ORAL ARGUMENT HELD ON 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*.
Plaintiffs-Appellees,

v.

DISTRICT OF COLUMBIA, *et al*.
Defendants-Appellants.

On Appeal from Orders of the United States District Court
for the District of Columbia

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GLOSSARY OF ABBREVIATIONS

ACA	Patient Protection and Affordable Care Act
ACEDS	Automated Client Eligibility Determination System
CMS	Centers for Medicare and Medicaid Services
EPSDT	Early and periodic screening, diagnostic, and treatment services
ESA	Economic Security Administration

This brief addresses the two issues set forth by the Court following oral argument. Order, September 26, 2017, ECF No. 1694625. First, plaintiffs had the requisite standing to permit issuance of injunctive relief in April 2016 because the district court correctly found that, as of this date, defendants' application and renewal processing violations caused both ongoing harm and a significant risk of future injury to Medicaid beneficiaries. Second, because these ongoing violations frustrated the purpose of the Settlement Order's prospectively applicable EPSDT provisions, and because Rule 60(b)(5) permits the imposition of additional injunctive relief to effectuate the purposes of a consent decree, the district court properly modified the Settlement Order to address these application and renewal processing violations.

I

PLAINTIFFS HAD THE REQUISITE STANDING TO PERMIT ISSUANCE OF INJUNCTIVE RELIEF IN APRIL 2016

In order to establish standing to seek injunctive relief, plaintiffs "must show [they are] suffering an ongoing injury or face[] an immediate threat of injury." *Dearth v. Holder*, 641 F.3d 499, 501 (D.C. Cir. 2010) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)). Here, plaintiffs established that, as of April 2016, they suffered both ongoing harm and an immediate threat of future injury.[1]

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[1] Those who apply for Medicaid during the pendency of this class action and have "claims[] for * * * injunctive * * * relief premised on an alleged delay in excess of

A. THE DISTRICT COURT CORRECTLY FOUND ONGOING HARM TO THE PLAINTIFF CLASS IN APRIL 2016

1. The Court Correctly Found Ongoing Systemic Problems Causing Delays in Application Processing

In defining the scope of application processing problems, the district court identified two discrete systemic issues affecting "thousands of Medicaid beneficiaries." JA 1277. First, defendants admitted that, as of December 2015, nearly 5,000 Medicaid applications were stuck in a backlog in DC Health Link and had been waiting for an eligibility determination for well over 45 days. JA 1289-1290. These problems arose from a "stuck/malformed" computer glitch and "other system performance issues" that caused the applications to become backlogged in the computer system. JA 1290. Second, the district court found that "in addition to the serious application backlogs," plaintiffs had also demonstrated a separate category of "significant hurdles facing Medicaid applicants as they attempt to file their initial applications" (JA 1291). These hurdles did not arise from technological defects but instead consisted of long lines at service centers and "widespread

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45 days in the processing Medicaid applications," are part of the plaintiff class. JA 1281.

All Medicaid beneficiaries "are annually subject to review of their continued eligibility for Medicaid benefits based on income, family status and other factors" through renewal or recertification. JA 1283, n. 6. Those who allege a "claim for * * * injunctive * * * relief premised on an alleged lack of advance notice of the discontinuance, suspension or obligation to recertify Medicaid benefits, after being found eligible," are part of the plaintiff class. JA 1281.

problems with document processing," resulting in defendants losing or misplacing applications submitted in person at service centers. JA 1291-1292 (noting a "failure to process the paperwork [submitted at service centers] in the first instance").

While the district court found some progress in ameliorating the first of these problems (the computer backlog) (JA 1292), the court specifically found that no progress had been made with respect to the second class of problems, emphasizing that "the issues of long Service Center wait times, paperwork loss, and processing delays have not been remedied." JA 1294 (emphasis added). To support this finding, the district court pointed to the example of Nurian Flores Rivas, who had submitted an application for her children in person at a service center in November 2015 and had still not received notice of a decision as of March 9, 2016, which, the district court emphasized, was "after the date the District represented that it had eliminated the application backlogs." JA 1294-1295. Rejecting defendants' efforts to characterize this example as an isolated mistake by a District employee rather than evidence of a systemic problem, the district court emphasized that individual errors and systemic issues are interrelated in that "individual errors combine to form systemic problems." JA 1295. The court thus found that, as of April 2016, systemic problems remained in defendants' processing of Medicaid applications.

2. The Court Correctly Found Ongoing Systemic Problems Causing Loss of Coverage at Renewal

In defining the scope of renewal processing problems, the district court again described two discrete systemic problems causing improper terminations. First, the district court described a backlog of renewals caused by the same "stuck/malformed" technological defect in DC Health Link that had affected initial applications (JA 1309). Second, the district court found that, "in addition to these technical errors," plaintiffs had also demonstrated a separate problem, namely, a "failure to process renewal paperwork in a timely manner." JA 1301. The district court illustrated this problem by citing examples of eight individuals who had lost Medicaid coverage despite timely submission of renewal forms and noting that CMS had found the District to be taking too long to process renewals. JA 1301-1303.

While the district court found some progress in ameliorating the first problem (the computer backlog) (JA 1309), the court made no finding of progress with respect to the second problem (failure to timely process renewal paperwork). To the contrary, the district court found that ongoing problems with submitting renewals online or by telephone remained, which were likely to exacerbate the problems with "long lines at service centers and paperwork processing issues" and to "lead to future losses in coverage" at renewal. JA 1310.

Indeed, the district court emphasized that plaintiffs had "provide[d] a wealth of individual narratives to demonstrate ongoing barriers that Medicaid beneficiaries

face in renewing their coverage." JA 1310 (emphasis added). Many of these narratives "demonstrate[d] the presence of renewal issues beyond February 26, 2016," contrary to defendants' claim that "it had rectified the lion's share of systemic renewal problems" by that date. JA 1311. To support this finding, the district court cited two specific individuals impacted by renewal errors subsequent to February 26, 2016. Larry Campbell had timely submitted a renewal form in February 2016, but nonetheless received a notice in March 2016 indicating that his coverage would be terminated. JA 1311-1312. The court also described the case of Leslie Jackson's EPSDT-eligible son, who suffers from a severe form of epilepsy. JA 1312-1314. Although Ms. Jackson renewed her son's coverage over the telephone in February 2016, she nonetheless received multiple termination notices and inconsistent information about the status of his coverage in February and March of 2016. The court found that "[a]s late as March 8, 2016, the District continued to provide inaccurate information that appears to be the product of either computer errors, processing backlogs, or both." JA 1313. The district court again rejected defendants' efforts to characterize these examples as "individualized error[s] that do[] not signal system problems," emphasizing that "it is impossible to separate individual mistakes from the systemic problems facing the District's Medicaid beneficiaries." JA 1314.

Moreover, the record contained evidence of numerous other examples of violations in renewal processing during February and March 2016,[2] further undermining defendants' assertions that these problems had been remedied by February 26, 2016. *See* JA 1192-1193 (individual who attempted to recertify was told in February 2016 that the "recertification had not been processed due to an excessive backlog and * * * was asked to come into an ESA service center and submit the renewal form again"); JA 1215-1216 (individual who timely submitted renewal form had coverage terminated by defendants in February 2016; coverage remained terminated until March 2016); JA1230-1232 (individual's coverage terminated in February 2016 after District failed to send her family a renewal form); JA 1225-1226 (individual who timely submitted renewal form had coverage terminated by defendants in February 2016). This additional evidence in the record, even if not specifically cited by the district court, further supports the court's finding of ongoing harm to the plaintiff class as of the time of the decision. *See United States v. Wyche*, 741 F.3d 1284, 1292 (D.C. Cir. 2014) ("[I]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it" (internal quotations omitted)).

[2] Plaintiffs had no opportunity to submit evidence of ongoing violations past March 9, 2016, the date of their reply brief. *See* JA 1245 (district court order that there were to be "no further filings" by plaintiffs following the reply brief).

It was these ongoing application and renewal problems described above that led the district court to conclude that injunctive relief was necessary. As the court explained: "Although the District has made substantial progress since Plaintiffs' initial filing on December 22, 2015, * * * it is clear from the Parties' submissions that significant obstacles remain. These obstacles stand between Medicaid eligible individuals and the healthcare to which they are entitled. For that reason, * * * Plaintiffs' Motion for Modification of the Settlement Order shall be granted." JA 1280; *see also* JA 1320 ("There is no question that many of the class members are being irreparably harmed by their inability to obtain Medicaid benefits.").

B. THE DISTRICT COURT CORRECTLY FOUND THAT A SUBSTANTIAL RISK OF FUTURE VIOLATIONS EXISTED IN APRIL 2016

In addition to demonstrating *ongoing* harm in April 2016, plaintiffs also demonstrated a significant risk of *future* injury. To establish standing on this basis, plaintiffs need only establish that there is "a substantial risk that the harm will occur" in the future." *Morgan Drexen v. CFPB*, 785 F.3d 684, 689 (D.C. Cir. 2015) (internal quotation marks omitted); *see also In Re: Navy Chaplaincy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012) (explaining that plaintiffs need not establish an "absolute certainty" of future injury but instead "a likelihood of injury that rises above the level of unadorned speculation—that is, a realistic danger that [they] will suffer future harm" (internal quotation marks omitted)).

Here, the district court found that, even in areas where defendants had made progress, there was a significant risk that violations would recur. With respect to the technological defects leading to application backlogs, the district court found that defendants had not "put in place a durable remedy to ensure that Medicaid applications will be decided within 45 days'" in the future. JA 1294 (internal quotation marks omitted). This finding was based on defendants' own admissions that "four of the root causes for the stuck/malformed defect in the District of Columbia computer system remain unresolved and that several new applications are still affected by those defects every day." *Id.* (citing JA 1133 (Declaration of Medicaid Director Claudia Schlosberg)). It was based on this affirmative evidence, rather than any misconception that the burden of proof fell on defendants, that the district court lacked any "assurance that the significant problems (and violations of the law) that arose will not arise again." JA 1321.

The record also contained evidence that numerous other systemic issues were ongoing and unremediated. These included failed data transfers between the legacy eligibility processing system (ACEDS) and the new DC Health Link system that caused "enrollment numbers [to] declin[e] by the thousands" (JA 1297-1298, JA 831, JA 416, JA 437); defendants' inability to accept online renewals, exacerbating problems with long lines and misplaced paperwork at service centers (JA 1309-1310, citing JA 1136, para. 12); and an "inability to accurately redetermine eligibility once

a life event has been reported due to system defects," leading to a "backlog" in processing life changes such as activation of Medicaid coverage upon report of the birth of a newborn (JA 1300, citing JA 471, JA 492). Defendants admitted that these systemic issues—some of which directly impacted EPSDT-eligible infants—persisted and could not be resolved immediately. *See* JA 827, 839-40 (acknowledging that the legacy ACEDS system would not be retired until 2018, requiring continued data transfer between ACEDS and DC Health Link, which had led to loss of coverage in the past); JA 1136, para. 12 (acknowledging in February 2016 that defendants still lacked capacity to accept renewals online); JA 1352 para. 7, JA 1354-1355 (defendants' admissions in May 2016 that system still lacked capability to automatically process life events such as the birth of a newborn).

These ongoing systemic problems impacting Medicaid eligibility were powerful evidence demonstrating a likelihood of future harm to plaintiffs. "[A]lthough 'past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief,' '[p]ast wrongs' may serve as 'evidence bearing on whether there is a real and immediate threat of repeated injury'" *N.B. v. District of Columbia*, 682 F.3d 77, 84 (D.C. Cir. 2012) (quoting *Lyons*, 461 U.S. at 102). This is especially true where, as here, the underlying root causes of many of the past violations have not been remedied. *See In Re: Navy Chaplaincy*, 697 F.3d at 1176 (finding a likelihood of future injury where defendants continued to adhere

to policies and procedures that plaintiffs claimed "ha[d] resulted in [illegal conduct in the past] and, if not ended, [would] continue to do so in the future").

A likelihood of immediate injury was further supported by the court's finding that defendants had only made significant progress in reducing backlogs after plaintiffs had filed their motion. JA 1321. The Supreme Court has held that "[i]t is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *United States v. Oregon State Medical Society*, 343 US. 326, 333 (1952). Here, where the court concluded that "the timing of [the District's progress] suggests that Court oversight has been a boon rather than a hindrance" and that it "ha[d] no assurance that the significant problems (and violations of the law) that arose will not arise again" (JA 1321), the district court reasonably found a risk of recurrence of harm that warranted injunctive relief. That finding should not be disturbed.

Finally, the district court's findings of likelihood of future harm to the plaintiff class are further buttressed by its findings in July 2016 in its opinion granting partial modification of the stay. The court rejected the claim that, as of July 2016, "the District was already providing Medicaid to any applicant or beneficiary who met the statutory and regulatory requirements." JA 1419. Instead, the district court found that "[p]laintiffs have presented numerous examples, some of which were most

distressing," that "demonstrate that there are cases in which Defendants, for whatever reason, are not responding quickly and providing coverage in response to inquiries about delayed processing of applications." *Ibid.*; *see, e.g.*, Salazar Decl., JA 1402-1404 (family with two EPSDT-eligible children had months-long gap in coverage after mother submitted renewal in September 2015 that was not processed until April 2016 after counsel intervened). The district court relied on this finding of ongoing harm to the plaintiff class in July 2016 to determine that modified injunctive relief pending appeal was necessary.

II

UNDER RULE 60(b)(5) AND *RUFO*, A DISTRICT COURT MAY ORDER ADDITIONAL RELIEF TO ADDRESS NEW FACTS THAT FRUSTRATE THE PURPOSE OF A CONSENT DECREE

A. RULE 60(b)(5) PERMITS MODIFICATIONS THAT IMPOSE ADDITIONAL INJUNCTIVE RELIEF

Rule 60(b)(5) provides that "[o]n motion and just terms, the court may relieve a party * * * from a final judgment, [or] order" when "applying it prospectively is no longer equitable." While such "relief" often comes in the form of relieving defendants from a consent decree's obligations, the Supreme Court's guidance in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 267 (1992), and the decisions of

numerous courts of appeals applying *Rufo* make clear that such "relief" can also take the form of adding new requirements to an existing consent decree.[3]

Both Rule 60(b) itself and *Rufo* use neutral language indicating that the rule is not limited to situations where a defendant seeks relief from a consent decree's obligations but instead applies to *any party* seeking a modification. *See* Fed. R. Civ. P. 60(b) (allowing a "party" to seek relief from a final judgment); *Rufo*, 502 U.S. at 383 (referring neutrally to "a party seeking modification" of a consent decree rather than restricting scope to defendants). As the court of appeals for the Tenth Circuit has explained (*David C. v. Leavitt*, 242 F.3d 1206, 1211 (10th Cir. 2001)):

> The plain language of Rule 60(b) * * * makes no distinction between plaintiffs and defendants but allows either "party" to seek relief from a judgment or order. *See* Fed. R. Civ. P. 60(b). Thus, Rule 60(b) does not categorically prohibit a plaintiff party to an unlitigated consent decree from seeking modification of the decree. Additionally, nothing in *Rufo* limits its application to cases in which modification is sought by the defendant party. *See Rufo*, 502 U.S. at 383 (stating the holding by using the neutral language, "a party seeking modification" and "[i]f the moving party meets this standard"); see also *Juan F. v. Weicker*, 37 F.3d 874, 879 (2d Cir. 1994) (applying *Rufo* in a case where modification was sought by the plaintiff party); *Williams v. Edwards*, 87 F.3d 126, 131-32 (5th Cir. 1996) (same). We reject the general proposition that only defendants can seek equitable modification of unlitigated consent decrees.

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[3] Aside from Rule 60(b)(5), the district court also had authority to modify the Settlement Order under the express terms of the Order itself. Paragraph 71 of the Settlement Order states that "either party shall have the right to move the Court for a modification of this Order at any time for any reason." JA 294 (emphasis added); *see also Salazar v. District of Columbia*, 633 F.3d 1110, 1122 (D.C. Cir. 2011) ("Paragraph 71 of the Settlement Order provides for modification 'at any time for any reason'").

Indeed, this Court, the Supreme Court, and other courts of appeals have found that Rule 60(b) can be applied to modify a consent decree to impose additional obligations on defendants. As this Court has explained, a district court may not only "relieve the [enjoined] party of the decree's constraints," under Rule 60(b), but also "[a]t the request of the party who sought the equitable relief, * * * may tighten the decree in order to accomplish its intended result." *United States v. Western Electric Company, Inc.,* 46 F.3d 1198, 1202 (D.C. Cir. 1995) (citing *United States v. United Shoe Machinery Corp*., 391 U.S. 244, 252 (1968)).[4] The Supreme Court and other courts of appeals have reached the same conclusion. *E.g.*, *Chrysler Corp. v. United States*, 316 U.S. 556, 563-64 (1942) (approving modification of consent decree that extended Court's jurisdiction over defendant beyond terms of initial consent decree); *United States v. Secretary of HUD*, 239 F.3d 211, 216 n.5 (2d Cir. 2001) ("Although the text of Fed. R. Civ. P. 60(b) focuses on modifications that relieve a party from the operation of a consent decree, * * * modifications * * * that increase the

[4] Some courts have found that the standard set forth in *United Shoe*, rather than Rule 60(b), governs modification requests that seek to increase the obligations under a consent decree. *See, e.g.*, *Holland v. N.J. Dep't of Corrections*, 246 F.3d 267, 288 n.16 (3d Cir. 2001); *see also New York v. Microsoft Corp*., 531 F. Supp. 2d 141, 169-70 (D.D.C. 2008) (declining to resolve the "thorny issue" of which standard applies because plaintiffs satisfied either standard (internal quotation marks omitted)). Under the *United Shoe* standard, Plaintiffs would only need show that the requested modification is necessary to accomplish the intended result of the Settlement Order, *see* 391 U.S. at 251-52, which is generally seen as a less "rigorous standard" than that set forth in *Rufo*. *Holland*, 246 F.3d at 288 n.16.

obligations imposed by a consent decree are also permissible"); *Williams v. Edwards*, 87 F.3d 126, 131 (5th Cir. 1996) ("A consent decree may be judicially modified, over a party's objection, when the court has reserved the power to modify and articulates the long-term objective to be accomplished"); *Juan F. v. Weicker*, 37 F.3d 874, 878 (2d Cir. 1994) (rejecting defendant's argument "that under general standards governing modification of consent decrees, the district judge erred because his order increased defendants' obligations beyond what they had consented to in the decree"); *Johnson v. Robinson*, 987 F.2d 1043, 1050 (4th Cir. 1993) ("[A] district court may, of course, modify a consent decree to impose new duties upon a party * * *"); *Western Transp. Co. v. E. I. Du Pont de Nemours & Co.*, 682 F.2d 1233, 1236 (7th Cir. 1982) (Posner, J.) ("This rule [60(b)] is usually invoked by losing defendants rather than, as in this case, a winning plaintiff; but we assume it can be used, in an appropriate case, by such a one").

B. COURTS CAN USE RULE 60(b) TO REIMPOSE PROVISIONS OF A CONSENT DECREE FROM WHICH DEFENDANTS BARGAINED TO BE RELEASED

Defendants have repeatedly argued that they were deprived the "benefit of the bargain" because the district court effectively reimposed requirements from which they had bargained to be released (the application processing requirements) or from which the district court had relieved them of complying (the renewal processing requirements). Plaintiffs demonstrated that the district court did not reimpose on defendants the requirements of the Settlement Order on the application processing

and renewal/recertification claims. Pl. Br. 24-27. However, even assuming *arguendo* that the district court had reimposed the same Settlement Order requirements to address defendants' violations of federal law, the Supreme Court, this Court, and other courts of appeals have made clear that there is no bar to using Rule 60(b) to modify a consent decree in a manner that reimposes obligations from which defendants have been relieved.

In *Chrysler Corp. v. United States*, 316 U.S. 556 (1942), the parties had entered a consent decree which placed restrictions on Chrysler's ability to affiliate with a credit company. Under the *Chrysler* decree, the defendant had bargained to be released from these restrictions if there was no final order in a related case by a date certain. Because there were delays in the related case, the district court extended the time period of the restrictions on Chrysler. Despite the fact that this modification subjected the defendant to continued restrictions from which they had bargained to be released by a date certain, the Supreme Court affirmed the modification, ruling that a district court may impose an additional burden on a defendant, more onerous than that set forth in a consent decree, if "the change served to effectuate * * * the basic purpose of the original consent decree." 316 U.S. at 562; *see also Thompson v. HUD*, 404 F.3d 821, 827 (4th Cir. 2005) (extending duration of court's jurisdiction over HUD beyond the bargained-for termination date in original consent decree based on local defendants' "nearly complete failure to

comply with their obligations"); *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1017 (6th Cir. 1994) (extending duration of consent decree past bargained-for termination date, even where "substantial progress [had] been made under the [decree]").

In *Pigford v. Veneman,* 292 F.3d 918, 925-928 (D.C. Cir. 2002), this Court reviewed a district court's interpretation of a consent decree that administered remedies to a plaintiff class of African-American farmers to address racial discrimination in federal credit programs. Under the original consent decree, the defendant had bargained to be relieved from paying claims by the plaintiff class that were not filed by a certain deadline. Due to failings by class counsel, numerous individual claims of class members were submitted late. This Court found that, while the relief requested by the plaintiffs was not merely an interpretation of the consent decree, the decree could be modified under Rule 60(b)(5) to encompass such relief. This Court reached this conclusion despite the defendant's arguments that such a modification would "deny [it] the benefit of its bargained-for * * *deadlines," emphasizing that the modification advanced the "express purpose" of the decree to ensure that "all class members receive full and fair treatment." *Id.* at 925, 927.

Courts have also found it appropriate to reinstate provisions of an original consent decree from which a subsequent court order relieved defendants from compliance. In *Williams v. Edwards*, *supra*, the district court, finding renewed

violations of the law by defendants, had reinstated certain provisions of the original consent decree from which an order of the district court had subsequently relieved defendants from complying. The court of appeals found such modification permissible, endorsing what it viewed as "a return by the district court to the constraints originally established by the parties and the court, a return motivated by the apparent re-emergence" of the unlawful conditions that gave rise to the original decree. 87 F.3d at 132.

Thus, even accepting defendants' arguments that the additional injunctive relief imposed here deprived them of their bargained-for release from application processing requirements, or reimposed renewal processing requirements that the district court had ended, the case law above demonstrates that such an outcome is permissible when necessary to effectuate the purpose of the underlying consent decree.

C. THE DISTRICT COURT CORRECTLY FOUND THAT NEW RELIEF WAS NECESSARY TO EFFECTUATE THE PURPOSES OF THE EPSDT PROVISIONS.

The case law above establishes that modifying a consent decree to impose additional injunctive relief—even relief that reimposes requirements from which a defendant had been relieved from compliance—is appropriate where such relief is necessary to fulfill the purposes of the consent decree or prevent the decree from becoming inequitable or unworkable.

Here, the district court found that the Settlement Order's prospectively applicable EPSDT provisions could not be fulfilled without additional relief to prevent defendants from unlawfully depriving children and families of Medicaid eligibility at the time of application and renewal. The district court found that "thousands of Medicaid beneficiaries" had been deprived of Medicaid eligibility due to "the District's failure" to timely process Medicaid applications and timely renew Medicaid coverage. JA 1287-1288. Defendants have no obligation to provide the EPSDT services required under the Settlement Order to children who lack Medicaid eligibility. *See* JA 1317 (a "child cannot obtain any EPSDT service when he or she lacks Medicaid eligibility"). Nor do defendants have any obligation to provide the notice of EPSDT services required under the Settlement Order to parents, caretakers, and pregnant women who lack Medicaid eligibility. *See* JA 286 at para. 54 (requiring provision of EPSDT notice only to those parents, caretakers, and pregnant women who have been found "eligible for Medicaid benefits").

Thus, by unlawfully depriving the plaintiff class of Medicaid eligibility, Defendants escape their obligations under the Settlement Order to provide EPSDT services and notice and deprive the plaintiff class of the benefit of these bargained-for protections. Additional relief to address this unlawful denial of Medicaid eligibility was therefore necessary to prevent the EPSDT provisions from becoming

unworkable and to "provide for the plaintiff class the protections and services originally agreed to by the parties and ordered by the court." *Juan F*, 37 F.3d at 879.

D. THE INJUNCTIVE RELIEF IMPOSED HERE DID NOT SEEK TO ADDRESS VIOLATIONS OF NEW LAWS AND THUS WAS APPROPRIATELY ACCOMPLISHED THROUGH MODIFICATION RATHER THAN FILING A NEW LAWSUIT

Plaintiffs' motions did not seek to address violations of the Affordable Care Act (ACA) but rather violations of two longstanding obligations of federal Medicaid law.

First, under longstanding statutory and regulatory requirements, defendants must process Medicaid applications within 45 days. *See* 42 U.S.C. 1396a(a)(8); 42 C.F.R. 435.912(c)(3)(formerly 42 C.F.R 435.911); D.C. Code 4-205.26; *see also* ECF No. 2070, Pl. Mem. in Support of PI Motion at 1-2; ECF No. 2093, Pl. Mem. in Support of Motion to Modify at 1 (citing these provisions). Second, under constitutional due process requirements and longstanding statutory and regulatory requirements, defendants must refrain from terminating Medicaid coverage at renewal without an affirmative eligibility determination and advance notice. *See* U.S. Const., 5th Am.; 42 C.F.R. 435.917(a) (formerly 42 C.F.R. 435.919); 42 C.F.R. 435.930(b); D.C. Code 4-205.55(a); *see also* ECF No. 2070 at 2; ECF No. 2093 at 1 (citing these provisions). These provisions were not altered by the enactment of the ACA. Instead, it was these same provisions that the district court found defendants to be violating in 1996, *see Salazar v. District of Columbia*, 954 F. Supp.

287, 324-326 (D.D.C. 1996), and that the district court again defendants to be violating in the April 2016 opinion. *See* JA 1287-1288 (citing 42 C.F.R. 435.912(c)(3) and D.C. Code 4-205.26); JA 1296 (referring to the 1996 opinion's discussion of legal requirements concerning termination at the time of renewal).

Although the ACA did create "almost a seismic change in * * * [defendants'] procedures for verifying Medicaid eligibility," JA 315-316 (emphasis added), it did not alter the core legal obligations owed by defendants to Medicaid applicants and beneficiaries described above. Instead, the ACA is relevant because, in attempting to comply with the ACA's new eligibility processing procedures, defendants adopted flawed technology and failed to process timely the applications and renewals submitted in paper format at the service centers, which led to widespread violations of the pre-existing legal obligations on which the Settlement Order was predicated. *See* JA 1287 (explaining that "in order to facilitate implementation of the ACA's new rules, the District took steps to build a new, automated Medicaid application and eligibility determination system" and that "[t]hese changes did not go smoothly," leading to violations of 42 C.F.R. 435.912(c)(3), D.C. Code 4-205.26, and federal law regarding pre-termination notice at the time of renewal). There was no abuse of discretion in the district court modifying the Settlement Order to address violations of pre-existing legal requirements that frustrated the purpose and effectiveness of the prospectively applicable EPSDT provisions.

Respectfully submitted,

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CERTIFICATIONS

I, Zenia Sanchez Fuentes, certify as follows:

I hereby certify that:

(1) this brief complies with the page 20-page limitation set forth by the Court's Per Curiam Order of September 26, 2017, excluding the parts of the brief exempted by 32(f), and

(2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Word 2016 in Times New Roman 14 Point Font.

<u>/s/ Zenia Sanchez Fuentes</u>
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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2017, I caused a true copy of the foregoing Initial Brief for Appellees to be delivered electronically via the Court's CM/ECF system to counsel for defendants-appellants, Todd S. Kim, Loren L. AliKhan, and Richard S. Love, counsel for *amicus* Legal Aid Society of the District of Columbia, Jonathan H. Levy, and counsel for *amicus* Children's Law Center, Allen Snyder.

I further certify that on the same date, I served via Courier 4 paper copies of the brief on the Clerk.

/s/ Zenia Sanchez Fuentes
Zenia Sanchez Fuentes

Dated: October 10, 2017

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