its case mooted, a plaintiff must both file its suit before the relevant appropriation lapses and seek a preliminary injunction preventing the agency from disbursing those funds.” *Id.* (emphasis in original). The court reasoned that, when a litigant fails to take either step, “federal courts are without authority to provide monetary relief” because the Appropriations Clause prevents additional funds from being paid out of the Treasury. *Id.* at 1428. It reasoned further that awarding “funds available from sources other than the 1986 appropriation” would contravene the “fundamental requirement” of § 702 of the APA “that a plaintiff seek relief ‘other than money damages.’ ” *Id.* (emphasis in original) (quoting 5 U.S.C. § 702).

\*5 [7] Under *City of Houston*, which we now follow, plaintiffs’ claims are moot. In so holding, we are mindful that, unlike in *City of Houston*, plaintiffs in this case sought to enjoin HHS’s expenditure of the funds for FYs 2007 and 2008 before HHS exhausted the relevant appropriations. Thus, whereas the *City of Houston* plaintiff could be faulted for failing to act, plaintiffs here took action but were unable to preserve the status quo. As a result, while the claims in *City of Houston* were moot at the time they were filed, plaintiffs’ claims became moot, despite their efforts, during the course of this litigation. Unfortunately, however, these are distinctions without a difference for purposes of the mootness doctrine. Although the *City of Houston* court indicated that a

plaintiff must “seek a preliminary injunction,” *id.* at 1427, its analysis applies with equal force where a plaintiff attempts, but ultimately fails, to enjoin an agency’s expenditures. Our analysis turns on the fact that, irrespective of the status of these appropriations when the action was commenced, HHS had exhausted them by the time the proceedings were remanded.<sup>FN9</sup> After this was verified by the district court, the only option “remaining to the court [was] that of announcing the fact and dismissing the cause.” *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514, 19 L.Ed. 264 (1868).

[8][9] Plaintiffs seek to evade the holding of *City of Houston* by arguing that, notwithstanding HHS’s exhaustion of the appropriations at issue, their claims are not moot because they could collect on a judgment from the appropriation in the Judgment Fund, 31 U.S.C. § 1304(a). The Judgment Fund is a “permanent, indefinite appropriation for the payment of judgments.” GAO, 3 *Principles*, *supra* note 7, at 14-31. But the availability of this appropriation has limits. It “constitutes an appropriation of amounts sufficient to pay ‘final judgments ... and interest and costs,’ ” *id.* at 14-32, *only* when the sought-after payment is: (1) “not otherwise provided for” by law; (2) “certified by the Secretary of the Treasury”; and (3) payable under, *inter alia*, 28 U.S.C. § 2414 (relating to final judgments entered by federal district courts). 31 U.S.C. § 1304(a).

[10] Moreover, the Judgment Fund does not waive the government’s sovereign immunity, and “the legal basis for a judgment or award must be found elsewhere in the law.” GAO, 3 *Principles*, at 14-34. As noted above, because plaintiffs rely on the government’s waiver of its sovereign immunity in § 702 of the APA, the only available remedy is an injunction directing HHS to fund Nassau-Suffolk as an EMA in FYs 2007 and 2008 from the appropriations that were authorized by Congress for those years. Money from the Judgment Fund, by contrast, would function as a substitute remedy to compensate plaintiffs for losses they suffered during FYs 2007 and 2008. Such a remedy would constitute “money damages” within the meaning of that term in § 702 of the APA, and the government has not waived its sovereign immunity with respect to such claims.<sup>FN10</sup> In light of this immunity, the district court lacked authority to grant relief based on the Judgment Fund.

--- F.3d ---, 2010 WL 2025524 (C.A.2 (N.Y.))  
(Cite as: 2010 WL 2025524 (C.A.2 (N.Y.)))

\*6 [11] Finally, even if defendants had waived their immunity, the Judgment Fund's appropriation would not be available because the statute's first requirement—that the payment sought must not be “otherwise provided for,” [31 U.S.C. § 1304\(a\)\(1\)](#)—is not satisfied. “There is only one proper source of funds in any given case.” GAO, 3 *Principles*, at 14-40. In this case, that source is the congressional appropriations for FYs 2007 and 2008 relating to Part A of the Ryan White Act. Where, as here, “payment of a particular judgment is otherwise provided for as a matter of law, the fact that the defendant agency has insufficient funds at that particular time does not operate to make the Judgment Fund available.” *Id.* at 14-39. We are persuaded by the GAO's construction of the operative statutory phrase, and therefore conclude that the appropriations relating to the funds plaintiffs seek are “otherwise provided for,” [31 U.S.C. § 1304\(a\)\(1\)](#). Consequently, insofar as the Judgment Fund is concerned, defendants are entitled to sovereign immunity and the statutory prerequisites for access to this appropriation are not satisfied. Therefore, we hold that this alternative appropriation is unavailable as a funding source for the remedy plaintiffs seek.

### III. CONCLUSION

Defendants acknowledge that, based on our prior interpretation of the statute, see [Leavitt, 524 F.3d at 414](#), HHS misapplied the Ryan White Act's 2006 amendments to Nassau-Suffolk. There is no dispute that Nassau-Suffolk has now been properly funded as an EMA during FY 2009. There is also no dispute that, by the time this action was remanded to the district court, HHS had exhausted the congressional appropriations relating to FYs 2007 and 2008 of the Ryan White Act grant program. However, in light of defendants' sovereign immunity and the Appropriations Clause, resort to those appropriations was the only remedy available to plaintiffs for their claims. We therefore hold that plaintiffs' claims relating to FYs 2007 and 2008 are moot because no effectual relief may be granted.

Like the district court, we too are aware of the consequences of the result that we now announce. The principles that govern this appeal, however, stem from the very foundation of our institutional authority. As a court of limited jurisdiction, we are not free to exceed the bounds of the legal framework that governs our operation. Accordingly, we affirm the

judgment of the district court dismissing plaintiffs' claims.

[FN\\*](#) The Clerk of the Court is respectfully directed to amend the official caption of this action to conform to the caption of this opinion.

[FN1.](#) Unless otherwise noted, all statutory citations are to the current version of the U.S.Code. For additional discussion of the amendments to the Ryan White Act and the history of plaintiffs' grant funding, see [County of Nassau, N.Y. v. Leavitt, 524 F.3d 408, 411-13 \(2d Cir.2008\)](#).

[FN2.](#) Congress revived the Ryan White Act grant program on October 31, 2009 by enacting the Ryan White HIV/AIDS Treatment Extension Act of 2009, [Pub.L. No. 111-87, 123 Stat. 2885](#).

[FN3.](#) In addition to Nassau and Suffolk Counties, the plaintiffs in the district court included private entities in those counties that use Ryan White Act funds to administer HIV-and AIDS-related services, as well as individuals who utilize those services. Although only Nassau County filed a notice of appeal in this action, we use the plural form, “plaintiffs,” for purposes of clarity.

[FN4.](#) In plaintiffs' motion for an injunction pending their appeal, they did not argue that irreparable harm was threatened by the possibility that HHS would exhaust the appropriations at issue. (See Decl. in Support of Plaintiffs-Appellants Mot. for an Expedited Appeal at 5-10, [County of Nassau, N.Y. v. Leavitt](#), No. 07-0825-cv (2d Cir. Mar. 14, 2007).)

[FN5.](#) Although there is an exception to this “general rule” where a dispute is “capable of repetition, yet evading review,” [Quattrone, 402 F.3d at 309](#) (internal quotation marks omitted), it is inapplicable here in light of, *inter alia*, HHS's decision to fund Nassau-Suffolk as an EMA during FY 2009. See [City of Houston v. Dep't of Housing & Urban Dev., 24 F.3d 1421, 1427](#)

--- F.3d ---, 2010 WL 2025524 (C.A.2 (N.Y.))  
 (Cite as: 2010 WL 2025524 (C.A.2 (N.Y.)))

[\(D.C.Cir.1994\).](#)

FN6. Although there are, of course, additional instances in which Congress has waived the federal government's sovereign immunity for other types of claims, plaintiffs have not invoked any of them.

FN7. Contrary to plaintiffs' assertion, we did not address these issues in [Aetna Casualty & Surety Co. v. United States](#), 71 F.3d 475 (2d Cir.1995). In [Aetna](#), we simply held that it would not have been  *futile*  for the plaintiff-appellant to amend its pleading in the district court to add a claim pursuant to § 702 of the APA. See [id. at 478-79](#). Although the government asserted that the plaintiff's claims relating to a tax refund were moot because it had paid the refund to another entity, we were in no position to address-as the district court did in this case-the factual issue of whether the relevant appropriation had been exhausted. Moreover, our statement in [Aetna](#) that the government's "duty" to pay the tax refund did "not disappear simply because the money was paid in error to the wrong person," [id. at 479](#), is not inconsistent with the notion, which is applicable here, that a federal court may lack authority to adjudicate the requirements of a duty in a given case. Finally, as discussed *infra*, unlike the judgment that plaintiffs seek in this case, it appears that there was an available, unexhausted appropriation for the judgment the plaintiff sought: "[t]ax refund judgments are payable from the permanent, indefinite appropriation" codified at [31 U.S.C. § 1324](#). See Gov't Accountability Office, 3 *Principles of Federal Appropriations Law* (hereinafter, "GAO, *Principles*"), at 14-40 (3d ed. Sept.2008), available at <http://www.gao.gov/special.pubs/d08978sp.pdf>.

FN8. In [City of Houston](#), the D.C. Circuit acknowledged a narrow exception that, under some circumstances, "permits a court to award funds based on an appropriation even after the date when the appropriation lapses, so long as 'the lawsuit was instituted *on or before that date.*' " [City of Houston](#), 24 F.3d

at 1426 (first emphasis added) (quoting [W. Va. Ass'n of Cmty. Health Ctrs. v. Heckler](#), 734 F.2d 1570, 1576 (D.C.Cir.1984)). Importantly, however, "[a]pplication of this equitable doctrine ... assumes that funds remain after the statutory lapse date." [W. Va. Ass'n of Cmty. Health Ctrs.](#), 734 F.2d at 1577. In any event, because this appeal does not require us to consider the implications of lapsed-as opposed to exhausted-appropriations, we do not now pass on the availability of the exception referenced in [City of Houston](#).

FN9. This holding is no broader than the facts of the case before us. There is no indication in the record that HHS distributed Ryan White Act grant funding to other entities that were wrongly classified as EMAs, or that the agency disregarded any legal obligation to avoid dispensing the funds at issue. Nor are we in a position to pass on the veracity of plaintiffs' assertion that HHS "clearly had time and opportunity to issue or hold back funds." At this point, that is a matter that can only be addressed by resort to the political branches.

FN10. The GAO has previously taken the position that "monetary awards made under the APA and other equitable authorities should be treated no differently than other monetary awards when being considered for payment from ... the Judgment Fund." GAO, 3 *Principles*, at 14-20 n. 47 (citing GAO, *In re Judgment Fund & Law Enforcement Seizure Claims*, B-259065 (Dec. 21, 1995)). We look to the GAO for authority given its role as "the investigative arm of Congress." [Med. Soc'y of N.Y. v. Cuomo](#), 976 F.2d 812, 815 (2d Cir.1992); see also Kate Stith, [Congress' Power of the Purse](#), 97 *Yale L.J.* 1343, 1390 (1988) ("While the judicial branch is not bound by the GAO determinations ... these determinations have been accorded significant deference by courts."). However, this authority (understandably) offers no view on what are antecedent questions relating to when and whether a court has authority to make "monetary awards under the APA" in the first place. In fact, in the

--- F.3d ---, 2010 WL 2025524 (C.A.2 (N.Y.))  
**(Cite as: 2010 WL 2025524 (C.A.2 (N.Y.)))**

same publication the GAO acknowledged that “[t]he Judgment Fund is not itself a waiver of sovereign immunity.” GAO, 3 *Principles*, at 14-34. Therefore, our sovereign immunity analysis does not conflict in any way with the GAO's position.

C.A.2 (N.Y.),2010.  
County of Suffolk, N.Y. v. Sebelius  
--- F.3d ---, 2010 WL 2025524 (C.A.2 (N.Y.))

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

CONNECTICUT ASSOCIATION	:	
OF HEALTH CARE FACILITIES, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CASE NO. 3:10-CV-136 (PCD)
	:	
MICHAEL P. STARKOWSKI, in his official	:	
capacity as Commissioner of Social Services,	:	
	:	
Defendant.	:	

**ORDER GRANTING PLAINTIFF’S EMERGENCY  
MOTION FOR AN INJUNCTION PENDING APPEAL**

Upon consideration of the Emergency Motion for an Injunction Pending Appeal filed by Plaintiff Connecticut Association of Health Care Facilities, Inc. (“CAHCF”), it is hereby

ORDERED that CAHCF’s motion is GRANTED; and it is

FURTHER ORDERED that, during the pendency of CAHCF’s appeal of this Court’s June 3, 2010 ruling denying CAHCF’s Motion for a Preliminary Injunction, Defendant Michael P. Starkowski (“Commissioner Starkowski”), as well as his agents, servants, employees, successors and assigns, are hereby enjoined from implementing section 32 of Connecticut Public Act 09-5; and it is

FURTHER ORDERED that Commissioner Starkowski, as well as his agents, servants, employees, successors and assigns, shall, for nursing facility services provided after the date of this Order, use the Medicaid payment methodology contained in section 17b-340 of the Connecticut General Statutes, as that statute existed immediately prior to the enactment of section 32, unless the use of that methodology would produce facility-specific per diem rates less than the per diem rate produced by section 32, in which event such facilities shall receive the higher per diem rate produced by section 32; and it is

FURTHER ORDERED that the security requirement of Rule 62(c) of the Federal Rules of Civil Procedure is waived.

SO ORDERED this \_\_\_\_\_ day of June, 2010, at New Haven, Connecticut.

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Peter C. Dorsey  
Senior United States District Judge

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