No. 05-5100, 05-5107

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OKLAHOMA CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS (OKAAP), *et al.*,	)	
Plaintiffs-Appellants/ Cross-Appellees,	)	
	)	**Lower Court No. 01-CV-0187-CVE-SAJ**
v.	)	
MICHAEL FOGARTY, Chief Executive Officer of the Oklahoma Health Care Authority (OHCA), *et al.*,	)	
Defendants-Appellees/ Cross-Appellants.	)	

PLAINTIFFS-APPELLANTS/CROSS-APPELLEES' REPLY TO DEFENDANTS' RESPONSE TO RULE 60(b)(6) MOTION FOR RELIEF FROM FINAL JUDGMENT

This Court has broad discretion to grant Plaintiffs' Motion. Ultimately, the Court must decide whether the particular circumstances underlying Plaintiffs' Motion are sufficiently "extraordinary" to warrant relief and whether "substantial justice" will be served by granting the Motion. The circumstances underlying Plaintiffs' Motion are truly unique and extraordinary and unlike any that have ever been brought before the Court on a Rule 60(b) motion. The Motion involves a

Congressional clarification of the discrete statute at issue in this case. Indeed, the very impetus for Congress's clarification of the law was to resolve a conflict among the Circuits regarding this point. The clarification makes it apparent that this Court's prior decision -- under which hundreds of thousands of children were denied a federal right to receive health care services -- was based upon a "misunderstanding." Under this same ruling, these children lost the benefit of an Injunction designed to assure that they receive necessary health care services with reasonable promptness. Clearly, this case involves extraordinary circumstances of the utmost public import and concern and substantial justice will be served by granting the Motion.

As demonstrated *infra*, Defendants' Response provides no basis upon which the Motion should be denied.

A. <u>The Court Has Discretion to, and Should, Grant Plaintiffs' Motion</u>

Defendants make several arguments that this Court is somehow legally precluded from granting Plaintiffs' Motion. All of these arguments are without merit and should be rejected.[1] [2] & [3] Defendants first propose that "this Circuit has

[1] Defendants make the novel argument that, despite Congress' clarification of the definition of "medical assistance," 42 U.S.C. §§ 1396a(a)(8) and 1396a(a)(10)(A) still cannot be enforced by Plaintiffs. Response at 13-14. However, this Court has not questioned whether those provisions confer enforceable rights. *See OKAAP v. Fogarty*, 472 F.3d 1208, 1212, n. 1 (10th Cir. 2007), and *Mandy R. ex rel. Mr. and Mrs. R. v. Owens*, 464 F.3d 1139, 1143 (10th Cir. 2006). It is well established that they do confer enforceable rights. *See, e.g.*,

held that *statutory* changes in law are not proper reasons for Rule 60(b)(6) relief." Response at 3 (emphasis added) ("all caps" formatting removed). Tellingly, Defendants do not cite a single case supporting this proposition. The fact is that the Circuit has never confronted a Rule 60(b)(6) motion where there has been a *clarification* of *statutory* law. This only helps to demonstrate the unique and extraordinary circumstances underlying Plaintiffs' Motion.

Defendants also take great pains to distinguish the facts underlying Plaintiffs' Motion from the factual scenarios in two of the Tenth Circuit cases cited in the Motion, *Pierce v. Cook & Co.,* 518 F.2d 720 (10th Cir. 1975), and *Ute Indian Tribe of the Uintah and Ouray Reservation v. State of Utah,* 114 F.3d 1513 (10th Cir. 1997). Response at 3-5. However, Plaintiffs have not argued that the

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S.D. ex rel. Dickson v. Hood, 391 F.3d 581, 607 (5th Cir. 2004). The controversy in this case was over whether those provisions confer a right to receive health care services. That controversy has now been unmistakably resolved by Congress.

[2] Defendants also make the inexplicable argument that, even after "medical assistance" has been clarified to include "care and services," Defendants are still not required to ensure that recipients actually receive health care services. Plaintiffs believe this issue is amply addressed in the Motion and requires no further reply.

[3] Defendants' suggestion in footnotes 1 and 5 of its Response that Plaintiffs' counsel has no client at the present time is unsupported and untrue. Plaintiffs' counsel continues to represent the two organizational Plaintiffs. In addition, nearly all of the named individual Plaintiffs are currently under the requisite age of 21. Even so, once a class has been certified, if subsequent events or the passage of time has modified the claims of the named plaintiffs, they may still serve as class representatives under certain circumstances. *See, e.g., Sosna v. Iowa,* 419 U.S 393, 397-403 (1975); *see also Napier v. Sister May Gertrude*, 542 F.2d 825, 826 (10th Cir. 1976); *Reed v. Heckler,* 756 F.2d 779, 785 (10th Cir. 1985).

Pierce and *Ute Indian Tribe* cases involved the same factual pattern as that underlying Plaintiffs' Motion. *See* Motion at 13-14. Rather, Plaintiffs argued that *Pierce, Ute Indian Tribe* and *Adams v. Merrill Lynch Pierce Fenner & Smith,* 888 F.2d 696 (10th Cir. 1989), establish that there is precedent in this Circuit for post-judgment relief from a mandate where there has been an intervening change in relevant law. Again, the dispositive issue is whether the circumstances underlying Plaintiffs' Motion are sufficiently "extraordinary" to justify relief, not whether Plaintiffs' Motion fits precisely into the factual rubric of a previous decision. The unique and extraordinary fact pattern underlying Plaintiffs' Motion -- *i.e.,* a *clarification* of relevant *statutory* law involving the federal health care rights of hundreds of thousands of poor children -- warrants relief from the Mandate.

Next, citing to *Collins v. Wichita*, 254 F.2d 837 (10th Cir. 1958), Defendants argue that there is a bright line rule that a "simple decisional law change," which does not create or resolve a conflict between state and federal law, does not warrant relief under Rule 60(b)(6). Response at 5-6. In reality, the *Collins* decision is of scant relevance because the issue at hand is not a "simple decisional law change." Furthermore, to the extent that *Collins* could be viewed as relevant, it must be viewed in light of subsequent authority. In particular, in the more recent *Adams* decision (which Defendants fail to cite in their Response), the Tenth Circuit conversely held: "[i]n this circuit, a change in relevant case law by the United

States Supreme Court warrants relief under Fed.R.Civ.P. 60(b)(6)." *Adams,* 888 F.2d at 702 (citations omitted). Thus, as *Adams* makes clear, there is no bright line that would preclude relief in the case at bar.[4] Additionally, even more recently, the Supreme Court further clarified that an intervening change in decisional law will usually not, *by itself*, constitute an extraordinary circumstance required for relief under Rule 60(b)(6). *Agostini v. Felton,* 521 U.S. 203, 239 (1997).[5] As demonstrated in Plaintiffs' Motion, and summarized in the Introductory Statement of this Reply, the Motion involves clarification of a relevant statute plus many other "special circumstances." The Motion should be granted.

B. Section 2304 of the Patient Protection and Affordable Care Act is a Clarification of Law That May Properly Be Applied to Actions That Preceded Its Enactment

Defendants argue that Section 2304 of the Patient Protection and Affordable Care Act ("PPACA") cannot apply to a case that arose prior to the statute's enactment, citing a "longstanding rule of statutory construction" which prohibits retroactive application of statutory changes. But the rule Defendants cite is not

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[4] Notably, the Court granted relief even though the case did not involve a conflict of state and federal law. *See Id.* at 697-98 (discussing procedural background).

[5] The Sixth Circuit has since interpreted *Agostini* to mean there must be a change in decisional law "coupled with some other special circumstance" to grant relief under Rule 60(b)(6). *In re Abdur'Rahman,* 392 F.3d 174, 185 (6th Cir. 2004), (en banc), judgment vacated, 545 U.S. 1151 (2005) (citation omitted). While the *In re Abdur'Rahman* judgment was vacated by the Supreme Court, the "rationale behind [the] finding in *Abdur'Rahman.*..remains valid." *Thompson v. Bell,* 580 F.3d 423, 443 (6th Cir. 2010) (en banc).

relevant here because: (1) Section 2304 is a clarification of law; (2) Plaintiffs request prospective relief; and (3) retrospective application of Section 2304 will not attach new legal consequences to Defendants' actions.

In the Tenth Circuit, a subsequent amendment to a statute may be given retroactive effect if the changes are clarifying rather than substantive. *See, e.g.*, *United States v. Aptt*, 354 F.3d 1269, 1276 (10th Cir. 2004); *Andrews v. Deland*, 943 F.2d 1162, 1172 n.7 (10th Cir. 1991).[6] An amendment to a statute clarifies a law, as opposed to substantively changes a law, where Congress's intent was to clarify and where its intent does not contradict the plain language of the statute. *Henning v. Union Pac. R.R.*, 530 F.3d 1206 (10th Cir. 2008); *Herrera v. First N. Savings and Loan Ass'n*, 805 F.2d 896 (10th Cir. 1986). In evaluating Congressional intent, the Tenth Circuit considers several factors such as: Congress's characterization of an amendment as a clarification, legislative history supporting Congress's view of the amendment as a clarification and any dispute or ambiguity surrounding the pre-amendment law. *Herrera*, 805 F.2d at 901; *Henning*, 530 F.3d at 1214-16.

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[6] *See also, Ford v. Ford Motor Credit Corp.*, 574 F.3d 1279, 1283 (10th Cir. 2009); *Comm'r v. Keystone Consol. Indus.*, 508 U.S. 152, 159 (1993); *Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d 1275, 1282 (10th Cir. 2010). The concerns expressed in the *Dobbs* dissent are not at issue under the facts of this case.

In the case at hand, the *Herrera* and *Henning* factors strongly support the argument that Congress's amendment of the definition of "medical assistance" is a clarification of the term and not a substantive change in the law. First, Congress characterized the amendment as a clarification by its title, "Clarification of Definition of Medical Assistance." Second, the House Energy and Commerce Committee Report (the "House Report") demonstrates Congress's intent to make a "technical correction…to conform this definition to the longstanding administrative use and understanding of the term" and "to correct any misunderstanding as to the meaning of the term." H.R. Rep. No. 111-299 at 649-50, 2009 WL 3321420 (Oct. 14, 2009). Finally, there was a dispute among the federal circuits concerning the definition of "medical assistance," which Congress sought to resolve through its clarification of the definition. All of these factors demonstrate that the amendment was a clarification of what Congress always believed to be the definition of "medical assistance." Such clarifications are entitled to retrospective effect.

Even if the amendment is deemed to be a change in law rather than a clarification, the change may still be granted retrospective effect. With regard to newly enacted statutes, the Supreme Court has made an important distinction between damages and prospective relief in determining whether retroactive effect of an intervening change in law was proper. *Landgraf v. USI Film Products*, 511

U.S. 244, 273-274 (1994). In particular, cases involving prospective injunctive relief have been held by the Supreme Court to be appropriate for application of the changed statutes. In *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921), the Supreme Court held that § 20 of the Clayton Act, enacted while the case was pending on appeal, governed the propriety of injunctive relief against labor picketing during the appeal by reasoning that "'relief by injunction operates *in futuro*'" and that the plaintiff had no "vested right" in the decree entered by the trial court." *Landgraf*, 511 U.S. at 273-274 (quoting *American Steel Foundries*, 257 U.S. at 201). Under that same reasoning, Section 2304 of the PPACA should be retrospectively applied because Plaintiffs are requesting (and were awarded) injunctive relief rather than damages, an important distinction from *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 911 F.2d 1377 (10th Cir. 1990), where monetary damages were sought.

In the recent decision of *Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d 1275, 1282 (10th Cir. 2010) (which Defendants fail to cite in the Response), this Court applied *Landgraf* in the context of a statutory amendment. The *Dobbs* opinion (at 1282), and the cases cited therein, rely upon the basic rule set forth in *Landgraf* that "every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be

deemed [impermissibly] retrospective." *Landgraf*, 511 U.S. at 269 (citation omitted). But, the reverse is also true -- those statutes that do not attach new legal consequences to past conduct are not deemed to operate in an impermissible retrospective manner. *Dobbs*, 600 F.3d at 1283; *Landgraf*, 511 U.S. at 269-70; *see also*; *Hem v. Maurer*, 458 F.3d 1185, 1190 (10th Cir. 2006).

When this analysis is applied here, it is plain that Section 2304 may be applied, even though the case arose before Section 2304 was enacted by Congress. Because Congress was merely restating what it *always* believed to be the law, the application of the statute does not increase Defendants' liability or create new legal consequences for their actions -- it merely requires compliance with the law as it was always intended.[7]

C. Substantial Justice Will Be Served by Granting Plaintiffs' Motion

Lastly, Defendants claim they will suffer an injustice if Rule 60(b)(6) relief is granted. Response at 10-14. Defendants' claim of an injustice is absurd. There can be no injustice in Defendants being required to prospectively comply with federal law which assures children the right to necessary medical care. Whatever prejudice Defendants allege they would suffer in being subjected to an Injunction

[7] Thus, the case at bar is markedly different from the facts considered by this Court when it rejected retroactive application of a statute in *DeVargas*. The concerns expressed by the *DeVargas* Court are not present here where there is no comparable expansion of liability or history of reliance on contrary authority. The only other case in this Circuit to have decided the same issue, *Mandy R.*, was decided well after the trial and District Court's findings of fact in this case.

they never complied with, and which was vacated based upon a misunderstanding of the law, pales in comparison to hundreds of thousands of children losing a federal right to receive health care services and losing the benefit of an Injunction designed to ensure they receive those services as required by the Medicaid Act.

Defendants assert it would be more just to force these Plaintiffs, with limited resources, to file a new lawsuit and start all over again from square one. As Defendants well know, it is highly unlikely, if not completely impossible, that Plaintiffs could ever find the resources to initiate a second round of costly, protracted litigation. Requiring such unnecessary additional litigation would also contravene the overarching intent of the Federal Rules of Civil Procedure, *i.e.*, the "just, speedy, and inexpensive determination of every action…" Fed.R.Civ.P. 1. Plaintiffs propose that the far more just result would be to grant the Motion and reinstate the Injunction. Then, if Defendants believe they are in compliance, they would be free to -- once again -- seek post-judgment relief. *See, e.g., Rufo v. the Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992); *Jouett v. Arney*, 766 F. Supp 934 (D. Kan. 1991).

WHEREFORE, premises considered, Plaintiffs' Rule 60(b)(6) Motion for Relief from Final Judgment should be granted over the objections of Defendants.

Respectfully submitted,

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CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to the Court's General Order of March 18, 2009, regarding digital submissions, I hereby certify that (1) no privacy redactions were made as none were necessary and the document submitted herewith are exact copies of the written documents filed with the clerk; and (2) the digital submissions have been scanned with Kaspersky Internet Security 2010 and, according to the program, is free of viruses.

/s/ Louis W. Bullock

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2010, I mailed a true and correct copy of the above and foregoing document, by U.S. Mail, postage prepaid, to:

Howard J. Pallotta
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I hereby certify that on the 9th day of July, 2010, I emailed the attached document to:

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/s/ Louis W. Bullock
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