NOT YET SCHEDULED FOR ORAL ARGUMENT

Nos. 16-7065, 16-7085 & 16-7100

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OSCAR SALAZAR, *et al.*,
APPELLEES,

V.

DISTRICT OF COLUMBIA, *et al.*,
APPELLANTS.

ON APPEAL FROM ORDERS OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

FINAL BRIEF FOR THE DISTRICT OF COLUMBIA APPELLANTS

KARL A. RACINE
Attorney General for the District of Columbia

TODD S. KIM
Solicitor General

LOREN L. ALIKHAN
Deputy Solicitor General

RICHARD S. LOVE
Senior Assistant Attorney General
Office of the Solicitor General

Office of the Attorney General
441 4th Street, NW, Suite 600S
Washington, D.C. 20001
(202) 724-6635
richard.love@dc.gov

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties and amici*.—The plaintiffs below and appellees here are Oscar Salazar, Pauisa Argueta, Teresa Argueta, Mirna Paz, Irma Isabel Flores, Yanet Abigail Flores, Luis Alfredo Flores, Carlina Flores, Ana Iris Flores, Abigail Flores, Nelson Alvarez, Jessica Cruz, Sylvia Cruz-Diaz Alvarez, and Juan Antonio Flores. The defendants below and appellants here are the District of Columbia and, in their official capacity, Muriel Bowser, Mayor of the District of Columbia, and Laura Zeilinger, Director of the District of Columbia Department of Human Services. There are no amici.

B. *Ruling under review*.—The District of Columbia appellants seek review of the April 4, 2016 order (Kessler, J.) granting plaintiffs' motion for modification of the settlement order (JA 1272-74). A subsequent order denying the District's motion to alter or amend the court's April 4, 2016 order was entered on June 2, 2016 (JA 1414) and appealed on June 23, 2016. An order granting plaintiffs' motion to modify the stay of the April 4 order was entered on July 12, 2016 (JA 1415-16) and appealed on August 11, 2016. On August 23, 2016, this Court consolidated the three appeals (Nos. 16-7065, 16-7085, and 16-7100).

C. *Related cases*.—This matter has been before the Court before in Nos. 14-7050, 10-7166, 10-7106, 10-7030, 09-7154, 09-5432, 08-7100, 04-7200, 98-7106, 97-7094. There are no other related cases

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TABLE OF AUTHORITIES*

Cases

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* Authorities upon which we chiefly rely are marked with asterisks.

Statutes and Regulations

GLOSSARY

ACA	Patient Protection and Affordable Care Act
ACEDS	Automated Client Eligibility System
DCAS	District of Columbia Access System
EPSDT	Early and periodic screening, diagnostic, and treatment services
JA	Joint Appendix
MAGI	Modified Adjusted Gross Income

JURISDICTIONAL STATEMENT

The district court has jurisdiction of this case under 28 U.S.C. § 1331. This Court has jurisdiction of this appeal under 28 U.S.C. § 1292(a)(1) because the district court's April 4, June 2, and July 12, 2016 orders granted injunctive relief. JA 1272-74, 1414, 1415-16. The District of Columbia timely noted its appeals from these orders on May 4, June 23, and August 11, 2016. ECF Nos. 2131, 2146, 2174.

STATEMENT OF THE ISSUES

1. Whether the district court lacked the authority to modify a settlement order to re-impose requirements it had previously terminated, especially given that the court in doing so did not provide the District of Columbia the fundamental protections it was due.

2. Whether, even if the court had authority, this Court should vacate the re-imposed requirements because they were neither justified by nor suitably tailored to changed circumstances.

STATEMENT OF THE CASE

Since the entry of a "Settlement Order" on January 25, 1999, the district court has supervised a complex remedial scheme concerning medical services and assistance provided by the District of Columbia's Medicaid program pursuant to Title 19 of the Social Security Act. In 2009, the court vacated the section of the Settlement Order on timely processing of initial Medicaid applications, and in 2013, it terminated the section on the annual renewal process. Nonetheless, on

April 4, 2016, the court modified the Settlement Order to require the District to (1) "provisionally approve all Medicaid applications pending over 45 days until a final determination can be made," and (2) "continue the eligibility of all Medicaid recipients due to be renewed or recertified for 90 days after each recipient's renewal or recertification deadline unless [the District] ha[s] affirmatively determined that the recipient is no longer eligible for Medicaid." JA 1273-74.

On April 14, the District filed motions to stay and to alter or amend the court's order. ECF 2113, 2114. On May 17, the court granted the District's motion to stay the April 4 order pending resolution of this appeal, but, on June 2, it denied the District's motion to alter or amend the order. JA 1392-93, 1414. Then, on July 12, the court modified its stay to require the District to:

> (1) "provide provisional Medicaid eligibility to any (non-disability) Medicaid applicant who identifies him or herself to the District of Columbia with a good-faith claim that he or she has applied for Medicaid and that his or her application has not been acted upon within 45 days"; and
>
> (2) "provide 90 days of continued Medicaid eligibility to any Medicaid beneficiary who identifies him or herself to the District of Columbia with a good-faith claim that he or she has been or is soon to be terminated from Medicaid at renewal/recertification without advance written notice or that he or she has submitted the renewal/recertification form or required documents, but has been or is soon to be terminated from Medicaid on the grounds that he or she failed to submit the form or required documents."

JA 1415-16. The District appeals from the April 4, June 2, and July 12 orders. These appeals were consolidated by this Court on August 23.

1. The Entry Of The Settlement Order, And The Later Termination Of Sections II And III.

In 1993, plaintiffs filed this case asserting violations of federal law arising from several aspects of the District's administration of its Medicaid program. The class that was certified was not a unified, comprehensive one, "but has always been a collection of several sub-classes, with each sub-class consisting of Medicaid applicants and recipients with a particular set of claims." JA 325; *see* JA 326 ("[T]he class should be certified as five separate sub-classes rather than as one comprehensive class." (internal quotation marks omitted)).

In 1996, following a bench trial, the court found the District liable for several categories of violations involving sub-classes III through V; namely, that the District did not: (1) process and decide on applications for Medicaid eligibility in a timely manner (Sub-class III); (2) provide advance adequate notice before suspending or terminating benefits (Sub-class IV); and (3) provide adequate notice of early and periodic screening, diagnostic, and treatment ("EPSDT") services to eligible children when requested (Sub-class V). *Salazar v. District of Columbia*, 954 F. Supp. 278, 324-34 (D.D.C. 1996).

Thereafter, in 1999, the parties entered into a Settlement Order, memorializing the District's obligations to remedy the violations. JA 251-99. Section II of the Settlement Order detailed steps the District was to take to redress problems related to the timely processing of initial applications for Medicaid

eligibility. JA 253-60 ¶¶ 6-16. In general, Section II required the District to decide Medicaid applications and notify beneficiaries within 45 days of receiving an application. JA 253 ¶ 6(a). If the District demonstrated compliance over three consecutive years, the Settlement Order provided that Section II would terminate. JA 294 ¶ 74. On February 24, 2009, having satisfied the associated exit criteria that the parties had negotiated, the District moved with consent to vacate Section II, and the court granted the motion. JA 96 (Minute Order, Feb. 24, 2009), 1284.

Section III of the Settlement Order concerned the recertification of Medicaid eligibility. JA 261-67 ¶¶ 17-28. To comply with Medicaid laws regarding annual recertification, the District mailed recertification forms to beneficiaries each year for them to complete and return or risk losing their benefits. Section III prescribed a schedule by which the District sent out recertification forms, using language specified by the Settlement Order, and various notices advising beneficiaries of the status of their recertification. JA 261 ¶ 17. The Settlement Order prohibited the District from terminating a Medicaid recipient's eligibility unless it complied with the prescribed schedule. JA 261 ¶ 17.

However, after passage of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 11-148, 124 Stat. 119 (2010), the laws pertaining to Medicaid eligibility applications and annual recertifications changed significantly. Instead of the largely manual and paper-based recertification system required by

Section III, the ACA required the District to move to a "passive" renewal model in which beneficiaries' eligibility is determined to the extent possible through reliable information available to the District, such as data available in the individual's account, or through other agency databases such as those linked to the Internal Revenue Service and the Social Security Administration. 42 C.F.R. § 435.916. These changes required the District to revise all of its notices and to retool and automate the renewal process, as described more fully below.

On September 20, 2013, in light of the change in law, the District moved to terminate Section III because it could not move forward with implementation of the ACA's passive renewal system while being bound by conflicting provisions in Section III. ECF 1870. The district court granted the District's motion on October 18, finding that "[t]here is simply no comparison between the statutory framework that existed at the time [the district court] made its factual findings in 1996 and what implementation of the ACA envisions," and that the ACA's renewal provisions "are in direct conflict with the renewal process in Section III." JA 316. The court concluded "that passage of the ACA has created a significant change in circumstances that justifies termination of the provisions of Section III of the Consent Order." JA 315.

The court recognized that the task of implementing the passive renewal process "presents many technological and logistical challenges . . . [and] will be a

massive undertaking requiring the resources, creativity, and attention to detail of many people within the District of Columbia Government." JA 315. And it understood that "implementation will undoubtedly be both rocky and fairly long in coming." JA 316. While plaintiffs opposed the District's motion, they did not appeal the court's decision to terminate Section III. JA 1285.

The only portion of the Settlement Order that remained in force at that point relates to notice and delivery of EPSDT services to children. JA 1286. These provisions, still in effect today, establish detailed procedures for notice of the nature and availability of EPSDT services and for tracking and providing these services to eligible children under 21 years of age. JA 1286. In 2014, 98,350 District children were eligible for EPSDT services, out of a population of almost a quarter of a million District Medicaid beneficiaries. JA 824-25 ¶ 10, 1286.

2. The ACA's Impact.

a. Creation of the DC Access System.

The ACA has transformed Medicaid, particularly in how states determine the eligibility of individuals on initial application for benefits or during annual renewal of eligibility. JA 822-23 ¶ 5. This is especially important in the District of Columbia, where approximately one in three District residents are Medicaid beneficiaries. JA 824-25 ¶ 10. A key component of the new eligibility standards is the ACA's Modified Adjusted Gross Income ("MAGI") methodology, which uses

tax information to assess income, household composition, and family size. JA 822-23 ¶ 5. MAGI beneficiaries constitute the majority of the District's Medicaid population. JA 839 ¶ 57. Different eligibility standards are used to assess the non-MAGI population—mostly individuals with disabilities and the elderly. JA 830 ¶ 28, 839 ¶ 57.

To implement the eligibility reforms called for by the ACA, the District began building a new, automated eligibility determination system, known as the DC Access System ("DCAS"). JA 826-27 ¶¶ 14-15. When fully realized, DCAS will provide streamlined, automated eligibility determinations for all public health and human services benefits offered by the District, at which point the District will retire its legacy eligibility system, the Automated Client Eligibility Determination System ("ACEDS"). JA 826-27 ¶ 15.

Since October 1, 2013, individuals have been able to submit applications for Medicaid benefits online, over the phone, by fax, by mail, or in person at the District's Department of Human Services, Economic Security Administration Service Centers. JA 829-30 ¶ 25. Once an application is received, information on it is compared against federal and local electronic data sources and processed through an automated rules engine. JA 830 ¶ 26. The individual is then notified of the results of the application. JA 830 ¶ 26. If the information is sufficient to make an eligibility determination, the individual is notified and approved for Medicaid

immediately. JA 830 ¶ 26. Between October 2013 and January 1, 2016, over 33,000 new electronic applications for Medicaid were processed in DCAS on the same day they were submitted. JA 854-55 ¶ 99.

b. Implementation of passive renewals.

After an initial application is approved, Medicaid eligibility must be re-determined on an annual basis. The ACA (through its implementing regulations) mandates a "passive" annual renewal process for MAGI beneficiaries. 42 C.F.R. § 435.916(a). When a MAGI beneficiary is due to be renewed, the District uses available local and federal electronic data to attempt to verify the beneficiary's continued eligibility. JA 831-32 ¶ 32. If available information is sufficient to confirm eligibility, the beneficiary is notified of that decision and need not take any further action. JA 831-32 ¶ 32. If it is insufficient, the beneficiary is sent a form 60 days prior to the renewal date that is pre-populated with the information already available to the District and is asked to fill in the missing portions and return the form. JA 1296. If the form is not returned, the beneficiary is provided 30 days' notice that benefits will terminate if the form is not returned by the renewal date. JA 832 ¶ 33, 878-83 (MAGI 30-day Notice). Recipients of this notice are advised of their rights to seek review. JA 881-83. However, even when an individual fails to provide the needed information on time, the ACA mandates, and the District provides, a 90-day grace period that allows benefits to be restored

retroactive to the date of termination if the completed form is returned within the grace period and the information establishes eligibility. JA 832 ¶ 33; 42 C.F.R. § 435.916(a)(3)(iii).

Due to the complexity of the required tasks, the passive renewal process for District MAGI beneficiaries has been managed in two phases. The first phase was to implement passive renewal functionality for MAGI beneficiaries whose eligibility had been determined using pre-ACA methodologies—these beneficiaries are known as the "M1 renewal group." JA 832-33 ¶¶ 34-35. Any MAGI beneficiary who applied and was determined eligible for Medicaid prior to October 1, 2013 belonged to the M1 renewal group. The second phase involved renewal of beneficiaries previously determined to be eligible through MAGI methodologies—the "D1 renewal group." JA 836 ¶ 45. Thus, as M1 beneficiaries are renewed using MAGI methodologies, they become part of the D1 renewal group.

The automated passive renewal process for M1 beneficiaries began in December 2014 for beneficiaries whose renewals were required starting in January 2015. JA 833 ¶ 37. For the D1 population, it began in December 2015 for MAGI beneficiaries with renewal dates in February 2016. JA 838-39 ¶ 54. Non-MAGI beneficiaries go through the same renewal process that the District has used for the last 15 years. JA 838-39 ¶ 54, 840 ¶ 58, 906-08.

Throughout 2015, the District instituted a variety of new, enhanced outreach strategies to remind beneficiaries who are unable to passively renew of the need to complete and submit documentation to establish their continued eligibility for Medicaid. JA 828-29 ¶ 22, 833-34 ¶¶ 38-40. Historically, roughly only 60% of beneficiaries responded to renewal notices under the pre-ACA framework; in 2015, following the implementation of the passive renewal process, the renewal rate increased to 86.3%. JA 835-36 ¶ 44.

c. Challenges presented by the transition from ACEDS to DCAS.

The transition from ACEDS to DCAS is of critical importance. As with virtually every other jurisdiction attempting to implement new ACA eligibility systems, the District has encountered technological challenges. JA 827-28 ¶¶ 19-20. To address these challenges, the District repurposed and trained staff, engaged stakeholders and the advocacy community to assist with the identification of beneficiaries who may have been adversely affected, and added caseworkers to process applications and renewals and staff in Service Centers to answer renewal-related questions. JA 828-29 ¶¶ 22, 24. The United States Centers for Medicare and Medicaid Services has also monitored all aspects of the transition closely and has reviewed and approved every systemic action the District has taken with respect to the implementation of DCAS, including the timetable for the various phases of the project as well as the content and timing of renewal forms sent to

beneficiaries. JA 826 ¶ 14; 827 ¶¶ 16, 18; 828-30 ¶¶ 22, 25; 831-32 ¶¶ 30, 32; 833 ¶ 36; 836-37 ¶¶ 47-50; 839-40 ¶ 57; 842-44 ¶¶ 63, 65-67; 844-45 ¶ 69; 846-47 ¶ 75.

3. The District Court's Modification Of The Settlement Order To Resume Oversight Of The District Of Columbia Government On Matters Addressed By The Terminated Portions Of The Settlement Order.

Plaintiffs moved for a preliminary injunction on December 22, 2015, arguing that there were significant technical and logistical problems processing applications to initiate and renew Medicaid benefits and asking the district court to resume oversight of the District's system for making eligibility determinations—the subject of the parts of the Settlement Order that had been terminated by the court in 2009 and 2013. ECF 2070. The District filed an opposition on January 15, 2016. ECF 2077. After the motion was fully briefed, plaintiffs filed a second, independent motion on February 9, seeking virtually identical relief, this time styled as a motion to modify the Settlement Order under Fed. R. Civ. P. 60(b). ECF 2093. The District filed its opposition on February 26 and a sur-reply on March 28. ECF 2097, 2108. With the parties' consent, the district court resolved the two motions simultaneously. JA 1279-80.

In its April 4 memorandum opinion, the court repeatedly found that the District had made "substantial progress since Plaintiffs' initial filing on December 22, 2015, in addressing the changes in its administration of the Medicaid program

to comply with the ACA." JA 1280; *see* JA 1292-95, 1308-09, 1321. Finding "impressive" its progress in reducing the number of backlogged initial applications (those pending in excess of 45 days), the court observed that "'[a]s of February 24, 2016, zero individuals were in the case processing backlog (down from 1,247 individuals on January 11, 2016), and as of February 23, 2016, . . . 67 initial applications were affected by the [stuck/malformed] issue (down from 1,408 on January 11, 2016).'"[1] JA 1292-93 (quoting JA 1132-33 ¶¶ 4-5).

The court also found that "the District has made substantial progress with respect to the issue of passive renewals." JA 1308. Fifty-nine percent of the 7,000 renewals processed in February 2016 were passively renewed and the number of renewals affected by the "stuck/malformed" issue was reduced to zero as of February 26. JA 1308-09.

Nonetheless, finding "that despite its substantial progress, the District has still not been able to *entirely* remediate the problems," JA 1295 (emphasis added), the court granted plaintiffs' motion for modification and denied as moot the motion

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[1] Two groups of backlogged cases are referenced. JA 1290. The first group is "stuck/malformed" cases, meaning that technical issues prevented the system from making a fully formed case in DCAS when information was entered into the system. JA 842-43 ¶ 65. Those technical errors prevented a caseworker from reviewing a case to reach a determination. A second group of cases were backlogged as a result of other technology issues or problems verifying required information. JA 1290.

for a preliminary injunction. JA 1272-74. The court found "unconvincing" the District's argument that any current delays in processing applications for initial and renewed benefits were the result of individual employee mistakes, not systemic issues endemic to its administration of the Medicaid program. JA 1295; *see* JA 1314. Its reasoning was not based on a finding of any fault the District could reasonably be expected to remedy. Instead, the court reasoned: "whether it is an individualized error or a system problem, it is the beneficiary who is suffering." JA 1314. It ordered the District to (1) grant provisional Medicaid eligibility to any applicant for Medicaid whose application has been pending for more than 45 days until the District can make a final decision, and (2) continue Medicaid benefits of all beneficiaries due to be renewed or recertified for 90 days after the renewal or recertification deadline unless the District affirmatively determines that the beneficiary no longer is eligible for Medicaid. JA 1273-74. The court further ordered:

> These remedies shall remain in place until Defendants demonstrate to the Court, based on substantial evidence, that their technology and administrative processing systems for making timely eligibility determinations on applications and providing adequate notice to Medicaid recipients and applicants of the decisions on renewals and applications are functioning as required to ensure and protect the rights of Medicaid recipients and applicants.

JA 1274.

In explaining its authority to modify the Settlement Order under Fed. R. Civ. P. ("Rule") 60(b)(5) despite its earlier termination of the two sections applicable to the processing of initial and renewed benefits, the court appears to have accepted the plaintiffs' argument that the Settlement Order requirements that had not been terminated—those relating directly to early and periodic screening, diagnostic, and treatment services under Medicaid—were themselves sufficient to support the modification "because it is common sense that a child cannot obtain any EPSDT service when he or she lacks Medicaid eligibility." JA 1317.

The court next determined that there was a change in circumstances sufficient to warrant modification despite the "District's significant progress in reducing the processing time for the backlogs and stuck/malformed errors in the month of February 2016." JA 1321. The court noted that it had "no assurance" that the problems in processing initial applications and renewals would not "arise again," and that the District's "commendable progress" since the filing of plaintiffs' initial motion in December 2015 suggested that court oversight "has been a boon rather than a hindrance." JA 1321.

The court also rejected the District's contention that the modifications were not suitably tailored to the changed circumstances because they required that benefits be provided to individuals well beyond those who receive EPSDT services. JA 1327-28. The court concluded that while its authority to modify was

based on the prospective application of the EPSDT provisions, the changed circumstances to which its modification had to be suitably tailored were the processes for initial and renewed benefits that affected "adults as well as children." JA 1327. It concluded that it was "in the public interest to ensure that those children and adults do not lose the vital services provided by Medicaid coverage under the ACA." JA 1328.

On April 14, the District filed motions to alter and amend and to stay the court's April 4 order. ECF 2113-14. On May 17, the court granted the District's motion to stay and, on June 2, denied the motion to alter or amend. JA 1392-93, 1414. On July 12, the court granted in part plaintiffs' motion to modify the stay and ordered the District to provide "provisional Medicaid" to individuals who identify themselves as having applications pending over 45 days and to provide 90 days of continued eligibility to beneficiaries who identify themselves as terminated or soon-to-be-terminated at their renewal date. JA 1415-16. A memorandum opinion setting forth the reasons for modifying the stay was issued on July 19. JA 1417-20.

STANDARD OF REVIEW

A grant or denial of relief under Rule 60(b) is reviewed for abuse of discretion. *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988). A "'district court by definition abuses its discretion when it makes an

error of law.'" *Smalls v. United States*, 471 F.3d 186, 191 (D.C. Cir. 2006) (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)).

SUMMARY OF ARGUMENT

The Court should vacate the district court's modification of the Settlement Order. The district court simply lacked authority to take the actions it did, and even assuming authority it abused its discretion.

1. The Settlement Order agreed to by the parties and approved by the district court established a detailed set of remedial requirements that would terminate upon satisfaction of the prescribed performance standards. The district court's modifications deprived the District of the benefit of this bargain by reimposing requirements for initial Medicaid applications and renewals that were akin to those previously embodied in the Settlement Order and terminated pursuant to its terms. Moreover, their imposition contravenes the reason for partially terminating an institutional reform settlement—returning local control once a violation is remedied. Furthermore, granting additional injunctive relief based on alleged violations of a law that did not exist at the time the Settlement Order was approved without requiring a new lawsuit deprived the District of the due process protections it should have been afforded.

The court also misapplied Rule 60(b). The court's modifications reimposed requirements whose prospective application was lost when they were terminated

and its reliance on distinct EPSDT provisions that do have prospective application is inconsistent with the terms of the Settlement Order and the purpose of Rule 60(b)(5). The EPSDT provisions cannot serve as the basis for reimposing eligibility and renewal requirements because the plaintiff class is composed of separate distinct sub-classes and the Settlement Order severed the EPSDT provisions from those concerning Medicaid eligibility and renewals, each of which had its own bargained-for criteria to exit judicial supervision. The court also disregarded the concerns underlying Rule 60(b)(5) by reasserting authority over functions it had previously returned to local control and by doing so in a manner that made their return substantially more onerous.

2. The court's modifications are also not justified by the changes that it found. The court's findings did not establish that children are not receiving EPSDT services because of changes with regard to Medicaid eligibility and these changes did not make the EPSDT provisions unworkable or inequitable. Delays resulting from the District's efforts to comply with the ACA do not affect the EPSDT services provided after eligibility has been determined. In addition, the modifications regarding Medicaid renewals are impermissible because it was anticipated when those provisions were terminated that there would be lengthy and significant problems implementing the ACA's reforms.

Moreover, the modifications are not suitably tailored to remedy the alleged harm to EPSDT-eligible children but instead fashion a remedy for *adult* beneficiaries. This plain mismatch is itself reason to find an abuse of discretion. In addition, the court misinterpreted the public interest by failing to defer to local officials and expanding significantly the local processes over which it exercises oversight. The district court also failed to consider the substantial financial costs of its modifications. Finally, even assuming it had authority to reimpose requirements it had previously terminated, the court abused its discretion by failing to preserve "the essence of the parties' bargain"—termination of settlement provisions when the associated exit criteria were met or when continued enforcement became inequitable.

ARGUMENT

I. The District Court Lacked The Authority To Modify The Settlement Order To Reimpose The Requirements Of Sections It Had Previously Terminated, Especially Given That It Had Not Afforded The District The Fundamental Procedural Protections It Was Due.

"[T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). Thus, "[a] court may not replace the terms of a consent decree with its own, no matter how much of an improvement it would make in effectuating the decree's goals." *United States v. Int'l Bhd. of Teamsters*, 998 F.2d 1101, 1107 (2d Cir. 1993). Here, the district

court based its modification on Fed. R. Civ. P. 60(b)(5), which authorizes a district court to give relief from a final order if it is no longer equitable that the judgment should have prospective application. JA 1316. However, "an order or judgment may be modified under . . . Rule 60(b)(5) only to the extent that it has prospective application." *Twelve John Does*, 841 F.2d at 1138. Judgments and orders "may also be prospective only in part, in which case Rule 60(b)(5) could permit modification only of the portion of the judgment that has prospective effect." *Keepseagle v. Vilsack*, 118 F. Supp. 3d 98, 123-24 (D.D.C. 2015) (citing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 42, 431 (1855)). The district court violated these principles.

A. A new lawsuit is required to redress new violations of terminated portions of a settlement order.

The court's April 4 requirement that the District "provisionally approve all Medicaid applications pending over 45 days" is essentially identical to the Settlement Order's requirement that the District determine and mail notice of Medicaid eligibility within 45 days—a requirement that the court vacated on February 24, 2009. *See* JA 96 (Minute Order, Feb. 24, 2009); *compare* JA 253 ¶ 6(a) (determine and provide notice regarding eligibility within 45 days), *with* JA 1273 ("provisionally approve all Medicaid applications pending over 45 days"). Similarly, the April 4 requirement to continue for 90 days the eligibility of all Medicaid recipients not determined ineligible by their renewal deadline is akin to

the Settlement Order's prohibition on terminating a recipient's eligibility unless the District complied with a prescribed schedule for timely processing renewals—a provision that the court terminated on October 18, 2013. *See* JA 311-21; *compare* JA 1274 (continue eligibility at renewal deadline for 90 days unless District affirmatively determines recipient is no longer eligible) *with* JA 261 ¶ 17 (District may not terminate at renewal deadline unless prescribed schedule of actions has been satisfied).

Thus, in the guise of a modification, the district court erroneously reimposed requirements of the Settlement Order that it had previously vacated or terminated. The Settlement Order is just that—a settlement between the parties that resolved the lawsuit, and "[b]ecause a decree is the sole source of the parties' rights, a district court may not impose obligations on a party that are not unambiguously mandated by the decree itself." *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995) (citing *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 522 (1986); *Armour & Co.*, 402 U.S. at 681-82). The Settlement Order resolved all the claims raised in plaintiffs' complaint and plaintiffs' rights are therefore limited to those expressed in the Settlement Order; any new relief must be sought in the context of a new lawsuit. Permitting a modification to resurrect requirements previously terminated pursuant to the terms of the parties' agreement improperly deprives the District of the benefit of the bargain it negotiated—ending

judicial oversight and plaintiffs' enforcement powers in exchange for meeting agreed-upon metrics or otherwise satisfying the requirements of applicable law. *EEOC v. Local 40*, 76 F.3d 76, 81 (2d Cir. 1996) (enforcing consent decree after its expiration would "depriv[e] the union of the benefit of its bargain"); *United States v. Overton*, 834 F.2d 1171, 1174 (5th Cir. 1987) (municipality would lose the benefit of its bargain were the court to enforce provisions of consent decree after municipality satisfied exit criteria).

The court erroneously found otherwise based solely on the plaintiffs' disclaimer that they were not seeking to reinstate the vacated portions of the Settlement Order. JA 1323-24. The court and plaintiffs have provided no persuasive reason why plaintiffs' failure to formally request reinstatement should matter, when reinstatement was the plain effect of granting their motion. Permitting a modification in these circumstances defeats the rationale behind terminating segregable portions of a consent decree—to allow a local government to resume control of its political branches from a federal court once a violation is remedied. *Freeman v. Pitts*, 503 U.S. 467, 489 (1992) ("[T]he court's end purpose must be to remedy the violation and in addition to restore state and local authorities to control."); *Bobby M. v. Chiles*, 907 F. Supp. 368, 371 n.8 (N.D. Fla. 1995) (after partial termination of consent decree, the appropriate remedy to redress new violations is to file a new lawsuit); *Hadix v. Johnson*, No. 80-73581, 2014 WL

4678252, at *2 (E.D. Mich. Sept. 18, 2014) (denying motion by inmate to enforce terminated provisions of partially terminated consent decree and directing filing of new lawsuit).

Moreover, the modification imposed by the district court is based not on the systemic failures that gave rise to the Settlement Order some 17 years ago, but on alleged violations of an entirely different law. Even assuming (incorrectly) that the district court's termination of oversight on these matters did not prevent it from resuming that oversight through Rule 60(b), the court should not be allowed to shoehorn *new* claims that the District is not complying with the ACA into what remains of this lawsuit. *Freeman*, 503 U.S. at 489; *Bobby M.*, 907 F. Supp. at 371 n.8; *Hadix v. Johnson*, 2014 WL 4678252, at *2.

The Settlement Order never mandated compliance with the ACA; indeed, the ACA did not even exist at the time the parties entered into the agreement. And, as the district court found, "[t]here is simply no comparison between the statutory framework that existed at the time [it] made its factual findings in 1996 and what implementation of the ACA envisions." JA 316. If plaintiffs wish to litigate these issues, they should file a new lawsuit. *Shepard v. Madigan*, 958 F. Supp. 2d 996, 1001 (S.D. Ill. 2013) (new claim about a new law must be raised in a new suit); *Dowell v. Bd. of Educ. of Okla. City Pub. Schs.*, 782 F. Supp. 574, 578-79 (W.D. Okla. 1992) ("For any post-1987 developments that Plaintiffs believe are

discriminatory, they must bring a new action alleging a new constitutional violation, not move under Rule 60(b)(5) to add further relief for their initial 1961 claim.").

Indeed, because the court granted "*additional* injunctive relief, based on the *new* factual circumstances," without a new lawsuit being filed, the District was deprived of normal due process protections afforded to a defendant, such as the opportunity to conduct discovery, take depositions, and have the issues adjudicated at trial. JA 1323. The district court significantly expanded the District's obligations under the Settlement Order without any of these procedural protections. And in addition to forgoing the applicable pleading, disclosure, and discovery requirements of Rules 8 and 26-37, allowing plaintiffs to raise challenges to the District's implementation of the ACA within the confines of a 1993 lawsuit effectively excused their compliance with the class action requirements of Rule 23. Plaintiffs were not required to demonstrate that the problems alleged were the result of a "single or uniform policy or practice" or that these issues prevented sufficiently numerous EPSDT-eligible beneficiaries from accessing services. *D.L. v. District of Columbia*, 713 F.3d 120, 127 (D.C. Cir. 2013). Indeed, the court found the District in violation of the ACA without plaintiffs even having to amend their complaint to allege a wholly different problem than the one giving rise to the

1999 Settlement Order. JA 1321 (finding the changed circumstances violated "the Constitution and the ACA").

All this was improper. The district court had no authority to modify the Settlement Order to reinstate terminated provisions, and certainly not in this way.

B. The court relied on an unsupported view of Rule 60(b)(5).

The standard applied by this Court "in determining whether an order or judgment has prospective application" sufficient to trigger the application of Rule 60(b)(5) "is whether it is executory or involves the supervision of changing conduct or conditions." *Twelve John Does*, 841 F.2d at 1139. "Where the claim is that the application of an order is prospectively inequitable, Rule 60(b)(5) is available." *Salazar ex rel. Salazar v. District of Columbia*, 633 F.3d 1110, 1122 (D.C. Cir. 2011).

The district court's February 24, 2009 and October 18, 2013 orders have no prospective effect. Those orders terminated provisions of the Settlement Order that formerly existed and relieved the District from any continuing obligations in this case in the realms of eligibility and renewal determinations. Whatever prospective application those provisions had was lost upon termination, and orders dismissing claims are not prospective within the meaning of the rule. *Twelve John Does*, 841 F.2d at 1139 (reversing order reinstating the United States Attorney General after his dismissal from an unconstitutional prison conditions case because

the dismissal order did not have the prospective application required under Rule 60(b)(5)); *see Maraziti v. Thorpe*, 52 F.3d 252, 254 (9th Cir. 1995) ("[T]he dismissal order did not have 'prospective application' within the meaning of Rule 60(b)(5)."); *Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 272 (3d Cir. 2002) (same); *Gibbs v. Maxwell House*, 738 F.2d 1153, 1555-56 (11th Cir. 1984) (same); *Dowell*, 782 F. Supp. at 577 (desegregation decree dissolved by the court did not have "the required prospective application" under Rule 60(b)(5)).

Furthermore, to permit modifications akin to the requirements terminated by the February 24, 2009 and October 18, 2013 orders on the grounds that the court retains oversight responsibilities for distinct provisions of the Settlement Order related to EPSDT services would be at odds with the terms of the Settlement Order as well as Rule 60(b)(5)'s purposes.

While it is true that what remains of the class in this case consists of children who are eligible for EPSDT services (Sub-class V), the district court has consistently found that the subclasses are distinct from one another, and that it never intended to certify a unified class. *See, e.g.*, JA 178 ("The [c]ourt finds, however, that for analytical clarity the class should be certified as separate sub-classes rather than as one comprehensive class."); JA 325 ("Over the long life of this case, the Plaintiff class has always been described as a collection of several sub-classes, with each sub-class consisting of Medicaid applicants and recipients

with a particular set of claims."). Individuals with claims regarding the timeliness of decisions on initial Medicaid applications (previously Sub-class III) or renewals (previously Sub-class IV) do not share anything meaningful in common with the remaining provisions in the Settlement Order concerning EPSDT services (Sub-class V). Indeed, not until "after being found eligible" do the requirements for EPSDT services take effect. *See* JA 193 ¶ 37 (Second Amended Complaint). The Settlement Order's framework severed the EPSDT provisions from those concerning Medicaid eligibility and renewals and contained separate criteria to exit judicial supervision in each area. JA 294-96 ¶¶ 74, 75, 77. Just as the degree of compliance in one area could not inform compliance in another, the prospectively applicable EPSDT provisions cannot serve as the basis, under Fed. R. Civ. P. 60(b)(5), to modify the Settlement Order to reimpose requirements for processing initial Medicaid applications and renewals.

Moreover, "institutional reform injunctions often raise sensitive federalism concerns," which are heightened when federal court decrees dictate otherwise discretionary decisions of state or local officials over their own programs and budget, as the court's injunction does here. *Horne v. Flores*, 557 U.S. 433, 448 (2009). The public interest is also affected because "such decrees reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions." *Rufo v. Inmates of Suffolk Cty.*

Jail, 502 U.S. 367, 381 (1992) (internal quotation marks and citation omitted). In recognition of these concerns, courts "must take a flexible approach to Rule 60(b)(5) motions"—one that "ensure[s] that 'responsibility for discharging the State's obligations is returned promptly to the State and its officials' when the circumstances warrant." *Horne*, 557 U.S. at 450 (quoting *Frew v. Hawkins*, 540 U.S. 431, 442 (2004)).

This admonition was turned on its head when the court used Rule 60(b)(5) to reimpose requirements for initial eligibility and renewal determinations after it had returned responsibility for those functions to the District. The court also disregarded these federalism concerns by reasserting oversight over these local functions, despite the District's "commendable" progress, because it believed its "oversight has been a boon rather than a hindrance" and because it had "no assurance" that the eligibility problems "will not arise again." JA 1321; *see also Salazar*, 633 F.3d at 1118 (in deciding whether to modify a consent decree, the court must take into account "'the resulting prejudice, if any, to the present elected officials and the public they represent'" (quoting *Shakman v. City of Chicago*, 426 F.3d 925, 934 (7th Cir. 2005))).

The court reasoned that its order was "consistent with the goal of restoring responsibility over local management functions as quickly as possible" because it allowed the District to move to terminate the modifications "anytime" it can

demonstrate that its "systems and processes will comply with applicable law." JA 1324-25. But this grants the District nothing more than what it always had, which is the ability to move to terminate anytime it could demonstrate that it was in compliance with applicable law. And it fails to account for the federalism concerns underlying and the important function Rule 60(b)(5) serves in institutional reform litigation. *Horne*, 557 U.S. at 447. Indeed, by reimposing requirements for eligibility and renewal without the associated exit criteria bargained for in the Settlement Order, the court not only expanded its authority over local government functions, but it delayed the return of those functions by making termination substantially more onerous. Thus, the court's order contravenes both Rule 60(b)(5) and the Settlement Order, whose termination provisions included acceptable error rates not recognized here. JA 254 ¶ 8, 256 ¶ 12, 262 ¶ 19, 294-95 ¶¶ 74, 75. Indeed the error-rate with regard to the initial processing requirements, requirements that are essentially identical to the modification imposed here, was satisfied. JA 96 (Minute Order, Feb. 24, 2009), 254 ¶ 8.

II. Even If The District Court Had Authority, The Injunction Was Neither Justified By Nor Suitably Tailored To Changed Circumstances.

Under Rule 60(b), a court may modify a consent decree when the moving party establishes that "a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed

circumstances." *Rufo*, 502 U.S. at 393. Significant factual changes include those that "make compliance with the decree substantially more onerous" or where "unforeseen obstacles" make a decree "unworkable." *Id.* at 384. "[M]odification should not be granted where a party relies upon events that actually were anticipated." *Id.* at 385.

If a modification is warranted, it should be "tailored to resolve the problems created by the change in circumstances," and no more. *Id.* at 391. In tailoring a decree modification, courts must consider the public interest and the separation of powers doctrine, which together require that it "defer to local government administrators, who have the primary responsibility for elucidating, assessing, and solving the problems of institutional reform," and avoid modifications that make "it substantially more onerous to abide by the decree." *Id.* at 392. In addition, "[f]inancial constraints" "are a legitimate concern of government defendants in institutional reform litigation and therefore are appropriately considered in tailoring a consent decree modification." *Id.* at 392-93. Moreover, a modification "must preserve the essence of the parties' bargain." *Pigford v. Veneman*, 292 F.3d 918, 927 (D.C. Cir. 2002). Again, the district court did not adhere to governing legal principles.

A. Changed circumstances do not justify the court's order.

The district court concluded that the relief it imposed did not amount to reinstatement of dismissed portions of the Settlement Order that formerly governed similar obligations in the eligibility context, but instead represented needed modifications of the prospectively applicable EPSDT provisions. JA 1323-24. This explanation does not withstand scrutiny. Plaintiffs' evidence of changed circumstances was the changes that allegedly occurred in initial application processing after the court terminated the related Settlement Order provisions in 2009 and the changes that allegedly occurred in renewals after those provisions were terminated in 2013. ECF 2093 at 6-15. In addition, the court did not find that the changes regarding eligibility determinations and renewals were in fact causing or even contributing to the District's inability to meet the metrics required under the remaining EPSDT provisions memorialized in Sections V and VI of the Settlement Order. Instead, it found that the changes were related to the EPSDT provisions because "a child cannot obtain any EPSDT services when he or she lacks Medicaid eligibility" and "a substantial proportion of the District's Medicaid population" is made up of children. JA 1326.

This finding, which the court asserted was based on "common sense," JA 1326, cannot substitute for specific factual findings that establish that children are not receiving EPSDT services on a widespread basis because of ongoing eligibility

issues. The court's findings did not establish that the failures to timely process initial Medicaid applications and renewals for certain individuals significantly affected, for example, the rate at which children receive well-child screenings, the District's ability to conduct outreach and trainings concerning EPSDT services, or any of the other specific requirements contained in Sections V and VI. The court erred in its application of Rule 60(b)(5) because the EPSDT provisions were not made unworkable or inequitable by the change in circumstances with regard to Medicaid eligibility. Any delay in determining eligibility resulting from the District's efforts to comply with the ACA does not compromise or otherwise diminish the notice about or EPSDT services that must be provided once eligibility has been determined.

Nor did plaintiffs submit evidence that showed otherwise. Indeed, the court overwhelmingly relied on anecdotal evidence regarding the manner in which adults, not the children who might merit EPSDT services, were affected by eligibility problems. *See* JA 1302 & n.12 (five examples of alleged difficulties experienced by adults), 1305 (alleged failure to cover a single childless adult), 1307-08 (experiences of adult patients), 1310-11 (unnamed adult beneficiary who claimed that she had not received recertification form), 1311-12 (adult).

The court relied on only four instances where children receiving Medicaid were alleged to have been affected by the issues plaintiffs asserted, but even those

examples do not support a finding of widespread, ongoing harm frustrating the ability of eligible children to obtain EPSDT services. One instance involved a child who allegedly experienced a loss of coverage over a year ago (JA 1301), another a mother who paid $16 out-of-pocket on a single occasion eight months ago for medication to which she alleges her son was entitled (JA 1303), and two with no allegation that the children even attempted to access any EPSDT services during the alleged loss of coverage (JA 1308, 1313-14).[2] These few cases do not demonstrate that the eligibility issues of which plaintiffs complain impeded the ability of the District's 95,000 EPSDT-eligible children to obtain needed services on either a widespread or ongoing basis and thus do not constitute significantly changed circumstances sufficient to support the modification ordered here. JA 1389 ¶ 8. Indeed, the record before the court demonstrated that 97.6 percent of eligible District children are enrolled in Medicaid—the second highest eligibility rate for children in the country. JA 824 ¶ 9, 1390-91 ¶ 12. And a recently released

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[2] The court also pointed to the case of Ms. Nurian Flores Rivas, a mother of two children. JA 1294-95. But one child's Medicaid was approved within 45 days of the application as required (Seymour Decl., JA 1255 ¶¶ 20.e-20.f (mother applied for son on November 24, 2015 and coverage approved on December 29, 2015)), while the other child received health coverage through the Immigrant Children's Program, (JA 1255 ¶ 20.c). That program is "designed to provide health coverage to individuals under the age of twenty-one (21) who are not eligible for Medicaid." Department of Healthcare Finance, *Immigrant Children's Program*, *available at* http://dhcf.dc.gov/service/immigrant-childrens-program (last visited Jan. 19, 2017).

study indicates that the District is first in the nation for continuous Medicaid coverage of children. JA 1390-91 ¶ 12 *available at* http://www.communityplans.net/Portals/0/Policy/Medicaid/GW_ContinuityInAnEraOfTransition_11-01-15.pdf.

Another reason why the court erred is that the changes in the renewal process brought about by the ACA were anticipated. As it must, the court acknowledged that when it terminated the renewal provisions of the Settlement Order it anticipated that the "implementation [of the ACA's reforms] w[ould] undoubtedly be both rocky and fairly long in coming." JA 1322. Its caveat that it did not anticipate "the magnitude of the problem" does not excuse its failure to abide by the Court's direction in *Rufo* not to grant a modification based "upon events that actually were anticipated." JA 1322; *Rufo*, 502 U.S. at 385. While the scope of the problem may not have precisely been known at the time the renewal provisions were terminated, the court and the parties unquestionably anticipated lengthy and significant problems implementing the ACA's new requirements.

Moreover, the court's reliance on the fact that neither the renewal problems nor the ACA's passage were anticipated when the Settlement Order was entered is misplaced. JA 1322-23. While it is true that the context of *Rufo*'s directive was to events anticipated at the time the *Rufo* decree was entered, 502 U.S. at 382, it makes little sense to limit that directive to *Rufo*'s factual context and to not apply it

to a modification that reimposes settlement provisions based upon events anticipated at the time those provisions were terminated. If plaintiffs disagreed with the termination of the injunctive provisions, their remedy was to appeal at the time of the termination—not to seek to reinsert the provisions later based on events that had been anticipated earlier.

B. Even if changed circumstances did justify the court's order, it is not suitably tailored to the circumstances.

Even if the record did support the conclusion that the changes in initial eligibility processing and renewals made the EPSDT provisions unworkable or inequitable, the relief the court imposed was not suitably tailored to remedy the alleged harm to EPSDT-eligible children. "A change in circumstances is not a free pass to rewrite a consent decree; rather 'the focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances.'" *Keepseagle*, 118 F. Supp. 3d at 127 (quoting *Rufo*, 502 U.S. at 391). The court expanded the remaining scope of this case to fashion a remedy for adult beneficiaries, who comprise roughly two-thirds of the Medicaid population according to the court's own figures. JA 1326. The new injunctive relief predominantly affects individuals who are not members of the EPSDT-eligible class, thereby tripling the number of individuals over which the district court exercises oversight.

The court found that it was not required to tailor its modifications to the EPSDT-eligible children. JA 1327. It reasoned that its modifications were suitably tailored because "the problems created by the District's implementation of the ACA provisions" affects adults as well as children and it "is in the public interest to ensure that those children and adults do not lose the vital services provided by Medicaid coverage under the ACA." JA 1327-28.

Rule 60(b)(5), however, does not provide district courts authority to do whatever they believe is in the public interest as long as a plaintiff can articulate *some* connection between a live settlement order provision and the relief the plaintiff wants. *See Rufo*, 502 U.S. at 391. Indeed, the "public interest and [c]onsiderations based on the allocation of powers within our federal system" "require that the district court defer to local government administrators" when considering modifications that make "it substantially more onerous to abide by the decree." *Id.* at 392. The court failed to adhere to these requirements here. Instead, it misinterpreted the public interest, failed to defer to local administrators, and imposed modifications that make the Settlement Order substantially more onerous by expanding significantly the local processes over which it exercises oversight and dispensing with the exit criteria that had been associated with those previously terminated provisions. This was an abuse of discretion.

The court's rationale that its requirement for provisional approval of all Medicaid applications pending longer than 45 days is suitably tailored because it provides only what the law already requires also overlooks these federalism concerns. JA 1328-29. And, as set forth in section I.B., the modifications are contrary to the Court's admonition to return executive functions to local control as promptly as circumstances permit. *Horne*, 557 U.S. at 450.

In addition, the court failed to consider the substantial financial costs its April 4 order imposes on the District (and the federal government), a concern that the court should have considered in tailoring the modifications it imposed. *See Rufo*, 502 U.S. at 392-93 (appropriate consideration should be given to the government's financial concerns in tailoring a modification). In its motion to alter and amend the April 4 order, the District explained that 90 days of continuing coverage for beneficiaries whose eligibility is not established by their renewal date will cost over $20 million in District funds and almost $80 million in federal funds each year the requirement is in effect. ECF 2113 at 9-10; JA 1345-46 ¶ 32. These figures do not include the costs associated with the system and other changes required to implement the court's order. ECF 2113 at 9.[3]

[3] Although the court did identify these cost estimates as part of its reason for staying its April 4 order, JA 1398, the court subsequently modified its stay without considering the costs associated with the relief its modification authorized, JA

And finally, as explained, by imposing requirements similar to those that were previously terminated the court failed to ensure that its modifications preserved "the essence of the parties' bargain," which provided for termination upon satisfaction of certain performance standards and/or when continued enforcement became inequitable. *Pigford*, 292 F.3d at 927. Even assuming that the court had authority to modify the bargain in some way, it abused its discretion in modifying it this way and disincentivizing future parties from entering into settlement orders.

1417-20. In any event, the modified stay is only in effect pending resolution of this appeal.

CONCLUSION

This Court should reverse the district court's April 4, June 2, and July 12, 2016 orders.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

TODD S. KIM
Solicitor General

LOREN L. ALIKHAN
Deputy Solicitor General

/s/ Richard S. Love
RICHARD S. LOVE
Senior Assistant Attorney General
Bar Number 340455
Office of the Solicitor General

Office of the Attorney General
441 4th Street, NW, Suite 600S
Washington, D.C. 20001
(202) 724-6635
(202) 730-0491 (fax)
richard.love@dc.gov

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CERTIFICATE OF SERVICE

I certify that on May 12, 2017, an electronic copy of this final brief was served through the Court's ECF system, to:

Kathleen L. Millian
Zenia Sanchez Fuentes
Lynn E. Cunningham
Terris, Pravlik & Millian, LLP

Martha Jane Perkins
National Health Law Program

/s/ Richard S. Love
RICHARD S. LOVE

CERTIFICATE OF COMPLIANCE

I further certify that this brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 8,629 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point.

/s/ Richard S. Love
RICHARD S. LOVE