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

REPLY BRIEF FOR THE DISTRICT OF COLUMBIA APPELLANTS

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GLOSSARY

ACA	Patient Protection and Affordable Care Act
EPSDT	Early and periodic screening, diagnostic, and treatment services

SUMMARY OF ARGUMENT

1. The district court incorrectly applied Federal Rule of Civil Procedure ("Rule") 60(b)(5) by reimposing Medicaid eligibility requirements in the Settlement Order after they had been terminated.

A. This Court should reject the claims that the district court did not really reinstate terminated provisions, where the Settlement Order and Rule 60(b)(5) permitted modification only of provisions with prospective application. The court claimed that it instead was modifying distinct Settlement Order requirements that had not been terminated concerning early and periodic screening, diagnostic and treatment ("EPSDT") services. But its rationale—that those services cannot be obtained without Medicaid eligibility—sweeps too far and renders provisions of the Settlement Order meaningless. The court had no authority to resume oversight of local executive functions relating to Medicaid eligibility after it found the District of Columbia had satisfied the exit provisions the parties had negotiated for initial applications and after it terminated the renewal requirements pursuant to other Settlement Order provisions, with plaintiffs opting not to appeal. There is no reasonable interpretation of the Settlement Order that authorized the court to override those provisions through the *separate* EPSDT provisions.

Trying a completely different tactic, plaintiffs also argue that the Medicaid eligibility requirements did not lose their prospective application because the court

never decertified the associated subclasses when it terminated those requirements. They improperly seek affirmance on a rationale that the district court itself rejected. Moreover, adopting that rationale would have been an abuse of discretion given how, as the court found, "no provisions of the Settlement Order relating to Medicaid application processing or benefits renewal remain[] in effect." Formal decertification was unnecessary.

This Court should thus accept what is plain: the district court here reimposed the core requirements that previously had been terminated.

B. The district court erred in doing so. This situation critically differs from those involving *existing* settlement requirements, as to which Rule 60(b)(5) might authorize modification. Reimposing requirements that were *terminated* pursuant to a Settlement Order that allowed each distinct section to be independently terminated deprived the District of the benefit of its court-approved bargain. In addition, the court improperly relied on its notion of what is in the public interest to reassert authority over portions of the District's Medicaid program and failed to adequately account for important federalism concerns. Furthermore, the modifications were based on alleged violations of a subsequently enacted federal law that substantially changed the criteria and processes for effectuating Medicaid eligibility and renewal determinations. If there were factual reasons to be concerned, the court should have required a new lawsuit. Its decision to proceed

this way deprived the District of the procedural protections it should have been afforded.

2. In any event, the district court's modifications were not even factually justified. It cited the changes in the District's Medicaid program that arose from the revisions required to comply with new eligibility rules. The resulting problems had been almost entirely eliminated prior to the modification order, and the court failed to conduct an analysis sufficient to justify the injunction it imposed. Instead, it relied on a "common sense" finding that cannot substitute for specific factual findings that the failures to timely process initial applications and renewals made the EPSDT provisions unworkable or inequitable. The few instances that the court did find of children who were affected by eligibility problems do not support a finding of widespread, ongoing harm.

The new injunctive relief is also not suitably tailored because it predominantly affects individuals who are not members of the EPSDT-eligible class and fails to preserve the essence of the parties' settlement, which allowed the distinct sections of the Settlement Order to be independently terminated.

ARGUMENT

I. The District Court Lacked The Authority To Modify The Settlement Order In The Manner It Did Here.

Contrary to plaintiffs' argument that the Settlement Order provides for continuing jurisdiction and can be modified at any time for any reason, Plaintiffs'

Br. 15-19, the district court did not have "free-ranging interpretive or enforcement authority untethered from the [Settlement Order's] negotiated terms." *Pigford v. Veneman*, 292 F.3d 918, 925 (D.C. Cir. 2002). Although the parties could move to modify "at any time for any reason," the Settlement Order also provides that "the general body of federal law governing motions to modify orders in contested matters pursuant to Rule 60(b) . . . shall apply." ECF 663 ¶¶ 71, 72. The court's authority to modify is not expanded by the Settlement Order's provisions; instead, those provisions underscore that only modifications allowed by Rule 60(b) could issue. *Cf. Sierra Club v. Meiburg*, 296 F.3d 1021, 1033 (11th Cir. 2002) ("We do not read these boilerplate provisions as giving the district court any more power to modify the decree than it already had under Rule 60(b)(5) . . . as explicated by the Supreme Court in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992).").

Indeed, the district court recognized that plaintiffs' modification motion "is governed" by Rule 60(b)(5), which undisputedly, and critically, allows an order to be modified "only to the extent that it has prospective application." ECF 2110 at 41-42; *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988). As explained in the District's opening brief and here, the court's modifications violated this limit, as well as the terms of the Settlement Order.

A. Despite plaintiffs' attempts to argue otherwise, the district court's modifications resurrected terminated requirements.

On appeal, plaintiffs try but fail to establish that all the court did was permissibly modify injunctive requirements that had prospective application, rather than revive requirements that it had terminated. They repeat the argument that the district court incorrectly accepted: that the EPSDT provisions were a proper basis for the modifications "because it is common sense that a child cannot obtain any EPSDT services when he or she lacks Medicaid eligibility." Plaintiffs' Br. 21 (quoting ECF 2110 at 43). However, as the court has repeatedly found, this case is comprised of a "collection of several subclasses" with distinct claims, and the Settlement Order's framework severed the EPSDT provisions from those concerning Medicaid eligibility and renewals, with each set of provisions carrying unique requirements and unique criteria for exiting judicial supervision. ECF 2110 at 7 (quoting ECF 2046 at 2); *see also* ECF 92, 663 ¶¶ 74-77.

The prospectively applicable EPSDT provisions thus cannot serve as the basis, under Rule 60(b)(5), to modify the Settlement Order to reimpose the separate requirements for processing initial Medicaid applications and renewals, any more than the degree of compliance in one area could inform compliance in another. Under the court's sweeping rationale, it could modify the Settlement Order to require *any* Medicaid-related process or service as long as *any* prospectively applicable provision remained—no matter how tenuous the relation,

and no matter how clearly the parties had bargained for particular requirements to terminate upon the satisfaction of exit criteria—because no process or service can be obtained by persons who lack Medicaid eligibility. That approach stretches Rule 60(b) too far, rendering meaningless the terms of the parties' agreement and disincentivizing settlement. *Pigford*, 292 F.3d at 927.

Plaintiffs also argue, as they did below, that the court had continuing jurisdiction over these issues because it did not formally decertify the subclasses for Medicaid applications and renewals when the court terminated the associated Settlement Order requirements and supposedly "contemplated continuing monitoring and enforcement of the rights of the [renewal] subclass by plaintiffs' counsel." Plaintiffs' Br. 16; *see also* Br. 17, 22-24; ECF 2070 at 40-41. The court did not adopt this view, which itself is reason to reject the argument. *See Kickapoo Tribe v. Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir. 1995) (noting how review for abuse of discretion depends on "the reasons given" by the trial court). Indeed, in its April 4, 2016 order, the court indicated that it had *not* intended "to retain broad jurisdiction over the District's processing of Medicaid applications and renewals"; plaintiffs "read too much into" the 2013 order terminating the Settlement Order's renewal provisions. ECF 2110 at 50 n.15.

Moreover, in modifying the Settlement Order, the court neither found that the application and renewal subclasses remained certified nor suggested that the

subclasses' continuing status mattered. It did not even address this portion of plaintiffs' argument, probably because there was no need to decertify the application and renewal subclasses formally once the court terminated its oversight and the relief provided to these subclasses. *Cf. Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 522 (1986) ("[I]t is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree."). As the court found, after it issued its termination orders, "no provisions of the Settlement Order relating to Medicaid application processing or benefits renewal remained in effect. The only portions of the Settlement Order affecting programmatic elements of the District's Medicaid program that remained in force related to the delivery of EPSDT services." ECF 2110 at 11-12. Just as it would not matter if a formal decertification order accompanied an order terminating an *entire* consent decree, it does not matter here whether any subclass was formally decertified when the relevant Settlement Order provisions were terminated.[1]

[1] Plaintiffs' reliance on the language in the November 7, 1994 order that certified the class to include all persons who have or will apply for Medicaid "during the pendency of this litigation," Plaintiffs' Br. 16 (citing ECF 100 at 1), is further misplaced because that order was issued more than four years prior to the Settlement Order, pursuant to whose terms the Medicaid eligibility and renewal provisions were no longer in effect.

Relatedly, plaintiffs argue that in its May 18, 2015 order, ECF 2046, the court found that there were three remaining subclasses—the application and renewal subclasses and the EPSDT subclass. Plaintiffs' Br. 17, 22-24. Plaintiffs cannot raise this forfeited argument for the first time here. *See Texas v. United States*, 798 F.3d 1108, 1115 (D.C. Cir. 2015). It lacks merit in any event. The court's May 2015 order addressed a Medicaid recipient's challenge to a District of Columbia administrative law judge's partial denial of a reimbursement request; it was not about what subclasses did or did not remain in effect. ECF 2046. Moreover, despite devoting six pages to identify "prior relevant orders in this case," the court's April 4, 2016 decision never referenced its May 2015 order and, again, did not find that the application and renewal subclasses remained in effect. ECF 2110 at 7-12. Quite the contrary: the termination of the application and renewal sections of the Settlement Order "meant the end of the [c]ourt's supervision of conduct related to those [s]ections," and only the EPSDT sections "remained in force." ECF 2110 at 12, 43.

Finally, plaintiffs argue that the court did not really reimpose prior requirements because its modifications did not exactly match in length or terms the provisions of the Settlement Order that it had previously terminated. Plaintiffs' Br. 25-28. Not so. The court's modification requiring the District to "provisionally approve all Medicaid application pending over 45 days" is essentially identical to

the Settlement Order provision it vacated in 2009—that the District "shall determine eligibility and mail a notice of decision within forty-five (45) days of the date of receipt of all applications." ECF 663 ¶ 6(a); ECF 2109 at 2. And the modification requiring the District to continue eligibility for 90 days past the renewal deadline unless it affirmatively determined that the Medicaid recipient was no longer eligible effectively duplicates the provision the court terminated in 2013, which prohibited the District from terminating eligibility at the renewal deadline unless a prescribed schedule of actions had been satisfied. ECF 663 ¶ 17; ECF 2109 at 3. While the Settlement Order included reporting and other terms that the court did not reissue, the court's modifications reimpose the core requirements previously terminated.

B. Resurrecting terminated provisions violated the Settlement Order and improperly deprived the District of control of its Medicaid program based on alleged violations of a new law without requiring a new lawsuit.

Nor is there merit to the arguments of plaintiffs and *amici* that the district court could reimpose the terminated provisions. Plaintiffs argue that the court's modifications did not deny the District the benefit of its bargain because the parties agreed that modifications to the Settlement Order could be sought pursuant to Rule 60(b) and the District has used this provision on prior occasions to be relieved of obligations to which they had agreed. Plaintiffs' Br. 28-30. However, unlike motions to modify an existing Settlement Order requirement, the court's

modifications here reimposed requirements that had been terminated pursuant to the terms of the parties' bargain.

Plaintiffs seek to distinguish the cases that found that enforcing dismissed decree provisions deprived a party of the benefit of its bargain because those cases "involve instances in which modification or enforcement was attempted years after the *entire* consent decree had been terminated and the cases dismissed." Plaintiffs' Br. 30 (citing *EEOC v. Local 40*, 76 F.3d 76, 81 (2d Cir. 1996), and *United States v. Overton*, 834 F.2d 1171, 1174 (5th Cir. 1987)). This attempted distinction is formalistic and not meaningful. The happenstance of whether distinct injunctive requirements formally appear in one order or two should not control whether the court can, without requiring a new suit, allow the reinstatement of a terminated requirement. The fact that the modifications were sought prior to the dismissal of the entire case is irrelevant when each of the sections of the Settlement Order resolved the distinct claims of separate subclasses, each of which had its own bargained-for criteria to exit judicial supervision. *E.g.*, ECF 663 ¶¶ 74, 75, 77. Permitting a modification to reimpose requirements dismissed under these terms—here, seven and three *years* after they were terminated—improperly deprives the District of the benefit of its bargain, which allowed the District to independently terminate individual sections of the Settlement Order once the distinct exit criteria were satisfied or when continued enforcement became inequitable.

It is also contrary to the rationale for terminating segregable parts of a decree—to allow a government to resume control over local functions once a violation is remedied, as recognized in *Freeman v. Pitts*, 503 U.S. 467, 489 (1992). While plaintiffs seek to distinguish *Freeman*, because it recognized that judicial control could be retained when "a constitutional violation in one area cannot be eliminated unless the judicial remedy addresses other matters as well," here the court did not retain—quite to the contrary, it reasserted—control after terminating provisions pursuant to the terms of the parties' bargain. Plaintiffs' Br. 33-34; *Freeman*, 503 U.S. at 497.

Reimposing requirements for eligibility and renewal determinations after the court had restored responsibility for those functions to the District is also inconsistent with the flexible approach courts are required to take on 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 v. Flores*, 557 U.S. 433, 450 (2009) (internal quotation marks omitted). Plaintiffs argue that the court's order is consistent with this requirement because the District's "ability to achieve termination of the April 4 Order is significantly less onerous than the 3-year compliance period under the Settlement Order." Plaintiffs' Br. 32. This is an inappropriate comparator because the District already satisfied the Settlement Order's bargained-for termination

provisions. By reimposing requirements for eligibility and renewal the court did exactly the opposite of what the Supreme Court directed; it reasserted its authority over District functions and it made the return of those functions more onerous by failing even to recognize the error rates the Settlement Order agreed was acceptable in the exit criteria. Instead, the court ordered the District to provisionally approve *all* Medicaid applications pending over 45 days" and to "continue the eligibility of *all* Medicaid recipients" who have not received a timely renewal decision until the District could demonstrate that its processes "are functioning as required." ECF 2109 at 2-3 (emphases added). And the failure to recognize an acceptable error rate in a system processing approximately 17,500 applications and renewals every month—nearly 210,000 per year—while undergoing federally imposed changes is especially onerous where the court finds it "impossible to separate individual mistakes from the system problems facing the District's Medicaid beneficiaries." ECF 2097-1 ¶ 21; ECF 2110 at 40.

Plaintiffs and *amicus* argue that the flexible modification standard is based on equity and the public interest, which the court properly considered and found was furthered by ensuring that both "children and adults do not lose the vital services provided by Medicaid coverage." Plaintiffs' Br. 54-55; *Amicus* Br. 8. Both misinterpret the standard. Courts are required to take a flexible approach to modifying an institutional reform decree under Rule 60(b)(5) 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*, 557 U.S. at 448. 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. Thus, the "public interest and [c]onsiderations based on the allocations of powers within our federal system" "require that the district court defer to local governments administrators" when considering modifications that make "it substantially more onerous to abide by the decree." *Rufo*, 502 U.S. at 392.

The court failed to account for these concerns. Instead, it 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).[2] The court's belief that its "oversight has been a boon" also ignores the

[2] Nor are the court's modifications authorized to "tighten the decree in order to accomplish its intended result," as *amicus* argues. Br. 7 (quoting *United States v. Western Elec. Co.*, 46 F.3d 1198, 1202 (D.C. Cir. 1995)). Here the intended

"sensitive federalism concerns" that animated the Supreme Court's requirement for flexibility. ECF 2110 at 47; *Horne*, 557 U.S. at 448.

Moreover, as the District also explained in its opening brief, the modifications imposed here were based not on the systemic failures that gave rise to the Settlement Order, but on alleged violations of an entirely different and subsequently enacted law—the Patient Protection and Affordable Care Act ("ACA"). Plaintiffs' contrary contention lacks merit. They contend that the modifications were based on the claims in this case, not alleged violations of a new law, because the District's core obligations under the Settlement Order and the ACA are the same. Plaintiffs' Br. 35-36. First, plaintiffs overlook the fact that the District's obligations under the Settlement Order with regard to initial Medicaid applications and renewals were terminated. Thus, the class members here do not have "live claims" regarding initial applications and renewals that "are protected under a consent decree," the reason plaintiffs advance for distinguishing the holding in *Shepard v. Madigan*, 958 F. Supp. 2d 996, 1001 (S.D. Ill. 2013), that "a new claim about a new law must be raised in a new suit." Plaintiffs' Br. 36-37 n.10. Second, even if the initial and renewal obligations were the same, the ACA

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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.

changed the criteria and processes for effectuating those determinations. 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." ECF 1886 at 6. Nonetheless, the court found the District in violation of the ACA, ECF 2110 at 47, without plaintiffs even having to amend their complaint to allege a wholly different problem than that which gave rise to the 1999 Settlement Order. Plaintiffs should have been required to file a new lawsuit if they wished to litigate these issues.

Furthermore, granting "*additional* injunctive relief, based on the *new* factual circumstances," ECF 2110 at 49, without requiring the filing of a new lawsuit, deprived the District "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," District Br. 23. Plaintiffs argue that the "District is not a person under the Fifth Amendment entitled to due process" and that it did not seek leave to conduct discovery or request an evidentiary hearing on their motions. Plaintiffs' Br. 37-38. But it is beyond question that in defending against a new complaint the District, as any other federal court litigant, would be entitled to the procedural protections of the Federal Rules of Civil Procedure. These are the protections that the District was denied when the court rejected its request that plaintiffs "not be allowed to shoehorn new claims that the District is not complying

with the ACA into what remains of this lawsuit, which is now focused on the provision of EPSDT services to children." ECF 2077 at 21; ECF 2097 at 1. In defending against a new lawsuit, the District would not be required to seek leave to conduct discovery or request an evidentiary hearing and, as set forth in the District's opening brief, 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." District Br. 23. The latter claim is not a new argument that the District forfeited for being raised for the first time on appeal, as plaintiffs contend, Br. 38, but an example of a procedural protection that the District lost when the court refused its request that plaintiffs be required to raise their claims in a new lawsuit.

Thus, the court's modifications deprived the District of the benefit of its bargain, the flexibility courts are required to apply, and the procedural protections to which it was entitled.

II. Even If The District Court Had Authority, The Modifications Are Neither Justified By Nor Tailored To Changed Circumstances.

A. The court's modifications are not justified by the cited changes.

As the District has explained, the court also erred in applying Rule 60(b)(5) because it did not find that the changes regarding eligibility and renewal determinations made the EPSDT provisions unworkable or inequitable. District Br. 29-31. Relying on examples from the evidence plaintiffs submitted, plaintiffs

and *amicus* respond by arguing that the court's order was justified by the allegedly large number of individuals denied Medicaid coverage and the resulting harm. Plaintiffs' Br. 8-9, 39-40, 47-48; *Amicus* Br. 12-13, 15-16, 22-23, 27.

The court's own findings defeat that argument. It found that by February 24, 2016, the District had eliminated almost entirely the problems in timely processing initial Medicaid applications that had occurred in 2015 through the beginning of 2016 as a result of the District's need to rewrite its Medicaid program to comply with the ACA. ECF 2110 at 14-21. Indeed, the court identified only a single example of an initial application problem that persisted beyond late February 2016. ECF 2110 at 20-21. Furthermore, although the court also identified examples of problems with benefits renewals a year earlier in 2015, almost all of them were resolved or otherwise justified by the District and only two of the examples concerned renewal issues beyond February 26, 2016. ECF 2110 at 26-34, 36-40. As the court acknowledged, "the District has made substantial progress with respect to the issue of passive renewals"—a requirement that did not even exist at the time the Settlement Order was signed. ECF 2110 at 34.

Nonetheless, based on this isolated and anecdotal evidence, the court found "that despite its substantial progress, the District has still not been able to entirely remediate the problems" and "that a significant number of Medicaid beneficiaries

have been harmed."[3] ECF 2110 at 21, 40. This finding was not based on any statistical or otherwise robust analysis that showed that plaintiffs are realistically threatened by a repetition of the problems that occurred in 2015. The finding was insufficient to justify a structural reform injunction, and certainly not one that reimposed 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. *See, e.g.*, *City of L.A. v. Lyons*, 461 U.S. 95, 109 (1983) (recognizing that injunction should issue only on realistic threat that unlawful conduct will recur).

Moreover, the evidence plaintiffs submitted does not demonstrate, and the court did not find, that the EPSDT provisions were made inequitable or unworkable because of the changes with regard to Medicaid eligibility. Indeed, the court did not identify any connection between plaintiffs' evidence of changed circumstances and the prospectively applicable EPSDT provisions it relied on to modify the Settlement Order, reasoning just that "a child cannot obtain any EPSDT services when he or she lacks Medicaid eligibility." Plaintiffs' Br. 39-41; ECF 2110 at 52. The court's findings, however, did not establish that failures to timely

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[3] *Amicus* incorrectly says the District has conceded problems "are ongoing." *Amicus* Br. 14. In the cited passage, the District merely indicated what *the court* found, quoting the same sentence the District references here. District Br. 12.

process Medicaid applications and renewals significantly affected the notice about or provision of EPSDT services that the District must provide once eligibility has been determined.

Plaintiffs' contention that the court's finding is "simple logic" cannot substitute for specific factual findings of EPSDT services not being provided because of ongoing eligibility issues. Plaintiffs' Br. 47. Nor can the declining participation ratios that plaintiffs point to, which cannot be considered because plaintiffs identify them for the first time on appeal, and because the court did not identify this decline, let alone rely on it. Even if they are considered, these statistics are insufficient because plaintiffs fail to identify any evidence that ties the asserted decline to delays or errors in processing Medicaid applications or renewals. Plaintiffs' Br. 45.

The District also explained that the court relied on only four instances where children receiving Medicaid were allegedly affected by the changes plaintiffs asserted, instead relying on anecdotal evidence regarding the way in which adults, not children who might be entitled to EPSDT services, were affected by eligibility problems. District Br. 31-32. Plaintiffs identify additional affidavit testimony concerning children that the court did not include in its memorandum opinion and argue that "[t]he fact that the court described a fewer number of cases of children than those present in the evidence, does not mean that the court dismissed the

declarations concerning those children." Plaintiffs' Br. 47 n.12. Plaintiffs provide no support for this assertion, which in any event does not demonstrate that the court relied on any more than the four cases the District noted it had identified. Indeed, plaintiffs only identify three cases involving children that the court cited, all of which the District referenced in its opening brief. Plaintiffs' Br. 48 (citing ECF 2110 at 27-28, 29, 39-40); *see also* District Br. 31-32 (citing ECF 2110 at 27, 29, 34, 39-40). These few examples do not support a finding of widespread, ongoing harm frustrating the ability of eligible children to obtain EPSDT services.

Amicus similarly argues that the court's identification of only four cases involving children is a "quibble" in light of the volume of evidence plaintiffs submitted. *Amicus* Br. 24. However, the District responded to plaintiffs' evidence with evidence that disputed or otherwise justified or resolved the actions plaintiffs identified and the court never resolved these disputes. For example, after identifying several individual examples of problems processing renewal paperwork, ECF 2110 at 27-28, 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." ECF 2110 at 29-30; *see also id.* at 36 ("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].”). While *amicus* urges this Court to consider the entire record, Br. 24, it should not rely on disputed evidence where the district court did not exercise its discretion to resolve the disputes. *See, e.g., United States v. Kelly*, 790 F.2d 130, 139 (D.C. Cir. 1986) (finding abuse of discretion in failure to resolve “crucial factual disputes”).

Plaintiffs also contend that the studies the District referenced that show it has the second highest Medicaid eligibility rate for children nationally do not overcome the evidence that “thousands of Medicaid beneficiaries” were affected by the District’s implementation of the ACA’s requirements. Plaintiffs’ Br. 48-49. However, the court found that the District was “able to resolve all of the thousands of remaining cases” and that its progress was “commendable.” ECF 2110 at 47.

Moreover, when it terminated the Settlement Order’s renewal provisions, the court recognized that the ACA presented “many technological and logistical challenges” and anticipated “that implementation will undoubtedly be both rocky and fairly long in coming.” ECF 1886 at 5-6. Plaintiffs, however, argue that the changed circumstances resulting from implementation were not anticipated at the time of termination because the court also found no evidence “that the due process rights of class members would not be adequately protected.” Plaintiffs’ Br. 43. That finding had nothing to do with the anticipated implementation problems, however, but instead recognized that “the ACA regulations provide multiple

safeguards to ensure that no members of the plaintiff class whose eligibility must be renewed *in 2013* will be denied due process." ECF 1886 at 9 (emphasis added). While the precise scope of the problem may not have been known, the court certainly anticipated lengthy and significant problems implementing the ACA. For these reasons, changed circumstances did not justify the court's reversal of its proper, and unappealed, termination of Settlement Order provisions.

B. The modifications are not suitably tailored to remedy the alleged harm to EPSDT-eligible children.

Further, even if changed circumstances justified modification, the new injunctive relief ordered here is not suitably tailored. As explained, it expands the remaining scope of this case to individuals who are not members of the EPSDT-eligible class, makes the Settlement Order substantially more onerous by increasing significantly the court's oversight of local processes and the costs of compliance, and fails to ensure that the essence of the parties' bargain is preserved. District Br. 34-37.

Plaintiffs contend otherwise, repeating their argument that because the court never decertified the initial application and renewal subclasses, the "remedy in the April 4 Order is closely tailored to address their claims." Plaintiffs' Br. 50. As explained, however, there was no need to decertify the application and renewal subclasses because once the court terminated the relief provided to these subclasses

"no provisions of the Settlement Order relating to Medicaid application processing or benefits renewal remained in effect." ECF 2110 at 11; *see supra* 6-8.

Plaintiffs also argue that the April 4 order is not rendered invalid for assisting "additional Medicaid beneficiaries who are not in the EPSDT subclass" because EPSDT-eligible children make up "about 40% of the entire Medicaid population" and an otherwise proper remedy is not invalid because it has collateral effects. Plaintiffs' Br. 51-52. For the latter proposition plaintiffs rely on *Brown v. Plata*, 563 U.S. 493 (2011), which affirmed a three-judge panel's order requiring the State of California to reduce its prison population to 137.5% of design capacity. *Id*. at 501. Although the cases were brought by two classes of inmates, those with serious mental health and those with serious medical conditions, the Court found that the order was not invalid because it was likely to affect inmates without those conditions. *Id*. at 531. However, there "it became apparent that a remedy for the constitutional violations would not be effective absent a reduction in the prison system population" because no other remedies had been found to be sufficient during the pendency of the lengthy litigation, and "[a] release order limited to prisoners within the plaintiff classes would, if anything, unduly limit the ability of State officials to determine which prisoners should be released." *Id*. at 500-01, 532. No similar facts exist here.

To the contrary, here the court terminated the requirements for initial Medicaid applications after the District satisfied the exit criteria agreed to in the Settlement Order and, pursuant to the agreement's modification provisions, terminated the requirements for renewals in an order plaintiffs did not appeal. Years later, as a result of changes brought about by the ACA, the court modified the Settlement Order to reimpose those requirements based on the prospectively applicable EPSDT provisions, an entirely separate and distinct section of the Settlement Order. However, the court failed to tailor its modifications to EPSDT-eligible children. Unlike the order in *Brown*, the new injunctive relief here, which predominantly affects individuals who are *not* members of the EPSDT-eligible class, is a result of the court's failure to suitably tailor its order; it is not a collateral consequence.

District courts cannot do whatever they believe is equitable or in the public interest just because a plaintiff can articulate *some* connection between a live prospective settlement order provision and the requested relief, however disproportionate it may be.[4] The court cannot have it both ways; either it

[4] *Amicus* argues that the court "had discretion to modify any part" of the Settlement Order, relying on *Chrysler Corp. v. United States*, 316 U.S. 556 (1942), which they contend did not focus "on which particular part of the consent decree had prospective effect but whether the modification 'served to effectuate or to thwart the basic purpose of the original consent decree.'" *Amicus* Br. 18. But

improperly relied on the EPSDT provisions to demonstrate the required prospective application under Rule 60(b)(5) or it failed to suitably tailor the modifications it imposed. That plaintiffs "disclaim that they are seeking to revive" the eligibility and renewal requirements is of no moment when the court's order plainly has that effect. ECF 2110 at 43. And reviving those requirements expands the District's obligations substantially beyond the percentage of Medicaid beneficiaries who are eligible for EPSDT services.[5]

Misrelying on *Kansas v. Nebraska*, 135 S. Ct. 1042 (2015), plaintiffs argue that the court properly considered the public interest and that its equitable powers are broader and more flexible "where 'federal law is at issue.'" Plaintiffs' Br. 53. Here the court was modifying a Settlement Order, not remedying a failure to comply with an interstate compact Congress had approved, as in *Kansas*. In any event, and as explained, plaintiffs misinterpret the flexible modification standard, and the court failed to adhere to it. *See supra* 11-14; District Br. 26-28, 35.

Chrysler is a pre-*Rufo/Horne* decision that does not discuss Rule 60(b), which the court here found "governed" plaintiffs' motions. ECF 2110 at 41. Moreover, the scope of a consent decree is not discerned "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).

[5] Plaintiffs also assert that the court found that the Medicaid eligibility problems were systemic and that the District did not challenge this finding. Plaintiffs' Br. 51. No challenge was made because that is not what the court found; instead, it found that individual mistakes and systemic issues were interrelated and impossible to separate. ECF 2110 at 21, 40.

Despite arguing that the District "did not provide any estimates of the financial cost of compliance with the April 4 Order until after the court had issued it," plaintiffs next contend that the district court nonetheless properly considered financial harm. Plaintiffs' Br. 54-55. They say the initial application requirement will impose no additional cost if eligibility decisions are made timely and the renewal modifications were tailored to not saddle the District "with the burden of indefinitely furnishing benefits to individuals who may no longer be Medicaid eligible." Plaintiffs' Br. 54-55 (quoting ECF 2110 at 57). The court's April 4 order, however, created a new class of Medicaid "provisional" beneficiaries and left the District to figure out the financial and technical means to process them. *See, e.g.*, ECF 2114-1 (explaining the steps and costs to comply). While the District did argue prior to the issuance of the April 4 order that "granting plaintiffs' motion will cause financial harm to District residents that will not be recoverable," it could not submit estimates of the costs of complying with an order it had not seen. ECF 2077 at 40. Once the order issued, the District promptly asked the court to reconsider, explaining that the annual cost to the District for 90 days of continuing coverage for beneficiaries whose eligibility is not established by their renewal date was over $20 million with no possibility of recovery. ECF 2113 at 12-13. This amount does not include the substantial costs in time and resources associated with the systems and other changes needed to implement the April 4

order, which together far exceed "the cost of complying with federal Medicaid law." *Amicus* Br. 10; ECF 2113 at 3-10. The court refused to tailor its modifications in light of these substantial costs and denied the District's motion to alter or amend. ECF 2141.

Plaintiffs further argue that the court properly denied this motion because the District's financial estimates could have been but were not provided in any of its prior filings. Plaintiffs' Br. 56. Again, the District could not estimate in advance the financial costs of compliance, particularly where the court's April 4 order differed from the relief requested by plaintiffs. Moreover, the court did not deny the District's motion to alter or amend for the reason plaintiffs state; it denied the motion because it "technically" "has no jurisdiction to rule on the Motion" because the District appealed its April 4 order, and because it had stayed its April 4 order. ECF 2141. The court's issuance of a stay is an implicit acknowledgement that its April 4 order is not suitably tailored. ECF 2135.

Finally, by reimposing requirements terminated pursuant to the terms of the Settlement Order, whose segregable sections were independently terminable, the court failed to "preserve the essence of the parties' bargain," District Br. 36, an argument for which plaintiffs have no response. *Pigford*, 292 F.3d at 927.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 24, 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 6,500 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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