ORAL ARGUMENT HELD SEPTEMBER 25, 2017

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 APPEALS FROM ORDERS OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE DISTRICT OF COLUMBIA APPELLANTS

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Cases

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

GLOSSARY

ACA	Patient Protection and Affordable Care Act
EPSDT	Early and periodic screening, diagnostic, and treatment services
JA	Joint Appendix
Rule	Federal Rule of Civil Procedure

STATEMENT OF THE ISSUES

On September 26, 2017, the Court ordered supplemental briefs addressing two issues:

1. Whether plaintiffs had "the requisite standing to permit the issuance by the district court of injunctive relief in April 2016, *see City of Los Angeles v. Lyons*, 461 U.S. 95 (1983)"; and

2. Whether the grounds for "relief" from a final judgment under Federal Rule of Civil Procedure ("Rule") 60(b)(5), and the analytic framework for "Rule 60(b) motions established in *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992), apply when a district court orders 'additional injunctive relief' that is 'based on the new factual circumstances,' *Salazar v. District of Columbia*, 177 F. Supp. 3d 418, 441 (D.D.C. 2016), that arose following 'almost a seismic change' in the 'statutory framework' on which the consent decree had originally been predicated, *Salazar v. District of Columbia*, 991 F. Supp. 2d 34, 37 (D.D.C. 2013), *see id*. (noting the intervening 'enormous systemic and legal changes to our healthcare system')."

SUMMARY OF ARGUMENT

1. The district court found that by late February 2016, the District of Columbia had basically eliminated earlier delays in the processing of Medicaid benefits that resulted from the District's efforts to comply with the Patient

Protection and Affordable Care Act ("ACA") requirement for an automated eligibility determination system. JA 1288-95. Despite repeatedly recognizing the District's substantial progress in implementing the required system, the court imposed a sweeping injunction based on its conclusion that the District had not "entirely remediate[d]" the implementation problems, its belief that its oversight was beneficial, and its asserted lack of "assurance" that the prior problems would not recur. JA. 1295, 1321. The court's reliance on its lack of assurance that significant problems would not recur improperly shifted to the District *plaintiffs'* burden to establish standing.

Plaintiffs were required to demonstrate that they were "likely to suffer future injury" from a recurrence of the prior eligibility problems. *Lyons*, 461 U.S. at 105. However, the court did not find that plaintiffs were faced with a real and immediate threat that the prior problems with Medicaid eligibility would recur, nor did the evidence support such a finding. Instead, the court identified only a few problems processing initial and renewed Medicaid benefits after February 2016, from a population of almost 250,000 Medicaid beneficiaries. Accordingly, plaintiffs did not establish the requisite standing to permit the court to issue injunctive relief in April 2016.

2. In addition, for several reasons, the district court misapplied Rule 60(b)(5) here. First, it did not "relieve" either party of the requirements of a

judgment or order. Instead it subjected the District to additional requirements—indeed, requirements that the court previously terminated pursuant to the terms of the Settlement Order that the parties had negotiated and it had approved. Second, the court failed to consider sufficiently the framework for analyzing Rule 60(b)(5) motions developed by the Supreme Court. It ignored the Court's federalism concerns, misinterpreted and relied on its own notion of what was in the public interest, and impeded, rather than facilitated, the ability of District officials to respond to the technological challenges and substantive demands that arose from the ACA's requirement for an automated eligibility determination system. Third, it improperly used Rule 60(b)(5) to impose additional injunctive relief concerning Medicaid eligibility based on new factual circumstances that arose from the requirements of the subsequently enacted ACA, which the district court earlier recognized represented an almost "seismic change" in the "procedures for verifying Medicaid eligibility."

ARGUMENT

I. Plaintiffs Lacked Standing To Permit The District Court To Issue Injunctive Relief In April 2016.

In *Lyons*, the Supreme Court reversed a preliminary injunction that had enjoined the City of Los Angeles police department from using certain chokeholds absent a threat of death or serious bodily injury, holding "that the federal courts are without jurisdiction to entertain Lyons' claims for injunctive relief." 461 U.S. at

99-101. The preliminary injunction was based on the district court's finding that Lyons was stopped for a traffic violation on October 6, 1976, and "without provocation or legal justification the officers involved had applied a department-authorized chokehold." *Id*. at 99. The Court noted that "Lyons' standing to seek the injunction requested depended on whether he was likely to suffer future injury from the use of chokeholds by police officers." *Id*. at 105. But as it held in two prior cases, "past wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy." *Id*. at 103. And here there was no district court "finding that Lyons faced a real and immediate threat of again being illegally choked." *Id*. at 110. In addition, even assuming standing for the injunction arose from his pending damages suit, an injunction "is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again." *Id*. at 111. Furthermore, "recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions." *Id*. at 112.

Here the court found that "[d]uring *2015 and the beginning of 2016*, the District failed to comply with [its] duty" to determine eligibility within 45 days of an initial Medicaid application. JA 1288 (emphasis added). However, as of February 24, 2016, the court found that "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). Nonetheless, based on only *one* instance of a post-February 2016 problem regarding initial applications, the court found "that despite its substantial progress, the District has still not been able to *entirely* remediate the problems."[2] JA 1295 (emphasis added).

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 as of February 26, 2016, the number of renewals affected by the "stuck/malformed" issue was

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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 when information was entered. 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.

[2] The District explained that this singular problem resulted from an individual's mistake, "rather than systemic problems," but the court found the distinction irrelevant. JA 1295. The court noted that plaintiffs argued that the District had not put a durable remedy in place, but did not make a finding that plaintiffs were right about this. JA 1294. Moreover, plaintiffs' assertion is not supported by the declaration on which they relied, in which the District's Medicaid Director instead explained the additional steps the District was taking "*to ensure* that a backlog does not re-emerge." JA 1133 ¶ 6 (emphasis added).

reduced to zero, there was no backlog, and nothing was "impeding the processing or mailing of [renewal] notices." JA 1308-09.

Furthermore, although the court also identified instances of problems with benefits renewals a year earlier in 2015, almost all of them were resolved or otherwise justified by the District prior to the court's April 4, 2016 order. JA 1300-08, 1310-11. For example, after identifying several individual examples of problems processing renewal paperwork, JA 1301-02, the court noted that "the District states that it has reviewed each of the foregoing individual cases [and] that all of them were resolved," and that "most of these cases were the result of systemic problems that had already been fixed." JA 1303-04; *see also* JA 1310 ("Several of [plaintiffs'] narratives [of renewal problems] are consistent with the District's story of progress—that is, issues affecting the individuals described were, in fact, resolved [before the court ruled]."). Thus, the court found that the District was "able to resolve all of the thousands of remaining cases" and that its progress was "commendable." JA 1295, 1314, 1321. And as with initial applications, the court identified only two instances of renewal problems beyond February 26, 2016. JA 1311-14.[3]

[3] Even here, the court recognized that one individual's Medicaid coverage was extended through September 2016, JA 1312, and although the District admitted that the other instance resulted from an individual, as opposed to systemic, error,

Indeed, the court's finding that "Medicaid beneficiaries have been harmed" was not based on any statistical or otherwise robust analysis. JA 1314. Instead, the court overwhelmingly relied on anecdotal evidence regarding the manner in which a relatively small number of the District's 150,000 adult Medicaid beneficiaries, not the children who might merit the early and periodic screening, diagnostic, and treatment ("EPSDT") services required by the provisions of the Settlement Order the court relied upon to impose its modifications, were affected by eligibility problems. JA 1302 & n.12, 1305, 1307-08, 1310-12. And the court's analysis regarding EPSDT-eligible children was no more robust, relying instead on a "common sense" finding that "a child cannot obtain any EPSDT services when he or she lacks Medicaid eligibility." JA 1326. This rationale cannot substitute for specific factual findings, and the court relied on only four instances where children were alleged to have been affected by the prior Medicaid eligibility problems. *See e.g.* District Br. 31-32. These few cases did not demonstrate that the eligibility issues of which plaintiffs complain impeded the ability of the District's 98,000 EPSDT-eligible children to obtain needed services on either a widespread or ongoing basis, let alone that they faced a real and immediate threat that receipt of

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the court again rejected the distinction. However, its reasoning was not based on any finding of fault the District could reasonably be expected to remedy—"whether it is an individualized error or a system problem," reasoned the court, "it is the beneficiary who is suffering." JA 1314.

these services would be impeded by a recurrence of the prior Medicaid eligibility problems.

The court thus did not make a finding that there was a real and immediate threat of recurrence. Even if it had, the three instances identified by the court of post-February 2016 problems regarding the processing of initial applications and renewals would not have supported such a finding. The court's own findings instead demonstrate that the District had eliminated almost entirely the prior problems in timely processing initial and renewed Medicaid benefits that had occurred in 2015 through January 2016 and that plaintiffs were not "realistically threatened by a repetition of" the prior problems. *Lyon*, 461 U.S. at 109.

Thus, plaintiffs lacked standing sufficient to permit the issuance of injunctive relief. Indeed, even if viewed on the merits, the court's findings were insufficient to justify the structural reform injunction it issued in April 2016, and certainly not one that re-imposed requirements previously terminated pursuant to the terms of the parties' settlement based on alleged violations of a new law, without requiring the filing of a new lawsuit.

II. The District Court's April 4, 2016 Order Contravenes The Plain Language Of And Framework For Analyzing Motions Under Rule 60(b)(5).

Fed. R. Civ. P. 60(b) authorizes federal courts to "relieve a party" "from a final judgment [or] order" on a variety of grounds including, under Rule 60(b)(5),

when it "is no longer equitable" to apply the judgment or order prospectively. With rare exception, "[t]he plain meaning of legislation should be conclusive." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989). The same principle is applicable to court rules. *In re Mohammad*, 866 F.3d 474, 476 (D.C. Cir. 2017) (applying plain meaning to a practice rule of the United States Court of Military Commission Review). The word "relieve" means "to free from a burden," "obligation, condition, or restriction." Merriam-Webster, "Relieve," *available at* https://www.merriam-webster.com/dictionary/relieve.

In its April 4, 2016 order, the court awarded plaintiffs relief under Rule 60(b)(5) that is inconsistent with the rule's plain meaning. No party was afforded "relief from a final judgment [or] order" under Rule 60(b); to the contrary, the district court imposed additional requirements. There is no sensible way to construe the April 4, 2016 order as providing such "relief" to plaintiffs. Indeed, construed in that improper fashion, the order would grant plaintiffs what they expressly disclaimed—revival of the Medicaid eligibility sections of the Settlement Order through untimely "relief" from the 2009 and 2013 orders that terminated those sections. JA 1316-17. In any event, those sections lost their prospective application when they were terminated. *See Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1139-40 (D.C. Cir. 1988) (holding that dismissal order was not prospective within meaning of Rule 60(b)). Instead, plaintiffs sought

"additional injunctive relief, based on the new factual circumstances." JA 1317. The court, however, could not grant such relief under Rule 60(b), by its plain meaning.

The error of applying Rule 60(b)(5) to the "new factual circumstances" that arose here is also apparent when viewed through the framework established by *Rufo* and its progeny for analyzing motions brought under the rule. In *Rufo*, the Court vacated an order that denied a county's request under Rule 60(b)(5) to modify a consent decree to allow double bunking of male detainees in a jail then under construction based on a change in the law and an increase in inmates that outpaced its population projections. 502 U.S. at 372-77. The modification had been denied because the county failed to make a "clear showing of grievous wrong." *Id.* at 376-77. The Court found that Rule 60(b)(5) permitted "a less stringent, more flexible standard." *Id.* at 380. "[T]he public interest is a particularly significant reason for applying a flexible modification standard in institutional reform litigation 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." *Id.* at 381 (internal quotation marks omitted). "[T]he public interest and considerations based on the allocation of powers within our federal system require that the district court defer to local government administrators, who have the primary responsibility for elucidating,

assessing, and solving the problems of institutional reform, to resolve the intricacies of implementing a decree modification." *Id*. at 392 (internal quotation marks and citation omitted).

In a more recent case where a denial of relief from a judgment was reversed, the Supreme Court reiterated that a flexible approach to modifying an institutional reform decree under Rule 60(b)(5) is required because of "sensitive federalism concerns" and the need to facilitate the ability of local officials to respond to "changes in the nature of the underlying problem" and "governing law." *Horne v. Flores*, 557 U.S. 433, 448 (2009). The public interest in sound and efficient government operations is affected when on-going injunctions "bind state and local officials to the policy preferences of their predecessors" and "limit their ability to respond to the priorities and concerns of their constituents." *Id*. at 449 (internal quotation marks omitted). And these concerns are heightened when, as here, the "decree has the effect of dictating state or local budget priorities." *Id*. at 448. 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." *Id.* 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 that it was "in the public interest to ensure that [both] children and adults do not lose the vital services provided by Medicaid under the ACA." JA 1321, 1328.

Rule 60(b)(5) does not provide the district court authority to do whatever it believes is in the public interest, particularly where it imposed modifications that make the Settlement Order substantially more onerous by expanding significantly the local processes over which it exercises oversight. *See Rufo*, 502 U.S. at 391. The court failed to defer to local administrators, and relied on its own notion of what is in the public interest, without "keep[ing] in mind how long-term injunctions can impact a State's ability to make basic decisions for itself and its citizens." *Gov't of Province of Manitoba v. Zinke*, 849 F.3d 1111, 1118 (D.C. Cir.

2017).[4] Thus, the court failed to consider sufficiently the concerns that formed the analytic framework established in *Rufo* and *Horne*.

The court also misapplied Rule 60(b)(5) by granting "*additional* injunctive relief, based on the *new* factual circumstances." JA 1323. As the District explained in its briefs, the modifications imposed here were based not on the systemic failures found by the trial court in 1996, but on alleged violations occurring in 2015 through the beginning of 2016 of an entirely different and subsequently enacted law—the ACA. The Settlement Order never mandated compliance with the ACA 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. The ACA "usher[ed] in major reforms in many different areas of the American health care system." JA 1276. It "created a vast new statutory framework for

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[4] Nor are the court's modifications authorized to "tighten the decree in order to accomplish its intended result." *United States v. W. Elec. Co.*, 46 F.3d 1198, 1202 (D.C. Cir. 1995). Here the intended result of the Settlement Order was achieved when the court terminated the initial application requirements upon the District's satisfaction of the associated exit criteria and terminated the renewal requirements in an order plaintiffs did not appeal. Moreover, *Western Electric* concerned an antitrust consent decree, not institutional reform litigation. *Id*. at 1199. In addition, the modification in *Western Electric* did not undermine a primary purpose of the decree, unlike here where a primary consideration of the Settlement Order was the ability to independently terminate its segregable sections. *Id*. at 1207; JA 294-96 ¶¶ 74-77.

ensuring health care" and "is an extraordinarily complex law." JA 315. Moreover, implementation of the ACA's requirements "presents many technological and logistical challenges," which will require "the resources, creativity, and attention to detail of many people with the District of Columbia Government." JA 315. Indeed, the ACA represented an almost "seismic change in the areas of health insurance, healthcare, *procedures for verifying Medicaid eligibility*, and financing of Medicaid."[5] JA 315-16.

Nonetheless, the court found the District in violation of the ACA, JA 1321, without plaintiffs even having to amend their complaint to allege this wholly different problem from what gave rise to the 1999 Settlement Order. The court misapplied Rule 60(b)(5) to impose additional injunctive relief based on new factual circumstances that arose because of the "far-reaching changes to the District's Medicaid program" resulting from the subsequent enactment of the ACA. JA 1276.

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[5] These findings from October 2013, along with the court's recognition that implementation of the ACA's reforms "will undoubtedly be both rocky and fairly long in coming," also demonstrate that the changed circumstances the court relied on for the renewal modifications were anticipated, in contravention of the directive in *Rufo* not to grant a modification based "upon events that were actually anticipated." 502 U.S. at 385.

CONCLUSION

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

Respectfully submitted,

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October 2017

CERTIFICATE OF SERVICE

I certify that on October 10, 2017, electronic copies of this brief were served through the Court's ECF system, to:

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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 3,311 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.

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