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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Aita Darjee on her own behalf and on behalf of her minor child N. D.; and Alma Sanchez Haro on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Thomas Betlach, Director of the Arizona Health Care Cost Containment System, in his official capacity,

Defendant.

No. CV 16-00489 TUC-RM (DTF)

LODGED: PROPOSED PLAINTIFFS' REPLY IN FURTHER SUPPORT OF PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT AND OBJECTIONS TO DEFENDANT'S EXHIBITS ATTACHED TO DOC. 249 AND ARGUMENT BASED ON THOSE EXHIBITS IN HIS REPLY PORTION OF DOC. 250

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v.

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Defendant.

No. CV 16-00489 TUC-RM (DTF)

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT AND OBJECTIONS TO DEFENDANT'S EXHIBITS ATTACHED TO DOC. 249 AND ARGUMENT BASED ON THOSE EXHIBITS IN HIS REPLY PORTION OF DOC. 250

Pursuant to Rule 56 of the Federal Rules of Evidence, Plaintiffs submit this Reply in further support of Plaintiffs' Partial Motion for Summary Judgment on Count II. Pursuant to Local Rule 7.2(m)(2), Plaintiffs submit objections to Exhibits A (¶¶ 3-4, 7-10), C (except page 109), D, E (except page 154), and F through I, and any argument and reference to those exhibits in the Reply portion of Defendant's unified brief (Doc. 250).

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I. Plaintiffs Object to Exhibits Unrelated to Defendant's Response to Plaintiffs' Statement of Material Facts (Doc. 249) and to Defendant's Argument and Reference to those Exhibits in the Reply Portion of his Brief (Doc. 250)

Defendant filed a unified Reply in Support of his Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgement on Count II. *See* Doc. 250. He also filed a Response to Plaintiffs' Statement of Facts in Support of Plaintiffs' Motion for Summary Judgment on Count II. Doc. 249. Attached to the Response to Plaintiffs' Statement of Facts are nine exhibits. Docs. 249-1 through 9.

Several of those exhibits are not referenced in Defendant's Response to Plaintiffs' Statement of Facts and are instead used solely to support Defendant's arguments in his Reply. Accordingly, they are an improper attempt to supplement the record. The local rules do not contemplate attaching additional exhibits to replies in support of a motion for summary judgment. *B2B CFO Partners, LLC v. Kaufman*, 856 F.Supp.2d 1084, 1086-87 (D. Ariz. 2012) (holding local rules do not provide for submission of additional exhibits to replies in support of summary judgment); *Kinnally v. Rogers Corp.*, 2008 WL 5272870 at *2 (D. Ariz. August 14, 2014) (same).

The rule against introducing new facts and evidence in a reply is not new. *See Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996). The rule exists "to guard against unfairness and surprise. It would be unfair and reversible error, for a district court to consider new evidence offered in a reply without affording the non-moving party an opportunity to respond." *Sunburst Minerals, LLC v. Emerald Copper Corp.*, 300 F.Supp.3d 1056, 1060 (D. Ariz. 2018) (citing cases in notes 12-13). Rule 56(c) allows the moving party to object in the reply to the non-moving party's evidence but does not authorize the moving party to rely on new evidence in doing so, *id.*, and local rule 56.1(b) specifically prohibits the filing of a reply statement of facts in support of a motion for summary judgment.

Therefore, pursuant to Local Rule 7.2(m), Plaintiffs object to those exhibits that are not related to Defendant's Response to Plaintiffs' Statement of Facts concerning Count II,

specifically: Doc. 249-1, Exhibit A, Second Declaration of Dareth Cox, paragraphs 3-4, 7-10; Doc. 249-3, Exhibit C, pages from Deposition of Deborah Bailey taken on April 6, 2018, except for page 109; Doc. 249-4, Exhibit D, pages from Deposition of Lisa Greenfield taken on June 13, 2017; Doc. 249-5, Exhibit E, pages from Deposition of Tara Lockner taken April 17, 2018 except for page 154; Doc. 249-6, Exhibit F, pages from Deposition of Brenda Rackley taken on March 8, 2018; Doc. 249-7, Exhibit G, pages from Deposition of Julie Swenson; Doc. 249-8, Exhibit H, Document entitled ADES DBME A-3 Reduce FES Error Rate; and Doc. 249-9, Exhibit I, HEAPlus Update dated June 29, 2018.

None of these documents relate to or are cited in Defendant's Response to Plaintiffs' Statement of Facts concerning Count II. *See* Docs. 249, 250 at 19-23. Rather, these documents concern Defendant's Reply and are supplemental evidence that either was available to Defendant when he filed his motion for summary judgment or, in the case of Exhibits A (paragraphs noted above) and I, new evidence that Plaintiffs have no opportunity to address.

The court should also disregard any portion of the reply in support of the motion for summary judgment that refers to or relies on those documents. *EEOC v. TIN Inc.*, No. CV–06–1899, 2008 WL 2323913, at *1 (D. Ariz. June 2, 2008), *rev'd on other grounds*, 349 Fed. App'x 190 (9th Cir. 2009). Plaintiffs object to the reply portions of Defendant's brief that reference and rely on the improper supplemental and new evidence: *See, e.g.*, Doc. 250 at 5 (referencing Exhibit A ¶ 3 and Exhibit F), 7-8, (referencing Exhibit A ¶¶ 8-9 and Exhibit C, Bailey Dep.), 9 (referencing Exhibits D and E), 11 n.4 (referencing Exhibits C and G), 13 (referencing Exhibit F and Exhibit A ¶ 3), 14 (referencing Exhibits C and I).

II. Plaintiffs' Unified Statement of Facts is Proper Under Local Rule 56.1

As with its Unified Memorandum, Plaintiffs submitted a Unified Statement of Facts in Support of Plaintiffs' Partial Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment. Doc. 239. Defendant objects to the unified statement of facts because he claims it violates Local Rule 56.1(a) by including facts that are not needed to decide the motion for summary judgment. However, Plaintiffs followed

Local Rule 56.1 and combined the statement of facts for both counts of the complaint in a separate document from their unified legal memorandum in support of Plaintiffs' motion for partial summary judgment and in opposition to Defendant's motion for summary judgment. Plaintiffs also provided the required, separate response to Defendant's Statement of Facts.

III. Plaintiff Sanchez Haro's Notice Claim is Not Moot

Defendant incorrectly argues that Plaintiffs are not entitled to summary judgment on Count II, because Plaintiff Sanchez Haro's claim is moot.[1] Defendant relies on the Court's preliminary injunction ruling, but that reliance is misplaced. That decision was based on the limited record available at the outset of this case before discovery was completed and the evidence fully developed. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 396, (1981); *Marketquest Grp., Inc. v. BIC Corp.*, No. 11-CV-618-BAS-JLB, 2018 WL 2933518, at *11 (S.D. Cal. June 12, 2018). Indeed, the District Court recognized as much, ruling that Plaintiffs could not obtain a preliminary injunction "[w]ithout more." Doc. 86 at 18. But, as discussed in Plaintiffs' unified brief, Plaintiffs have "more" now. As Plaintiffs explained, the material facts support the likelihood of continued improper reductions. Doc. 246 at 4-10, 18-30; Doc. 239, Pls.' SOF ¶¶ 91-114, 142-48, 160-164, 169-70, 183-86, 218-223, 231-51, 260-62, 284-322. And when benefit reductions occur,

[1] Defendant's assertion that Plaintiff Sanchez Haro did not contest the mootness of her notice claim, s*ee* Doc. 250 at 19, is frivolous. In their Unified Memorandum, Plaintiffs explained in detail the harm to Plaintiff Sanchez Haro from receipt of the improper notice, and throughout their mootness section, Plaintiffs continually refer to Plaintiffs' *claim*s. Doc. 246 at 2, 8, 10, 12. Moreover, as described in the text, Plaintiffs provided ample evidence showing that benefit reductions are likely to continue. Although, Plaintiffs did not immediately repeat these arguments, under the heading of Count II in their unified brief, that organizational choice does not amount to a waiver. Moreover, Defendant's cursory mootness argument in his response brief ignores that Plaintiffs continue to fall into several exceptions to mootness. Finally, as demonstrated in Defendant's most recent pleading, Defendant is *still* changing the policy in direct response to this litigation and before the court has time to fully review Plaintiffs' claims. Thus, their claims fall squarely within both the voluntary cessation and capable of repetition yet evading review exceptions. *See* Doc. 246 at 11-15.

Defendant sends constitutionally infirm notices. Doc. 246 at 8; Doc. 239, Pls.' SOF ¶¶ 46, 69, 134-37, 153-57, 191-203, 238, 248, 260, 297; Doc. 242, Exs. 27, 31, 36, 44**.** This evidence far exceeds the "general allegations of unlawful policies" that Plaintiffs presented at the outset of the case. Doc. 86 at 18. Indeed, the record now shows that this case is analogous to *Barry v. Lyon*, 834 F.3d 706 (6th Cir. 2016), where a food stamp recipient had repeatedly been denied food stamps and received a constitutionally deficient notice. The court held plaintiff's notice claim was not moot because he could reasonably be expected to encounter subsequent problems with his benefits based on his prior problems and that the injury to plaintiffs occurred when the agency denied or terminated the benefits and sent the inadequate notice. *Id*. at 715. The Court must now make a fresh assessment of the evidence; the preliminary injunction ruling is simply "not binding on the district court at [the summary judgment] stage of the litigation." *Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007). Because the benefit reductions remain likely, Plaintiffs' claims—including the notice claim—are not moot.

IV. Defendant's Notices Violate Due Process

Defendant has made different assertions about which version of the notice is being sent to which beneficiaries. Defendant initially argued that individuals whose benefits were reduced from full to emergency benefits received the notice produced at Doc. 229-16. Ms. Cox's newest testimony now concedes that—as Plaintiffs argued in their opening brief—that notice is only going to people who *already* receive emergency benefits. The Defendant is not sending it to putative class members whose benefits are *reduced*. *See* Doc. 249-1, Ex. A at ¶ 5; Doc. 246 at 31 (citing Pls.' SOF ¶ 207). With that concession, the evidence is undisputed that the notices that Defendant sent to Sanchez Haro on October 12, 2017, March 28, 2017, and April 12, 2016 are still being used when benefits are reduced. *See* Doc. 246 at 31. These notices provide only one-line of explanation for the benefit reduction: "We took this action because your immigration status does not let you get full medical services." *See* Doc. 242, Exs. 27, 31, 36 (hereinafter "one-line notices"). Plaintiffs are entitled to a summary judgment ruling on that notice.

In his response brief, Defendant takes another new position and contends that, as of June 1, 2018, Defendant sends a "supplemental" notice, at some point in time after the one-line notice of benefit reduction that Plaintiff received is sent. Doc. 250 at 20-21. Defendant's position regarding the content of the "supplemental" notice is contradictory. At one point, he suggests that the supplemental notice contains the language in the notice at Doc. 229-16.[2] Elsewhere he contends that the supplemental notice includes the language in the newly produced Exhibit B, Doc. 249-2.[3] Regardless of the precise language Defendant uses, the supplemental notices cannot cure the constitutionally infirmity: they still fail to provide an individualized explanation and the generalized explanation they do provide is confusing and factually inaccurate.

A. Adequate Notices Must Provide an Individualized Explanation for the Change in Eligibility

None of Defendant's proffered notices are sufficient because none of the notices provide an individualized explanation of the reason for the change in benefits. *See* Doc. 249, Def.'s Resp. to Pls.' SOF ¶¶ 137, 157, 195, 208. An individualized explanation is a cornerstone requirement of due process. *See, e.g., Barnes v. Healy*, 980 F.2d 572, 579 (9th

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[2] For instance, Defendant's brief asserts that the supplement includes language identical to Doc. 229-16. *Compare* Doc. 250 at 20 ("You can get emergency services coverage only. You cannot get full medical services because of your immigration status. You have NOT been a Lawful Permanent Resident . . .) *with* Doc. 229-16 at 3 ("You can get emergency services coverage only. You cannot get full medical services because of your immigration status. You have NOT been a Lawful Permanent Resident . . .).

[3] The new "supplement" Defendant produced as Exhibit B to his response brief includes slightly different language. *See* Doc. 249-2 ("You may have gotten a letter in the mail that said your AHCCCS Medical Assistance was changing from full medical services to Federal Emergency Services only because your immigration status does not let you get full medical services. To get full AHCCCS Medical Assistance you must: be a Lawful Permanent Resident . . . "). Defendant also asserts that at some unspecified time in the future, some version of similar language will be merged into the one-line notices that are currently sent out. Doc. 250 at 20-21. The Court does not have a copy in the record of any notice that is actually being sent—other than the one-line notices received by Plaintiff—and Plaintiff, therefore, is entitled to summary judgment on the notices that Sanchez Haro actually received.

Cir. 1992) (notice must be more than conclusory statement and include "factual underpinnings"). The Medicaid regulations specify that Defendant must provide a "clear statement of the *specific* reasons supporting the intended action[.]" 42 C.F.R. § 431.210(b) (emphasis added). The purpose of notice is to 'clarify what the charges are in a manner adequate to apprise the individual of the basis for the government's proposed action.'" *Rodriguez v. Chen*, 985 F. Supp. 1189, 1194 (D. Ariz. 1996) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974)). In *Rodriguez*, Medicaid denial notices stating that the claimant "is now in a new category for his age and no longer eligible due to excess household income" and "net income exceeds maximum allowable" were found to violate the U.S. Constitution and the Medicaid Act because they did not adequately apprise the individual of the basis for the government's proposed action. *Id.* at 1195. The notices at issue here suffer from the same deficiency. Although they are intended to alert a beneficiary that their eligibility has *changed* because of their immigration status, the notices do not explain what—if anything—about the person's immigration status Defendant believes has changed. *See K.W. ex rel. D.W. v. Armstrong*, 298 F.R.D. 479, 490 (D. Idaho 2014) ("[T]he law requires an explanation for any change."). As Judge Marquez previously recognized in this case, the explanation that "your immigration status does not let you get full medical services," "could have a number of meanings, e.g., Sanchez Haro's immigration status changed unbeknownst to her or Defendant changed which immigration statuses are eligible for full benefits." Doc. 85 at 19. That failure to provide a specific reason for the agency's action renders the notices constitutionally deficient.

Defendant also argues that his obligation to comply with due process is limited to decisions based on financial calculations. This cannot be the law because the seminal case establishing constitutional due process protections in Medicaid, *Goldberg v. Kelly*, 397 U.S. 254 (1970), involved plaintiffs who were being terminated from coverage on grounds that did not involve financial calculations. Thus, courts have repeatedly held that Medicaid and other public benefit beneficiaries are entitled to individualized explanations for agency actions that are not based on mathematical calculations. *See*, *e.g.*, *Barry v. Lyon*, 834 F.3d

706, 719-20 (6th Cir. 2016) (notice that informed food stamp recipient that "you . . . [are] not eligible for assistance due to a criminal disqualification" was not constitutionally sufficient.); *Kerr v. Holsinger*, No. CIV.A.03-68-H, 2004 WL 882203, at *6 (E.D. Ky. Mar. 25, 2004) (individualized explanation of medical necessity and level of care required); *Cherry v. Tompkins*, No. C-1-94-460, 1995 WL 502403, at *17 (S.D. Ohio Mar. 31, 1995) (agency required to provide notice with "specific factual reasons supporting the proposed termination," to beneficiaries terminated for lack of medical need).

Even the cases that do address financial calculations require the agency to go beyond the calculations themselves and provide a factual *explanation*. In *Barnes,* 980 F.2d at 579-80, for instance, the Ninth Circuit required the state agency to explain why certain sums of child support were not passed-through to the custodial parent, noting that the statement "any money that was collected was not current support" was not adequate. *Id*. at 579. *See also K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 968, 974 (9th Cir. 2015) (finding notices stating that "Using information from the Individual Needs Inventory and a complete case file review conducted by the Regional Independent Assessor, your individual budget is calculated to be $_" were inadequate "because they did not specify *why* participants' budgets had decreased.") (emphasis added).

Defendant also argues that he uses the notices he does because he requires contractors to write notices at a sixth grade level, and the intersection of immigration laws and Medicaid is "difficult." Doc. 250 at 22. First, Defendant offers no evidence to support this assertion. Second, difficulty as a defense to a due process notice was rejected in *Rodriguez,* where the court explained that while facts may seem complicated at first, "with careful aforethought, a simple explanation," can be provided. 985 F. Supp. at 1194. The same is true here. *See Barnes,* 980 F.2d at 578 (finding it feasible to add individualized explanations where Defendant already determines information "for its own use").

Not only is the individualized explanation feasible, it is necessary to enable Plaintiff Sanchez Haro and other putative class members to properly prepare for their appeal. "A primary purpose of providing adequate notice to participants is to enable them to prepare

a defense for a hearing." *K.W.*, 789 F.3d at 973. None of the notices Defendant has proffered accomplish that purpose. As Plaintiffs have explained, the problem in Ms. Sanchez Haro's case is that the computer looks only at her current status (Legal Permanent Resident or "LPR") and the date she obtained that status (January 13, 2015), and concludes that she has not held that status for more than five years. Doc. 246 at 4-6. But each notice, whether developed before or after the case was filed, does not enable the recipient to know the basis for the decision. For example, Ms. Sanchez Haro cannot tell whether AHCCCS is evaluating her as an LPR or a battered immigrant (or something else entirely). She also cannot discern if the problem is: (1) that AHCCCS cannot verify that she currently holds a qualifying status, such as LPR status; (2) that AHCCCS cannot verify that she ever previously held battered immigrant status; (3) whether AHCCCS knows she held battered immigrant status, but is using the wrong date as the "grant date" of that status; (4) whether AHCCCS has evaluated her for any exemptions to the five-year bar; or (5) whether AHCCCS has evaluated her exemption to the five-year bar based on continuous residence since 1996 and determined that her documents do not establish that exemption. In fact, Defendant asserts in this litigation that he has not been able to verify Ms. Sanchez Haro's continuous presence in the United States since before August 22, 1996 (despite the fact that she has provided documentation of this in the past). Doc. 246 at 29 (citing Pls.' SOF ¶¶ 165-66, 185-90). That explanation is nowhere to be found in the notices. Providing an individualized explanation of the immigration status AHCCCS actually used to determine her eligibility is necessary so that Ms. Sanchez Haro can understand the factual basis for Defendant's decision to reduce her benefits, decide whether that decision is incorrect, and prepare her defense, by directing her to the disputed issues and identifying what documentation she must gather.

B. Defendant's Longer Generalized Explanations Do Not Cure the Deficiency

Defendant contends that he satisfies due process by sending a supplemental notice, at a later date, with a longer—but still generalized—description of immigrations statuses.

Doc. 250 at 20-21. But, regardless whether Defendant sends the supplemental notice with the wording in Doc. 229-16 or the newer notice produced at Doc. 249-2, those notices do not satisfy due process.

First, whether standing alone or combined, they do not provide the required individualized explanation. Instead, they state that an individual does *not* have approximately 20 different immigration statuses, *see* Doc. 229-16. This is insufficient because it still does not enable Ms. Sanchez Haro to prepare a defense. *See Barnes*, 980 F.2d at 579 (holding that the explanation in the notice itself must be more than a "general explanation" or "conclusory statement" and must provide at least "a brief statement of [the decision's] factual underpinnings."); *Gray Panthers v. Schweiker*, 652 F.2d 146 (D.C. Cir. 1980) (failure to specify which of two possible reasons—unnecessary treatment or unreasonable medical charges—motivated denial of Medicare benefits was not "meaningful" and created significant risk of an erroneous deprivation.). The court in *Febus v. Gallant*, 866 F. Supp. 45 (D. Mass. 1994), reached a similar conclusion. In *Febus*, the state conducted computer searches to see whether individuals receiving benefits in Massachusetts showed up in other states' databases. If there was a computer match, the State sent a notice terminating benefits because the persons "are living outside of Massachusetts." *Id.* at 46. The court held the notices deficient because the actual reason for the termination was the "computer search." *Id*. Even though individuals receiving the notice could recognize that the agency's conclusion about where they lived was wrong, the notice was insufficient because it did not explain the *evidence* relied on by the agency in a way that enabled the applicant to effectively challenge it. Thus, even if Defendant is right that, based on Defendant's supplemental notices, Ms. Sanchez Haro could "immediately recognize as incorrect" Defendant's conclusions about her immigration status, *see* Doc. 250 at 22, that is insufficient. Defendant's failure to identify which immigration status it relied on to evaluate her eligibility is fatal.[4]

[4] Defendant relies on *Unan v. Lyon*, 853 F.3d 279 (6th Cir. 2017) for his assertion that the proposed (but not used) longer notice is adequate. *Unan* is easily distinguishable

Second, the supplemental notices are confusing and do not enable applicants to recognize an agency's error. They are not written at a sixth grade level: there is no explanation or definition of what the immigration categories are, although many of the terms are unfamiliar. *See* Doc. 242, Pls.' SOF ¶ 213. In fact, when Plaintiff Sanchez Haro was shown the wording in Doc. 229-16, Exhibit P, her testimony is that if she got the notice, she "would not know why I could not get full medical benefits." Doc. 242-2 at ¶ 11. She stated that the listing of the immigration categories was confusing to her and she did not understand many of the categories. *Id*. Defendant does not offer any evidence to dispute this testimony. And since even the most recent proposed notice, Doc. 249-2, Exhibit B, contains nearly identical wording as Doc. 229-16, Ms. Sanchez Haro's undisputed testimony applies to the newer supplemental notice as well.

Moreover, the notices are not factually correct. As Plaintiffs explained in their Unified Memorandum, the notices state, "You have NOT been a Lawful Permanent Resident, or an immigrant with Humanitarian Parolee Status, or a battered immigrant for 5 or more years." Doc. 229-16 at 2 (emphasis in original). But an applicant can combine years in multiple statuses to satisfy the five-year requirement, or as in Ms. Sanchez Haro's case, satisfy the five-year requirement in a prior status. Doc. 246, n.15. Defendant

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on this point. First, the notice at issue in *Unan* was sent after the persons had already received revised notices that contained additional information agreed to by the parties. *Id.* at 291. The *Unan* court addressed only whether the subsequent retroactive notices, for the time period between January 2014 and May 2015, needed to list the exact *time period* when the individual was erroneously assigned to emergency services in the past. *Id.* at 288. It was this particular date range that the court concluded would not provide much benefit to the individuals, in light of the fact that the individuals "already received past notices regarding ESO coverage" that revealed the dates, and the plaintiffs did not explain how "knowledge of the specific time period is necessary to the appeals process." *Id*. at 292. Second, the *Unan* court held the notices were sufficient because they informed the claimant of the right to a hearing and included a hearing request form that included the reason for the appeal. *Id.* But in the Ninth Circuit, the ability to invoke a right to a hearing does not absolve the defendant of the obligation to provide an adequate notice in the first instance. *K.W.*, 789 F.3d at 973-74 (holding availability of a hearing does not deprive the plaintiffs of their right to a constitutionally sufficient notice that provides information needed to challenge benefit reductions at a hearing).

incorporated this fundamental error into the newest proffered notice, Doc. 249-2, Exhibit B. That notice states you must "*be* a Lawful Permanent Resident, or an immigrant with Humanitarian Parolee status, or a battered non-citizen for 5 or more years." *Id.* (emphasis added). Not only does this not recognize the ability to combine statuses, it suggests that the applicant must *currently* hold the status that satisfies the five-year bar. Ms. Sanchez Haro could reasonably think that because she has not held her current LPR status for five years, and because she no longer holds battered immigrant status, that she does not qualify. Defendant's failure to provide an accurate factual explanation violates all notions of due process and is fatal. *See Thompson v. Roob*, 2006 WL 2990426, at *7 (S.D. Ind. Oct. 19, 2006) (notices must include "an accurate statement of the eligibility standard . . . . Without a correct understanding of the objective test . . . the ability of a denied applicant . . . to mount a successful appeal may certainly be impeded.").

Finally, the importance of Medicaid benefits weighs strongly in favor of adding individualized explanations. Notices must "provide a detailed individualized explanation of the reason(s) for the action . . . in terms comprehensible to the claimant." *Ortiz v. Eichler*, 794 F.2d 889, 896 (3rd Cir. 1986). To comport with due process, notice must be "tailored to the capacities and circumstances" of the recipients who must decide whether to request a hearing. *Goldberg,* 397 U.S. at 268. Courts have repeatedly recognized that the importance of Medicaid and other public benefits and the barriers that beneficiaries face weigh in favor of requiring more detailed and individualized notices. *See*, *e.g.*, *Kapps v. Wing*, 404 F.3d 105, 126 (2d Cir. 2005) (fact that many claimants of utility benefits "face obstacles, such as advanced age, or disability, which make the process of seeking further information difficult," weighed in favor of adding additional detail to notices); *Rodriguez,* 985 F. Supp. at 1195. That is especially true here, because Plaintiffs are low-income immigrants, with limited English proficiency, who are being asked to navigate a complex bureaucracy. *See e.g.*, *V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1120 (N.D. Cal. 2009) (notices were not tailored to circumstances of individuals with limited English

proficiency).[5]

There is real harm in the confusion caused by these notices.[6] As Sanchez Haro testified, she stopped going to the doctor when she received the notice. Pls.' SOF ¶ 140. Courts have also acknowledged that the *threat* of losing medical benefits is itself a cognizable harm that weighs in favor of adding additional explanation. *See e.g.*, *Strouchler v. Shah*, 891 F. Supp. 2d 504, 526 (S.D.N.Y. 2012). These cases underscore the "brutal need" of the Plaintiffs in this case, and the reasons that clear, detailed explanations are necessary, particularly in light of the limited administrative burden. *Goldberg*, 397 at 261. Thus, until Defendant's notices provide an individualized explanation of the reason for the change in benefits, they will not satisfy due process.

C. Defendant's Notices Violate Due Process for Additional Reasons

Finally, Defendant fails to rebut Plaintiffs' material facts that the notices are deficient because they fail to clearly: (1) tell the person that they can review their whole case file pursuant to 42 C.F.R. § 431.18(d); (2) explain the option to continue to get benefits pursuant to 42 C.F.R. § 431.210(e); and (3) explain when the right to appeal must be filed in general and in particular to continue to get benefits pursuant to 42 C.F.R. § 431.206(b)(1)

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[5] In response to Pls.' SOF ¶¶ 154 and 216, Defendant incorrectly asserts that Exhibit D, Doc. 124-5, is a transcribed telephone interview with Ms. Sanchez Haro conducted in English. Page 8 of the exhibit shows that the telephone call was translated from Spanish into English.

[6] Without any legal support, Defendant asserts that it sent Ms. Sanchez Haro a "corrected" notice regarding her eligibility for full medical benefits and this subsequent notice "nullifies" the improper one-line notice. Doc. 250 at 21. It does not. *See Thompson*, 2006 WL 2990426, at *7 (sending subsequent, conflicting notices "does not redeem the adequacy of the notice," because "there is a high likelihood of conflation or misunderstanding."); *Barry*, 834 F.3d at 715 ("The plaintiffs were injured at the time the agency denied or terminated their food benefits and provided inadequate notice."). Nor does this assertion address the fact that Defendant included the same inadequate explanation in the one-line notices Ms. Sanchez Haro received on April 12, 2016 and March 28, 2017, which resulted in her inability to access medical services. Doc. 242, Pls' SOF ¶¶ 134-37, 153-57. Because Plaintiff Sanchez Haro will receive a constitutionally infirm notice the next time her benefits are improperly reduced she is entitled to summary judgment on Count II.

and (2).

Defendant cursorily asserts that the notices satisfy some of these requirements, *see* Doc. 250 at 21, but the one-line notice and the notice produced at Doc. 229-16 have identical wording and the newly produced "supplement," Doc. 249-2, omits any reference to these rights. When shown the wording in the one-line notice and Doc. 229-16, about reviewing the case file, the option to continue to get benefits and the appeal deadlines, Plaintiff Sanchez Haro stated that she did not understand the wording. Doc. 242-2, Ex. 12 ¶¶ 7-9; *Id.* ¶ 7 (regarding case file); *Id.*¶ 8 (option to continue to get benefits); *Id.* ¶ 9 (regarding the deadline for an appeal). There is no evidence in the record contradicting her testimony. In fact, AHCCCS has acknowledged that the notices could be clearer and stated that AHCCCS intended to change the language "to clarify that customers can ask for a copy of their entire file," and "update[e] the hearings page so information about premiums is excluded when not applicable." Doc. 239, Pls.' SOF ¶ 204. But those changes have not been made. *See* Doc. 249-1, Ex. A, ¶ 6. These persisting deficiencies exacerbate the problems associated with the lack of individualized notice, and also separately and independently violate due process.

Conclusion

As explained above, Plaintiffs object to Defendant's Exhibits A (¶¶ 3-4, 7-10), C (except page 109), D, E (except page 154), and F through I, submitted with his Response to Plaintiffs Statement of Facts, Doc. 249, and to any argument or reference to those exhibits in the reply portion of Defendant's brief, Doc 250. In addition, for all the reasons above as well as those in Plaintiffs' Unified Memorandum, Doc. 246, there are no material facts in dispute and Plaintiffs are entitled to summary judgment on Count II as a matter of law.

Respectfully submitted this 30th day of August 2018.

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NATIONAL HEALTH LAW PROGRAM

WILLIAM E. MORRIS INSTITUTE FOR JUSTICE

By /s/ Ellen S. Katz

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August 2018, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal to the following CM/ECF Registrants:

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