No. 25-

IN THE

Supreme Court of the United States

GILLIAN FILYAW,

Petitioner,

v.

STEVE CORSI, ET AL.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *Ex parte Young*, sovereign immunity poses no barrier to suits against state officials when a plaintiff "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc.* v. *Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (citation omitted). The circuits have split on the recurring question whether a suit to restore property unlawfully withheld by the state seeks prospective relief to redress an ongoing violation of the law, or whether such a suit seeks retrospective relief to remedy a past violation. Over a dissent by Chief Judge Colloton, a divided Eighth Circuit panel below embraced the minority view that a suit seeking to restore unlawfully withheld property is barred by sovereign immunity, bringing the split in the circuit courts to six to two. The question presented is:

When a suit alleges that state officials are depriving a plaintiff of property in violation of due process, does the suit allege an ongoing violation of the law for which prospective relief is available under *Ex parte Young*?

PARTIES TO THE PROCEEDING

Petitioner in this Court is Gillian Filyaw, individually and on behalf of all others similarly situated. Respondents are Steve Corsi, Chief Executive Officer of the Nebraska Department of Health and Human Services, in his official capacity, and Drew Gonshorowski, Director of the Division of Medicaid and Long-Term Care, in his official capacity.

STATEMENT OF RELATED PROCEEDINGS

U.S. Court of Appeals for the Eighth Circuit:

Filyaw v. *Corsi*, No. 24-3041 (8th Cir. Aug. 27, 2025) (reported at 150 F.4th 936).

U.S. District Court for the District of Nebraska:

Filyaw v. *Corsi*, No. 4:24CV3108 (D. Neb. Sept. 9, 2024) (not reported but available at 2024 WL 4135877).

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Gillian Filyaw respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit's decision (Pet. App. 1a-21a) is reported at 150 F.4th 936.

The District Court's opinion granting Respondents' motion to dismiss (Pet. App. 22a-46a) is not reported but is available at 2024 WL 4135877.

JURISDICTION

The Eighth Circuit entered judgment on August 27, 2025. Pet. App. 1a-21a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. XI

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XIV, § 1

> No State shall * * * deprive any person of life, liberty, or property, without due process of law[.]

INTRODUCTION

This petition presents the Court with an opportunity to resolve a circuit conflict of profound importance to the vindication of property rights against unconstitutional incursions by the state. In the decision below, a divided panel of the Eighth Circuit held that an individual may not pursue a claim for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908), to vindicate a claim that the state is unconstitutionally withholding property in violation of the Due Process Clause. The Eighth Circuit reasoned that such a due process violation is a past action, rather than the sort of "ongoing violation of federal law" for which *Ex parte Young* suits are available. *Verizon Md. Inc.* v. *Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 636 (2002). That conclusion is in accord with the position of the First Circuit, but contrary to the holdings of six other courts of appeals that have all found that the ongoing deprivation of property without due process is an "ongoing violation of federal law" that may be vindicated under *Ex parte Young*. *Ibid.*

This Court should grant certiorari to resolve the circuit split and hold that *Ex parte Young* suits are available to remedy a state's deprivation of its citizens' property rights. It is by now firmly established that *Ex parte Young* suits are available where a "complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Ibid.* As Chief Judge Colloton explained in dissenting from the Eighth Circuit's decision below, when a plaintiff alleges that state officials deprived her of property through a defective process and continue to withhold that property without remedying the procedural defect, "she has alleged an ongoing violation of her constitutional rights." Pet. App. 19a. And where—as here—the plaintiff seeks an injunction compelling reinstatement of her property rights unless and until the state provides her with adequate process, she seeks "prospective relief." Pet. App. 19a.

The Eighth Circuit concluded otherwise by erroneously fixating on the alleged procedural defect here—a constitutionally inadequate notice that the plaintiff's Medicaid benefits were being terminated. It was undisputed that Medicaid benefits are a constitutionally protected property interest, and, because the case is at the motion-to-dismiss stage, the Eighth Circuit was also obligated to accept as true the plaintiff's allegation that the notice was constitutionally defective. But the court held that, because sending the notice was a past act, the plaintiff was merely complaining of an already-completed constitutional violation rather than an ongoing one. As Chief Judge Colloton's dissent observed, that holding disregards that the deprivation of property without due process is "ongoing" so long as the state neither restores the property nor provides sufficient process. Pet. App. 20a.

This Court's intervention is urgently needed. The position adopted by the First and Eighth Circuits extinguishes a vital tool in ensuring that states respect the

constitutionally protected property rights of their citizens. Because states are generally immune from suit under the Eleventh Amendment, *Ex parte Young* provides a crucial—and often exclusive—means of enlisting federal courts in the protection of federal rights infringed by states. Any ongoing deprivation of property rights can be reframed as challenging an act that occurred in the past. Thus, under the position adopted by the First and Eighth Circuits, state officials will be free to deprive their citizens of property without process and to retain the property in perpetuity, with federal courts powerless to provide any redress. To avoid that untenable result, this Court should grant review.

STATEMENT

A. Factual Background

Petitioner Gillian Filyaw is a Nebraska resident and mother of two. Pet. App. 59a (¶ 54). She enrolled in Nebraska Medicaid in the fall of 2020, while pregnant with her first child. Pet. App. 60a (¶ 56). Ms. Filyaw remained continuously enrolled in Nebraska's Medicaid program until the spring of 2024. Pet. App. 60a (¶ 57).

The Nebraska Department of Health and Human Services ("NDHHS") administers Nebraska's Medicaid program and "determines whether an individual is eligible to receive assistance." Pet. App. 24a; Pet. App. 51a (¶13-15). Although state participation in Medicaid is optional, once a state elects to participate, it must comply with the requirements of the federal Medicaid Act and implementing rules. Pet. App. 24a; Pet. App. 55a (¶ 32). After NDHHS makes an initial eligibility determination, it reviews a recipient's continuing eligibility at least once every 12 months in a process known as "renewal." Pet. App. 55a (¶ 34). NDHHS must provide enrollees with timely and adequate written notice of any eligibility decision, including termination. Pet. App. 55a (¶ 35). If NDHHS determines that a recipient is no longer eligible, it must maintain

Medicaid enrollment until constitutionally adequate notice is provided. Pet. App. 56a (¶ 36); see also Pet. App. 57a-58a (¶¶ 41-45).

On April 18, 2024, NDHHS issued Ms. Filyaw a notice proposing to terminate her Medicaid coverage based on her income (hereinafter "Income Termination Notice"). Pet. App. 60a (¶ 58). The notice provided Ms. Filyaw with only a conclusory reason for termination, stating only "income exceeds standards." Pet. App. 60a (¶ 59). The notice provided no explanation for that determination. It did not include a calculation of Ms. Filyaw's household income, nor did it notify Ms. Filyaw of the income limit she was alleged to have exceeded. Pet. App. 60a (¶ 59). "As a result of the conclusory reason provided on the Income Termination Notice, Plaintiff cannot adequately prepare a response to the proposed termination of coverage." Pet. App. 60a (¶ 60).

On May 1, 2024, NDHHS terminated Ms. Filyaw's Medicaid coverage. Pet. App. 60a (¶ 57). The disruption in health coverage caused her to forgo or delay treatment to address multiple serious health concerns. Pet. App. 61a (¶ 62).

B. Procedural Background

On June 11, 2024, Ms. Filyaw filed suit against Respondents (the Chief Executive Officer of NDHHS and another NDHHS official responsible for her coverage denial) in their official capacities in the U.S. District Court for the District of Nebraska. Pet. App. 2a-3a. Ms. Filyaw brought claims under 42 U.S.C. § 1983, alleging that Respondents were depriving her of her federally protected property rights without due process, in violation of the Fourteenth Amendment. Pet. App. 50a, 52a (¶¶ 9, 17). She also sought to represent a class of similarly situated Nebraskans whose Medicaid benefits were terminated based on

Income Termination Notices identical to the one she received.

Ms. Filyaw's complaint sought declaratory and injunctive relief—but not damages. She sought a declaration that NDHHS's Income Termination Notices "do not satisfy the requirements of due process and are therefore unconstitutional." Pet. App. 64a (Request for Relief). She also sought a preliminary and permanent injunction preventing Respondents from enforcing the unconstitutional Income Termination Notices. Pet. App. 28a. The injunction she sought would prevent an "ongoing deprivation of constitutionally protected property interests without adequate advance notice on behalf of the purported class through *prospective* reinstatement of the class's property interests in Medicaid." Pet. App. 50a (¶11) (emphasis added); see also Pet. App. 64a-65a (Request for Relief). Ms. Filyaw made clear that the requested injunctive relief "would not be effective until after an order from this Court and from that time forward, not before." Br. in Opp. to Defs.' Mot. to Dismiss at 2, Dkt. No. 42, *Filyaw* v. *Corsi*, No. 4:24-cv-3108 (D. Neb. Jul. 29, 2024) ("D. Ct. Br."); see also Appellant's Br. at 34, *Filyaw* v. *Corsi*, No. 24-3041 (8th Cir. Dec. 11, 2024) ("8th Cir. Br.") (injunction sought "would require reinstatement [of] Medicaid coverage only after the Court finds that the Income Termination Notice is inadequate").

Respondents did not dispute that Ms. Filyaw had a constitutionally protected property interest in her Medicaid benefits. Pet. App. 7a. But Respondents moved to dismiss for lack of subject matter jurisdiction, arguing, as relevant here, that sovereign immunity barred Ms. Filyaw's claims. Respondents maintained that the claims could not be brought under *Ex parte Young* because Ms. Filyaw challenged a prior unlawful act rather than an ongoing violation of the law, such that the relief she sought, though styled as prospective, was functionally retrospective. Pet. App. 34a-35a.

The district court agreed, holding that Ms. Filyaw's claim did not fall within *Ex parte Young*. Pet. App. 38a-45a. The court held that Ms. Filyaw did not allege an "ongoing violation" of federal law, reasoning that, since Ms. Filyaw did not pursue an appeal before the effective date provided in the notice, she was no longer "entitled to Medicaid benefits" and thus was not experiencing an ongoing deprivation. Pet. App. 45a. As a result, the district court accepted Respondents' argument that Ms. Filyaw's request for prospective reinstatement was, in fact, a disguised request for a reparative injunction "to cure past injuries" that could not be "fairly characterized as prospective" under *Ex parte Young.* Pet. App. 45a (citation omitted). Likewise, the court concluded that Ms. Filyaw's request for declaratory relief could not be "properly characterized as prospective" because it did not relate to an ongoing violation of her federal rights. Pet. App. 43a. The district court denied Ms. Filyaw's motion to certify the class as moot after granting the motion to dismiss. Pet. App. 30a.

A divided Eighth Circuit panel affirmed. Pet. App. 1a-21a. The majority concluded that Ms. Filyaw challenged the defendants' "discrete act of issuing a constitutionally deficient pre-termination notice," and that her ongoing deprivation of Medicaid coverage was simply an "ongoing effect[ ]" of the past violation. Pet. App. 7a-8a, 10a. As a result, the majority concluded that the relief sought by Ms. Filyaw was "effectively retrospective in nature and thus barred by the Eleventh Amendment." Pet. App. 17a. The majority attempted to distinguish cases from other circuits reaching a contrary result on the ground that the plaintiffs in those cases "never received any post-termination process or even had the opportunity for such a process" such that, in those cases, the "denial continued throughout the pendency of the lawsuit." Pet. App. 14a.

Chief Judge Colloton dissented, explaining that Ms. Filyaw "alleged that state officials have engaged in an

ongoing violation of [her] rights under the Due Process Clause," that she "sought prospective relief to end the violation," and that she may accordingly "proceed with her claim under 42 U.S.C. § 1983 and the doctrine of *Ex parte Young*." Pet. App. 19a. As Chief Judge Colloton noted, "[b]ecause, according to the complaint, the State has never provided Filyaw with adequate notice or a proper termination hearing and has continued to declare her ineligible for Medicaid benefits, she has alleged an ongoing violation of her constitutional rights." Pet. App. 19a.

Chief Judge Colloton further faulted the majority for declining to follow "authority from other circuits that show the way." Pet. App. 19a. Instead, he explained, the majority relied on "inapposite decisions in which any due process violation had been cured" by the time the plaintiff brought suit. Pet. App. 20a. In this case, by contrast, Ms. Filyaw alleges that the due process violation has not been cured, and the majority concluded otherwise only by "erroneously assum[ing] on the merits that the allegedly deficient notice was not deficient." Pet. App. 21a.

REASONS FOR GRANTING THE PETITION

The circuits are split over whether federal courts possess authority to provide redress under *Ex parte Young* where state officials deprive individuals of property in violation of the Due Process Clause. In the decision below, a divided panel of the Eighth Circuit joined the First Circuit in holding that a state's continued denial of an individual's property rights is a mere aftereffect of a prior due process violation, rather than the sort of ongoing violation of federal law that *Ex parte Young* suits may remedy.

That position breaks sharply from decisions in six other circuits permitting *Ex parte Young* suits to proceed in materially identical circumstances. The minority approach adopted below and embraced by the First Circuit undermines the supremacy of federal law and allows

states to insulate ongoing violations of federal property rights from judicial review. That result is irreconcilable with *Ex parte Young*, is unsupported by this Court's precedent, and would leave courts powerless to protect federal property rights no matter how egregious the violation.

The Court's intervention is necessary to restore uniformity on this critical question of federal jurisdiction and to reopen the courthouse doors to plaintiffs seeking to vindicate their federal property rights. The Court should grant the petition and reverse.

I. THE CIRCUITS ARE SPLIT ON WHETHER PARTIES MAY SUE TO RESTORE PROPERTY WITHHELD BY STATE OFFICIALS IN VIOLATION OF DUE PROCESS.

The circuits have sharply split on the question whether federal courts may grant relief under *Ex parte Young* to restore property unlawfully withheld in violation of the Due Process Clause. Six circuits—the Second, Fourth, Sixth, Seventh, Ninth, and Tenth—hold that, where a state deprives an individual of property without due process, there is an ongoing constitutional violation that may form the basis of an *Ex parte Young* suit unless the property has been restored or the state has provided constitutionally sufficient process. But two circuits—the First and the Eighth—hold that the state's unlawful deprivation of property is not an ongoing violation and is instead a mere ongoing effect of a prior violation. Thus, in two circuits, parties lack a vital federal remedy against state officials who deprive them of property without due process.

A. Six Circuits Correctly Hold That Withholding Property Without Due Process Constitutes An Ongoing Violation of Federal Law.

Six circuits correctly hold that an *Ex parte Young* suit is available where a state deprives an individual of her property without due process. Those courts recognize that both requirements for *Ex parte Young* relief are met by

such suits: An ongoing deprivation of property without due process constitutes an "ongoing violation of federal law," and the requested relief is "properly characterized as prospective" where the plaintiff seeks an injunction compelling reinstatement. *Verizon*, 535 U.S. at 645 (citation omitted).

Start with the Seventh Circuit. As Chief Judge Colloton noted, that court's decision in *Sherwood* v. *Marchiori*, 76 F.4th 688 (7th Cir. 2023), recognized that an ongoing deprivation of property without due process may form the basis for an *Ex parte Young* suit. In *Sherwood*, the Seventh Circuit allowed the plaintiffs to seek restoration of their benefits notwithstanding the state's argument that the denial of benefits should be treated as a past act. *Id.* at 695. The court explained that, because the plaintiffs had a "continued property interest in the underlying benefits, the alleged federal due-process violations are still ongoing," and plaintiffs "can invoke the *Ex parte Young* exception." *Id.* at 696; see also *Elliott* v. *Hinds*, 786 F.2d 298, 302 (7th Cir. 1986) (relief of reinstatement of property right "is clearly prospective in effect and thus falls outside the prohibitions of the Eleventh Amendment"); *Driftless Area Land Conservancy* v. *Valcq*, 16 F.4th 508, 522 (7th Cir. 2021) (finding "an ongoing violation of federal law when the alleged violation is a procedural error committed by a state actor at a discrete point" in the past).

Chief Judge Colloton also observed that the Fourth Circuit has confronted a case "of the same ilk" and allowed the claim to proceed. Pet. App. 20a. In *Coakley* v. *Welch*, 877 F.2d 304 (4th Cir. 1989), a state official allegedly terminated an employee without adequate notice, depriving him of the property interest in his employment. Though the termination happened in the past, the court deemed the deprivation to be "an ongoing violation" that allowed the plaintiff to seek "the injunctive remedy of reinstatement." *Id.* at 306-307 (quotation marks omitted). In

addition, the Fourth Circuit has confronted a case much like this one in which the plaintiff alleged a "reduction in Medicaid benefits" without the "individual notice" required by due process. *Kimble* v. *Solomon*, 599 F.2d 599, 601 (4th Cir. 1979). In that case, the Fourth Circuit held that "the [E]leventh [A]mendment permits an order requiring the prospective restoration of benefits." *Ibid.* Furthermore, the Fourth Circuit recently reiterated that, while the Eleventh Amendment prohibits a court from ordering state officials to pay interest unlawfully deprived *in the past*, a "court may issue an injunction prohibiting [a state] from *retaining* such interest *in the future*." *Albert* v. *Lierman*, No. 24-1170, 2025 WL 2608433, at *6 (4th Cir. Sept. 10, 2025) (emphasis added).

The Sixth Circuit agreed, explaining in *Cooperrider* v. *Woods*, 127 F.4th 1019 (6th Cir. 2025), that "state officials may commit 'ongoing' violations when they unconstitutionally retain possession of a person's identifiable property." *Id.* at 1044 (cleaned up). The Sixth Circuit further held that in "suits concerning a state's payment of public benefits under federal law, a federal court may enjoin the state's officers to comply with federal law by awarding those benefits in a certain way going forward." *Price* v. *Medicaid Dir.*, 838 F.3d 739, 747 (6th Cir. 2016).

The Ninth Circuit followed suit in a case much like this one involving the alleged denial of Medicaid funding without due process. See *K.W. ex rel. D.W.* v. *Armstrong*, 789 F.3d 962 (9th Cir. 2015). The court affirmed an injunction requiring defendants to "restore and continue the plaintiffs' Medicaid services * * * until the defendants first provide adequate advance notice" as well as "the opportunity for a fair hearing prior to the reduction or termination of services." *Id.* at 968 (quotation marks omitted). As the court explained, the "injunction grant[ed] only prospective relief allowed under the Eleventh Amendment, by restoring class members to the individualized budgets they had

prior to" a defective notice of termination, and "join[ed] a number of [its] sister circuits in rejecting Eleventh Amendment challenges directed at orders reinstating social assistance benefits prospectively." *Id.* at 974.

The Tenth Circuit held similarly in *Lewis* v. *New Mexico Department of Health*, 261 F.3d 970 (10th Cir. 2001), a Medicaid case where plaintiffs alleged that they were "depriv[ed] of procedural due process" by the denial of certain Medicaid benefits. *Id.* at 977. Although the services were first denied in the past, the court explained that the plaintiffs "clearly seek prospective equitable relief" because an injunction would simply require "that officials conform their *future* actions to federal law." *Id.* at 977-978 (emphasis added) (quotation marks and citation omitted); see also *Buchwald* v. *Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 495 n.5 (10th Cir. 1998) ("The existence of a past harm does not convert a prospective injunction into retrospective relief barred under the Eleventh Amendment.").

Finally, the Second Circuit has reached a similar conclusion, permitting a plaintiff to bring suit under *Ex parte Young* to challenge "the constitutional adequacy of the notice given" regarding the terms of certain state "benefits." *Russell* v. *Dunston*, 896 F.2d 664, 665 (2d Cir. 1990). The court rejected the state's argument for immunity on the basis that the plaintiff really sought to challenge "an action already taken," and instead addressed the plaintiff's due process claim squarely on the merits. *Id.* at 668 (citation and alteration omitted).

B. Two Circuits Hold That The Withholding Of Property Is Not An Ongoing Violation.

Two circuits have reached the opposite conclusion, holding that a state's ongoing withholding of property is not an ongoing deprivation and therefore cannot be redressed under *Ex parte Young*.

In the decision below, the Eighth Circuit held that a plaintiff unconstitutionally deprived of property without adequate notice "faces no ongoing violation of federal law" but instead merely experiences "the effects of the allegedly unconstitutional pre-termination notice." Pet. App. 8a. The court reasoned that an "injunction is not available" because "there is no continuing violation of federal law to enjoin." Pet. App. 18a (citation omitted). And, even though Ms. Filyaw seeks only the prospective restoration of her benefits, the panel concluded that she is "essentially requesting a reparative injunction to cure a past injury." Pet. App. 18a (cleaned up).

The First Circuit has held similarly. In *Cotto* v. *Campbell*, 126 F.4th 761 (1st Cir. 2025),[1] a case alleging that state officials forfeited plaintiffs' property in violation of due process, the court held that *Ex parte Young* relief was not available because there was no ongoing violation of federal law. According to the panel, "even if the Commonwealth defendants' *continued withholding* of plaintiffs' forfeited property did violate federal law, it would be a past violation, not an ongoing one." *Id.* at 770 (emphasis added). Thus, even though the state continued to deprive plaintiffs of their property, and even though plaintiffs sought relief that would require the return of that property in the future, the court held that there was no "future misconduct to enjoin" and thus "no prospective relief or ancillary relief for a federal court to grant." *Id.* at 768.

* * *

This Court's intervention is urgently needed to resolve this dispute regarding whether an ongoing deprivation of property rights gives rise to an ongoing violation of federal law that can be redressed through prospective relief or

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[1] A petition for certiorari is currently pending before this Court in *Cotto*. See pp. 22-23, *infra.*

whether—as the First and Eighth Circuit hold—immunity shields the states' unconstitutional deprivations of property from *Ex parte Young* suits.

II. THE DECISION BELOW IS WRONG.

Under *Ex parte Young*, sovereign immunity poses no barrier to suits seeking prospective relief against state officials engaged in ongoing violations of federal law. See *Papasan* v. *Allain*, 478 U.S. 265, 278-279 (1986). *Ex parte Young* rests on the premise that when a federal court commands a state official "to do nothing more than refrain from violating federal law," the official is not protected by sovereign immunity. *Va. Off. for Prot. & Advoc.* v. *Stewart*, 563 U.S. 247, 255 (2011).

Ms. Filyaw's complaint asserts a quintessential ongoing violation of federal law for which prospective relief under *Ex parte Young* is available. As Chief Judge Colloton explained, "according to the complaint, the State has never provided Filyaw with adequate notice or a proper termination hearing" and has continued to deny her Medicaid benefits, such that she "alleged an ongoing violation of her constitutional rights." Pet. App. 19a. And she seeks "prospective relief in the form of a declaratory judgment and injunction that would require the state officials to reinstate her eligibility for Medicaid"—*in the future*—"until such time as the State affords her adequate notice and properly terminates her benefits." Pet. App. 19a.

The majority's contrary conclusion resulted from two major errors. *First*, the court mistakenly concluded that Ms. Filyaw challenged the "discrete act of issuing a constitutionally deficient pre-termination notice," and that her ongoing deprivation of coverage was simply an "ongoing effect[ ]" of the past violation. Pet. App. 7a-8a, 10a. *Second*, the court incorrectly maintained that Ms. Filyaw's request for reinstatement of benefits was a disguised request for impermissible retrospective relief. Pet. App. 17a-18a. In

fact, reinstatement is a paradigmatic form of prospective relief for an ongoing violation of federal law.

If left uncorrected, these errors will have dramatic consequences, leaving individuals with no federal remedy in the myriad circumstances in which state officials unlawfully deprive them of property.

A. Ms. Filyaw Alleges An Ongoing Violation.

Ms. Filyaw's complaint alleges that Respondents "*continue to deprive*" her "of due process in violation of the Fourteenth Amendment" by withholding her Medicaid benefits without due process. Pet. App. 61a-62a (¶ 66) (emphasis added). While some constitutional violations—like the use of excessive force—consist of a discrete past action that can be remedied only through damages, see *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 111 (1983), where a state deprives an individual of property without due process, the state's retention of that property is ongoing conduct in violation of the Constitution for which relief under *Ex parte Young* is available.

This Court's precedent refutes the majority's contrary conclusion that the deprivation of Ms. Filyaw's property rights was merely the "effect" of a past, completed violation. In *Papasan*, the Court held that the ongoing "unequal distribution by the State of * * * benefits" is "precisely the type of continuing violation for which a remedy may permissibly be fashioned under *Young*." 478 U.S. at 282. Although the unequal distribution was initiated by state "actions in the past," the plaintiffs' allegations sought to redress "the *present* disparity in the distribution of the benefits." *Ibid.* (emphasis added). Similarly, in *Verizon*, the Court held that a plaintiff's suit to restrain state officials from continuing to enforce a *past* order that subjected them to ongoing financial harm "clearly satisfie[d]" the "straightforward inquiry into whether the complaint

alleges an ongoing violation of federal law." 535 U.S. at 646 (cleaned up).

Cases in which this Court has declined to find an ongoing violation confirm that one exists here. In *Green* v. *Mansour*, 474 U.S. 64 (1985), on which the Eighth Circuit majority relied, see Pet. App. 12a, the plaintiffs alleged that state officials violated federal law in distributing benefits, seeking both an injunction to prevent the violation of federal law prospectively as well as a declaration of illegality. *Green*, 474 U.S. at 64. But, unlike here, "Congress amended the relevant statutory provisions" while the litigation was underway, and it was "undisputed" that the state officials' conduct thereafter "conformed to federal law." *Id.* at 65. The plaintiffs accordingly "concede[d]" that the amendments "rendered moot" their claim for prospective injunctive relief. *Id.* at 68-69. Because it was undisputed that there was "no claimed continuing violation of federal law," the Court held that a declaratory judgment was unavailable, as it would relate solely to "a dispute about the lawfulness of [defendant's] *past* actions." *Id.* at 73 (emphasis added). In sharp contrast, Respondents here continue to violate federal law in withholding Ms. Filyaw's benefits, her claim for an injunction is not moot, and her requested relief does not merely pertain to a dispute about the lawfulness of Respondents' past actions.

In holding otherwise, the Eighth Circuit relied on precedent addressing whether a plaintiff alleged a "continuing violation" for purposes of determining the date on which a plaintiff's claim accrued. See Pet. App. 9a. But, as this Court has made clear, the question whether a plaintiff has alleged an ongoing violation under *Ex parte Young* has no bearing on the distinct question of when a particular claim accrues. For example, in *Reed* v. *Goertz*, 598 U.S. 230 (2023), a due process challenge to a state's process for adjudicating prisoner suits seeking DNA testing, the Court held that the plaintiff's "claim was complete and the

statute of limitations began to run" on a prior date when state-court litigation ended. *Id.* at 236. Although the Court held that the "claim was complete" in the past, the Court had no difficulty concluding that the plaintiff alleged an ongoing deprivation of his procedural due process rights, such that "the *Ex parte Young* doctrine allow[ed] suit[ ] * * * for declaratory or injunctive relief." *Id.* at 234. Because state officials allegedly *continued* to violate the plaintiff's rights by refusing to provide the process necessary, these officials could be sued under *Ex parte Young* even though the deprivation began in the past.

The Eighth Circuit also attempted to distinguish precedents from other courts of appeals finding an ongoing violation on similar facts by asserting that, in those cases, "the plaintiff was denied benefits without any notice whatsoever" and without being "afforded an opportunity for a hearing." Pet. App. 13a. But—as Chief Judge Colloton observed—that is exactly what Ms. Filyaw alleges here. Pet. App. 20a-21a. Speculation about the merits of Ms. Filyaw's due process claim was not an appropriate consideration at the motion-to-dismiss stage. As the Supreme Court has explained, "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon*, 535 U.S. at 646.

B. Ms. Filyaw Sought Prospective Relief In The Form of Reinstatement.

The Eighth Circuit majority also erroneously concluded that Ms. Filyaw sought relief that was "effectively retrospective in nature and thus barred by the Eleventh Amendment." Pet. App. 17a. According to the majority, she sought "a declaration that her rights were violated *in the past*" and "a reparative injunction to cure a *past injury*." Pet. App. 18a (cleaned up) (emphasis added).

1. The relief Ms. Filyaw seeks is prospective, not retrospective. As she made clear in her complaint, she seeks

"prospective reinstatement of the class's property interests in Medicaid." Pet. App. 50a (¶ 11). She reiterated in her district court briefing that the requested injunctive relief "would not be effective until *after* an order from this Court and from that time forward, not before." D. Ct. Br. at 2 (emphasis added). And she reaffirmed in the Eighth Circuit that the injunction she sought "would require reinstatement in Medicaid coverage *only after* the Court finds that the Income Termination Notice is inadequate." 8th Cir. Br. at 34 (emphasis added).

This Court has recognized that relief is prospective in indistinguishable circumstances. In *Edelman* v. *Jordan*, 415 U.S. 651 (1974), the Court explained that while a federal court could not "use state funds to make reparation for the past," the Eleventh Amendment "is no bar to" a judgment "that prospectively enjoined" state officials to provide benefits in the future. *Id.* at 664-665 (quotation marks and citation omitted). The Court explained that relief under *Ex parte Young* is available to require state officials to "comply with the federal standards for the future if the state is to have the benefit of federal funds in the programs" administered by the state. *Id.* at 665. See also *Price*, 838 F.3d at 747 (interpreting *Edelman* to mean that "a federal court may enjoin the State's officers to comply with federal law by awarding [state] benefits in a certain way going forward—even if the court may not order those officers to pay out public benefits wrongly withheld in the past").

The Eighth Circuit majority suggested that Ms. Filyaw's requested relief was "essentially" retrospective because it would require the state to pay Ms. Filyaw Medicaid benefits. Pet. App. 18a. But the Court has repeatedly rejected similar contentions. In *Edelman*, the Court explained that paying money from the treasury in the future may be the "necessary result of compliance with decrees which by their terms were prospective in nature." 415 U.S. at 668.

This kind of "ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*," under which state officials may be compelled to bring their prospective conduct in line with federal law—even if doing so means spending some state funds. *Ibid.*

In *Quern* v. *Jordan*, 440 U.S. 332 (1979), the Court likewise rejected the argument that relief needed to cure an ongoing violation was impermissibly retrospective because it would "lead inexorably to the payment of state funds for retroactive benefits and therefore it, in effect, amounts to a monetary award." *Id*. at 347. And in *Papasan*, the Court reiterated that a remedy to eliminate a current violation of federal law, "even a remedy that might require the expenditure of state funds, would ensure compliance *in the future* with a substantive federal-question determination rather than bestow an award for accrued monetary liability." 478 U.S. at 282 (quotation marks and citation omitted).

2. Reinstatement is a quintessential form of prospective relief for ongoing constitutional violations like the one at issue here. As this Court noted in *Edelman*, reinstatement is often the "necessary consequence of compliance in the future with a substantive federal-question determination." 415 U.S. at 668. That is because "[t]he goal of reinstatement * * * is not compensatory; rather, it is to compel the state official to cease her actions in violation of federal law and to comply with constitutional requirements." *Elliott*, 786 F.2d at 302.

The courts of appeals have therefore repeatedly held that an order requiring state officials to reinstate an unlawfully denied property interest constitutes prospective relief. See *Doe* v. *Lawrence Livermore Nat'l Lab'y*, 131 F.3d 836, 841 (9th Cir. 1997) ("reinstatement would simply prevent the prospective violation of [plaintiff's] rights

which would result from denying him employment in the future"); *Elliott*, 786 F.2d at 302 ("reinstatement * * * is clearly prospective in effect and thus falls outside the prohibitions of the Eleventh Amendment"); *Armstrong*, 789 F.3d at 974 ("We therefore join a number of our sister circuits in rejecting Eleventh Amendment challenges directed at orders reinstating social assistance benefits prospectively."); *Williams* v. *Kentucky*, 24 F.3d 1526, 1543 (6th Cir. 1994) (allowing prospective injunctive relief, "namely, reinstatement"); *Russell*, 896 F.2d at 667-668 ("an order that reinstatement be granted or that a reinstatement hearing be conducted is the sort of prospective relief that is not barred by the Eleventh Amendment" (citation omitted)); *Melo* v. *Hafer*, 912 F.2d 628, 637 (3d Cir.1990) ("a section 1983 claim for reinstatement may be maintained").

The Eighth Circuit's holding that the relief of reinstatement is instead impermissibly retrospective constitutes a radical departure from settled practice and squarely conflicts with *Edelman*.

III. The Case Presents an Ideal Vehicle for Resolving a Consequential Question.

This case offers the ideal opportunity for the Court to resolve the question presented. The issue is squarely presented and dispositive, the question is exceedingly important, and states located in circuits on the wrong side of the split are improperly held outside the reach of federal courts when they violate their citizens' property rights. This Court should therefore grant certiorari or, at a minimum, grant the petition presenting a similar question in *Cotto* v. *Campbell*, No. 24-1307 (pet. filed June 18, 2025) and hold this petition pending the outcome of that case.

A. This case squarely presents the *Ex parte Young* question as a pure question of law. The parties do not dispute that Ms. Filyaw has a constitutionally protected property interest in her Medicaid benefits. The district court

dismissed on sovereign immunity grounds alone and the Eighth Circuit affirmed. Pet. App. 2a. The *Ex parte Young* question is therefore both preserved and dispositive. And, because this case arises from the grant of a motion to dismiss, no factual disputes would complicate this Court's review.

B. The question presented is also a profoundly important one. *Ex parte Young* "gives life to the Supremacy Clause." *Green*, 474 U.S. at 68. "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Ibid.;* see also *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 105 (1984) (*Ex parte Young* is necessary for "the vindication of federal rights"). Without *Ex parte Young*, state officials would be free to violate federal law, insulated from the prospect that an injured party could bring suit to demand that they conform their conduct to the law. Thus, for more than a century, *Ex parte Young* has been "indispensable to the establishment of constitutional government and the rule of law." 17A Wright & Miller's Federal Practice & Procedure § 4231 (3d ed. 2025).

Under the decision below and similar precedent in the First Circuit, however, officials may disregard the constitutional command that the state may not deprive individuals of "property[ ] without due process of law." U.S. Const. amend. XIV, § 1. That is because *any* deprivation of a property interest could be characterized as a prior discrete act rather than an ongoing violation. Thus, individuals unlawfully deprived of property by the state will be left without a vital federal remedy—from the moment of the deprivation into perpetuity—because the violation will be narrowly defined as beginning and ending the moment the state commenced the deprivation. That result flouts *Ex parte Young* and would convert property rights into second-class rights, even though "[t]he Founders recognized

that the protection of private property is indispensable to the promotion of individual freedom." *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139, 147 (2021).

The split leaves the vindication of property rights to the happenstance of geography, undermining the uniformity of federal law and leaving state officials with no deterrent against unlawfully withholding property in states ranging from Maine to Missouri. At this stage in Ms. Filyaw's case, Respondents cannot dispute that their conduct in withholding property from Ms. Filyaw and tens of thousands of similarly situated Nebraskans is unconstitutional. The Eighth Circuit's decision would mean that there is nothing anyone can do about it.

C. This Court should therefore grant the petition, or—at a minimum—it should grant the currently pending petition in *Cotto*, No. 24-1307, and hold this case pending the disposition of that one.

Like this petition, *Cotto* asks the Court to consider "[w]hether the unlawful retention of property by state officials" is a "past wrong" or an "ongoing violation for *Ex parte Young* purposes." *Cotto*, No. 24-1307, Pet. at i (quotation marks and citation omitted). But the Court should grant certiorari in this case, rather than *Cotto*, because *Cotto* presents procedural complications not present here. The district court in *Cotto* held that the forfeitures at issue resulted in the transfer of ownership to the Commonwealth, see *Cotto* Pet. App. 38a-40a, and Petitioners did not cross-appeal that feature of the district court's decision, raising questions about whether the issue is preserved. See Reply Br. of State Appellants at 3-5, *Cotto* v. *Campbell*, No. 23-2069 (1st Cir. Oct. 11, 2024). Moreover, the Eighth Circuit's decision deepens the circuit split, and the dissenting opinion by Chief Judge Colloton makes this case an especially appealing vehicle for reviewing the question

presented. But, if the Court disagrees, it should at least grant in *Cotto* and hold this petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 17, 2025

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 24-3041

GILLIAN FILYAW,
individually and on behalf of all others similarly situated

Plaintiff-Appellant,

v.

STEVE CORSI,
Chief Executive Officer of the Nebraska Department of Health and Human Services, in his official capacity;
DREW GONSHOROWSKI,
Director of the Division of Medicaid and LongTerm Care, in his official capacity

Defendants-Appellees.

DANIELLE C. JEFFERIS;
American Civil Liberties Union of Nebraska

Amici on Behalf of Appellant(s)

Appeal from United States District Court
for the District of Nebraska - Lincoln

_____

Submitted: May 15, 2025
Filed: August 27, 2025

_____

Before COLLOTON, Chief Judge, SMITH and SHEPHERD, Circuit Judges.

_____

SMITH, Circuit Judge.

Gillian Filyaw alleged that the Nebraska Department of Health and Human Services (NDHHS) and officials from NDHSS (Defendants) deprived her and a class of Nebraskans of due process in terminating her Medicaid benefits without proper notice.

The district court[1] dismissed her claims, finding no *Ex parte Young*[2] exception to sovereign immunity. We agree and affirm.

I. *Background*

Medicaid is a federal and state funded program that provides medical coverage for certain people with limited income. Accepting the facts in Filyaw's complaint as true, she obtained Medicaid in the fall of 2020 administered through the NDHHS.

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[1] The Honorable Brian C. Buescher, United States District Judge for the District of Nebraska.
[2] 209 U.S. 123 (1908).

On April 18, 2024, prior to her coverage being terminated, Filyaw received a Notice of Action (Notice) from the NDHSS informing her that she was no longer eligible for Medicaid coverage because her "[i]ncome [e]xceed[ed] [s]tandards." R. Doc. 36-2, at 1. The Notice stated that she had a "right to request a conference with [N]DHHS to discuss the reason(s) for the action(s) indicated" and a "right to appeal for a hearing on any agency action or inaction on [her] application." *Id.* at 3. Furthermore, it stated Filyaw had "90 days following the date of this notice to request a fair hearing" and that

> [i]n cases of intended adverse action, where [N]DHHS is required to send you timely and adequate notice, if you request an appeal hearing within ten days following the date on this notice (or in a Medicaid case, before the effective date on this notice), [N]DHHS will not carry out the adverse action until a fair hearing decision is made . . . .

Id. (bold omitted). Filyaw alleged that the Notice is identical to notices of action the NDHHS has issued to 22,000 other Medicaid enrollees since April 1, 2023.

Filyaw did not appeal the termination decision at the state level, and her health coverage terminated on May 1, 2024. On June 11, 2024, Filyaw filed her complaint for herself and a class of Nebraskans "who, since March 1, 2023, have been or will be issued a written notice from Defendants proposing to terminate their Nebraska Medicaid eligibility for the reason 'income exceeds standards.'" R. Doc. 1, at 5. Filyaw sued Defendants in their

official capacity pursuant to 42 U.S.C. § 1983 and asked the district court to

a) Certify this action as a class action under Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure with respect to the proposed class identified herein;

b) Pursuant to 42 U.S.C. § 1983 declare that the Income Termination Notices used by Defendants do not satisfy the requirements of due process and are therefore unconstitutional;

c) Preliminarily and permanently enjoin Defendants from enforcing unconstitutional and unlawful Medicaid terminations per Income Termination Notices by affirmatively ordering that Defendants prospectively reinstate the property interests in Medicaid coverage of Plaintiff and proposed class until Defendants provide the enrollees an adequate termination notice that satisfies the requirements of constitutional due process, including setting forth the specific reasons why termination is proposed;

d) Preliminarily and permanently enjoin Defendants from terminating Medicaid coverage for future members of the proposed class without first providing the enrollee a termination notice that satisfies the requirements of due process, including setting forth the specific reasons why termination is proposed . . . .

Id. at 14–15. Filyaw also filed a motion to certify a class and a motion for a temporary restraining order (TRO). The

TRO was denied, as the district court determined Filyaw was unlikely to succeed on the merits because Filyaw sought retroactive or retrospective relief against Defendants, who were protected by sovereign immunity, and because the notices regarding her Medicaid rights likely satisfied due process.

Defendants filed a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a plausible claim for relief under Rule 12(b)(6). First, the district court considered whether it had subject matter jurisdiction prior to ruling on Filyaw's motion to certify a class, and thus it considered only Filyaw's claims—not the class claims—in ruling on the motion to dismiss. Next, the district court concluded that Filyaw had alleged no ongoing violation. Filyaw's Medicaid coverage had been terminated at the time that she filed her federal complaint because she had not appealed the state's determination. Consequently, she "ha[d] no Medicaid benefits to lose" and was "not at risk of being erroneously deprived of Medicaid coverage." R. Doc. 47, at 16. The district court stated that "the lingering effects of Defendants' past action do not convert it into an ongoing violation." *Id.* at 17 (cleaned up). Finally, the district court found that Filyaw also was not seeking prospective relief, as Filyaw sought "a reparative injunction" "to cure past injuries." *Id.* at 19 (quoting *Merritts v. Richards*, 62 F.4th 764, 772 (3d Cir. 2023)). This appeal followed the district court's dismissal of Filyaw's complaint.

II. *Discussion*

On appeal, Filyaw argues that she still suffers "an ongoing violation of her due process rights because she has not received adequate pre-termination notice, remains without Medicaid, and is at risk of future violations." Appellant's Br. at 2. She argues that she is entitled to prospective reinstatement to Medicaid until she receives a constitutionally adequate termination notice.[3] Defendants argue that the ongoing effects of the allegedly deficient pre-termination notice do not turn her past termination into an ongoing violation of federal law.

> [A]n unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. But the Supreme Court has also recognized sovereign immunity does not bar certain suits seeking declaratory and injunctive relief against state officers in their individual capacities based on ongoing violations of federal law. The *Ex parte Young* doctrine rests on the premise that when a federal court commands a state official to do nothing more than

[3] In her opening brief, Filyaw developed no argument as to the district court's decision to only consider her claims and not the claims of the proposed class. "Claims not raised in an opening brief are deemed waived. This court does not consider issues raised for the first time on appeal in a reply brief 'unless the appellant gives some reason for failing to raise and brief the issue in his opening brief.' " *Jenkins v. Winter*, 540 F.3d 742, 751 (8th Cir. 2008) (citation omitted) (quoting *Neb. Plastics, Inc. v. Holland Colors Ams., Inc.*, 408 F.3d 410, 421 n. 5 (8th Cir. 2005)). Filyaw thus waived any argument that the district court erred in considering only her claims and not the claims of the class as well.

> refrain from violating federal law, he is not the State for sovereign-immunity purposes.

Elder v. Gillespie, 54 F.4th 1055, 1062 (8th Cir. 2022) (cleaned up).

The doctrine of *Ex parte Young* is "a narrow exception" to sovereign immunity. *Wolk v. City of Brooklyn Ctr.*, 107 F.4th 854, 858 (8th Cir. 2024). There are two requirements to meet the *Ex Parte Young* exception. First, the plaintiff must "allege[] an ongoing violation of federal law." *281 Care Comm. v. Arneson* (*281 Care Comm. I*), 638 F.3d 621, 632 (8th Cir. 2011) (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)). Second, the plaintiff must be seeking prospective relief. *Id.*

Both parties agree that receipt of Medicaid is a constitutionally protected property interest. Where they differ is whether the alleged violation is ongoing and whether the relief that Filyaw seeks is prospective.

A. *Ongoing Violation*

Filyaw avers that she can show an ongoing violation in two ways. First, she states that because she has yet to receive proper pre-termination notice, she remains entitled to Medicaid benefits and Defendants continue to deprive her of those benefits. Second, she argues that she faces a risk of receiving the same pre-termination notice in the future because it is the policy and practice of Defendants to issue the allegedly inadequate pre-termination notices.

1. *Continual Deprivation of Medicaid*

We have not squarely addressed whether the termination of benefits following a discrete act of issuing a

constitutionally deficient pre-termination notice constitutes an ongoing violation. However, analogous cases from this circuit and our sister circuits indicate that Filyaw faces no ongoing violation of federal law. Instead, she is experiencing the effects of the allegedly unconstitutional pre-termination notice.

In *Humphrey v. Eureka Gardens Public Facility Board*, 891 F.3d 1079 (8th Cir. 2018), African-American homeowners alleged that the defendants violated their rights to procedural due process, substantive due process, and equal protection by installing grinder sewer systems instead of gravity sewer systems at their residences, resulting in higher utility expenses than residences with gravity systems. *Id.* at 1081. The *Humphrey* plaintiffs argued that they faced a continuing constitutional violation; thus, their claim was not time-barred. *Id.* at 1082. Although the court in *Humphrey* dealt with whether a claim was time-barred, it analyzed whether the plaintiffs' claims could be characterized as ongoing violations of federal law. *See id.* In doing so, the court in *Humphrey* looked to *Montin v. Estate of Johnson*, 636 F.3d 409 (8th Cir. 2011). There, we explained that

> [n]ot every plaintiff is deemed to have permanently sacrificed his or her right to obtain injunctive relief merely because the statute of limitations has run as measured from the onset of the objected-to condition or policy. . . . This is particularly true where it is appropriate to describe each new day under an objected-to policy as comprising a new or continuing violation of rights, as in the context of an Eighth

> Amendment claim for cruel or unusual punishment or a discrimination claim alleging ongoing implementation of a discriminatory wage scheme.

Id. at 415. In *Montin*, a civilly-committed sex offender experienced daily "unconstitutional restrictions o[n] his liberty of movement," and thus we found a continuing violation. *Id.* at 416. However, we also noted that the court would not have found a continuing violation for a "discrete act." *See id.* (internal quotation marks omitted). Applying that logic in *Humphrey*, we held that the discrete act of installing a different sewer system for some homes resulting in additional expenses for the homeowners did not cause the violation to be ongoing, as the "continuing responsibility for the additional expenses they entail[ed]" were "delayed, but inevitable, consequences of" the decision to install one sewer system over another. *Humphrey*, 891 F.3d at 1082.

Humphrey also analyzed the Supreme Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), in which the Supreme Court considered whether a college professor's Title VII claim was time-barred. *Id.* at 258. In *Ricks*, a college professor alleged a Title VII violation for his denial of tenure. *Id.* at 254. After the allegedly unconstitutional denial of tenure, the university terminated the professor a year later. *Id.* at 253. The Supreme Court ultimately held that

> the only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to [the professor]. That is so even though one of the

> effects of the denial of tenure—the eventual loss of a teaching position—did not occur until later.

Id. at 258 (footnote omitted). "The professor's termination was not a 'continuing violation' of Title VII, but was instead 'a delayed, but inevitable, consequence of the denial of tenure.' " *Humphrey*, 891 F.3d at 1082 (quoting *Ricks*, 449 U.S. at 257–58). Each of these cases—*Humphrey, Montin*, and *Ricks*—distinguished between the discrete violation of federal law and the ongoing effects from that violation. Here, the only alleged violation of federal law occurred when Filyaw received the allegedly defective Notice. That completed act has not been repeated in Filyaw's case. Thus, Filyaw is not suffering an ongoing violation of federal law, "even though one of the *effects* of the [allegedly unconstitutional pre-termination notice]—the eventual loss of [Medicaid]—did not occur until later." *Ricks*, 449 U.S. at 258.

An analogous case from the Third Circuit also supports this conclusion. *See Merritts*, 62 F.4th at 772. Merritts sought injunctive relief related to Pennsylvania state officials' allegedly unconstitutional condemnation of his land. *Id.* at 768. The defendants pursued easements across Merritts's property. *Id.* Merritts rejected the officials' offers. *Id.* In response, they instituted a condemnation proceeding against Merritts. *Id.* After unsuccessfully challenging that condemnation proceeding in state and federal court, Merritts brought suit under 42 U.S.C. § 1983 for declaratory and injunctive relief, arguing that the taking of his land was unconstitutional. *Id.* at 770.

The Third Circuit held that the Eleventh Amendment barred Merritts's claim because he was not alleging an ongoing violation of federal law. *Id.* at 772. This was because

> Merritts pursues injunctive and declaratory relief based on two claimed past violations of federal law: acquiring the easements without justification and not providing just compensation. Although those earlier actions may have present effect, that does not mean that they are ongoing. *See Papasan v. Allain*, 478 U.S. 265, 277–78, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986) ("*Young* has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past ...."). Here, after Merritts refused the offer of $500 for the easements, PennDOT acquired them through a condemnation proceeding that concluded before this lawsuit was filed. The lingering effects of that discrete past action do not convert it into an ongoing violation.

Id. Filyaw attempts to distinguish *Merritts* by stating that "the underlying state condemnation proceedings were long completed, and the defendants lawfully owned the property at the time the federal lawsuit attempting to review the state court judgment was filed in federal court." Appellant's Br. at 27. But Merritts was arguing that the defendants there had unlawfully taken his property in violation of the Constitution, just as Filyaw is arguing that Defendants here unlawfully terminated her Medicaid benefits without proper pre-termination notice. *See*

Merritts, 62 F.4th at 772. Like the plaintiff in *Merritts*, the violation that Filyaw asserts is a past act, and she seeks remedy for that past violation.

Filyaw cites several cases that she contends support her entitlement to prospective reinstatement of her benefits until she receives proper notice. These cases, however, predate *Green v. Mansour*, 474 U.S. 64 (1985). *Green* made clear that the *Ex parte Young* exception to Eleventh Amendment sovereign immunity required an "ongoing violation[] of federal law." *Id.* at 71; *see also Cotto v. Campbell*, 126 F.4th 761, 771 (1st Cir. 2025) (stating that "the Court granted certiorari in *Green* to answer" whether a court can "issue a declaratory judgment that state officials violated federal law in the past" "[i]f there is no ongoing violation of federal law" (internal quotation marks omitted)). Thus, Filyaw's cases are not on point because they fail to consider whether the violation is ongoing.[4]

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[4] *See Edelman v. Jordan*, 415 U.S. 651, 667–69 (1974) (holding that an award of retroactive payments was barred by the Eleventh Amendment); *see also Milliken v. Bradley*, 433 U.S. 267, 289–90 (1977) (holding than an order "requir[ing] state officials ... to eliminate a de jure segregated school system" was "prospective relief ... not barred by the Eleventh Amendment"); *Chu Drua Cha v. Noot*, 696 F.2d 594, 607 (8th Cir. 1982) (holding that plaintiffs were entitled to the prospective relief of reinstatement of their benefits until they had received proper notice without any analysis of whether there was an ongoing violation of federal law); *Kimble v. Solomon*, 599 F.2d 599, 604–05 (4th Cir. 1979) (holding that the district court could order prospective relief requiring the state to provide benefits until the plaintiffs received adequate pre-termination notice, without addressing whether there was any ongoing violation of federal law).

This case differs from other cases in our sister circuits that have found an ongoing violation for present effects from a past violation. In *Sherwood v. Marchiori*, 76 F.4th 688 (7th Cir. 2023), the plaintiff was denied benefits without any notice whatsoever nor afforded an opportunity for a hearing. *Id.* at 694. Thus, plaintiff's procedural due process claim was ongoing because the plaintiff "never had a chance to tell their side of the story." *Id.* at 696 (cleaned up). In contrast, the plaintiff in *Sonnleitner v. York*, 304 F.3d 704 (7th Cir. 2002), received a post-deprivation hearing. *See id.* at 718. Consequently, even an allegedly inadequate notice prior to the state action was not characterized as ongoing. *See id. But see Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 523–24 (7th Cir. 2021) (holding permit issued in violation of due process remained unlawful as long as it was in force and effect, as plaintiff alleged that the officials who issued the permit were biased).

In *Coakley v. Welch*, 877 F.2d 304 (4th Cir. 1989), South Carolina terminated a cargo supervisor without any pre- or post-termination notice provided by state law. *Id.* at 305. There, the Fourth Circuit held that this was an ongoing violation. *Id.* By contrast, in *Talley v. Folwell*, 133 F.4th 289 (4th Cir. 2025), the Fourth Circuit found no ongoing violation when the plaintiff's benefit reduction claim could have been appealed despite not having an opportunity to raise due process before an administrative law judge (ALJ). *Id.* at 298–99. Even though she was not allowed to make that argument before the ALJ, "she had a right to appeal that decision to the superior court of the

county where she resided." *Id.* at 299. Thus, the plaintiff's "decision not to avail herself of the appeals process—through which she could have made her constitutional arguments in state court—does not render the process she received constitutionally deficient." *Id.*

These cases can be distinguished based on whether the alleged denial of procedural process could be characterized as ongoing or whether it was a single discrete act in the past. In *Sherwood* and *Coakley*, the plaintiff never received any post-termination process or even had the opportunity for such a process, and that denial continued throughout the pendency of the lawsuit. *See Sherwood*, 76 F.4th at 696 ("[G]iven the sustained absence of any process here . . . the alleged federal due-process violations are still ongoing."); *Coakley*, 877 F.2d at 305–07 (holding that the "deni[al of] adequate pre- and post-termination process" authorized by unconstitutional regulations could be characterized as ongoing). In contrast, in *Sonnleitner* and *Talley*, the plaintiff either had a post-deprivation hearing or had the opportunity for one and decided to forgo it, and thus the only deprivation was at a single point in the past, when the pre-deprivation notice was issued. *See Sonnleitner*, 304 F.3d at 718 (holding that "the allegations against the defendants in their official capacities refer to, at most, a past rather than an ongoing violation of federal law" because the plaintiff "was eventually given an opportunity to tell his side of the story"); *Talley*, 133 F.4th at 298 (holding that "any recoupment now being pursued by defendants [was] not an ongoing consequence of an inadequate process"

because the plaintiff decided "not to avail herself of the appeals process[ ]through which she could have made her constitutional arguments in state court"). Here, Filyaw is more like the plaintiffs in *Sonnleitner* and *Talley*; she had the opportunity for both a pre- and post-termination hearing, as outlined on the Notice. Thus, her only deprivation occurred at a discrete point in the past and is not a continuing violation.

2. *Risk of Receiving Same Pre-termination Notice*

Filyaw further argues that even if the failure to issue a proper pre-termination notice does not qualify as an ongoing violation, she still meets the requirement to show an ongoing violation of federal law because she faces an imminent risk of receiving the same improper notice in the future.

"Absent a real likelihood that the state official will employ his supervisory powers against plaintiffs' interests, the Eleventh Amendment bars federal court jurisdiction." *281 Care Comm. v. Arneson* (*281 Care Comm. II*), 766 F.3d 774, 797 (8th Cir. 2014) (quoting *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) (per curiam)). Filyaw must show that she is "subject to or threatened with" receiving another allegedly improper notice. *See id.* An ongoing violation can be shown if "[t]he very harm alleged remains likely to recur barring a change in the state's operation of the program or judicial intervention." *Elder*, 54 F.4th at 1062.

Filyaw argues that "because she is entitled to reinstatement in Medicaid, she faces a risk that she will be issued a deficient . . . Notice again." Appellant's Br. at 29.

She argues that *Elder* supports this result. The district court, however, properly applied *Elder* to Filyaw. In *Elder*, the plaintiffs had appealed their benefits termination through the state process, already had their benefits reinstated, and sought an injunction to prevent the inadequate notice from recurring. 54 F.4th at 1060. Filyaw did not challenge the district court's decision to only consider her claim and not the claims of her proposed class. As a result, she cannot rely on the potential risk that members of her class may face in receiving the same Notice in the future. Filyaw is no longer enrolled in Medicaid, and she does not allege in her complaint that she would be entitled to Medicaid if she applied today. Defendants correctly point out that the chain of causation for Filyaw to receive the same Notice is too attenuated to represent "a real likelihood" that her due process rights would be violated in the future. *See 281 Care Comm. II*, 766 F.3d at 797 (internal quotation marks omitted). She would have to (1) requalify for Medicaid; (2) choose to apply and receive benefits; (3) earn income that exceeds the eligibility thresholds; and (4) receive the same termination Notice. Thus, she is not at risk of receiving the same allegedly inadequate Notice again in the future. *See McCartney v. Cansler*, 608 F. Supp. 2d 694, 699–700 (E.D.N.C. Mar. 16, 2009) (finding a class of plaintiffs who had been denied, reduced, or terminated Medicaid coverage had sufficiently stated an ongoing violation when they had alleged that the "policies and practices . . . imminently threaten [p]laintiffs . . . with further illegal denials, reductions, and terminations of coverage" (internal quotation marks omitted)), *aff'd sub nom. D.T.M.*

v. Cansler, 382 F. App'x 334 (4th Cir. 2010) (unpublished per curiam)

Filyaw's arguments regarding whether there is an ongoing violation are unpersuasive. Filyaw received the allegedly inadequate Notice at a discrete point in the past, and Filyaw is not at risk to receive the same Notice in the future. She has not shown that the alleged violation is ongoing nor has she shown that the *Ex parte Young* exception to sovereign immunity is applicable.

B. *Nature of Relief*

Filyaw requests a declaration that the Notice that she received violated her right to due process. She also seeks an injunction reinstating her enrollment in Medicaid until she does receive proper notice. Both forms of relief are effectively retrospective in nature and thus barred by the Eleventh Amendment.

Filyaw's requested relief must be both prospective and equitable to qualify for the *Ex parte Young* exception to sovereign immunity. *See Courthouse News Serv. v. Gilmer*, 48 F.4th 908, 911 (8th Cir. 2022). The requirement to show that the relief is prospective is "closely related" to the ongoing-violation requirement. *Cotto*, 126 F.4th at 771. This is because "[w]ithout an ongoing violation to curtail, there are no prospective injunctions for a federal court to issue." *Id. Ex parte Young* "does not permit judgments against state officers declaring that they violated federal law in the past." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

The district court correctly found that "Filyaw's request for a declaration that Defendants violated her due process

rights is fundamentally retrospective because it does not relate to an ongoing violation of her federal rights; instead, it pertains to the May 2024 termination of her Medicaid coverage." R. Doc. 47, at 19 (cleaned up). Filyaw's requested relief is a declaration that her rights were violated in the past and thus is barred by sovereign immunity.

Filyaw's request for an injunction reinstating her Medicaid benefits similarly fails. The Supreme Court has established that when "there is no continuing violation of federal law to enjoin ... an injunction is not available." *Green*, 474 U.S. at 71. Plaintiff's claim mirrors the situation in *Merritts*, in which the court found that the plaintiff was essentially requesting "a reparative injunction" "to cure [a] past injur[y]." 62 F.4th at 772.

This characterization is supported by Filyaw's complaint, which does not allege that she is currently eligible for Medicaid. Instead, Filyaw challenges only the past procedural deficiencies in the Notice that she received. Because any injunctive relief would address past harm rather than "serve[] directly to bring an end to a present violation of federal law," *Papasan*, 478 U.S. at 278, such relief is retrospective in nature and therefore barred by the Eleventh Amendment.

III. *Conclusion*

Accordingly, we affirm.[5]

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[5] Because we hold that Filyaw does not meet the requirements to meet the exception of sovereign immunity established in *Ex parte Young*, we need not reach the question of whether we should abstain under *Younger v. Harris*, 401 U.S. 37 (1971), or the merits of Filyaw's claims.

COLLOTON, Chief Judge, dissenting.

Gillian Filyaw alleged that state officials have engaged in an ongoing violation of Filyaw's rights under the Due Process Clause. She sought prospective relief to end the violation. Filyaw may proceed with her claim under 42 U.S.C. § 1983 and the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), so I would reverse the judgment and remand for further proceedings.

Filyaw asserts that state officials unlawfully terminated her eligibility for benefits under the Medicaid program without adequate notice. On that basis, she alleges that the officials deprived her of property without due process of law, in violation of the Fourteenth Amendment. Because, according to the complaint, the State has never provided Filyaw with adequate notice or a proper termination hearing, and has continued to declare her ineligible for Medicaid benefits, she has alleged an ongoing violation of her constitutional rights. Filyaw seeks prospective relief in the form of a declaratory judgment and injunction that would require the state officials to reinstate her eligibility for Medicaid until such time as the State affords her adequate notice and properly terminates her benefits.

The majority identifies authority from other circuits that show the way, but then declines to follow them. As the court explained in *Sherwood v. Marchiori*, 76 F.4th 688 (7th Cir. 2023), where a State terminates benefits without adequate process, and the plaintiff has a continued property interest in the underlying benefits, "the alleged federal due-process violations are still ongoing." *Id.* at 696.

Similarly, where approval of a permit was allegedly tainted by adjudicator bias in violation of the Due Process Clause, a plaintiff challenging the process by which the permit was issued advanced a claim of ongoing constitutional violation that could proceed under *Ex parte Young*. *Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 523-24 (7th Cir. 2021). In *Coakley v. Welch*, 877 F.2d 304 (4th Cir. 1989), a State terminated an employee without proper notice as required by state law, so the plaintiff alleged an ongoing due-process violation until he received notice and an opportunity to be heard on the termination. *Id.* at 307. Filyaw's claim is of the same ilk: Her complaint alleges that she never received due process—before or after termination of her benefits—so the ongoing deprivation of benefits without due process is an ongoing constitutional violation.

The majority relies instead on inapposite decisions in which any due process violation had been cured by the provision of a hearing after adequate notice. *See Talley v. Folwell*, 133 F.4th 289, 298-99 (4th Cir. 2025) (no ongoing due-process violation because State provided hearing at which plaintiff was able to oppose recoupment); *Sonnleitner v. York*, 304 F.3d 704, 718 (7th Cir. 2002) (no ongoing due-process violation because plaintiff received post-deprivation hearing). The majority asserts that Filyaw likewise "had the opportunity for both a pre- and post-termination hearing, as outlined on the Notice." But of course Filyaw's allegation is that the notice was inadequate under the Due Process Clause, and this court must accept that allegation as true for purposes of a

motion to dismiss. There was no adequate opportunity for hearings unless the court erroneously assumes on the merits that the allegedly deficient notice was not deficient.

The majority also cites *Merritts v. Richards*, 62 F.4th 764 (3d Cir. 2023), but that case does not support the State's position here. The plaintiff in *Merritts* alleged that an unconstitutional taking of private property constituted an ongoing violation of federal law. But the State had acquired the property at issue in a state condemnation proceeding that was concluded before the federal lawsuit was filed, and the property owner declined to file a petition challenging the amount of compensation, so any violation of federal law had concluded. *Id.* at 772. There was no ongoing deprivation of property based on a denial of due process as in *Sherwood, Driftless, Coakley*, and this case.

Filyaw seeks prospective relief that would require the State to reinstate Medicaid coverage until such time as the State provides adequate termination notice that satisfies the Due Process Clause. Accordingly, Filyaw's claim may proceed against the defendant officials under 42 U.S.C. § 1983 and the doctrine of *Ex parte Young.* This conclusion, of course, implies no view on the merits of her claim.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

4:24CV3108

GILLIAN FILYAW,
individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

STEVE CORSI,
Chief Executive Officer of the
Nebraska Department of Health and Human
Services, in his official capacity; and
MATT AHERN,
Interim Director of the Division of
Medicaid and Long-Term Care, in his official
capacity,

Defendants.

MEMORANDUM AND ORDER ON DEFENDANTS' MOTION TO DISMISS

Plaintiff Gillian Filyaw brought a 42 U.S.C. § 1983 claim against defendants Steve Corsi and Matt Ahern (collectively Defendants) seeking declaratory and injunctive relief for herself and on behalf of a proposed class of Nebraskans enrolled in Medicaid. Filing 1. Filyaw alleges that Defendants deprived her and the proposed class members of due process when Defendants issued notices of action informing certain Medicaid enrollees that their benefits had been terminated. Filing 1 at 12. Defendants moved to dismiss Filyaw's Complaint for lack of subject matter jurisdiction and for failure to state a claim, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), respectively. Filing 34. For the reasons below, the Court grants Defendants' Motion.

I. INTRODUCTION

A. Factual Background

The Court considers the following nonconclusory allegations as true for the purposes of ruling on this Motion. *See Bauer v. AGA Serv. Co.*, 25 F.4th 587, 589 (8th Cir. 2022) (quoting *Pietoso, Inc. v. Republic Servs., Inc.*, 4 F.4th 620, 622 (8th Cir. 2021)). Following Eighth Circuit Court of Appeals precedent, the Court also considers "materials 'necessarily embraced by the pleadings.' " *LeMay v. Mays*, 18 F.4th 283, 289 (8th Cir. 2021) (quoting *Buckley v. Hennepin Cnty.*, 9 F.4th 757, 760 (8th Cir. 2021), in turn quoting *Greenman v. Jessen*, 787 F.3d 882, 887 (8th Cir. 2015)). This is the appropriate approach for the Court's consideration of both a Rule 12(b)(6) challenge and a "facial" Rule 12(b)(1) challenge. *Pharm. Rsch. & Mfrs.*

of Am. v. Williams, 64 F.4th 932, 945 n.7 (8th Cir. 2023) (Rule 12(b)(1) facial challenge standard).

Plaintiff Gillian Filyaw is 23 years old and resides in North Platte, Nebraska, with her husband and two young children. Filing 1 at 3 (¶ 12); Filing 1 at 10 (¶ 54). According to Filyaw, her household income is "low" and often fluctuates based on seasonal demands for her husband's job. Filing 1 at 11 (¶ 55). Filyaw alleges she discovered she was pregnant in October or November of 2020 and enrolled in Nebraska Medicaid coverage. Filing 1 at 11 (¶ 56).

Medicaid is a jointly funded state and federal program that provides medical coverage to certain categories of low-income individuals. Filing 1 at 6 (¶ 30). States are not required to participate in Medicaid but states that choose to participate must comply with federal requirements in order to receive federal funds. Filing 1 at 7 (¶ 32). The Nebraska Department of Health and Human Services (NDHHS) administers Medicaid in Nebraska and determines whether an individual is eligible to receive assistance. Filing 1 at 4 (¶ 15). Defendant Steve Corsi is the Chief Executive Officer of the NDHHS. Filing 1 at 4 (¶ 13). Defendant Matt Ahern is the Interim Director of the Division of Medicaid and Long-Term Care at the NDHHS. Filing 1 at 4 (¶ 14).

After the NDHHS makes an initial eligibility determination, it reviews an individual's continuing eligibility at least once every 12 months in a process known as a "renewal." Filing 1 at 7 (¶ 34). If the renewal process reveals that a covered individual is no longer

eligible for Medicaid the NDHHS must provide the ineligible individual timely and adequate written notice of termination. Filing 1 at 7 (¶ 36). During the COVID-19 pandemic the federal government offered enhanced federal funding to state Medicaid programs on the condition that recipient states kept most Medicaid enrollees "continuously enrolled" in coverage through March 31, 2023, the end of the federally declared COVID-19 public health emergency. Filing 1 at 9–10 (¶¶ 46–48). As a result, the NDHHS paused eligibility renewals during the public health emergency. Filing 1 at 10 (¶ 49). The NDHHS restarted renewals on March 1, 2023, with the "first wave" of terminations taking effect on April 1, 2023. Filing 1 at 10 (¶49).

Filyaw alleges she was continuously enrolled in Nebraska Medicaid coverage until her coverage terminated on May 1, 2024. Filing 1 at 11 (¶ 57). On April 18, 2024—thirteen days before her coverage terminated—Filyaw received a notice of action from the NDHHS informing her that a renewal of eligibility had been completed and she had been found ineligible for Medicaid coverage. Filing 1 at 11 (¶ 58); Filing 36-2 at 1. Along with their Brief in support of this Motion, Defendants filed a copy of the April 18, 2024, notice of action (Notice). Filing 36-2. Filyaw alleges the contents of the Notice as part of her Complaint, Filing 1 at 11 (¶ 59), and she concedes the Notice—which she calls an "Income Termination Notice"—is necessarily embraced by the Complaint, Filing 42 at 3. As a result, the Court will consider the Notice as

"materials necessarily embraced by the pleadings." *LeMay*, 18 F.4th at 289.

The Notice states that Filyaw was deemed ineligible for continued Medicaid coverage because her "[i]ncome [e]xceeds [s]tandards." Filing 36-2 at 2. It also explains Filyaw's "right to request a conference with [N]DHHS to discuss the reason(s) for the action(s) indicated" and her "right to appeal for a hearing on any agency action or inaction" on her application. Filing 36-2 at 3. The Notice indicates that Filyaw has "90 days following the date of this notice to request a fair hearing." Filing 36-2 at 3. It also states, "In cases of intended adverse action, where [N]DHHS is required to send you timely and adequate notice, if you request an appeal hearing within ten days following the date on this notice (or in a Medicaid case, before the effective date on this notice), [N]DHHS will not carry out the adverse action until a fair hearing decision is made ...." Filing 36-2 at 3. Filyaw alleges that the Notice is identical to notices of action the NDHHS has issued to more than 22,000 Medicaid enrollees since March 1, 2023, in that both Filyaw's Notice and the other 22,000 notices provide "income exceeds standards" as the reason for terminating coverage. Filing 1 at 11 (¶ 61).

Filyaw did not appeal the termination decision and alleges that she has not had health coverage since her Medicaid coverage terminated on May 1, 2024. Filing 1 at 11 (¶ 62). *See also* Filing 42 at 23.

B. Procedural Background

On June 11, 2024, Filyaw filed a Complaint in this case on behalf of herself and a proposed class of Nebraskans

"who, since March 1, 2023, have been or will be issued a written notice from Defendants proposing to terminate their Nebraska Medicaid eligibility for the reason 'income exceeds standards.' " Filing 1 at 5 (¶ 21). Filyaw sues Defendants in their official capacities pursuant to 42 U.S.C. § 1983 and, in relevant part, asks the Court to

a) Certify this action as a class action under Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure with respect to the proposed class identified herein;

b) Pursuant to 42 U.S.C. § 1983 declare that the Income Termination Notices used by Defendants do not satisfy the requirements of due process and are therefore unconstitutional;

c) Preliminarily and permanently enjoin Defendants from enforcing unconstitutional and unlawful Medicaid terminations per Income Termination Notices by affirmatively ordering that Defendants prospectively reinstate the property interests in Medicaid coverage of Plaintiff and proposed class until Defendants provide the enrollees an adequate termination notice that satisfies the requirements of constitutional due process, including setting forth the specific reasons why termination is proposed;

d) Preliminarily and permanently enjoin Defendants from terminating Medicaid coverage for future members of the proposed class without first providing the enrollee a termination notice that satisfies the requirements of due process, including

setting forth the specific reasons why termination is proposed;

Filing 1 at 14 –15 (Request for Relief).

Along with her Complaint, Filyaw filed a Motion to Certify Class, Filing 9, and a Motion for Temporary Restraining Order, Filing 4. Filyaw sought a Temporary Restraining Order that would in relevant part

1) Order the Defendants to cease enforcement of the unlawful and unconstitutional termination of Plaintiff's Medicaid eligibility by prospectively reinstating her in Medicaid coverage until such time that the Defendants provide her with an adequate termination notice that comports with constitutional due process or until a hearing on Plaintiff's forthcoming motion for a preliminary injunction may take place.

Filing 4 at 4 (Request for Relief).

On June 20, 2024, the Court denied Filyaw's Motion for Temporary Restraining Order. Filing 30. In its Order denying the Motion for Temporary Restraining Order, the Court examined the likelihood that Filyaw's claim would succeed on the merits and determined that success was unlikely in part because Filyaw sought retroactive or retrospective relief against official-capacity Defendants protected by sovereign immunity. Filing 30 at 19. The Court also concluded that the several notices regarding her Medicaid rights that "Filyaw had received, far more than likely satisfied due process." Filing 30 at 26. On July 1, 2024, Defendants filed a Motion to Dismiss Complaint, Filing 34, as well as a Motion to Stay Proceedings for

Certification of Class, Filing 35. Magistrate Judge DeLuca granted the Motion to Stay on July 18, 2024, after Filyaw did not oppose it. Filing 41 (Text Order). In their Motion to Dismiss, Defendants challenge Filyaw's Complaint for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a plausible claim under Rule 12(b)(6). Filing 34. Defendants' Motion to Dismiss is now before the Court.[1]

II. LEGAL ANALYSIS

A. Preliminary Considerations

The Court begins by acknowledging that on July 18, 2024, Magistrate Judge DeLuca stayed Filyaw's Motion to Certify Class pending further order of the Court. Filing 41 (Text Order). However, the Court will first address Defendants' Motion to Dismiss because the Motion challenges the Court's subject matter jurisdiction and "[w]ithout jurisdiction, the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (internal quotation marks omitted) (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1868)). "[W]hen [jurisdiction] ceases to exist, the only function remaining to the [C]ourt is that of announcing the fact and dismissing the cause." *Id.* (internal quotation marks omitted) (quoting same).

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[1] Filyaw requests oral argument on Defendants' Motion to Dismiss. Filing 43. Exercising its discretion pursuant to NECivR 7.1(e), the Court denies Filyaw's Motion for Oral Argument on Defendants' Motion to Dismiss Complaint. NECivR 7.1(e) ("In general the court does not allow oral argument or evidentiary hearings on motions.").

Although Filyaw's Complaint raises claims on her behalf and on behalf of a proposed class, "for the purpose of the [M]otion to [D]ismiss, only [Filyaw's] claim[], and not those of any potential class members, are considered." *Hudock v. LG Elecs. U.S.A., Inc.*, 2017 WL 1157098, *3 (D. Minn. Mar. 27, 2017). This course is appropriate "because [Defendants'] [M]otion to [D]ismiss addresses the [C]ourt's subject matter jurisdiction." *Does v. Univ. of Washington*, 2016 WL 5792693, *3 (W.D. Wash. Oct. 4, 2016). *See also Hannibal-Fisher v. Grand Canyon Univ.*, 523 F.Supp.3d 1087, 1093 (D. Ariz. Mar. 5, 2021) ("Courts 'generally consider only the claims of a named plaintiff in ruling on a motion to dismiss a class action complaint prior to class certification.' " (quoting *Barth v. Firestone Tire & Rubber Co.*, 673 F.Supp. 1466, 1475 (N.D. Cal. Sept. 1, 1987))). Thus, in ruling on Defendants' Motion to Dismiss for lack of subject matter jurisdiction, the Court's analysis is limited to Filyaw's claim and the Court will not consider the claims of her proposed class. For the reasons discussed below, the Court does not have subject matter jurisdiction over Filyaw's claim. As a result, Filyaw's Motion to Certify Class is denied as moot.

B. The Challenge to Subject Matter Jurisdiction

Defendants' Motion to Dismiss is for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and for failure to state a claim pursuant to Rule 12(b)(6). Because the Court does not have subject matter jurisdiction over Filyaw's claims, as discussed below, the Court does not need to determine whether Filyaw failed to state a claim pursuant to Rule 12(b) (6). *See Sianis v. Jensen*, 294 F.3d

994, 997 (8th Cir. 2002) ("Subject matter jurisdiction is a threshold matter that [courts] are obligated to address at the outset."). Accordingly, the Court addresses only the parties' arguments regarding the Rule 12(b)(1) challenge and does not consider the questions raised by the parties about abstention or the merits of Filyaw's claim.

1. Rule 12(b)(1) Standards

Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for a pre-answer motion to dismiss for "lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1). The Eighth Circuit Court of Appeals has explained that on a Rule 12(b)(1) motion,

> The plaintiff bears "the burden of proving the existence of subject matter jurisdiction," and we may look at materials "outside the pleadings" in conducting our review. [*Herden v. United States*, 726 F.3d 1042, 1046 (8th Cir. 2013) (en banc)] (quoting *Green Acres Enters., Inc. v. United States*, 418 F.3d 852, 856 (8th Cir. 2005)). Because of the "unique nature of the jurisdictional question," *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990) (citation omitted), it is the court's duty to "decide the jurisdictional issue, not simply rule that there is or is not enough evidence to have a trial on the issue," *id.* at 730. As such, if the court's inquiry extends beyond the pleadings, it is not necessary to apply Rule 56 summary judgment standards. *Id.* at 729. Rather, the court may receive evidence via "any rational mode of inquiry," and the parties may "request an evidentiary hearing." *Id.* at 730 (quoting *Crawford v. United States*, 796 F.2d 924, 928 (7th Cir. 1986)). Ultimately, the court

> must rule upon "the jurisdictional issue [unless it] is 'so bound up with the merits that a full trial on the merits may be necessary to resolve the issue.'" *Id.* (quoting *Crawford*, 796 F.2d at 928).

Buckler v. United States, 919 F.3d 1038, 1044 (8th Cir. 2019); *Am. Fam. Mut. Ins. Co. v. Vein Ctrs. for Excellence, Inc.*, 912 F.3d 1076, 1081 (8th Cir. 2019) ("[A] motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b) (1) raises a factual challenge to the court's jurisdiction, and courts may look to evidence outside the pleadings and make factual findings." (citing *Davis v. Anthony, Inc.*, 886 F.3d 674, 679 (8th Cir. 2018)).

The *Buckler* decision suggests that a challenge to subject matter jurisdiction pursuant to Rule 12(b)(1) is always "factual," but "facial" challenges are also possible:

> In deciding a motion under Rule 12(b)(1), the district court must distinguish between a facial attack—where it looks only to the face of the pleadings—and a factual attack—where it may consider matters outside the pleadings. *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir.1990). In a factual attack, the "non-moving party does not have the benefit of 12(b)(6) safeguards." *Id.* If the jurisdictional issue is "bound up" with the merits of the case, the district court may "decide whether to evaluate the evidence under the summary judgment standard." *Moss v. United States*, 895 F.3d 1091, 1097 (8th Cir.2018). This court is bound by the district court's characterization of the Rule 12(b)(1) motion. *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir.2016) ("The method in which the district court

> resolves a Rule 12(b)(1) motion—that is, whether the district court treats the motion as a facial attack or a factual attack—obliges us to follow the same approach.").

Croyle by & through Croyle v. United States, 908 F.3d 377, 380–81 (8th Cir. 2018). When a challenge to subject matter jurisdiction is "facial," the plaintiff is entitled to Rule 12(b)(6) "safeguards" that require the Court to "accept 'the facts alleged in the complaint as true and draw[] all reasonable inferences in favor of the nonmovant.'" *Bauer v. AGA Serv. Co.*, 25 F.4th 587, 589 (8th Cir. 2022) (quoting *Pietoso, Inc. v. Republic Servs., Inc.*, 4 F.4th 620, 622 (8th Cir. 2021)). In applying the Rule 12(b)(6) "safeguards" to a "facial" challenge, the Court "can consider documents 'necessarily embraced by the complaint,' including 'documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleadings.' " *Rossi v. Arch Ins. Co.*, 60 F.4th 1189, 1193 (8th Cir. 2023) (quoting *Zean v. Fairview Health Servs.*, 858 F.3d 520, 526 (8th Cir. 2017)).

In this case, Defendants do not designate their Rule 12(b) (1) challenge as "factual" or "facial." *See generally* Filing 37; Filing 44. Filyaw asserts that "Defendants present a facial attack" to subject matter jurisdiction, Filing 42 at 3, and Defendants do not refute this assertion in their Reply. *See generally* Filing 44. Defendants did introduce evidence outside the record when they submitted alongside their opening Brief an index containing an affidavit of defendant Matt Ahern, Filing 36-

1, and the April 18, 2024, Notice to Filyaw, Filing 36-2. However, Defendants do not rely on this evidence to support their Rule 12(b)(1) argument. Filing 37 at 7–9. In any event, Filyaw concedes that the Notice is necessarily embraced by the Complaint and suggests the Court's Rule 12(b)(1) "inquiry should be limited to the [C]omplaint and the necessarily embraced [N]otice." Filing 42 at 12, 3. The Court concludes that the challenge here is "facial" because neither party asks the Court to consider materials beyond the Complaint and the necessarily embraced Notice on the Rule 12(b)(1) part of the Motion. Under these circumstances, Filyaw is entitled to Rule 12(b)(6) "safeguards." *Croyle*, 908 F.3d at 380.

2. Eleventh Amendment Sovereign Immunity

a. The Parties' Arguments

Defendants argue that the Eleventh Amendment doctrine of sovereign immunity bars Filyaw's claim against them and strips the Court of subject matter jurisdiction in this case Filing 37 at 7. Defendants acknowledge that *Ex parte Young*, 209 U.S. 123 (1908), provides a limited exception to a state's general immunity from suit by permitting lawsuits against state officials in their official capacity when the relief sought is both equitable and prospective. Filing 37 at 7. However, Defendants contend that *Ex parte Young* does not apply to Filyaw's claim because Filyaw waited to file this suit until after the termination of her benefits took effect. Filing 37 at 8–9.

Defendants argue that Filyaw's requested permanent equitable relief—an order from the Court requiring

Defendants to reenroll Filyaw and other potential class members into Medicaid coverage until adequate notice is given—does not fall within the *Ex parte Young* exception because it would impermissibly obligate Defendants "to spend Nebraska Medicaid funds reimbursing [Filyaw] and her desired class for medical expenses incurred during the interim period between Medicaid terminations based on allegedly insufficient notice and the judgment on [sic] this Court." Filing 37 at 9. Defendants then assert that Filyaw's requested declaratory relief is "purely retrospective in nature," arguing that a declaration of the constitutionality of Defendants' "income exceeds standards" notices of action would deal with "wholly past conduct" as Filyaw's Medicaid coverage is already terminated. Filing 37 at 9. According to Defendants, sovereign immunity bars Filyaw's entire suit. Filing 37 at 8.

Filyaw, on the other hand, argues that her request for "prospective reinstatement" of Medicaid coverage falls within the *Ex parte Young* exception. Filing 42 at 4–5. Filyaw denies that she is seeking damages or monetary relief, such as the retroactive payment of past medical expenses. Filing 42 at 5. Instead, Filyaw contends that her requested relief "would prospectively restore [Filyaw] and the proposed class to their pre-termination standing, until they receive a constitutionally sufficient notice." Filing 42 at 7. According to Filyaw, "[t]his type of forward-looking, prospective reinstatement is appropriate even if it has an ancillary effect on the state treasury by requiring the state to provide Medicaid coverage in the future." Filing 42 at 7. In Filyaw's view, prospective reinstatement would address

"an ongoing violation of federal law" allegedly committed each time Defendants have issued or will issue a notice of Medicaid termination based on the reason "income exceeds standards." Filing 42 at 10.

In reply, Defendants distinguish Filyaw's claim from the claims of her proposed class. Filing 44 at 1. Defendants concede that it may be possible to prospectively apply Filyaw's requested injunctive and declaratory relief to proposed class members whose Medicaid coverage has not yet been terminated. Filing 44 at 2. However, Defendants argue that because Filyaw's coverage is already terminated she "cannot rely on the possible claims of speculative proposed class members to cure this defect in her personal claim." Filing 44 at 2–3. As discussed above, the Court considers only Filyaw's claim—not the claims of any proposed class members—in ruling on Defendants' Rule 12(b)(1) challenge. *See Hudock*, 2017 WL 1157098 at *3. Thus, the Court must determine whether the Eleventh Amendment bars Filyaw's claim.

b. Applicable Standards

"Sovereign immunity is the privilege of the sovereign not to be sued without its consent." *Church v. Missouri*, 913 F.3d 736, 742 (8th Cir. 2019) (internal quotation marks omitted) (quoting *Virginia Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 253 (2011)). "The Eleventh Amendment is 'one particular exemplification of that immunity.' " *Id.* (quoting *Fed. Mar. Comm'n v. South Carolina State Ports Auth*., 535 U.S. 743, 753 (2002)). Although the language of the Eleventh Amendment "expressly encompasses only suits brought against a State by citizens of another State,"

the Supreme Court "long ago held that the Amendment bars suits against a State by citizens of that same State as well." *Papasan v. Allain, 478 U.S. 265*, 276 (1986). As a result, "[b]ecause of the Eleventh Amendment, States may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the immunity." *Green v. Mansour, 474 U.S. 64*, 68 (1985).

In *Ex parte Young*, 209 U.S. 123 (1908), however, the Supreme Court established an "exception to Eleventh Amendment immunity." *Johnson v. Griffin*, 69 F.4th 506, 512 (8th Cir. 2023). Under the *Ex parte Young* doctrine, "a private party may sue state officials in their official capacities for prospective injunctive relief." *Id.* (internal quotation marks omitted) (quoting *McDaniel v. Precythe*, 897 F.3d 946, 951–52 (8th Cir. 2018)). In other words, "sovereign immunity does not bar certain suits seeking declaratory and injunctive relief against state officers in their official capacities based on ongoing violations of federal law." *Elder v. Gillespie*, 54 F.4th 1055, 1062 (8th Cir. 2022) (internal quotation marks omitted) (quoting *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1131 (8th Cir. 2019), in turn quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997)). However, the *Ex parte Young* "exception is narrow: It applies only to prospective relief, does not permit judgments against state officers declaring that they violated federal law in the past, and has no application in suits against the States and their agencies, which are barred regardless of the relief sought." *Puerto*

Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, 506 U.S. 139, 146 (1993) (internal citations omitted).

"In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Courthouse News Serv. v. Gilmer*, 48 F.4th 908, 911 (8th Cir. 2022) (internal quotation marks omitted) (quoting *Stewart*, 563 U.S. at 255). "For Eleventh Amendment purposes, the line between permitted and prohibited suits will often be indistinct"; however, courts discern "on which side of the line a particular case falls" by "look[ing] to the substance rather than to the form of the relief sought." *Papasan*, 478 U.S. at 278.

c. The Court Lacks Subject Matter Jurisdiction Over Filyaw's Claim Under *Ex Parte Young*

As discussed above, in addressing the threshold question of subject matter jurisdiction the Court considers only whether Filyaw's § 1983 claim against Defendants is barred by sovereign immunity. See *Hudock*, 2017 WL 1157098 at *3. "Section 1983 does not override Eleventh Amendment immunity." *Hadley v. N. Arkansas Cmty. Tech. Coll.*, 76 F.3d 1437, 1438 (8th Cir. 1996). As a result, the Eleventh Amendment will bar Filyaw's claim against Defendants—state officials sued in their official capacities—unless her claim falls under *Ex parte Young*. *See Stewart*, 563 U.S. at 254 (determining that "absent waiver or valid abrogation, federal courts may not

entertain a private person's suit against a State" unless the suit falls within the "limited" *Ex parte Young* doctrine). To determine *Ex parte Young*'s applicability in this case, the Court conducts a "straightforward inquiry" into whether Filyaw's Complaint and the necessarily embraced Notice "allege[] an ongoing violation of federal law and seek[] relief properly characterized as prospective." *Courthouse News*, 48 F.4th at 911. Under this "straightforward inquiry," the Court concludes that Filyaw's claim does not meet *Ex parte Young*'s requirements and is instead barred by sovereign immunity.

i. Filyaw Fails *Ex Parte Young*'s First Requirement Because She Does Not Allege an Ongoing Violation of Federal Law

Filyaw does not satisfy the first *Ex parte Young* prong because she fails to allege an ongoing violation of federal law. Filyaw alleges Defendants deprived her of due process when they issued the Notice informing her that she is ineligible for Medicaid coverage because her "income exceeds standards." Filing 1 at 12 (¶ 66). Filyaw specifically takes issue with this "income exceeds standards" language, alleging that it creates a "risk of erroneous deprivation" of her property interest in Medicaid benefits and "fail[s] to provide timely, adequate notice of the basis for" the NDHHS's decision. Filing 1 at 12 (¶¶ 65–66). Although allegations of a due process violation can bring a suit within the *Ex parte Young* exception, see *Elder*, 54 F.4th at 1061–63, the alleged violation must be ongoing to warrant *Ex parte Young*

protection from dismissal, *Courthouse News*, 48 F.4th at 911. Filyaw contends that she has alleged an ongoing violation of due process and she points the Court to *Elder v. Gillespie*, 54 F.4th 1055 (8th Cir. 2022), as proof that her suit should fall under *Ex parte Young*. Filing 42 at 9–10. The Court is not persuaded.

In *Elder*, the Eighth Circuit held that the plaintiffs—beneficiaries of Arkansas Medicaid services—could sue state officials under *Ex parte Young* in part because the plaintiffs properly alleged an ongoing violation of due process. *Elder*, 54 F.4th at 1062–63. Like Filyaw here, the *Elder* plaintiffs' eligibility for Medicaid benefits was reassessed at least annually by the state agency overseeing Medicaid. *Id.* at 1059. After one such reassessment the plaintiffs received notices of action informing them that their Medicaid benefits were to be reduced or terminated. *Id.* Like the Notice in Filyaw's case, the *Elder* notices of action stated that a timely appeal would prevent the agency from reducing or terminating the plaintiffs' benefits until after a hearing took place. Id. Unlike Filyaw, however, the Elder plaintiffs timely appealed the agency decision. Id. From this point on, Filyaw's circumstances diverge significantly from those of the Elder plaintiffs.

Though the Notice explains Filyaw's right to appeal the NDHHS's termination decision—including her right to maintain her benefits until the outcome of a fair hearing if she appealed before the termination took effect on May 1, 2024—as of July 29, 2024, Filyaw admittedly had "not filed an administrative appeal of her Medicaid termination." Filing 42 at 23. As a result, when Filyaw filed her

Complaint on June 11, 2024, her coverage was already terminated, and she had not been entitled to Medicaid benefits for over a month. Filing 36-2 at 1. She is still not entitled to Medicaid benefits today. Filing 1 at 11 (¶ 62). The *Elder* plaintiffs, on the other hand, did timely appeal the state agency's eligibility decision meaning they were each entitled to maintain their benefits until the outcome of a fair hearing. *Elder*, 54 F.4th at 1059. Despite this timely appeal, the agency "mistakenly" reduced or terminated the plaintiffs' benefits before a hearing could occur. *Id.* at 1060. Although the agency reinstated the plaintiffs' benefits upon notification of the error, the plaintiffs still sued state officers in their official capacities alleging the officers had violated the plaintiffs' right to due process and seeking among other things a declaratory judgment and a permanent injunction. *Id.* Because the *Elder* plaintiffs had timely appealed the eligibility decision, they were still entitled to Medicaid services at the time they filed their suit against the defendants. *Id.* at 1062. This is not Filyaw's reality.

Moreover, because the *Elder* plaintiffs were still active Medicaid beneficiaries they remained subject to annual reassessment of their eligibility. *Elder*, 54 F.4th at 1062. As the Eighth Circuit noted, the plaintiffs had alleged that the state agency had "no plans to switch to a different assessment tool, allocation methodology, or notice of action than those" used during the premature reduction or termination of the plaintiffs' benefits. *Id.* "[B]arring a change in the state's operation of the program or judicial intervention," the *Elder* plaintiffs—current Medicaid

beneficiaries—risked experiencing again the "very harm alleged." *Id.* The Eighth Circuit determined that under these circumstances the plaintiffs were "presently suffering from a violation of federal law" and thus fell within the *Ex parte Young* exception. *Id.* at 1062–63. Filyaw's circumstances are markedly different. Because Filyaw's entitlement to Medicaid coverage ended on May 1, 2024, she is no longer subject to the NDHHS's renewal process, and she is also not at risk of being erroneously deprived of Medicaid coverage. Simply put, Filyaw has no Medicaid benefits to lose. Thus, any alleged "risk of erroneous deprivation of Medicaid coverage" by Defendants, or any alleged failure by Defendants "to provide timely, adequate notice" of the basis for terminating Filyaw's benefits had already occurred by the time Filyaw filed her Complaint. Filing 1 at 12 (¶ 66).

Filyaw's allegation that Defendants violated her due process rights in the past is inconsistent with *Ex parte Young*'s "focus on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past." *Papasan*, 478 U.S. at 277–78. "Although [Defendants'] earlier actions [of providing allegedly improper notice] may have present effect [on Filyaw], that does not mean that they are ongoing." *Merritts v. Richards*, 62 F.4th 764, 772 (3d Cir. 2023). Indeed, even under *Ex parte Young*'s "straightforward inquiry," "[t]he lingering effects of [Defendants'] past action do not convert it into an ongoing violation." *Id.* Because Filyaw fails to allege that she is "presently suffering from a violation of federal law,"

her claim against Defendants does not fall within the *Ex parte Young* exception to sovereign immunity. *Elder*, 54 F.4th at 1062.

ii. Filyaw Fails *Ex Parte Young*'s Second Requirement Because She Does Not Seek Prospective Relief

Filyaw also fails to satisfy the second *Ex parte Young* prong because the relief she seeks cannot be properly characterized as prospective. The Court has made clear that it considers only the relief Filyaw seeks on her own behalf, not the relief she requests for her proposed class. *See Hudock*, 2017 WL 1157098 at *3. Specifically, Filyaw seeks a declaration that the Notice used by Defendants violated the requirements of due process and is therefore unconstitutional. Filing 1 at 14. She also asks the Court to order Defendants to prospectively reinstate her property interest in Medicaid coverage until "adequate termination notice" is provided. Filing 1 at 14. Although Filyaw seeks equitable relief, her requested relief must be both equitable and prospective to fall within the *Ex parte Young* exception. *See Courthouse News*, 48 F.4th at 911 (concluding that the plaintiff's case "checks all the *Ex parte Young* boxes" because the plaintiff alleges ongoing violations of federal law and "seeks only prospective relief, not damages: declaratory and injunctive relief from two state officials").

The Court first addresses Filyaw's request for an injunction prospectively reinstating her Medicaid coverage. By using the phrase "prospective reinstatement," Filyaw styles her requested injunctive relief as "forward-

looking." Filing 42 at 7. However, the Court examines the substance of Filyaw's requested relief rather than its form. *See Papasan*, 478 U.S. at 278–79. Defendants argue that Filyaw's desired injunctive relief is "retroactive and retrospective in nature because it requires the repayment of [Filyaw's] past medical expenditures that occurred after her termination from Medicaid." Filing 37 at 1–2. Filyaw counters that her request for reinstatement is truly prospective because it would "only provide such Medicaid coverage from the time [an] order was entered until Defendants cure their constitutional violation by providing adequate notices." Filing 42 at 5–6. Filyaw acknowledges that the Eleventh Amendment bars "retroactive monetary damages" but contends that she is seeking restoration to her "pre-termination standing," not "retroactive payment of damages." Filing 42 at 5, 7 According to Filyaw, an order prospectively reinstating her Medicaid benefits would only have an "ancillary effect on the state treasury by requiring the state to provide Medicaid coverage in the future." Filing 42 at 7.

Filyaw is correct that under *Ex parte Young*, the Eleventh Amendment does not bar relief that is equitable "even though accompanied by a substantial ancillary effect on the state treasury." *Papasan*, 478 U.S. at 278. However, such relief must "serve[] directly to bring an end to a present violation of federal law" to escape the Eleventh Amendment bar. *Id.* "Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the

named defendant." *Id.* The Court has already determined that Filyaw's Complaint fails to allege an ongoing violation of federal law since she is not entitled to Medicaid benefits. "Because there is no continuing violation of federal law to enjoin in this case, an injunction is not available." *Green*, 474 U.S. at 71. "By seeking an injunction to cure past injuries—[Defendants' alleged failure to provide Filyaw with adequate termination notice]—[Filyaw] asks for a reparative injunction. Such an injunction cannot be fairly characterized as prospective." *Merritts v. Richards*, 62 F.4th 764, 772 (3d Cir. 2023).

Because Filyaw fails to allege an ongoing violation of federal law, her desired declaratory relief also cannot be properly characterized as prospective under *Ex parte Young*. Filyaw's request for a declaration that Defendants violated her due process rights is "fundamentally retrospective because it does not relate to an ongoing violation of [her] federal rights; instead, it pertains to [the May 2024] termination" of her Medicaid coverage. *Corn v. Mississippi Dep't of Pub. Safety*, 954 F.3d 268, 276 (5th Cir. 2020). *Ex parte Young* "does not permit judgments against state officers declaring that they violated federal law in the past." *Puerto Rico Aqueduct*, 506 U.S. at 146. Thus, Filyaw fails to satisfy both *Ex Parte Young* requirements and her claim is barred by sovereign immunity.

III. CONCLUSION

For these reasons, the Court lacks subject matter jurisdiction over the claims contained in Filyaw's Complaint, Filing 1. After a "straightforward inquiry," the Court finds that Filyaw neither alleges an ongoing

violation of federal law nor seeks relief properly characterized as prospective. As a result, Filyaw's claim does not fall within the *Ex parte Young* exception to sovereign immunity and the Eleventh Amendment bars Filyaw's suit against Defendants. Accordingly,

IT IS ORDERED:

1. Plaintiff Gillian Filyaw's Motion for Oral Argument, Filing 43, is denied;
2. Defendants Steve Corsi and Matt Ahern's Motion to Dismiss, Filing 34, is granted; and
3. Plaintiff Gillian Filyaw's Motion to Certify Class, Filing 9, is denied as moot.

Dated this 9th day of September, 2024

BY THE COURT:
/s/ Brian C. Buescher
Brian C. Buescher
U.S. District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

Case No._____

GILLIAN FILYAW,
individually and on behalf of others similarly situated

Plaintiff,

v.

STEVE CORSI,
Chief Executive Officer of the Nebraska Department of Health and Human Services, in his official capacity, and
MATT AHERN,
Interim Director of the Division of Medicaid and Long-Term Care, in his official capacity,

Defendants.

COMPLAINT
(CLASS ACTION)

PRELIMINARY STATEMENT

1. Defendant Steve Corsi and Defendant Matt Ahern (collectively, "Defendants") are terminating Medicaid health care coverage for tens of thousands of Nebraskans without providing adequate written notice as required by the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.
2. Defendants issued notice to Plaintiff Gillian Filyaw (hereinafter, "Plaintiff") and have issued or will issue notice to the proposed class that their enrollment in Nebraska's Medicaid program will be terminated by the Nebraska Department of Health and Human Services ("Department") on the basis of their income, but the notice was issued without an adequate reason for the proposed termination, instead providing only the conclusory reason that "income exceeds standards" (hereinafter "Income Termination Notice" or "Income Termination Notices").
3. Federal COVID-19 legislation provided enhanced federal funding to state Medicaid programs on the condition that states kept most Medicaid enrollees continuously enrolled in coverage from March 1, 2020 through March 31, 2023. 42 U.S.C. § 1396d (note Families First Coronavirus Response Act, Pub. L. No. 116-127, § 6008, 134 Stat. 178, 208-209 (2020)); 42 U.S.C. § 1396a(tt)(1)(A) (added by Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 5131 (2022)).
4. After the federal COVID-19 protections for Medicaid enrollees ended, Defendants began redetermining

Medicaid eligibility for more than 390,000 Nebraskans. *Nebraska Medicaid Maintenance of Eligibility (MOE) Unwinding Operational Plan*, *Version 1.2*, Nebraska Dept. of Health and Human Services, at 6, (Feb. 8, 2023), https://dhhs.ne.gov/Documents/Nebraska%20Medicaid%20Maintenance%20of%20Eligibility%20(MOE)%20Unwinding%20Operational%20Plan.pdf.

5. Since April 2023, more than 22,000 Nebraskans have been issued an Income Termination Notice proposing to end their Medicaid enrollment for only the conclusory reason that their "income exceeds standards."
6. The Department includes no other explanation of the reason on the Income Termination Notices, such as the source of an enrollee's income, the enrollee's household size, a calculation of enrollee's household income, or the applicable income limit for eligibility based on the enrollee's household size.
7. Between May 2023 and November 2023, thousands of Nebraskans each month were issued Income Termination Notices that provide only the identical conclusory reason "income exceeds standards."
8. The most recent publicly available data at the time of filing indicates an additional 48,561 enrollees remain to be redetermined, many of whom are at risk of also being issued an Income Termination Notice. *Medicaid Unwind Dashboard* (last updated Apr. 30, 2024), https://datanexusdhhs.ne.gov/views/MedicaidUnwindPublic/MedicaidUn

windPublic?%3Aembed=y&%3AisGuestRedirectFromVizportal=y last visited June 11, 2024).

9. Plaintiff brings this action on behalf of herself and all others similarly situated to challenge Defendants' failure to provide adequate notice to enrollees prior to terminating their Medicaid coverage, as required by the Due Process Clause of the Fourteenth Amendment.
10. Plaintiff seeks (1) a class-wide declaration that Defendants' Income Termination Notices do not satisfy due process requirements and are therefore unconstitutional; and (2) a classwide preliminary injunction and permanent injunction enjoining Defendants, in their official capacities, from enforcing the unconstitutional and unlawful termination of Medicaid coverage for Plaintiff, and all others similarly situated, including those enrollees that have already been issued an Income Termination Notice, and enrollees that have not yet been issued an Income Termination Notice.
11. Furthermore, Plaintiff seeks to prevent this ongoing deprivation of constitutionally protected property interests without adequate advance notice on behalf of the purported class through prospective reinstatement of the class's property interests in Medicaid coverage until such time that sufficient notice be issued to the entire class.

PARTIES

Plaintiff

12. Plaintiff Gillian Filyaw is 23 years old and resides in North Platte, Nebraska.

Defendants

13. Defendant Corsi is Chief Executive Officer of the Department and is responsible in his official capacity for overseeing all Department functions and their operation consistent with state and federal law. Neb. Rev. Stat. § 81-3117; *see* Neb. Rev. Stat. §§ 68-908(1), 68- 907(2). He is sued in his official capacity.
14. Defendant Ahern is Interim Director of the Division of Medicaid and Long-Term Care of the Department and is responsible in his official capacity for overseeing all Medicaid Division functions and their operation consistent with state and federal law. Neb. Rev. Stat. § 81-3116(4). He is sued in his official capacity until such time that his successor in interest is named and is ordered to be joined to the action pursuant to Fed. R. Civ. P. 25(c).
15. Defendants are responsible for the administration of the Medicaid program in the state of Nebraska, which provides eligibility determination notices, including termination notices, to enrollees.
16. Defendants have offices at 301 Centennial Mall South, Lincoln, Nebraska.

JURISDICTION AND VENUE

17. This action arises under 42 U.S.C. § 1983 and the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.
18. The Court's subject matter jurisdiction over this action is conferred by 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3).
19. Declaratory relief is authorized by 28 U.S.C. §§ 2201(a), 2202, and Fed. R. Civ. Pro. 57. Injunctive relief is authorized by Fed. R. Civ. Pro. 65.
20. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

CLASS ACTION ALLEGATIONS

21. Plaintiff brings this action under Fed. R. Civ. Pro. 23(a) and (b)(2) on behalf of a class defined as follows:

> Those who, since March 1, 2023, have been or will be issued a written notice from Defendants proposing to terminate their Nebraska Medicaid eligibility for the reason "income exceeds standards."

22. Plaintiff alleges that Defendants' failure to provide adequate termination notice prior to terminating Medicaid eligibility unconstitutionally deprives her and all others similarly situated of due process to which they are legally entitled under the Due Process Clause of the Fourteenth Amendment.
23. The class is so numerous that joinder of all members is impracticable. Since April 2023, more than 22,000

Nebraskans have been issued an Income Termination Notice with the identical conclusory reason that their "income exceeds standards." Each month, many more Nebraskans are issued identically deficient Income Termination Notices. More than 48,000 enrollees remain to be redetermined, many of whom are at risk of also being issued an Income Termination Notice.

24. There are questions of law or fact common to the proposed class, including whether Defendants' issuance of Income Termination Notices fails to provide an adequate reason for the proposed termination as required by due process.

25. Plaintiff's claims are typical of the claims of the plaintiff class. Plaintiff and the proposed class have been or will be issued Income Termination Notices by Defendants, which propose to terminate their Medicaid eligibility based on their income, without an adequate reason to support the proposed termination in violation of the Due Process Clause of the Fourteenth Amendment.

26. Plaintiff will fairly and adequately protect the interests of the proposed class because they suffer from the same unlawful deprivation of their property interest in Medicaid coverage. In supporting their individual claims, Plaintiff will simultaneously advance the claims of absent class members. Plaintiff knows of no conflicts of interest among class members.

27. Plaintiff and the proposed class are represented by Nebraska Appleseed Center for Law in the Public Interest, whose attorneys are experienced in class action litigation and will adequately represent the class. Counsel has the resources, expertise, and experience to prosecute this action on behalf of the proposed class.
28. Plaintiff's claims satisfy the requirements of Fed. R. Civ. P. 23(b)(2). Defendants have acted on grounds generally applicable to the proposed class by issuing Income Termination Notices that communicate only the ultimate conclusion without providing an adequate reason, which should include at least the income calculation and relevant income limit for the enrollee's household size, thereby making appropriate preliminary and final injunctive relief and declaratory relief with respect to the proposed class as a whole.
29. A class action is superior to other available methods for a fair and efficient adjudication of this matter in that the prosecution of separate actions by individual class members would unduly burden the Court and create the possibility of conflicting decisions.

CONSTITUTIONAL, STATUTORY, AND REGULATORY SCHEME

Medicaid Overview

30. Medicaid is a jointly funded state and federal program established in 1965 that provides medical coverage to certain categories of low-income

persons pursuant to Title XIX of the Social Security Act. 42 U.S.C. §§ 1396–1396w-7; *see* Neb. Rev. Stat. § 68-906.

31. The purpose of Medicaid is to furnish medical assistance to individuals whose income and resources are insufficient to pay the costs of their medically necessary care. *See* 42 U.S.C. § 1396-1.
32. State participation in Medicaid is optional. When a state chooses to participate, it must comply with the requirements of the federal Medicaid Act and implementing rules in order to receive federal funds to match state expenditures under the program. *Bowlin v. Montanez*, 446 F.3d 817, 818 (8th Cir. 2006).
33. Such requirements include how a state determines Medicaid eligibility and when the state can terminate an enrollee's Medicaid coverage.
34. After the state makes an initial eligibility determination, the state reviews an enrollee's continuing eligibility at least once every 12 months. 42 C.F.R. § 435.916, 477 Neb. Admin. Code § 3-007. This process of reviewing an individual's continuing eligibility once every 12 months is known as renewal.
35. Defendants are required to provide enrollees timely and adequate written notice of any eligibility decision, including an approval, denial, termination, or suspension of eligibility, or a denial or change in benefits and services. 42 U.S.C. § 435.917(a).

36. If the state determines that the recipient is not eligible in any category of Medicaid or on any basis of eligibility, Medicaid enrollment must be maintained until the individual is provided timely and adequate written notice that includes a statement of what action the agency will take and the effective date of such action, a clear statement of the specific reasons supporting the proposed termination, the specific regulations that support the proposed termination, and information on the individual's hearing rights. 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.206(b)-(c), 431.210, 435.917(a); Neb. Rev. Stat. § 68- 914(3); 477 Neb. Admin. Code § 9-002.01 – 9-002.03.
37. Enrollees and applicants for Medicaid have "the right to appeal any action, inaction, or failure to act with reasonable promptness by requesting a fair hearing." 477 Neb. Admin. Code 10-002.
38. Such appeal must be requested within 90 days of the mail date of the notice being appealed. 477 Neb. Admin. Code 10-003.
39. If an appeal is submitted before the effective date on the notice, the enrollee is presumed to have requested that their Medicaid enrollment continue pending the appeal decision unless the enrollee indicates otherwise. 477 Neb. Admin. Code 10-004; *see* 42 C.F.R. § 431.230(a).
40. If the outcome of the appeal is that the state's action or inaction is sustained, the state may recover the costs of the services provided during the pendency

of the appeal and recoup such costs from the enrollee. 42 C.F.R. § 431.230(b).

Due Process Requirements for Medicaid Termination Notices

41. The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution prohibits any state from depriving any person of a property interest without the due process of law.
42. Medicaid coverage, like other welfare benefits, is a matter of statutory entitlement for individuals qualified to receive it, and thus is a constitutionally protected property interest that cannot be deprived without due process of law. U.S. Const. amend. XIV, § 1; *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Bliek v. Palmer*, 102 F.3d 1472, 1475 (8th Cir. 1997).
43. Constitutional due process requires that a Medicaid enrollee be issued timely and adequate written notice detailing the reasons for a proposed termination, and an effective opportunity for a hearing before services are terminated. *Goldberg*, 397 U.S. at 267-68.
44. Due process requires that adequate notice is "complete, stated in plain language, and reasonably calculated to afford the plaintiffs an opportunity to raise their objections to the state's proposed actions." *Bliek*, 102 F.3d at 1476.
45. Medicaid notices of adverse action must be in plain and clear terms, provide an explanation for why benefits are being reduced, provide specific references for the reduction in coverage, and "be as

specific as reasonably practicable" about the enrollee's eligibility criteria. *See Elder v. Gillespie*, 54 F.4th 1055, 1064 (8th Cir. 2022) (quoting *Jacobs v. Gillespie*, No. 3:16-cv-119-DPM (E.D. Ark. Nov 1, 2016)).

COVID-19 Medicaid Continuous Coverage Requirements

46. Federal COVID-19-related protections required states to keep most Medicaid enrollees continuously enrolled in coverage from March 1, 2020 through March 31, 2023. 42 U.S.C. § 1396d, 42 U.S.C. § 1396a(tt)(1)(A).
47. On March 18, 2020, the Families First Coronavirus Response Act (FFCRA) was signed into law. The FFCRA offered enhanced federal funding to state Medicaid programs if states met certain requirements, one of which was to keep most Medicaid enrollees continuously enrolled in coverage despite any changes in circumstances through the end of the month of the federally declared COVID-19 public health emergency ("PHE") with very few exceptions. 42 U.S.C. § 1396d (note Families First Coronavirus Response Act, Pub. L. No. 116-127, § 6008, 134 Stat. 178, 208-209 (2020)).
48. Congress subsequently de-coupled the Medicaid continuous coverage requirement from the PHE and set March 31, 2023 as the date-certain for the end of continuous coverage requirement. 42 U.S.C. § 1396a(tt)(1)(A) (added by Consolidated

Appropriations Act, 2023, Pub. L. No. 117-328, § 5131 (2022)).

49. On March 1, 2023, Defendants restarted renewals, and the first wave of terminations took effect April 1, 2023.

50. The unwinding of the continuous coverage requirement was expected to continue through at least April 2024.

51. As of the date of filing, the most recent publicly available data shows that even after April 30, 2024, renewals for 48,561 cases are still pending.

52. All Medicaid enrollees facing termination must be issued a timely and adequate written notice detailing the reasons for a proposed termination and an effective opportunity for a hearing before services are terminated.

53. Even after the unwinding of the continuous coverage requirement is over, all enrollees will continue to be renewed at least every twelve months, and many current and future enrollees are at risk of being issued an Income Termination Notice in the future as Defendants have used the conclusory reason "income exceeds standards" in the past and are expected to continue to use the same deficient Income Termination Notices after the unwinding is over.

FACTUAL ALLEGATIONS

Plaintiff Gillian Filyaw

54. Plaintiff, Gillian Filyaw, resides in North Platte, Nebraska with her husband and two young children.

55. Plaintiff's household income is low and often fluctuates based on seasonal demands for her husband's job.
56. Plaintiff recollects that she enrolled in Nebraska Medicaid coverage in October or November of 2020 when she discovered she was pregnant.
57. Plaintiff was continuously enrolled in Nebraska Medicaid coverage until her coverage ended on May 1, 2024.
58. Defendants issued Plaintiff an Income Termination Notice dated April 18, 2024 proposing to terminate her Medicaid coverage.
59. The Income Termination Notice issued to Plaintiff provides only a conclusory reason for her termination - that "income exceeds standards." However, the notice did not include a calculation of Plaintiff's household income nor the income limit based on household size used to determine whether she was eligible for Medicaid.
60. As a result of the conclusory reason provided on the Income Termination Notice, Plaintiff cannot adequately prepare a response to the proposed termination of coverage.
61. The Income Termination Notice issued to Plaintiff is identical to the Income Termination Notices issued to more than 22,000 Medicaid enrollees since March 1, 2023 in that it provides only the conclusory reason "income exceeds standards," without identifying the household income, calculation,

household size, or applicable limit used in the eligibility determination.

62. Plaintiff has relied on Medicaid health coverage to address multiple serious health concerns in the past. Since her Medicaid was terminated, Plaintiff has forgone or delayed necessary health care because it is unaffordable without health coverage.

63. Plaintiff is experiencing emotional distress and great harm because of the unconstitutional deprivation of her Medicaid coverage without adequate notice.

STATEMENT OF CLAIM

Defendants violated Plaintiff's due process rights as guaranteed by the Fourteenth Amendment of the U.S. Constitution.

64. Plaintiff incorporates, as if fully set forth herein, the allegations included in Paragraphs 1 through and including 63.

65. The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution bars the state from depriving a person of their property interest, which includes Medicaid benefits, without affording the individual adequate, timely notice and an opportunity to be heard prior to the termination of the benefits. U.S. Const. amend. XIV, § 1; *Goldberg*, 397 U.S. at 267-68; *Bliek*, 102 F.3d at 1475.

66. Defendants have deprived, and continue to deprive, Plaintiff and the proposed class of due process in violation of the Fourteenth Amendment by issuing the Income Termination Notices to Plaintiff and the

proposed class, creating a risk of erroneous deprivation of Medicaid coverage and failing to provide timely, adequate notice of the basis for the agency's decision.

67. Plaintiff seeks relief on this claim pursuant to 42 U.S.C. § 1983, which provides a cause of action to redress the deprivation of their constitutional rights by persons acting under color of state law.
68. Plaintiff and the proposed class are entitled to injunctive and declaratory relief preventing the unconstitutional deprivation of the due process rights that arise from the Defendants' issuance of the Income Termination Notice.
69. Plaintiff and proposed class members that have been issued Income Termination Notices and who have been terminated from Medicaid coverage are entitled to a preliminary and permanent injunction prohibiting Defendants from enforcing the unconstitutional and unlawful termination of their Medicaid coverage, including prospective reinstatement of their property interest in Medicaid, until Defendants issue timely and adequate termination notice that sets forth the specific reasons for the proposed termination as required by constitutional due process.
70. Future proposed class members that have been or will be issued Income Termination Notices but who have not yet been terminated from Medicaid coverage are entitled to a preliminary and permanent injunction prohibiting Defendants from

terminating their Medicaid coverage until Defendants issue timely and adequate termination notice that sets forth the specific reasons for the proposed termination as required by constitutional due process.

DECLARATORY AND INJUNCTIVE RELIEF

71. Plaintiff and the proposed class have no adequate remedy at law to challenge or litigate the deficiencies of Defendants' Income Termination Notices but for an action for declaratory judgment and injunctive relief.
72. Plaintiff and the proposed class are likely to succeed on the merits of their claim, as all claims are enforceable by private parties and based on facts establishing the Defendants' unlawful conduct.
73. Plaintiff and the proposed class are likely to suffer irreparable harm in the absence of injunctive relief because they face the threat of termination of benefits without adequate notice and rely on Medicaid for access to health care.
74. The harm that Plaintiff and the proposed class suffer outweighs any harm that would be caused to the Defendants by ensuring that Medicaid enrollees are provided adequate notice prior to termination of eligibility.
75. The public interest is significant in protecting Medicaid beneficiaries' right to adequate notice prior to the termination of eligibility because Medicaid provides medically necessary services to people who live in or near poverty and who cannot

afford such medically necessary services without Medicaid.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter a judgment in favor of Plaintiff and the proposed class they represent as follows:

a) Certify this action as a class action under Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure with respect to the proposed class identified herein;

b) Pursuant to 42 U.S.C. § 1983 declare that the Income Termination Notices used by Defendants do not satisfy the requirements of due process and are therefore unconstitutional;

c) Preliminarily and permanently enjoin Defendants from enforcing unconstitutional and unlawful Medicaid terminations per Income Termination Notices by affirmatively ordering that Defendants prospectively reinstate the property interests in Medicaid coverage of Plaintiff and proposed class until Defendants provide the enrollees an adequate termination notice that satisfies the requirements of constitutional due process, including setting forth the specific reasons why termination is proposed;

d) Preliminarily and permanently enjoin Defendants from terminating Medicaid coverage for future members of the proposed class without first providing the enrollee a termination notice that satisfies the requirements of due process, including

setting forth the specific reasons why termination is proposed;

e) Award the Plaintiff litigation costs and reasonable attorneys' fees, as provided for by 42 U.S.C. § 1988;

f) Waive the requirement for the posting of a bond as security for the entry of relief;

g) Set a time and place for hearings on the motions to be filed by Plaintiff and notice be given to all persons entitled thereto as provided by law;

h) Set the place of trial of this case as Lincoln, Nebraska; and

i) Order such other and further relief as the Court may deem just and proper.

Dated this 11th day of June, 2024.

Respectfully submitted,

Gillian Filyaw, on behalf of herself and all others similarly situated, Plaintiff

/s/ Kelsey E. Arends

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CERTIFICATE OF SERVICE

I hereby certify that on this day, the 11th of June, 2024, a copy of the foregoing was filed using the Court's ECF system, and the attorneys for the Plaintiff separately emailed copies of this Complaint to the following:

Jennifer A. Huxoll, Civil Litigation Bureau Chief, Nebraska Attorney General's Office, via email: Jennifer.Huxoll@nebraska.gov.

This the 11th of June, 2024.

By: */s/ Kelsey E. Arends*

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