NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 22-7060

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

ELSA MALDONADO, *et al.*,
APPELLANTS,

V.

DISTRICT OF COLUMBIA,
APPELLEE.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE THE DISTRICT OF COLUMBIA

KARL A. RACINE
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

THAIS-LYN TRAYER
Deputy Solicitor General

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

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 724-6635
richard.love@dc.gov

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties and amici*.—The plaintiffs below and appellants here are: Elsa Maldonado; and BR, by her parent and next friend, Ann Robertson. The defendant below and appellee here is the District of Columbia. There are no amici.

B. *Ruling under review*.—Appellants appeal from the March 29, 2022 order (Leon, J.) dismissing their complaint (Joint Appendix "JA" 539), the minute orders dated July 24, 2019 (JA 272) and January 6, 2020 (JA 400), and all orders merged therein.

C. *Related cases*.—This case was previously appealed in *N.B., by her parent and next friend, Michelle Peacock*, No. 14-7054, decided on July 17, 2015, and in *N.B., by her parent and next friend, Michelle Peacock*, No. 11-7084, decided on June 8, 2012. These cases were reported and are available at 682 F.3d 77 (D.C. Cir. 2012), and 794 F.3d 31 (D.C. Cir. 2015), respectively.

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

---

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

Statutes and Regulations

GLOSSARY

JA	Joint Appendix
RD	ECF Record Document

STATEMENT OF THE ISSUES

Plaintiffs in this case are Medicaid beneficiaries. They originally brought suit to challenge the District's alleged policy, prior to 2020, of failing to provide Medicaid claimants with individualized, written notice of the reasons for denying prescription coverage at the point-of-sale. The questions presented are:

1. Whether plaintiffs' claim that the District's old policy violates due process is now moot, where the District has enacted a new policy that, since 2020, requires pharmacists to provide written notice at the point-of-sale, including the reason for the denial, to anyone who submits a prescription and asks to have it covered by District Medicaid.

2. Whether the complaint attacking the District's old policy remains moot where plaintiffs' contentions that the dispute is still live are based on a different claim—regarding policy *implementation* rather than the absence of a policy—that they improperly seek to advance for the first time on appeal.

3. Whether this case is moot despite the voluntary cessation doctrine where the District's enactment of its current policy and subsequent actions have completely eradicated the prior lack of individualized notice at the point-of-sale and any lingering effects thereof, and where it is not reasonable to expect that the District will retract its notice policy.

4. Whether the district court permissibly exercised its discretion in staying discovery pending its ruling on the District's motion to dismiss, and whether this case lacks the exceptional circumstances warranting reassignment to a new judge if the case is remanded.

STATEMENT OF THE CASE

1. Prescription Drug Coverage Under The District's Medicaid Program.

Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.*, established Medicaid as a "co-operative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals." *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990). Although created by federal statute, Medicaid provides that each state—including the District of Columbia—is responsible for deciding eligibility, the services provided, and related procedures. 42 U.S.C. § 1396a(a)(5); *see id.* § 1301(a)(1). The District's Department of Health Care Finance is the designated state agency that administers the District's Medicaid program, including its prescription drug program. D.C. Code § 7-771.07; 29 DCMR § 2700.1. The program reimburses participating pharmacies for prescription drugs approved by the United States Food and Drug Administration and certain over-the-counter medications, subject to well-established limitations. 29 DCMR § 2703.

Medicaid claimants in the District receive coverage in one of two ways: either directly from the District through its fee-for-services program, or through one of four managed care organizations. JA 170-71 ¶¶ 21-22. The District and each managed care organization independently contract with a pharmacy benefits manager, which in turn operates an electronic claims management system to process prescription claims. JA 170-71 ¶¶ 21-22.

Prescriptions that are presented to a pharmacy by a person who represents that they are a Medicaid recipient are submitted through the pharmacy's computer to a pharmacy benefits manager. JA 171 ¶ 23. Thereafter, the pharmacy receives, electronically, a response from the pharmacy benefits manager that indicates whether the prescription will be covered by Medicaid, and, if denied, a rejection code that corresponds to a reason for denying the claim. JA 171 ¶ 23. A claim may be denied for many reasons. For example, a "prescription drug written under its brand or trade name [will] be filled with its generic equivalent" unless the prescribing physician indicates on the face of the prescription that the brand name drug is medically necessary or the brand name drug is on the District's Medicaid Preferred Drug List.[1] 29 DCMR § 2704. Prior authorization from the District is required for prescriptions for "[a]ny drug listed as non-preferred on the District's

[1] Publicly available at https://dc.fhsc.com/providers/PDL.asp.

Medicaid Preferred Drug List." *Id.* § 2706.2(a); *see id.* § 2706.1, 2706.3. Each managed care organization can have its own preferred drug list, but it must comply with District regulations. *See, e.g.*, ECF Record Document ("RD") 85-36 at 83 (a managed care organization provider manual stating that the "Amerigroup Pharmacy program utilizes a preferred drug list (PDL), which has been reviewed and approved by [the District's Medicaid agency]").

The District has a robust system of procedural safeguards for Medicaid claimants who have their prescriptions denied at the pharmacy. For example, participating pharmacies generally are required to provide, without cost to the Medicaid recipient, a three-day temporary supply when a prescription claim is rejected due to a prior-authorization requirement. 29 DCMR § 2705. Participating pharmacies are also required to conspicuously post signs in English and Spanish notifying Medicaid claimants of their rights when a prescription is denied. JA 415-16 (District's 2018 transmittal to Medicaid pharmacy providers), 417 (a copy of the notice that the transmittal requires pharmacies to prominently post at the point-of-sale). The signs inform Medicaid claimants of the assistance available from the District and managed care organizations through various helplines or the Office of the Healthcare Ombudsman, a District entity charged with assisting consumers in resolving coverage and other healthcare problems. D.C. Code § 7-2071.04. In addition, the District's Office of Administrative Hearings provides Medicaid

recipients "aggrieved by the action or inaction" of the District with fair hearings. D.C. Code § 4-210.01. And as a condition of participating in the District's Medicaid program, the District requires pharmacy providers to "[c]ooperate with any District of Columbia Medicaid Program initiatives to provide information to beneficiaries at the point of sale including, but not limited to" "(1) Prominently displaying posters or notices; and (2) Providing beneficiaries with individualized notices, letters, or pamphlets." 29 DCMR § 2701.2(d)(1) & (2).

2. The District Court Proceedings.

This case was originally brought by five individuals receiving Medicaid benefits from the District of Columbia, each of whom alleged that he or she was temporarily denied a prescribed drug without simultaneous written notice, the opportunity for a hearing, and continuation of the denied drug pending a hearing on the denial. JA 33-35. They alleged that these actions violated the Due Process Clause of the Fifth Amendment; Title XIX, the federal Medicaid statute; and District of Columbia law. JA 59-61.

On July 29, 2011, the district court concluded that plaintiffs lacked standing to bring this action. This Court reversed. *NB ex rel. Peacock v. District of Columbia* ("*NB I*"), 682 F.3d 77 (D.C. Cir. 2012). It concluded that at least one plaintiff had standing, having alleged a procedural injury that was "directly traceable to [the District Medicaid agency's] failure to establish policies and procedures for providing

the required notices when prescription coverage is denied at the point of sale." *Id.* at 86.

a. Plaintiffs' first amended complaint.

An amended complaint was filed in 2013. Therein, nine individuals alleged that the District's Medicaid agency and Affiliated Computer Services, the District's pharmacy benefits manager at the time, had issued "policies and manuals to pharmacy providers" that "contain no provisions providing for notice to the recipient of state action affecting the recipient's prescription drug coverage," the reason for the action taken, "the recipient's right to a hearing, and, if applicable, continued benefits when coverage of prescription drugs is denied, terminated, or reduced." JA 82 ¶ 38; *see* JA 83 ¶ 39 (same as to the guidance the District issued concerning medication prior authorization), 83-84 ¶¶ 41, 42 (same as to a claims processing manual), 84-84 ¶ 43 (same as to documents plaintiffs received in response to their Freedom of Information Act request for relevant regulations, policies, and transmittals). Plaintiffs once again asserted that the District's failure to ensure notice violated the Due Process Clause of the Fifth Amendment, Title XIX of the Social Security Act, and District of Columbia law. JA 117-18.

In March 2014, the district court granted the District's motion to dismiss, finding that plaintiffs failed to state a claim for relief under the Fifth Amendment or Title XIX. This Court affirmed the dismissal of plaintiffs' Title XIX claims but

remanded for further proceedings on plaintiffs' due process claims. *NB ex rel. Peacock v. District of Columbia* ("*NB II*"), 794 F.3d 31 (D.C. Cir. 2015). While concluding that plaintiffs "have protected property interests in the coverage of prescription drugs not completely excluded from Medicaid coverage," the question of what process was due when a prescription was denied was left to the district court. *Id*. at 43; *see id.* at 44.

Following that decision, the District filed an updated motion to dismiss that the district court granted in part and denied in part. *N.B. v. District of Columbia*, 244 F. Supp. 3d 176 (D.D.C. 2017). The court found that plaintiffs had "not stated a claim that they are constitutionally entitled to an evidentiary hearing before Medicaid denies coverage for a prescription," but did state a claim that they "received insufficient notice regarding the reason for their prescription denial at the point of sale." *Id*. at 181, 185.[2]

[2] The district court also dismissed plaintiffs' claims under District of Columbia law and their claims against the District's Mayor and Wayne Turnage, the Director of the District agency that administers the District's Medicaid program, both of whom were sued in their official capacities. *Id*. at 187-88.

b. Plaintiffs' second amended complaint.

Plaintiffs filed their second amended complaint in April 2019.[3] JA 21, 165-200. The second amended complaint includes allegations on behalf of the two appellants here,[4] each of whom alleges that she had a prescription fully or partially rejected by a pharmacy and did not receive written notice of the prescription coverage denial, the reason for the denial, the right to appeal, or the circumstances under which Medicaid would continue providing coverage of the prescription pending appeal. JA 176-81 (Elsa Maldonado), 192-97 (BR). Plaintiffs additionally repeat their allegations that the District's Medicaid agency and its agents issued "policies and manuals" that "contain no provisions providing for individualized written notice" of the action, reason, and right to a hearing, "and if applicable, continued benefits when coverage of prescriptions is denied." JA 172 ¶ 27; *see* JA 173 ¶¶ 28 & 29, 174 ¶¶ 31 & 32, 176 ¶ 37.[5]

---

[3] In addition to granting plaintiffs leave to amend, the court also denied the District's motions to stay briefing on plaintiffs' motions for class certification and for summary judgment and injunctive relief and ordered the parties to file a joint proposed schedule to govern briefing on the remaining motions. JA 21 (April 4, 2019 minute order).

[4] Although the second amended complaint was filed by Elsa Maldonado, John Doe, Linda Seals, and BR, by her parent and next friend Ann Robertson, JA 165, plaintiffs John Doe and Linda Seals voluntarily dismissed their claims on February 7, 2020. JA 26 (RD 127).

[5] In May, the court set forth a schedule for filing and addressing the District's motion to dismiss the second amended complaint, a due date for the District's answer

c. The District's January 2020 Policy requiring individualized, written notice.

In May 2019, the District initiated "a pilot program to test the operational feasibility of having Medicaid participating pharmacies hand out individualized paper notices to beneficiaries who were denied their prescription drugs at the point of sale." JA 321. Thereafter, on January 10, 2020, the director of the District's Medicaid program issued a transmittal to all Medicaid provider pharmacies informing them that they are required to "distribute individualized written notices to Medicaid beneficiaries," "including those enrolled in all D.C. Medicaid Managed Care Organizations," "whose medication claim request is denied after adjudication at the pharmacy point of sale." JA 409. The transmittal reminded pharmacy providers that they were required, pursuant to 29 DCMR § 2701.2(d), to cooperate

---

should the court deny its motion in whole or in part, a period for discovery, as well as a schedule to complete briefing on plaintiffs' motions for class certification and for summary judgment and injunctive relief. JA 21-22 (May 10, 2019 minute order). At the end of May, the District filed a partial motion to dismiss the second amended complaint, arguing that plaintiffs lacked standing to maintain claims based on the actions of the managed care organizations or their pharmacy benefit managers, which do not constitute state action. JA 22, 201-30. In July, the court denied without prejudice plaintiffs' motions for class certification and for summary judgment and a permanent injunction, or in the alternative for a preliminary injunction in light of its May 10, 2019 scheduling order. JA 23, 272 (July 24, 2019 minute order). In September, plaintiffs filed a motion for preliminary injunction. JA 23-24 (RD 114). In November, the court denied the District's partial motion to dismiss plaintiffs' second amended complaint. JA 25 (November 5, 2019 minute order). In December, the court denied plaintiffs' motion for a preliminary injunction. RD 123; *see* JA 388-99.

"in such initiatives to provide individualized notices." JA 410. The transmittal included a notice form for pharmacies to distribute. JA 411. The notice informs Medicaid claimants of the reason that their prescription could not be filled. JA 411. It also provides a description of the Medicaid claimant's rights and responsibilities, including the opportunity to fix the problem by calling the District or their managed care organization, to "get a three (3) day supply of medicine," and to ask for a fair hearing. JA 412.

d. The District's motion to dismiss plaintiffs' second amended complaint, or in the alternative for summary judgment.

In February 2020, the District moved to dismiss or for summary judgment, arguing that plaintiffs' case was rendered moot by the January 2020 policy. JA 26 (RD 130). In March, plaintiffs moved for a status conference or, alternatively, for a scheduling order allowing Rule 56(d) discovery. JA 418-61. In May, the district court stayed plaintiffs' request for discovery pending resolution of the District's motion, and set forth a schedule for completing briefing on the District's motion to dismiss. JA 462.

In March 2021, the court denied the District's motion, noting that it would set a status conference to address two "factual disparities." JA 468. Thereafter, plaintiffs moved for a status conference. JA 470-72. In support, plaintiffs included a declaration from BR's mother, stating that BR was denied a prescription without written notice, once in March and once in May 2021, in separate incidents involving

the same pharmacy. JA 475-76. The declaration states that the March denial was resolved by her care manager the following day, and that she received written notice by mail of the reason for the May denial, which included an explanation of her appeal rights. JA 475 ¶ 14, 476 ¶ 18. BR's allegation was the only claim of non-compliance that the District had received that year, and, after learning of it, the District's Senior Pharmacist contacted BR's managed care organization to discuss the allegations and direct compliance with the policy. JA 497 ¶ 13. The managed care organization in turn contacted and reminded the pharmacy of its obligations under the policy. JA 497 ¶ 13.

Plaintiffs also presented the results of a survey that they conducted of 16 of almost 130 District pharmacies that participate in the Medicaid program. JA 478-88; *see* JA 438. They asserted non-compliance by 13 of the pharmacies, JA 479 ¶ 6, JA 487 ¶6, although it appears that 11 reported providing written notice at the point of sale in some form, for example, through text, email, or the use of a different form provided by insurance companies. JA 480 ¶¶ 9 & 10, 481 ¶ 12, 482 ¶ 13, 485 ¶ 8, 486 ¶¶ 9-11, 487 ¶¶ 12 & 13, 488 ¶ 14. Many pharmacies additionally displayed signs at or behind the counter informing claimants of their rights regarding the denial of Medicaid coverage. JA 479 ¶ 7.

The court held a status conference in July at which it inquired: *first*, whether the 2020 policy covered beneficiaries who receive coverage through a managed care

organization; and, *second*, whether the policy covers Medicaid applicants as well as beneficiaries. JA 504-05. The court granted leave to the District to supplement its motion to dismiss to address these issues. JA 28 (July 23, 2021 minute order), 506. Plaintiffs again asked to conduct discovery, but the court declined to authorize it pending the District's supplemental filing. JA 506-07.

e. The District's supplemental motion to dismiss.

In August 2021, the District renewed and supplemented its motion to address the issues identified by the court. JA 489-94; *see* JA 29 (RD 146). *First*, the District confirmed that its policy extends to all Medicaid beneficiaries regardless of whether coverage is provided through the District's fee-for-service program or a managed care organization. JA 490-91, 496 ¶ 5. The retail pharmacies that contract with managed care organizations all participate in the Medicaid fee-for-service program and therefore are subject to all the fee-for-service regulations, including the requirement under 29 DCMR § 2701.2(d) to cooperate in providing "individualized notices." JA 495 ¶ 4. Furthermore, the District made the requirement to comply with its notice policy an explicit condition of the managed care contracts that were entered into in September 2020.[6] JA 496 ¶ 7. The District also explained some of

[6] This provision was not in the one managed care organization's contract that was still in effect in September 2020. Nonetheless, the managed care organization was aware of the notice requirement, which the District intends to include in any successor contract. JA 496 n.1.

the additional steps it had taken to facilitate compliance with its notice requirement. JA 491-93, 496-97 ¶¶ 8 & 11-13.

Second, the District explained that the notice required by its policy is provided to Medicaid applicants as well as beneficiaries. JA 490, 496 ¶ 5. To determine coverage, participating pharmacies are required to submit an inquiry to its prescription benefits manager for anyone claiming that their prescription is covered by Medicaid. JA 490, 496 ¶ 5. If the person has applied for Medicaid but has not yet been approved, the prescription benefit manager's answer will be, and the written notice will state, that the individual has not been determined eligible for Medicaid. JA 496 ¶ 6; *see* JA 411.

In September, plaintiffs requested a status conference and moved to lift the stay on discovery. JA 499-500. They argued that discovery was needed to address whether the District had a practice of enforcing its new policy. JA 510-18.

c. The district court grants the District's motion to dismiss and denies plaintiffs' motion to lift the stay on discovery.

On March 29, 2022, the court denied the request to lift the stay on discovery and granted the District's motion to dismiss on mootness grounds. JA 530. It determined that the "District, via transmittal # 20-01, has enacted a policy that provides plaintiffs with the precise relief they seek and that any likelihood of a future reversion to their prior deficient policy is speculative at best." JA 538. The court also found that the District's notice requirement "satisfies what [it] previously held

to be the process due to the plaintiffs in this case." JA 536. In light of the District's "enact[ment] [of] a policy specifically designed to provide the notice to which plaintiffs are entitled under the Constitution," the court found itself without any ability to "provide the plaintiffs with any further relief." JA 537. In dismissing the case as moot, the court further rejected the notion that plaintiff's asserted "handful of individualized instances of alleged noncompliance with the new policy" could sustain a live controversy. JA 537-38.

This timely appeal was filed by appellants on April 27, 2022. JA 30.

STANDARD OF REVIEW

This Court's review is de novo when dismissing a complaint for lack of subject matter jurisdiction on mootness grounds. A district court's 12(b)(1) dismissal may "rel[y] either on the complaint standing alone or on the complaint supplemented by undisputed facts evidenced in the record." *True the Vote v. IRS*, 831 F.3d 551, 555 (D.C. Cir. 2016). The determination of any disputed facts is reviewed for clear error. *Id*.

"[E]videntiary and docket management decisions" are reviewed "for abuse of discretion." *Banner Health v. Price*, 867 F.3d 1323, 1334 (D.C. Cir. 2017). "[R]eview for abuse of discretion generally is confined to determining whether the district court did not apply the correct legal standard or misapprehended the underlying substantive law, and whether the district court's ruling was within the

scope of permissible alternatives in light of the relevant factors and the reasons given to support it." *Smalls v. United States*, 471 F.3d 186, 191 (D.C. Cir. 2006). This Court will find an abuse of discretion when discretion is exercised in error "and the prejudicial impact of that error requires reversal." *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir. 1995).

SUMMARY OF ARGUMENT

This Court should affirm the district court's dismissal of plaintiffs' complaint as moot.

1. Plaintiffs complained that the District's policies, manuals, transmittals, and other documents that it issued to pharmacies participating in its Medicaid program contained no provision that required written notice of the reason for denying a Medicaid claimant's prescription, in violation of due process. Plaintiffs' claim is moot because the District enacted a new policy in 2020 that requires the exact notice that plaintiffs maintained was lacking. The notice requirement is applicable to Medicaid applicants as well as beneficiaries, whether their coverage is provided through the District's fee-for-service program or through a managed care organization. It therefore provides plaintiffs with complete relief, such that this Court is no longer presented with a live case or controversy. Indeed, the district court determined that the 2020 policy itself satisfies due process. The district court's conclusion upholding the constitutional sufficiency of the new policy should be the

end of the matter, particularly since any declaration concerning the District's past conduct would amount to nothing more than an advisory opinion.

2. To save their complaint from mootness, plaintiffs contend for the first time on appeal that the District employs an unlawful practice of failing to enforce the 2020 policy. Plaintiffs may not raise this new "practice" claim given that their complaint, all along, was that the District lacked any *policy* or other document that contained a requirement for individualized written notice. Even if plaintiffs could transform their complaint from a policy to a practice claim, they have not alleged and cannot state a claim for municipal liability under their new theory. They have not alleged, nor can they demonstrate, that the District knowingly ignores violations of the policy that are so prevalent that they amount to a standard operating procedure of which municipal policymakers must be aware. Any practice-based claim would, accordingly, require dismissal in any event.

3. The voluntary cessation exception does not preclude mootness here. The 2020 policy requirement and the District's subsequent actions eradicated the due process violation about which plaintiffs complain, along with any lingering effects. Nor is it reasonable to expect that the District will retract its notice policy and return to its allegedly deficient policy. Plaintiffs' argument to the contrary impermissibly reframes the violation for which they originally sought relief. Moreover, plaintiff's proffered evidence of imperfect implementation is self-contradictory and

unpersuasive. In any event, it does not undermine the District's policy change, which now requires individualized written notice.

4. The district court did not abuse its discretion in staying discovery pending its ruling on the District's motion to dismiss, nor should this case be reassigned. None of the topics about which plaintiffs sought discovery were relevant to the constitutional sufficiency of the District's 2020 notice policy and whether it mooted their claim. In addition, the circumstances that warrant the unusual relief of case reassignment do not exist here.

ARGUMENT

I. Plaintiffs' Claim Is Moot Because The District's Current Policy Provides Them With The Precise Relief They Sought.

A. The 2020 policy moots the claims raised in the second amended complaint.

"Article III, Section 2 of the Constitution permits federal courts to adjudicate only actual, ongoing controversies." *McBryde v. Comm. to Review Cir. Council Conduct & Disability Ords. of the Jud. Conf. of the U.S.*, 264 F.3d 52, 55 (D.C. Cir. 2001) (internal quotation marks omitted). "Accordingly, [t]o invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Chafin v. Chafin*, 568 U.S. 165, 171-72 (2013) (internal quotation marks omitted) (alteration in original). Where, as here, plaintiffs seek only prospective

injunctive and declaratory relief, they "must show that they suffer[] an ongoing injury or face[] an immediate threat of injury." *NB I*, 682 F.2d at 82.

The "case-or-controversy requirement" must "subsist[] through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990). "[I]t is not enough that a dispute was very much alive when suit was filed." *Id.* at 478. "If events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot." *McBryde*, 264 F.3d at 55. For "[f]ederal courts may not 'decide questions that cannot affect the rights of litigants in the case before them' or give 'opinion[s] advising what the law would be upon a hypothetical state of facts.'" *Chafin*, 568 U.S. at 172 (internal quotation marks omitted) (alteration in original). Thus, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," the "case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

This case is moot. From the beginning, the focus of plaintiffs' complaint has been the absence of any *policy* requiring that individualized written notice be provided to people who represent that they are Medicaid recipients, but whose prescriptions are denied coverage by Medicaid-participating pharmacies. JA 172-76. In the complaint operative here, the plaintiffs have alleged that the District's Medicaid agency

> and its agents, including the [pharmacy benefit managers] and [managed care organizations], have issued policies and manuals to pharmacy providers and Medicaid beneficiaries that contain no provisions providing for individualized written notice describing the state action affecting the person's prescription drug coverage, the reasons for the action, the person's right to a hearing, and, if applicable, continued benefits when coverage of prescription drugs is denied.

JA 172 ¶ 27; *see* JA 172-73 ¶¶ 28 & 29 (same for the *Medicaid Prior Authorization Guidance* provided to pharmacy providers), 174 ¶ 31 (same for manuals regarding claims processing), 174 ¶ 32 (same for transmittals, bulletins, and regulations), 176 ¶ 37 (same for statutes).

Indeed, this Court found that the procedural injury that plaintiffs alleged was that the District's Medicaid agency "has a policy of denying prescription coverage without providing the various forms of notice that plaintiffs claim are required." *NB I*, 682 F.3d at 85. "Specifically," explained the court, "the complaint alleges . . . that [the Department of Health Care Finance's] guidance and manuals for [Affiliated Computer Services] and pharmacies . . . contain no provisions for giving Medicaid recipients written notice of the reasons for coverage denials." *Id.*

In January 2020, the District corrected the alleged fundamental defect about which plaintiffs complained: the District instituted a policy that requires the precise written notice that plaintiffs claimed was lacking. The new policy requires all pharmacies participating in the District's Medicaid program to "provide a formal notice to any individual who claims a prescription benefit and has that claim denied,"

and to do so "at the pharmacy counter" at the time of the denial. JA 409, 534; *see* JA 410. Moreover, as part of the notice policy, the District's Medicaid agency produced and distributed to participating pharmacies pre-printed, triplicate notice forms for pharmacy staff to complete and give to the Medicaid claimant or his or her designee at the "pharmacy counter." JA 409. The notice form provides the Medicaid claimant with "a reason for the denial of the prescription (including, for example, that the claimant is 'not eligible for Medicaid today' or that 'the prescribed drug is not covered by Medicaid')." JA 535 (quoting JA 411). The notice form also includes "a page of information for the claimant including resources for 'how to fix the problem' (including potentially receiving a three days' supply of the medicine while the issue is resolved), as well as who to contact in the District government to challenge the denial, including via hearing." JA 535 (quoting JA 412).

The notice policy thus provides plaintiffs with exactly the process that they have sought all along. Moreover, the "policy covers the entirety of [plaintiffs'] putative class" by requiring that individualized written notice be provided to "not only active Medicaid *beneficiaries*, but also others who may have a protected interest in prescription drug benefits, such as Medicaid *applicants*."[7] JA 535. As the district court found, "anyone who claimed a prescription drug benefit under Medicaid but

---

[7] Although it is not an issue on appeal, plaintiffs sought class certification, which the court denied without prejudice. *See supra* n.5.

was denied (via an inquiry to the relevant pharmacy benefit manager), regardless of their status as beneficiary, applicant, or otherwise, [will] receive notice that they are currently not eligible for Medicaid." JA 535; *see* JA 496 ¶¶ 5 & 6. Additionally, the District's notice "policy applies to all pharmacies that participate in District Medicaid" and "covers both those who receive benefits directly through [its] fee-for-service program as well as those who are beneficiaries through an [managed care organization]." JA 536. As a result, plaintiffs' suit is "no longer embedded in any actual controversy about the plaintiffs' particular legal rights"—that is, the lawfulness of the District's actions prior to the 2020 policy. *City & Cnty. of San Francisco v. FERC*, 24 F.4th 652, 657 (D.C. Cir. 2022). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot." *Already*, 568 U.S. at 91.

Plaintiffs argue that the district court erred in finding that the District's 2020 policy provided them complete relief. Br. 39-45. But following the newly enacted policy, it is "impossible for [this] [C]ourt to grant any effectual relief whatever to" plaintiffs. *Chafin*, 568 U.S. at 172. Plaintiffs have requested a "permanent injunction ordering" the District and its agents "to comply with the Due Process Clause of the Fifth Amendment." JA 199 ¶ 3. And they have alleged that the process to which they are entitled is "adequate initial written notice that reasonably apprises [them] of the reasons for the prescription denial" at "the point of sale." *NB*, 244 F.

Supp. 3d at 183. The 2020 policy by its plain terms "requir[es] District of Columbia Medicaid participating pharmacies to distribute individualized written notices" that "[i]ndicat[e] the reason[s] for the denial" "at the pharmacy counter." JA 409. Plaintiffs' requested injunction therefore could only mirror the 2020 policy. *See, e.g.*, RD 114-2 at 1 (plaintiffs' proposed order preliminarily enjoining the District and requiring it to "implement policies and procedures that require all [participating] pharmacies" "to provide individualized written notice to persons whose medication prescription as written are denied Medicaid coverage"). But the Court "cannot order the appellee departments to do something they have already done." *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 91 (D.C. Cir. 1986).

In fact, the district court has already determined that the District's 2020 policy actually satisfies due process, underscoring the lack of any need for further relief. According to the district court, "the notice requirement satisfies what [the court] ha[s] previously held to be the process due to the plaintiffs in this case." JA 536. The plaintiffs have not challenged the district court's determination of what process is due, and that determination is now the law of the case. *See Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995). Nor did they argue in the district court that the new policy itself offends due process, thereby forfeiting any

challenge.[8] *Earle v. District of Columbia*, 707 F.3d 299, 308 (D.C. Cir. 2012) ("It is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal." (internal quotation marks omitted)). The constitutional sufficiency of the 2020 policy should therefore be treated as established, further proving that this case is moot.

Plaintiffs argue that even if their claim for injunctive relief has been mooted, declaratory relief is still available and necessary to "define the legal rights of the parties." Br. 43. But courts are not licensed to "rule on the legality of an agency

---

[8] The district court determined that plaintiffs mounted no constitutional challenge to the 2020 policy itself. JA 537. Yet in a footnote to its opening brief, plaintiffs maintain that a sample notice form attached to the policy is constitutionally insufficient because (1) the listed managed care organizations have not been updated and (2) plaintiffs read the form to suggest that beneficiaries of managed care organizations may request a fair hearing without first appealing to the managed care organization. Br. 27 n.1 (citing JA 517). The district court, however, concluded that the District must provide only "[s]ome initial written notice of the reason for the denial." *NB*, 244 F. Supp. 3d at 82. The District's policy provides the requisite information, and the sample notice provides information above and beyond what the district court required. Moreover, plaintiffs have not identified an inaccuracy, let alone one that is material. *See, e.g.*, *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 419 (1990) (reversing holding that the use of an out-of-date form constituted "affirmative misconduct" that should bind the government). Consistent with federal regulations, 42 C.F.R. § 438.402(c)(2), the challenged form first advises beneficiaries to contact their managed care organization to try and "fix the problem" and thereafter explains how to request a fair hearing. JA 412. Although the notice form will need to be updated to account for changes in the managed care organizations under contract with the District, Ms. Byrd testified that the notice form would be updated once pending challenges to the procurements of managed care organizations are resolved. JA 497.

policy that no longer exists." *Worth v. Jackson*, 451 F.3d 854, 861 (D.C. Cir. 2006); *see* JA 536 n.4; *see also Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008) (emphasizing that an "order declaring" past policy "illegal would accomplish nothing"). Here, the policy that plaintiffs challenges has been superseded by one that imposes an individualized notice requirement. Whatever was the case before, the District's existing policy now provides "plaintiffs with the precise relief they seek," and the court found that the "likelihood of reversion to the prior deficient policy" was "speculative at best." JA 538. Under these circumstances, the court correctly found that a declaratory judgment about the District's past policy would amount to an advisory opinion, "which federal courts cannot provide." JA 538 n.5; *Nat. Res. Def. Council, Inc. v. U.S. Nuclear Regul. Comm'n*, 680 F.2d 810, 814 (D.C. Cir. 1982).

Plaintiffs also contend that a declaratory judgment would not be advisory because their complaint sought more than a "change in policy"; they sought "actual receipt of due process notice at the pharmacy." Br. 40. But the fundamental allegations in plaintiffs' complaint concern the lack of a District policy or other document that required individualized written notice to Medicaid claimants whose prescriptions are denied. *See, e.g.*, JA 172 ¶ 27. For the reasons set forth in the following sections, plaintiffs cannot rescue their complaint from mootness by rewriting it. *See PETA v. Gittens*, 396 F.3d 416, 422 (D.C. Cir. 2005) (instructing

that "the 'wrong,'" for mootness purposes "must be defined in terms of the precise controversy it spawns"); *see also Clarke v. United States*, 915 F.2d 699, 704 (D.C. Cir. 1990) (focusing on plaintiffs' original theory of their claim and warning against framing "the injurious act as more broadly conceived").

B. Plaintiffs improperly seek to advance a new claim on appeal by challenging the implementation of the 2020 policy.

Plaintiffs suggest that the district court could have ordered some additional relief because they now assert that the District has an unlawful *practice* of non-compliance with its 2020 policy. Br. 41. But in so arguing, plaintiffs belatedly attempt to raise a claim that was not contained in their complaint, which the Court should reject. *See United States v. Naranjo*, 254 F.3d 311, 313 (D.C. Cir. 2001) ("This Court has a well-established rule against allowing parties to initiate new claims on appeal."); *see also Earle*, 707 F.3d at 308. To be sure, plaintiffs could have sought leave to amend their complaint to raise this novel contention in light of changed circumstances. But they did not. Accordingly, their complaint remains moot.

Plaintiffs now contend that their "claim concerns . . . not solely a policy change," but lack of "compliance with [the] [2020] Transmittal Memo." Br. 41. Yet that is not the claim they brought in the trial court. From the beginning, the "actions and inactions" that plaintiffs have maintained deny them due process, Br. 41, have always been the lack of any manual, guidance, transmittal, policy, regulation, or

statute "providing for individualized written notice." JA 172 ¶ 27; *see* JA 173-76 ¶¶ 28, 29 31, 32, & 37. Their theory of the case has always been premised on this lack of a policy. *See* RD 85-2 at 3 (claiming that "the District has no policy or procedure for pharmacies to provide individualized written notice when a Medicaid prescription is denied"); RD 114-1 at 26 (claiming that "relief should issue because the District has not implemented a policy or procedure to provide written notice"). And this Court itself has already recognized that plaintiffs' alleged due process violation rested on the District's "*policy* of denying prescription coverage without providing the various forms of notice that plaintiffs claim are required." *NB I*, 682 F.3d at 85 (emphasis added). Plaintiffs cannot now re-write their complaint on appeal to target a post-2020 *practice* of not providing written notice, rather than the pre-2020 *policy* that allegedly lacked an individualized notice requirement.

Even if plaintiffs were somehow permitted to amend their complaint on appeal, it would still fail on the merits because they have not alleged—and cannot show—a basis for municipal liability. A municipal liability claim requires that the "government entity itself is a moving force behind the deprivation [of a federal right]." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). There is no *respondeat superior* or vicarious liability under Section 1983 against municipalities. *Id*. at 664. Thus, to succeed in a Section 1983 claim against a municipality, a plaintiff must show that the constitutional violation was "inflicted pursuant to

Government 'policy or custom.'" *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 809 (1985). This can be accomplished, for example, through "the municipality adopt[ing] a policy that itself violates the Constitution" or the municipality's "employees' unconstitutional actions [that] are so consistent that they have become [a] custom of the municipality of which the supervising policymaker must have been aware." *Hurd v. District of Columbia*, 997 F.3d 332, 337 (D.C. Cir. 2021) (internal quotation marks omitted) (describing circumstances under which this Court has recognized a municipal policy or custom). It is the plaintiff's burden to plead and "identify the type of municipal policy at issue." *Blue v. District of Columbia*, 811 F.3d 14, 20 (D.C. Cir. 2015).

Here, plaintiffs have not alleged and cannot demonstrate "an affirmative link, such that a municipal policy was the 'moving force' behind the" newly alleged "constitutional violation." *Baker v. District of Columbia*, 326 F.3d 1302, 1306 (D.C. Cir. 2003) (citations and internal quotation marks omitted). The current District policy requires the exact notice that plaintiffs complained was lacking and that the trial court found was due. JA 534, 536. Plaintiffs have not alleged—even in their briefing—that the District "knowingly ignore[s] a practice" of violating that policy that is "so engrained that it amount[s] to a standard operating procedure of which municipal policymakers must [be] aware," nor can they support such a contention. *Hurd*, 997 F.3d at 338 (internal quotation marks omitted).

In fact, the record establishes that the exact opposite is true—non-compliance is rare, and the District has diligently pursued correction of those isolated instances. Since the policy's enactment, plaintiffs have offered allegations that the policy was not followed on only seven occasions: five in February 2020, JA 451-52, 457-58, when the program had just begun, and once each in March and May 2021 at the same pharmacy, JA 475-76. This is so even though, according to plaintiffs' claims, there are thousands of prescription benefits denials every year. *See, e.g.*, RD 114-7, 114-8. Moreover, after learning of the 2021 allegations, the District contacted the managed care organization involved, which promptly reminded the pharmacy to comply with the policy. JA 497 ¶ 13.

Thus, even if plaintiffs' complaint had alleged a practice claim or could be re-written to include one now, it would have to be dismissed for their failure to state a claim. *See EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997) ("Although the district court erroneously dismissed the action pursuant to Rule 12(b)(1), we could nonetheless affirm the dismissal if dismissal were otherwise proper based on failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)."). There is thus no reason to take the extraordinary step of allowing plaintiffs to constructively amend their complaint to keep this case alive. Put simply, the case is moot.

III. The Voluntary Cessation Exception To Mootness Does Not Save The Complaint.

Although the 2020 policy has provided plaintiffs the exact relief they seek, they maintain that the voluntary cessation exception to mootness applies such that the district court should adjudicate whether the District's *pre-2020* policy violates due process. Not so. That policy is gone, it will not recur, and its effects have been eradicated.

A "defendant's voluntary cessation of a challenged practice moots a case only if the defendant shows that: (1) there is no reasonable expectation . . . that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Larsen*, 525 F.3d at 4. "[T]he heavy burden of persua[ding] the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *PETA v. U.S. Dep't of Agric. & Animal & Plant Health Inspection Serv.*, 918 F.3d 151, 157 (D.C. Cir. 2019) (internal quotation marks omitted). However, in cases involving the government, the voluntary cessation "principle must be read in light of the presumption of legitimacy accorded to the Government's official conduct." *Id.* (internal quotation marks omitted). Furthermore, in defining the violation that "the voluntarily ceasing defendant might return" to, a plaintiff cannot "assert a broader notion of their injury than the one on which they originally sought relief." *Clarke*, 915 F.2d at 703.

As the district court properly found, the District's enactment of its 2020 policy and subsequent actions have eradicated the absence of any notice policy and any lingering effects, and there is no reasonable expectation that the District's prior policy will recur.

A. The District's transmittal memo completely eradicated the absence of a notice policy about which plaintiffs complained.

Plaintiffs do not dispute that the District now has a policy that requires written notice, where previously it did not. Instead, plaintiffs principally resist mootness on the basis that the alleged violation has not been eradicated but is "ongoing" because the 2020 policy has not yet been "implemented correctly." Br. 22, 27 (quoting JA 537); *see also* Br. 26 (complaining that pharmacies are not "actually fully in compliance with the policy"). Plaintiffs, however, cannot trigger the voluntary cessation exception to mootness by constructively amending their complaint. As discussed, *see supra* Section I.B, the District action (or inaction) challenged here was the District's "policy of denying prescription coverage without providing" written notice of the reasons for coverage denials. *NB I*, 682 F.3d at 85; *see also, e.g.*, JA 172 ¶ 27. That alleged violation has been completely cured by the District's issuance of the 2020 policy, which requires "exactly the notice claimed by plaintiffs to be required under the Fifth Amendment." JA 534.

In targeting enforcement of the 2020 policy, plaintiffs impermissibly seek to reframe the violation for which they originally sought relief. This Court has

repeatedly rejected such efforts. In *Clarke v. United States*, for example, the Council of the District of Columbia sought to prevent enforcement of a funding condition Congress imposed in the D.C. Appropriations Act of 1989, claiming that it violated the First Amendment by forcing them to enact new legislation. 915 F.2d at 700. While the case was pending, the 1989 Act expired, and the 1990 appropriations act did not contain a funding condition similar to the one the Council challenged. *Id.* Nonetheless, the Council maintained that the case was not moot and argued that the voluntary cessation exception to mootness applied because Congress might generally withhold appropriated funds in the future. *Id*. at 703. The Court, however, held plaintiffs to the "original theory of their claim"—the particular funding condition originally challenged, which uniquely required the Council to affirmatively enact a specific new law—and declined to endorse an "injurious act as more broadly conceived." *Id*. at 704. "[W]here plaintiffs are resisting a mootness claim," explained the Court, "they must be estopped to assert a broader notion of their injury than the one on which they originally sought relief." *Id*.

This Court has continued to demand precision in defining the wrong attributed to "the voluntarily ceasing defendant" that might recur. *Id*. For the "more broadly [a party] define[s] the wrongful conduct, the more numerous are the possible examples, and the greater the likelihood of repetition." *Id*. Applying that principle here, it is clear that plaintiffs' "original theory of their claim" is not imperfect

enforcement of the District's 2020 policy. *Id*. Rather, the "[t]he wrong" for mootness purposes "must be defined in terms of the precise controversy it spawns," and here the original "wrong" claimed was the District's pre-2020 policy, not any post-2020 practice. *Gittens*, 396 F.3d at 422. As a result, there can be no doubt that the alleged violation has been eradicated, and plaintiffs may not now avoid mootness by "recast[ing] their suit as challenging" something that was not part of their complaint. *Planned Parenthood of Wis., Inc. v. Azar*, 942 F.3d 512, 516 (D.C. Cir. 2019) (rejecting plaintiffs' attempt to reframe their challenge to a particular Funding Opportunity Announcement as one to an ongoing agency grant policy).

Even if enforcement of the 2020 policy was the correct lens through which to view mootness, the district court did not clearly err by rejecting plaintiffs' claims of non-compliance, which were exaggerated. *See* Br. 22-25. Through Melisa Byrd, its Medicaid director, the District submitted evidence that its policy required individualized notice at the point-of-sale, that it had no intention of changing the policy, and that the policy was largely successful, having learned of only one instance of non-compliance in the past year. JA 413-14, 495-98. After learning of that single pharmacy's failure to provide notice to BR, the Medicaid program's chief pharmacist immediately followed up with BR's managed care organization "to discuss both the policy and [BR's] allegations" and to remind it of its "obligations" under the District's notice policy. JA 497 ¶ 13. Moreover, while plaintiffs contend

that 13 of almost 130 District pharmacies that accept Medicaid prescriptions do not follow the 2020 policy, that number is misleading. *See* JA 438. It appears that 11 of those 13 pharmacies actually reported providing denial notices in some form, including on forms provided by insurance companies or by text or email. *See, e.g.*, JA 484-88 (incorrectly summarizing results of survey, in which plaintiffs allege that only three of sixteen pharmacies reported that they provide written notice); JA 483 ¶ 15, 487 ¶ 13 (counting pharmacists who were reticent to answer questions as non-compliant). It was not clear error for the district court to credit the District's evidence of the eradication of the alleged violation and any lingering effects, as compared to plaintiffs' self-contradictory affidavits.[9] *True the Vote*, 831 F.3d at 555; *cf. Hedgpeth v. Rahim*, 893 F.3d 802, 808 (D.C. Cir. 2018) (observing in summary judgment context that the court "'should not adopt [a] version of the facts' that 'is blatantly contradicted by the record, so that no reasonable jury could believe it'" (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007))).

At bottom, the imperfect implementation alleged does not draw into question the fact that the District has changed course and now operates under a policy that requires individualized written notice. JA 409-14. That is all the plaintiffs requested in their complaint. To the extent enforcement of the 2020 policy is relevant, in light

---

[9] In this respect, plaintiffs' evidence was not "unrebutted." Br. 24.

of the District's diligent actions to remedy even sporadic violations, it is unreasonable to say that the effects of plaintiffs' alleged violation, as originally pleaded, have not been completely eradicated.

Plaintiffs' remaining arguments in favor of the voluntary cessation exception lack merit. Plaintiffs maintain that the District failed to carry its "burden to prove that all Plaintiffs receive written notice." Br. 17 (citing *True the Vote*, 831 F.3d at 561-62). The case law on which it relies, however, does not demand that result. In *True the Vote,* plaintiffs complained of unequal treatment by the IRS when their applications for tax-exempt status were selected for more rigorous review on the basis of their organizations' suspected political orientation. 831 F.3d at 555. This Court concluded that the voluntary cessation exception applied where the IRS suspended its practice only "until further notice," where evidence of the agency's limited "progress toward alleviat[ing]" discrimination became available "only five months after the issuance of the district court opinion under review," and where the IRS "admitted to the Inspector General, to the district court, and [this Court]" that some of the plaintiffs' exemption applications still had not been processed. *Id*. at 561-62. The case thus does not stand for the proposition that the District must demonstrate perfect implementation of its unambiguous and wholesale change in policy. *See* JA 414, 495.

Plaintiffs further argue that the District has provided no specific data regarding compliance, funding, training, or monitoring of the notice policy. Br. 17; *see* Br. 18-20. But to show voluntary cessation of a policy that lacked a requirement for written notice, the District is not required to provide any particular statistics or data, and plaintiffs point to no precedent compelling such a showing. Br. 18-20. Once again, plaintiffs' argument conflates a change in policy—which Ms. Byrd's declarations undisputedly demonstrate—with enforcement of the District's policy. But to demonstrate that the District cured the lack of a notice policy, the District need not show that its policy requiring written notice is being "implemented flawlessly," particularly given the requirements for demonstrating municipal liability.[10] JA 537.

---

[10] A provision requiring compliance with the District's notice policy was not included in the one managed care organization's contract that was not subject to renewal in September 2020. *See* JA 496 ¶ 7 & n.1. Plaintiffs argue that without a contractual requirement, persons enrolled in that managed care organization cannot be assured that they will receive the written notice required by the District's policy. Br. 20-21. Not so. The policy was instituted through the January 2020 transmittal that was issued to "All Medicaid Pharmacy Providers" and informed them that they were required to "distribute individualized written notices" to "all beneficiaries who are served by D.C. Medicaid." JA 409. The provision that was included in the contracts for the three managed care organizations whose contract was renewed in September 2020 only "buttressed" the policy set forth in the January 2020 transmittal. JA 496 ¶ 7. Furthermore, Ms. Byrd testified that the District expects that the provision requiring compliance with its notice policy will "be in all future [managed care organization] contracts." JA 496 ¶ 7. Moreover, as a condition of participating in the District's Medicaid program, pharmacies are required to

Finally, the cases on which plaintiffs rely to argue that "mootness does not automatically result from a change in policy" are inapposite. Br. 26; *see* Br. 27-28. For example, the disputed conduct in *Zukerman v. United States Postal Service*, 961 F.3d 431 (D.C. Cir. 2020), was not moot following issuance of new guidelines where there was "no indication" that the new policy meaningfully addressed plaintiff's alleged First Amendment injury. *See id.* at 443-44 (observing that the agency had not "invalidated any postage issued under the prior policy," which plaintiff asserted as evidence of ongoing viewpoint discrimination). As the Court noted there, "correctly 'defining the wrong'" is critical. *Id*. at 443 (quoting *Clarke*, 915 F.2d at 703). Again, the 2020 policy squarely and completely addressed plaintiffs' allegation that there was no provision or policy requiring written notice when a prescription under Medicaid is denied, and the District diligently corrected the lone complaint of non-compliance asserted by plaintiff BR. Plaintiffs' alleged wrong is not ongoing.

Gluth v. Kangas, 951 F.2d 1504 (9th Cir. 1991), is equally inapposite. Br. 29. In *Gluth*, inmates at an Arizona state prison claimed that the Department of Corrections' law library policies denied them meaningful access to the court. *Id*. at 1507. But the claims in *Gluth* were not limited to the absence of a policy; they

---

cooperate with the District's policy to provide "beneficiaries with individualized notices." 29 DCMR § 2701.2(d)(2).

included alleged "deficiencies in library access, legal assistant and law library clerk training, and problems with the indigency standards." *Id*. at 1507. Moreover, the Court found that the declaration "that reasonable law library access would be afforded," on which the state exclusively relied, was vague and conclusory. *Id*. The District's policy here is neither conclusory nor vague; it imposes a clear requirement on all participating pharmacies to provide written notice whenever a prescription under Medicaid is denied. JA 409-14.

B. It is not reasonable to expect that the District will retract its notice policy.

The second criteria of the voluntary cessation exception is also not met here. *See Larsen*, 525 F.3d at 4. The district court correctly found no "reason to believe the District will soon reverse course and retract" its notice requirement. JA 536 n.7; *see* JA 538 (the "likelihood of a future reversion to the prior deficient policy is speculative at best"). Here, the District's Medicaid director testified that the "District has no intention to change the policy requiring pharmacies to provide these individualized written notices." JA 414; *see* JA 495 ¶ 3 (stating further that "the District has no intention of rescinding this policy"). Other than their speculation that the policy could be changed, plaintiffs provided no evidence to rebut the Medicaid director's testimony. The district court did not clearly err in determining that there existed "no more than a cursory suggestion" that the District's notice policy was likely to change. JA 536 n.4; *see Herbert v. Nat'l Acad. of Sci.*, 974 F.2d 192, 197

(D.C. Cir. 1992) (explaining that where a court's disposition of a motion to dismiss for lack of subject matter jurisdiction rests on a determination of disputed facts, it accepts the court's findings "unless they are clearly erroneous"); *see also Comm. in Solidarity with People of El Sal. (CISPES) v. Sessions*, 929 F.2d 742, 744 (D.C. Cir. 1991) (assessing the probability of recurrence is "a matter for the trial judge").

Plaintiffs argue that there should be a presumption of future injury because the District issued its 2020 policy "in a desire to avoid a judicial determination of liability." Br. 32; *see* Br. 33-34. To the contrary, when the government is the defendant, the recurrence factor "must be read in light of the presumption of legitimacy accorded to the Government's official conduct." *PETA*, 918 F.3d at 157 (internal quotation marks omitted). "A presumption of regularity supports the official acts of public officers," and consequently courts have given "declarations by (or on behalf of) government officials—public servants sworn to uphold the law—somewhat higher credence than statements" regarding non-recurrence "made by private parties." *Id*. (citing cases).

The notice policy that the District announced in 2020 is like other government commitments that this Court has found sufficient to establish that it was not reasonable to expect recurrence. *Id*. at 159 (crediting "a new permanent policy that agreed with plaintiff's position" and "formally announced changes to official governmental policy" (internal quotation marks omitted)). In *PETA*, for example,

the Court concluded, based in part on the "presumption of regularity," that a declaration stating the agency's "inten[t]" to "continue posting annual reports" requested under the Freedom of Information Act would moot that aspect of PETA's claim. *Id*. at 158-59; *see also id.* at 158 (remanding with respect to two different categories of information sought, where the declaration "f[ell] short of the necessary precision"). Here, too, the Medicaid director unambiguously committed to maintaining "the policy requiring pharmacies to provide these individualized written notices." JA 414. The District's commitment is sufficient to conclude that it is not reasonable to expect that the "District will soon reverse course and retract" its notice policy. JA 536 n.4; *see PETA*, 918 F.3d at 159; *Worth*, 451 F.3d at 861 (crediting an agency affidavit that the government would "not renew" the challenged policy to conclude that the action was moot under the voluntary cessation doctrine).

Plaintiffs argue that recurrence is likely because the notice policy was instituted by an agency memorandum, not a regulation or statute. Br. 34. But courts do not require any particular form or level of process and have even credited an agency declaration "express[ing] a clear intention to do as the complaint requests." *See PETA*, 918 F.3d at 159 (referencing "statements that courts have credited" and concluding that an appropriate "declaration by (or on behalf of)" agency officials "will moot" the case); *Worth*, 451 F.3d at 861 (crediting an agency affidavit). Plaintiffs also argue that the agency memorandum "may be reversed by Ms. Byrd or

her superiors," or "future officials and mayoral administrations." Br. 35. The District, however, "has no intention of rescinding [its] policy," JA 495 ¶ 3, and the mere possibility that it could be reversed does not mean that it is reasonable to expect that it will be. *See Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997) ("[M]ere power to reenact [a policy] is not a sufficient basis on which a court can conclude that a reasonable risk of recurrence exists.").

This case is unlike the Ninth Circuit's decision in *Sackett v. EPA*, 8 F.4th 1075 (9th Cir. 2021), on which plaintiffs rely. Br. 36. The Sacketts challenged an EPA compliance order stating that their property, on which they planned to build a home, contained wetlands that were subject to regulation under the Clean Water Act. *Id.* at 1079. A "jurisdictional determination" issued the following month and confirmed the same. *Id.* at 1081. Although the agency later represented in a letter that it would not *enforce* compliance, the Ninth Circuit concluded that the letter did not moot the Sacketts' claim because the jurisdictional decision had not been disavowed and evidenced the agency's continued authority to regulate the Sacketts' land. *Id.* at 1083-84; *see also id.* at 1087-88 (explaining further that the presumption of good faith typically afforded the government was not "dispositive" where the EPA informed the Sacketts of its change in position "only on the eve of [its] filing deadline for its opposition brief"). Here, by contrast, the District has completely

disavowed its prior policy through institution of a new policy requiring Medicaid claimants to be provided written notice when their prescription is denied.

Finally, plaintiffs argue that it is reasonable to expect recurrence of the old policy because of the District's "past violations," its purported refusal to "admit[] that it has a constitutional obligation to provide individualized written notice," and because it "waited nine years" before issuing its new policy. Br. 37, 38. The district court, however, did not find a history of past violations, nor did it find that the District instituted its 2020 notice policy simply to escape liability. The District has traditionally instituted many processes to protect the due process rights of Medicaid recipients: it has long had a fair hearing process, requires pharmacies to post signs notifying Medicaid claimants of their rights when a prescription is denied, provides healthcare assistance through various helplines and the Office of the Healthcare Ombudsman, and requires pharmacies to provide, without cost, a three-day temporary supply of a medication denied due to a prior-authorization requirement. *See supra* pp. 4-5. Moreover, plaintiffs acknowledged that the district court's 2017 ruling significantly changed the case because its ruling that "Medicaid beneficiaries have a right to this kind of notice at the pharmacy" was "one of the ones of first impression on this claim." JA 335. Thereafter, the District initiated a pilot program to determine the feasibility of requiring pharmacies to provide written notice at the point-of-sale, and in 2020 it instituted a final policy imposing that requirement.

The District enacted its notice policy in a good-faith effort to expand its practice of providing procedural safeguards to Medicaid claimants when their prescriptions are denied. JA 413 ¶ 4. Although the District's policy has evolved along with the rulings entered in this case, that is not evidence that its current notice policy is mere litigation posturing. *Larsen*, 525 F.3d at 4. And plaintiffs' speculation is insufficient to rebut the presumption that government officials will conduct themselves properly and in good faith. *See CISPES*, 929 F.2d at 744 (observing "the settled practice" of this Court to rely on representations by government officials in voluntary cessation analyses). The length and evolution of this litigation is more indicative of the likelihood that the District will maintain its notice requirement, not retract it.

IV. Plaintiffs' Remaining Arguments Are Unavailing.

A. The court did not abuse its discretion in staying discovery pending a ruling on the District's motion to dismiss.

The "decision whether to stay discovery is committed to the sound discretion of the district court judge." *White v. Fraternal Ord. of Police*, 909 F.2d 512, 517 (D.C. Cir. 1990). "It is settled that entry of an order staying discovery pending determination of dispositive motions is an appropriate exercise of the court's discretion." *Chavous v. D.C. Fin. Resp. & Mgmt. Assistance Auth.*, 201 F.R.D. 1, 2 (D.D.C. 2001). Here the court did not abuse its discretion in staying discovery pending its resolution of the District's motion to dismiss because the discovery

plaintiffs sought was not relevant to the District's mootness argument, and no additional facts were needed to resolve the motion.

Plaintiffs did not seek discovery on any topics relevant to the constitutional sufficiency of the District's 2020 notice policy or whether the policy in fact mooted plaintiffs' claim that the District *lacked* an individualized notice policy. *See supra* Part I.B. Plaintiffs instead sought discovery on an entirely new topic—the 2020 policy's *enforcement*. Plaintiffs stated that they needed to uncover facts surrounding the reasons for the District's change to a policy requiring written notice, how the policy was being implemented, whether the District was actively overseeing and monitoring pharmacy compliance, why the policy was initiated through a transmittal, and whether the District agrees that due process requires the notice offered by its policy. JA 427-33. None of this information, however, would have altered the fact that the policy imposed a notice requirement that previously did not exist and hence mooted the case. The court thus did not abuse its discretion in staying such discovery pending its disposition of the District's motion to dismiss.

In arguing otherwise, plaintiffs rely on *Herbert*, but their reliance is misplaced. Br. 45-46. In *Herbert*, the Court affirmed the district court's dismissal for lack of subject matter jurisdiction and rejected Herbert's argument that the trial court improperly refused to allow discovery, finding that the matter on which Herbert sought to conduct discovery was "superfluous." 974 F.2d at 200-01. So too

here. Nor did the court abuse its discretion in staying discovery because the merits were "inextricably intertwined with mootness," as plaintiffs now contend. Br. 46. Once again, the discovery requested would not have gone to the merits of the complaint or changed the finding on which the court concluded that plaintiffs' claim was moot—that the District's policy "provided exactly the notice claimed by plaintiffs to be required by the Fifth Amendment." JA 534.

B. The case does not meet the extraordinary criteria necessary to assign a new district court judge.

Plaintiffs complain that the district judge has been "extraordinarily unfair" to them because the court considered multiple motions to dismiss by the District without allowing them discovery or considering their motion for class certification and contend that the case should be reassigned. Br. 47; *see* Br. 48-51. But "[r]eassignment is unusual relief" granted only when "impartiality, the appearance of justice, and the possibility of waste and duplication" so require. *Thompson v. District of Columbia*, 967 F.3d 804 (D.C. Cir. 2020). Here, plaintiffs specifically argue that the case should be reassigned because "the district judge cannot be expected upon remand to move the case forward on the merits," contending that to date the "case has not moved an inch." Br. 52. Neither assertion is correct.

The district court appropriately moved this case forward after each of the two remands ordered by this Court. In 2013, after this Court's initial remand, plaintiffs filed an amended complaint, but in March 2014 the district court granted the

District's motion to dismiss. JA 15. This Court affirmed the dismissal of plaintiffs' Title XIX claims but remanded for further proceedings on plaintiffs' due process claims, issuing its mandate in late August 2015. JA 15. Following that remand, the District filed an updated motion to dismiss, which the district court granted in part and denied in part in March 2017. JA 17. By this point, the court had advanced the case significantly, narrowing it to a single issue.

Thereafter, plaintiffs waited eighteen months before moving to amend their complaint and to certify a class, and a month later they moved for summary judgment and an injunction. JA 18-19. In April 2019, the court granted plaintiffs' motion for leave to file a second amended complaint and the following month entered a schedule for filing and addressing the District's motion to dismiss and the plaintiffs' pending motions, as well as a period for discovery. JA 21-22; *see supra* p. 8-9 n.5. Pursuant to the court's schedule, the District filed its motion in February 2020, which, after numerous subsequent filings, including a request for extension by plaintiffs, JA 27, the court granted in March 2022. JA 26-29. Nothing in this chronology supports plaintiffs' contention that the district judge cannot be trusted to move this case forward should it be remanded.

To the contrary, "[d]istrict judges are routinely entrusted to follow directions on remand from appellate courts, and they well understand and embrace their obligation to do so." *United States v. Gaskins*, 6 F.4th 1350, 1366 (D.C. Cir. 2021).

Furthermore, "[r]eassignments are reserved for unusual circumstances" not implicated here. *Id*. For example, in *Thompson*, the Court considered a request to reassign the case after it had been remanded for a fourth time and nevertheless was sua sponte dismissed by the district court in a minute order—more than a decade after plaintiff brought suit. 967 F.3d at 808-09, 817. Even under those circumstances, this Court refused Thompson's request to reassign the case to a different judge on remand. It noted the rarity of reassignment and that "[t]his court's disagreement on the law says nothing about the district court's responsible execution of its duties." *Id*. at 817; *see United States v. Abney*, 957 F.3d 241, 254 (D.C. Cir. 2020) (remanding for resentencing but denying reassignment, noting that the "case is assigned to an experienced district judge," who it expected would be able to approach resentencing "with a clean slate and an open mind").

Here, too, there is no reason to believe that the district judge is prejudiced, will be unable to follow this Court's mandate, or will decline to properly move this case forward should it be remanded.

CONCLUSION

This Court should affirm the order of the district court.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

THAIS-LYN TRAYER
Deputy Solicitor General

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

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 724-6635
(202) 730-0491 (fax)
richard.love@dc.gov

November 2022

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 11,357 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 365 in Times New Roman 14 point.

/s/ Richard S. Love
RICHARD S. LOVE