ORAL ARGUMENT SCHEDULED FOR JANUARY 27, 2023

No. 22-7060

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

ELSA MALDONADO, *et al.*,
Plaintiffs-Appellants,

v.

DISTRICT OF COLUMBIA,
Defendant-Appellee.

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

REPLY BRIEF FOR APPELLANTS

MARTHA JANE PERKINS
National Health Law Program
1512 E. Franklin Street, Suite 110
Chapel Hill, NC 27514
(984) 278-7661
perkins@healthlaw.org

KATHLEEN L. MILLIAN
MICHAEL L. HUANG
NICHOLAS F. SOARES
STEPHANIE A. MADISON
Terris, Pravlik & Millian, LLP
1816 12th Street, NW, Suite 303
Washington, DC 20009
(202) 682-2100
kmillian@tpmlaw.com
mhuang@tpmlaw.com
nsoares@tpmlaw.com
smadison@tpmlaw.com

Counsel for Plaintiffs-Appellants

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SUMMARY OF ARGUMENT

A case is not moot if the violation alleged is ongoing. *See, e.g.*, *True the Vote v. IRS*, 831 F.3d 551, 561-64 (D.C. Cir. 2016). Here, Plaintiffs alleged the "ongoing" failure of the District to provide individualized written notice to Plaintiffs through its "policies, procedures, and practices" or lack thereof. JA165-66, 198, paras. 1, 153. Those allegations are supported by unrebutted evidence.

The district court erred by finding mootness without requiring the District to show that its due process violations had ceased. Brief for Appellants ("Pl. Br.") 15-28. While the District admits that it had the burden to prove mootness through voluntary cessation (Brief for Appellee ("Def. Br.") 29), it does not deny that it failed to produce evidence of actual cessation, and the record contains no evidence of cessation. In fact, the District admits that the evidence shows a continuing failure to provide due process. *Id.* at 32-34.

Unable to deny the evidence, the District argues that it does not matter whether the District is, in practice, still failing to provide individualized written notice, because it claims erroneously that Plaintiffs' complaint challenged only the District's lack of policies. According to the District, since it now has a policy in the form of the Transmittal Memo, Plaintiffs are attempting to "reframe" their claim as a challenge to the District's practices rather than policies. Def. Br. 30. The Court

need only look to Plaintiffs' complaint to see that the District's argument is without merit.

Beyond the threshold showing of cessation, the District had to show (1) that there is no reasonable expectation that its violations will recur and (2) that the Transmittal Memo "completely and irrevocably eradicated the effects of the alleged violation." *True the Vote*, 831 F.3d at 561. The District does not address the district court's failure to apply that test. Moreover, the District cannot meet that test.

On the issue of reassignment, the District does not dispute the facts which on their face evince unfairness and bias, *i.e.*, this case has been pending for more than 12 years without discovery, with the district court denying every effort by Plaintiffs to advance the case while entertaining motions to dismiss filed seriatim by the District, to the detriment of the health, security, and constitutional rights of Plaintiffs. The District also does not address all of the factors in the test for reassignment. Since that test is met, the case should be reassigned.

ARGUMENT

I. THE DISTRICT'S FAILURE TO PROVIDE PLAINTIFFS WITH DUE PROCESS IS ONGOING

This Court has explained that "[t]he fundamental concept of mootness is quite straightforward. . . . if there remains no conduct to be enjoined, then normally there is no relief that need be granted" and the case is moot. *True the Vote*, 831 F.3d at

561. Conversely, if there is ongoing conduct to be enjoined, there is relief to be granted, and the case is not moot.

As the District admits, "correctly defining" the conduct to be enjoined, *i.e.*, the "wrong" in the complaint, "is critical" to the mootness inquiry. Def. Br. 36 (quoting *Zukerman v. USPS*, 961 F.3d 431, 443 (D.C. Cir. 2020)). We start there: as evident in the first paragraph of the complaint, Plaintiffs alleged that the District's "policies, procedures, and practices" resulted in the failure to provide Medicaid recipients with individualized written notice when they are denied prescription medication benefits.[1] *See* JA165-66, para. 1 (emphasis added). Beyond the first paragraph, the allegations show that Plaintiffs' injury lies in the deprivation of notice and, therefore, the "wrong" complained of is the District's failure to provide notice, which goes beyond the existence *vel non* of a policy. *See* pp. 11-19 below. The complaint specifies that the District's failure is "ongoing." JA198, para. 153. As shown below, that allegation is supported by the evidence.

A. THERE IS NO EVIDENCE THAT THE DISTRICT'S DUE PROCESS VIOLATIONS HAVE CEASED

As a threshold matter, a party claiming mootness based on voluntary cessation must show that its unlawful conduct has actually ceased. *See True the Vote*, 831 F.3d at 561-62. This Court has emphasized that voluntary cessation means total

[1] This language has been used since the inception of the case in each iteration of the complaint. *See* JA33, para. 1; JA73, para. 1.

cessation, "not near cessation." *Id.* at 561. The district court erred by finding mootness without evidence that the District's violations ceased. Pl. Br. 15-28.

The District does not deny that it failed to submit evidence below demonstrating actual cessation.[2] Indeed, the District did not produce a shred of evidence that a single person has ever actually received written notice pursuant to the Transmittal Memo. The District summarizes its evidence as follows:

> 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.

Def. Br. 32. Statements about what the Transmittal Memo is supposed to require, a conclusory statement that the policy has been "largely successful," without supporting facts, and an admission of non-compliance, are grossly insufficient to meet the District's heavy burden to prove total cessation of its violations.

[2] At a July 2021 status conference, the district court asked the District to address three questions, including the critical question of "whether any [Plaintiffs] are still not receiving notice[.]" JA504; *see* Pl. Br. 12. The District's Statement of the Case leaves out this question. Def. Br. 11-12 (representing that the district court asked only two questions).

Plaintiffs' opening brief identified six reasons why the District's evidence is insufficient. Pl. Br. 16-22. The District fails to address three. First, the District does not address that, by its own admission, any program implementing or enforcing the Transmittal Memo requires funding. *Id.* at 18-19. In November 2019, the District represented to the district court that it would cost $572,000 to run a program providing individualized written notice for 12 months. *Id.*; JA438. There is no evidence that any such program was, is, or will be funded.

Second, the District does not address that there is no evidence that the District has policies, procedures, or practices to "ensure [that] network pharmacies distribute" individualized written notice, "monitor and track distribution" of notice, and require contractors to submit reports to the District about pharmacy compliance, as the Transmittal Memo supposedly requires. Pl. Br. 20 (quoting JA496, para. 7). Indeed, the District has admitted that it only learned of its failures to provide Plaintiff BR with individualized written notice because Plaintiffs presented that evidence in a motion (JA492), indicating that the District does not know itself whether notice is being provided. If the District does no monitoring or enforcement, it cannot ensure compliance with the Memo.

Third, the District does not address that its position has long been that it has no control over its managed care contractors and that it would be "purely speculative" whether the District's policies would be enforced by managed care

organizations, their contractors, and pharmacies. Pl. Br. 21-22 (quoting JA219, 267, and 491, n.1). Given that position, the District cannot show that the large majority of class members receive such notice.

The District fails to adequately respond to three other reasons. Plaintiffs explained in their opening brief that a declaration that a policy is "largely successful" is insufficient to prove mootness. Pl. Br. 17 (quoting JA497, para. 12). The District responds that it does not have to "demonstrate perfect implementation" of the Transmittal Memo. Def. Br. 34. However, as the caselaw shows, to prove mootness, it must provide evidence of cessation. *See, e.g.*, *True the Vote*, 831 F.3d at 561-62; p. 10 below.

Plaintiffs explained that the District did not provide "specific facts, such as data or statistics," to show that Plaintiffs are receiving notice. Pl. Br. 18. The District responds that it is "not required to provide any particular statistics or data[.]" Def. Br. 35. However, the point is not that the District had to provide "particular statistics or data" but that they had to provide "specific facts" to meet its burden of proof, and failed to do so.

Plaintiffs explained that the District admitted that one of its managed care contracts lacks any provision requiring the managed care organization to provide written notice. Pl. Br. 20-21. The District responds that, nonetheless, there is assurance that Plaintiffs will receive notice because a January 2020 transmittal

requires providers to "distribute individualized written notices," the District expects a provision to be written into all future contracts, and pharmacies are required to cooperate with the District's policies. Def. Br. 35-36, n.10. However, the District admits that despite all of those supposed assurances, it violated the due process rights of Plaintiff BR, who was enrolled with the managed care organization that was not contractually obligated to provide notice (Def. Br. 36), thus illustrating the ongoing nature of the District's violations.

B. EVIDENCE SHOWS THAT THE DISTRICT CONTINUES TO VIOLATE PLAINTIFFS' DUE PROCESS RIGHTS

Even though it was the District's burden to prove that its due process violations had ceased, Plaintiffs adduced evidence showing that the violations are ongoing. That evidence included declarations reporting that 13 of 16 pharmacies in all eight wards of the city, surveyed 17 months after the issuance of the Transmittal Memo, were not providing required notice. JA478-83, 484-88.

The District did not rebut that evidence below. There, the District's response was that it was "unable to assess the import of" the evidence. JA492, n.3. Now, the District claims that "plaintiffs' evidence was not 'unrebutted'" (Def. Br. 33, n.9) because "[i]t 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." *Id.* at 33. That conclusory and incorrect reasoning does not constitute a rebuttal of Plaintiffs' evidence.

As shown above, pp. 3-7, the District provided no "evidence of eradication of the alleged violation." Furthermore, there is nothing "self-contradictory" about Plaintiffs' declarations. The Wolf Declaration clearly and precisely summarizes the results of Plaintiffs' survey:

> Only one out the nine pharmacists with whom I spoke on June 15-17, 2021, stated that their pharmacy was currently providing individualized notice consistently pursuant to [Department of Health Care Finance] Transmittal #20-01. I was informed by the pharmacists in seven of the nine pharmacies that I visited that they do not provide individualized written notices at the time Medicaid coverage for a prescription is denied. One pharmacist stated that their pharmacy sometimes handed out the notice attached to [Department of Health Care Finance] Transmittal #20-01.

JA479, para. 6 (emphasis added).

Similarly, the Fortna Declaration states that:

> Only two out of the seven pharmacists with whom I spoke on June 16-17, 2021, stated that their pharmacy was currently providing individualized notice consistently pursuant to [Department of Health Care Finance] Transmittal #20-01. The remaining five pharmacists did not recognize the individualized notice form attached to [Department of Health Care Finance] Transmittal #20-01.

JA485, para. 6 (emphasis added).

The District asserts that "[i]t appears that 11 of those 13 pharmacies [which Plaintiffs reported as not providing notice, out of 16 total] actually reported providing denial notices in some form, including on forms provided by insurance companies or by text or email." Def. Br. 33. However, the record contains no evidence of such forms from insurers, including text messages or emails, and the

District has never claimed that such notices are constitutionally adequate. Moreover, such notices are not the form of notice supposedly required by the Transmittal Memo. *Compare* JA411-12 (sample form of notice) *with* JA486, para. 10 ("printout from the insurer . . . does not include information on how to appeal"). Thus, the District's assertion supports the conclusion that the large majority of pharmacies surveyed—13 of 16—are not in compliance with the Transmittal Memo. Thus, the statements in Plaintiffs' declarations that those pharmacies are not "currently providing individualized notice consistently pursuant to" the Memo is accurate, not contradictory. JA479, para. 6; JA485, para. 6.

The District also suggests that Plaintiffs incorrectly counted two pharmacists "who were reticent to answer questions as non-compliant." Def. Br. 33 (citing JA483, 487, paras. 13, 15). However, Plaintiffs counted them as non-compliant because they were non-compliant, not "reticent to answer questions." *See* JA483, para. 15 (pharmacist "does not use [the form of notice] every time"); JA487, para. 13 (pharmacist did not recognize the form of notice required by the Transmittal Memo).

Even if the District's interpretation of the evidence were correct, it amounts to an admission that the District has not ensured compliance with the Transmittal Memo. That is, even assuming that 11 (of 16) pharmacies provide some kind of notice from insurance companies, the District does not dispute that at least two

pharmacies provide no individualized written notice at all. The District also admits to failing to provide notice to Plaintiff BR, which likewise was a post-Transmittal Memo violation. Def. Br. 32; *see also* JA475-76, paras. 11-16. Thus, indisputably, the District's violations of the Due Process Clause are ongoing.

The District characterizes those ongoing violations as "sporadic" or "imperfect implementation."[3] Def. Br. 16, 33, 34. However, this Court explained in *True the Vote* that the "heavy burden of establishing mootness is not carried by proving that the case is nearly moot, or is moot as to a 'vast majority' of the parties. The[] heavy burden requires that they establish cessation, not near cessation." 831 F.3d at 561; *see also Polo Fashions v. Dick Bruhn, Inc.*, 793 F.2d 1132, ,1135 (9th Cir. 1986) ("the reform of the defendant must be irrefutably demonstrated and total"). If the District's due process violations are ongoing, even as to some members of the Plaintiff class, the case is not moot. *See id.*

[3] The District misleadingly represents that "non-compliance is rare" apparently on the basis that "plaintiffs have offered allegations that the policy was not followed on only seven occasions . . . . even though . . . there are thousands of prescription benefits denials every year." Def. Br. 28. Although District has never offered evidence about the frequency of compliance, the available evidence indicates that non-compliance is not rare. The seven occasions of non-compliance cited by the District were suffered by two Plaintiffs alone and of course do not represent the only instances of non-compliance among the total number of denials, as the District implies. As shown above, Plaintiffs' declarations show that 13 of 16 pharmacies surveyed do not comply with the Transmittal Memo. Extrapolation from that evidence suggests systemic non-compliance.

C. PLAINTIFFS' CLAIM CHALLENGES THE DISTRICT'S FAILURE TO PROVIDE INDIVIDUALIZED WRITTEN NOTICE, NOT THE ABSENCE OF A POLICY

Unable to deny the evidence, the District resorts to mischaracterizing Plaintiffs' claim. The District repeatedly argues that Plaintiffs' due process claim concerns only policy, not practice, and that Plaintiffs on appeal seek to "transform their complaint from a policy to a practice claim[.]" Def. Br. 16; *see also id.* at 18, 25, 26. The Court need only read Plaintiffs' complaint to see that that characterization is wrong. From the outset, the complaint expressly challenges the District's "policies, procedures, and practices" (JA165-66, para. 1 (emphasis added)), and further alleges:

> 2. Named plaintiffs have had Medicaid coverage denied by defendant for prescriptions as written without individualized written notice. As a result of defendant's failure to provide individualized written notice, named plaintiffs were unable to obtain medically necessary medications . . . .
>
> 10. Named plaintiffs bring this action on behalf of themselves and all others similarly situated. Plaintiffs' class consists of all persons who have applied for, received, or are receiving D.C. Medicaid who present a prescription to a Medicaid-participating provider . . . and who do not, or will not, receive timely and adequate individualized written notice when the prescription is denied or is not filled as written.
>
> 11(a) . . . [Class members] do not or will not receive individualized written notice when they are denied Medicaid coverage . . . [and]
>
> 11(b) There are questions of law and fact common to the class, namely whether defendant has denied class members their procedural rights under the Fifth Amendment of the Constitution by failing to ensure timely and adequate individualized written notice when Medicaid coverage for class members' prescriptions as written is denied . . . .

> 19. . . . [Because] Plaintiffs have a protected property interest in prescription drug benefits . . . . [t]he due process required includes timely and adequate individualized written notice . . . .
>
> 24. . . . Both when the claim is denied in its entirety and when the prescription is filled differently than as written, persons seeking Medicaid coverage are not provided with individualized written notice . . . .
>
> 32. [In response to information requests submitted by Plaintiffs' attorneys] [the Department of Health Care Finance's] responses included no individualized written notices . . . .
>
> 38. Defendant is failing to provide timely and adequate individualized written notice when Medicaid coverage of prescription drugs is denied for a prescription as written. . . .
>
> 56. Ms. Maldonado never received [individualized] written notice . . . . Defendant's actions and inactions deprive Ms. Maldonado of her due process notice rights . . . .
>
> 125. . . . [N]either BR nor her parents received any [individualized] written notice . . . .
>
> 148. As a result of defendant's failures to provide timely and adequate individualized written notice, persons receive no notice . . . .
>
> 153. Defendant's actions and inactions amount to ongoing policy, pattern, practice, and/or custom that violate plaintiffs' rights under the Due Process Clause of the Fifth Amendment of the Constitution. . . .
>
> 156. Defendant has deprived plaintiffs of Medicaid benefits without complying with the due process standards set forth in *Goldberg v. Kelly*[.]

JA165-99 (emphases added). Those allegations set forth a claim based on the District's failure to provide individualized written notice to Plaintiffs and explicitly encompass "actions and inactions" which "amount to ongoing policy, pattern, practice, and/or custom." JA198, para. 153.

Likewise, in requesting relief, Plaintiffs' complaint explicitly seeks "declaratory and injunctive relief . . . requiring the District of Columbia to give them timely and adequate individualized written notice"—not merely a policy about individualized written notice. JA166, para. 3. Plaintiffs specified that they request:

> (1) Certification of this action, as a class action . . . ;
>
> (2) A declaratory judgment pursuant to 28 U.S.C. 2201 and Rule 57 of the Federal Rules of Civil Procedure that defendant's policies, practices, and procedures alleged herein violate the named plaintiffs' and the plaintiff class's rights under the Due Process Clause of the Fifth Amendment to the Constitution;
>
> (3) A permanent injunction ordering defendant and defendant's agents, successors, employees, subordinates, and attorneys, to comply with the Due Process Clause of the Fifth Amendment of the Constitution;
>
> (4) Retention of jurisdiction over this action to ensure defendant's compliance with the mandates of the Court's orders;
>
> (5) An award of reasonable attorneys' fees and costs . . . ; and
>
> (6) Such other relief as may be deemed proper by the Court.

JA199 (emphases added). That requested relief explicitly goes beyond policy.

Plaintiffs agree that the complaint contained factual allegations about the District's lack of policies because, at the time of the complaint, the District had no policies regarding individualized written notice whatsoever. *See* JA172-76, paras. 27-37. However, the fact that the District lacked policies of course did not limit Plaintiffs' legal claim—which is about the deprivation of due process—to a claim about policies alone.

Plaintiffs note that claims involving the deprivation of due process inherently concern practices that deprive persons of due process, not only policies or the lack thereof. Put another way, a Medicaid beneficiary does not suffer injury by being deprived of a policy; rather, a beneficiary suffers injury by being deprived of procedural due process. *See Carey v. Piphus*, 435 U.S. 247 (1978) ("Procedural due process rules are meant to protect persons . . . from the mistaken or unjustified deprivation of life, liberty, or property").

Plaintiffs' complaint has long been understood by this Court and the District to mean what it says. This Court, in its two previous reversals of the district court, summarized Plaintiffs' claim and corresponding relief clearly. In 2012, this Court said that:

> Plaintiffs allege that the District, in violation of . . . federal . . . law, systematically fails to provide Medicaid recipients with timely and adequate written notice . . . . Plaintiffs seek no compensation for either the expense or inconvenience caused by [the Department of Health Care Finance's] failure to provide adequate notice. Instead, they request declaratory and injunctive relief requiring the District to provide the procedural protections that they claim are mandated . . . by the Due Process Clause.

NB ex rel. Peacock v. District of Columbia (*NB II*), 682 F.3d 77, 81 (D.C. Cir. 2012) (emphases added).

In 2015, this Court said that:

> [Plaintiffs] contend that the District . . . ha[s] systematically failed to provide Medicaid recipients with "adequate and timely notice . . ." when denying prescription drug coverage. Pls.' Amend. Compl. ¶ 1.

NB ex rel. Peacock v. District of Columbia (*NB IV*), 794 F.3d 31, 37 (D.C. Cir. 2015) (emphasis added). The Court explained that "[t]he final step in the due process inquiry calls for assessing whether the plaintiffs received constitutionally adequate process in connection with the denial of benefits." *Id.* at 44 (emphasis added).

Despite its current argument about the scope of Plaintiffs' claim, the District previously had no trouble reading the complaint. For nearly a decade before the Transmittal Memo, through four motions to dismiss, the District accurately described Plaintiffs' claim and corresponding relief as concerning the failure of the Plaintiffs to receive due process notice. For example, in 2013, in its second motion to dismiss, the District acknowledged that:

> Plaintiffs' . . . Amended Complaint essentially alleges a single claim, the gravamen of which, according to them, is that [the Department of Health Care Finance] has failed to ensure that Medicaid beneficiaries receive adequate notice when their prescription drug coverage is denied at retail pharmacies. . . . Plaintiffs seek no compensatory relief. . . . Instead, they request a declaration that their rights have been violated and a corresponding injunction requiring the District to provide procedural protections that comply with . . . the Due Process Clause.

RD46-1, pp. 8-9 (emphases added). In 2016, in its third motion to dismiss, the District acknowledged that:

> Plaintiffs ask the Court to find that, whenever they leave a retail pharmacy empty-handed, due process requires that they receive something in writing informing them that "[their] claim for prescription drugs is being denied or reduced, the reason for the denial or reduction, [their] right to a hearing, and the circumstances under which [their] coverage may be reinstated pending a hearing." Amend. Compl. ¶ 47.

RD64, p. 17 (emphasis added). In 2019, in its fourth motion to dismiss, the District acknowledged that:

> [T]he injunction plaintiffs seek, [is] to change the District's "policies, practices, and procedures" to ensure they "comply with the Due Process Clause[.]"

RD102-1, p. 17 (emphasis added). Thus, the District was well aware that Plaintiffs complained that they did not receive individualized written notice and were not asking merely that the District issue a written policy.

Only after the District issued the Transmittal Memo in 2020 and moved to dismiss for the fifth time based on mootness did it begin to argue that Plaintiffs' claim was limited to lack of a policy. *See* RD130-1, pp. 12-13; RD136, p. 10. Thus, contrary to the District's assertion that Plaintiffs are pleading a "new" practice claim "for the first time on appeal" (Def. Br. 16), the record shows that the District, not Plaintiffs, is attempting to recast the complaint by ignoring its plain language.

Contrary to the District's argument, Plaintiffs did not need to amend their complaint to plead a new claim about the District's "post-2020 *practice* of not providing written notice." Def. Br. 26. As shown above, Plaintiffs' claim already challenges the District's practice of not providing written notice, whether pre- or post-2020, because, as the evidence shows, that practice persisted after the issuance of the Transmittal Memo. *See, e.g.*, *True the Vote*, 831 F.3d at 561-64; *Zukerman*, 961 F.3d at 443; *Gluth v. Kangas*, 951 F.2d 1504, 1507 (9th Cir. 1991). The District

cites no authority for the proposition that issuance of a policy while a case is pending will automatically moot an already pleaded practices claim, requiring a plaintiff to plead a new, post-policy practices claim. The sole case relied on by the District, *Clarke v. United States*, 915 F.2d 699 (D.C. Cir. 1990), is inapposite, as the District's own description of the case demonstrates. Def. Br. 31. In the District's words:

> In *Clarke* . . . 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. . . . 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.

In other words, the conduct challenged by the Council was a funding condition in legislation that expired, and the new legislation contained no such condition, so the challenged conduct was not ongoing. Here, the District's violations are ongoing.

In sum, since Plaintiffs' complaint explicitly encompasses "policies, procedures, and practices," there is no merit to the District's argument that Plaintiffs' claim is about policy alone, or that the Transmittal Memo mooted any pre-Memo "practices" claim. Therefore, there is also no merit to the District's argument that the Transmittal Memo provides complete relief to Plaintiffs. Because Plaintiffs complained about more than the District's lack of a policy and sought more than a policy as relief, *a fortiori*, the issuance of a policy does not constitute complete relief.

See, e.g., *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam) ("a partial remedy is sufficient to prevent a case from being moot" (cleaned up)).

The District attempts to relitigate settled issues by arguing that, even if Plaintiffs' complaint encompasses the District's practices, Plaintiffs failed to state a claim because they have not shown municipal causation under *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978). Def. Br. 26-28. That argument is meritless. This Court has already held that Plaintiffs stated a claim under the Fifth Amendment and that the District takes state action through its contractors when it denies prescription drug benefits at the pharmacy. *NB IV*, 794 F.3d at 41-44. Moreover, the district court dismissed this case based on mootness (not Plaintiffs' failure to state a claim), so the District (not Plaintiffs) bore the heavy burden of proof. To refute mootness, Plaintiffs did not have to make any showing under *Monell*.

Finally, the Transmittal Memo was challenged by Plaintiffs as containing a material inaccuracy regarding the appeal process and for incorrectly identifying managed care organizations.[4] RD139, pp. 26-27; JA517. Thus, even if Plaintiffs' claim were about policies only, in its current form, the Memo would neither satisfy

[4] Therefore, the District is wrong that "plaintiffs have not challenged the district court's determination of what process is due, and that determination is law of the case" (Def. Br. 22), and wrong that plaintiffs did not "argue in the district court that the new policy itself offends due process, thereby forfeiting any challenge." *Id.* at 22-23.

due process nor provide complete relief to Plaintiffs. Without addressing Plaintiffs' objections to the form of notice, the district court found that "the District has provided exactly the notice claimed by plaintiffs to be required by the Fifth Amendment" (JA534) and that plaintiffs did not "directly challenge the sufficiency of the policy as a general matter[.]" JA537. These statements are incorrect factually—because Plaintiffs did challenge the policy—and incorrect legally because deficiencies in the form of a notice may preclude mootness. *See Knox v. Service Employees Int'l Union*, 567 U.S. 298, 307-08 (2012) (case not moot because "there [was] still a live controversy as to the adequacy" of notice). Thus, the district court's failure to address the issue is another basis for reversal.

II. EVEN IF THE DISTRICT'S VIOLATIONS CEASED, THE CASE IS NOT MOOT

Cessation of unlawful conduct is a threshold issue. *See True the Vote*, 831 F.3d at 561-62. Assuming the District showed cessation (which it did not), it still had to show that "(1) there is no reasonable expectation that the conduct will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.* The district court did not require such a showing and the District cannot make one now based on the record.

A. THE DISTRICT COURT FAILED TO APPLY THE TEST FOR VOLUNTARY CESSATION

As Plaintiffs showed in their opening brief, "[t]he district court neither cited nor applied legal standards to the District's claim of mootness," which is a basic error of law. Pl. Br. 15 (citing *Ameziane v. Obama*, 699 F.3d 488, 494-95 (D.C. Cir. 2012)). Since the District did not address that issue in its brief or otherwise defend the district court's failure to apply the law, the error should be treated as conceded. *Wiesner v. Federal Bureau of Investigation*, No. 10-5013, 2010 WL 3734097, at *1 (D.C. Cir. Sept. 23, 2010) (per curiam); *see also United States v. Reeves*, 586 F.3d 20, 26 (D.C. Cir. 2009).

B. THE DISTRICT DOES NOT MEET THE TEST FOR VOLUNTARY CESSATION

Without acknowledging that the district court failed to apply the law of voluntary cessation, the District argues that it satisfies the two-part test. *See* Def. Br. 29-42. It does not.

The District first argues that it meets the eradication prong. Def. Br. 30-37. "Eradicate" means "do away with as completely as if by pulling up by the roots" (https://merriam-webster.com) or "remove or destroy utterly" (https://dictionary.com). A Transmittal Memo cannot "completely and irrevocably eradicate[] the effects of" the District's due process violations if those violations

never ceased and are, in fact, ongoing. *True the Vote*, 831 F.3d at 561; *see* pp. 7-11 above.

However, assuming *arguendo* that the District's violations ceased, the District's argument is based on its incorrect reading of Plaintiffs' claim as challenging only the absence of a policy. *See* Def. Br. 30 ("The District's transmittal memo completely eradicated the absence of a notice policy about which plaintiffs complained" (emphasis added)). As shown above, pp. 11-19, Plaintiffs' claim is about the District's failure to provide individualized written notice. Thus, to meet its burden, the District must show more than a policy; it must show that it is actually providing notice to Plaintiffs.

Moreover, the District was required to show that the Transmittal Memo eradicated the "effects of the alleged violation," not merely the violation itself. *True the Vote*, 831 F.3d at 561 (emphasis added). Thus, even if the violation was only the lack of a policy, the District had to show more than the issuance of a policy. Although the District makes repeated conclusory assertions that it eradicated the "effects" of its violation (Def. Br. 1, 16, 29, 30, 33, 34) it never explains how the policy eradicated those effects, particularly given that it admits to "sporadic violations." *Id.* at 34; *see* pp. 7-11 above.

Next, the District argues that "[i]t is not reasonable to expect that the District will retract its notice policy."[5] Def. Br. 37. Again, that argument is based on an incorrect reading of Plaintiffs' claim. The standard is that "there is no reasonable expectation that the conduct will recur." *True the Vote*, 831 F.3d at 561 (emphasis added). The conduct at issue is the District's failure to provide individualized written notice to Plaintiffs. Such conduct may recur—and, in fact, has continued—without retraction of the Transmittal Memo.

In addition, the District's violations are likely to recur (or continue) in part because the Transmittal Memo is not durable and could be reversed by the stroke of a pen. Pl. Br. 34-35 & n.3. The Transmittal Memo does not even rise to the level of an official opinion from an attorney general which cases have deemed insufficient to establish mootness. *See, e.g.*, *Northland Family Planning Clinic v. Cox*, 487 F.3d 323, 341-42 (6th Cir. 2007); *Vermont Right to Life Committee v. Sorrell*, 221 F.3d 376, 383-84 (2d Cir. 2000). There is no regulation or statute in the District that guarantees the provision of individualized written notice. Rather, District

[5] The District asserts that "[t]he 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." Def. Br. 37 (quoting JA 536, n.4). This is erroneous for two reasons. First, the burden is on the District, not Plaintiffs, to show that the District's conduct will not recur. Pl. Br. 31. The district court reversed that burden. *Id.* Second, "clear error" is not the standard by which this Court reviews the district court's failure to apply the law regarding the likelihood of recurrence. That error of law is reviewed de novo. *Ameziane*, 699 F.3d at 494-95.

regulations only require 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 . . . [p]roviding beneficiaries with individualized notices, letters, or pamphlets." 29 D.C.M.R. § 2701.2(d) (emphasis added). The Transmittal Memo is such an "initiative" that could be changed or reversed at any time.

This case is unlike the cases cited by the District (Def. Br. 38-39) in which the government commits to "continue" doing something that it was already doing, "consistent with its practice" (*PETA v. USDA*, 918 F.3d 151, 158 (D.C. Cir. 2019)), or to not renewing an already expired policy. *Worth v. Jackson*, 451 F.3d 854, 860 (D.C. Cir. 2006). Here, the remedy for the District's violations requires it to take affirmative action to implement a permanent program of policies, procedures, and practices providing for procedural due process protections. In short, it requires effort and resources. Even if the District is entitled to a presumption of good faith as the government (Def. Br. 38), an agency memo is not enough to ensure that the District will regularly provide due process notice to Plaintiffs or that its violations will not recur. The high bar for mootness—that it must be "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur"—demands more. *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

Finally, even if the government is entitled to a good-faith presumption generally, the District's history of past violations and failure to comply with its own prior policies regarding signage at Medicaid pharmacies belie that presumption here. *See* Pl. Br. 37-38. The District's response is that "[t]he district court . . . did not find a history of past violations[.]" Def. Br. 41. But that is precisely the issue that Plaintiffs are appealing: the district court conducted no analysis and made no findings on the issue, and its failure to do so was error. The presumption is also belied by the District's continued refusal to admit that it has a constitutional obligation to provide individualized written notice to Plaintiffs. Pl. Br. 38-39.

III. THE TEST FOR REASSIGNMENT IS MET

Plaintiffs agree with the District that reassignment is "reserved for unusual circumstances." Def. Br. 46. That is this case. On its face, it is unusual—and extraordinarily unfair—for a case to be pending for 12 years without any discovery.

The Court considers three factors for reassignment: "impartiality, the appearance of justice, and the possibility of waste and duplication[.]" *Thompson v. District of Columbia*, 967 F.3d 804, 817 (D.C. Cir. 2020). The District addresses only the first factor, asserting that the district court is not biased because it "appropriately moved this case forward after each of the two remands ordered by this Court." Def. Br. 44.

However, as Plaintiffs have explained, bias is evident in the district court's disparate treatment of motions filed by the parties: the district court has entertained numerous motions to dismiss filed by the District while refusing to adjudicate the merits of motions filed by Plaintiffs. Pl. Br. 8, 48-51. The District does not dispute those facts. In addition, bias is evident in the district court's treatment of the issue of mootness. The district court expressly encouraged the District to try to moot the case, gave it more than a year to attempt to do so, and did not permit Plaintiffs to take discovery. *Id.* at 51-52. The District does not dispute those facts either.

The District does not address the other factors of the reassignment test: "the appearance of justice, and the possibility of waste and duplication[.]" *Thompson*, 967 F.3d at 817. Thus, these factors should be treated as conceded. *Wiesner*, 2010 WL 3734097, at *1.

The District cites *Thompson v. District of Columbia*, 967 F.3d at 808-09, to show that reassignment was not warranted in a case where the district court ruled against the plaintiff on dispositive motions four times, years after the plaintiff filed suit. However, there are clear differences between that case and this one. First, unlike here, *Thompson* proceeded to discovery, and all the way to pretrial, by the time the fourth appeal was heard from a ruling on summary judgment. *Id.* at 811-

12. Second, the rulings in *Thompson* were not all by the same judge.[6] Third, the Court found in *Thompson* that the district court "acted in a timely manner to address" the dispositive issue "and its ultimate summary judgment decision was explained to the parties and was thoughtful in its reasoning." 967 F.3d at 817. That was not the case here. The district court has repeatedly failed to timely rule on issues throughout this case, particularly Plaintiffs' motions for summary judgment and class certification which were ultimately denied without explanation, and it took more than two years to resolve the issue of mootness—without any evidentiary fact-finding. Pl. Br. 10-13. And, when the district court eventually dismissed the case as moot, its reasoning failed to even cite, much less apply, the relevant standards for mootness based on voluntary cessation.

[6] On remand from the first dismissal, the case was reassigned to another judge. *Thompson v. District of Columbia*, 478 F. Supp. 2d 5, 7-8 (D.D.C. 2007).

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed and the case should be reassigned to a different judge on remand.

Respectfully submitted,

/s/ Michael L. Huang
KATHLEEN L. MILLIAN, Circuit Bar No. 44908
MICHAEL L. HUANG, Circuit Bar No. 63934
NICHOLAS F. SOARES, Circuit Bar No. 63714
STEPHANIE A. MADISON, Circuit Bar No. 63723
Terris, Pravlik & Millian, LLP
1816 12th Street, NW, Suite 303
Washington, DC 20009-4422
(202) 682-2100
kmillian@tpmlaw.com
mlhuang@tpmlaw.com
nsoares@tpmlaw.com
smadison@tpmlaw.com

MARTHA JANE PERKINS, Circuit Bar No. 49948
National Health Law Program
1512 E. Franklin Street, Suite 110
Chapel Hill, NC 27514
(984) 278-7661
perkins@healthlaw.org

Counsel for Plaintiffs-Appellants

December 12, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that:

(1) this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,484 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

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

/s/ Michael L. Huang
MICHAEL L. HUANG
Counsel for Plaintiffs-Appellants

December 12, 2022

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2022, I caused a true copy of the foregoing Reply Brief for Appellants to be delivered electronically via the Court's CM/ECF system to counsel for defendant-appellee, Richard S. Love, Thais-Lyn Trayer, Ashwin P. Phatak, and Caroline S. Van Zile.

/s/ Michael L. Huang
MICHAEL L. HUANG
Counsel for Plaintiffs-Appellants