No. 16-5202

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES HOUSE OF REPRESENTATIVES,
Plaintiff – Appellee

v.

ERIC D. HARGAN, in his official capacity as Acting Secretary of Health and Human Services; U.S. Department of Health and Human Services; STEVEN T. MNUCHIN, in his official capacity as Secretary of the Treasury; U.S. Department of the Treasury,
Defendants – Appellants

THE STATE OF CALIFORNIA, et al.,
Intervenors for Appellants.

On Appeal from a Final Order of the U.S. District Court for the District of Columbia (No. 1:14-cv-01967) (Hon. Rosemary M. Collyer, U.S. District Judge)

JOINT STATUS REPORT

Plaintiff-appellee and defendants-appellants respectfully submit this joint status report. The parties and the intervenor States have reached a conditional settlement agreement for the resolution of this case, and the parties have filed with the district court a motion for an indicative ruling in accordance with that agreement, a copy of which is attached hereto as Exhibit A. As noted in that motion, the intervenor States support the motion. If the district court grants that

motion, the parties and the States will ask this Court to resolve this appeal by remanding the case to the district court for effectuation of the settlement with respect to this case.

Respectfully submitted.

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Counsel for Plaintiff-Appellee

December 15, 2017

CERTIFICATE OF SERVICE

I certify that on December 15, 2017, I caused the foregoing Joint Status Report to be filed via the Court's CM/ECF system, which I understand caused delivery of a copy to all registered parties.

/s/ Thomas G. Hungar
Thomas G. Hungar

No. 16-5202

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES HOUSE OF REPRESENTATIVES,
Plaintiff – Appellee

v.

ERIC D. HARGAN, in his official capacity as Acting Secretary of Health and Human Services; U.S. Department of Health and Human Services; STEVEN T. MNUCHIN, in his official capacity as Secretary of the Treasury; U.S. Department of the Treasury,
Defendants – Appellants

THE STATE OF CALIFORNIA, et al.,
Intervenors for Appellants.

On Appeal from a Final Order of the U.S. District Court for the District of Columbia (No. 1:14-cv-01967) (Hon. Rosemary M. Collyer, U.S. District Judge)

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES HOUSE OF REPRESENTATIVES, *Plaintiff*, v. ERIC D. HARGAN, in his official capacity as Acting Secretary of Health and Human Services; U.S. Department of Health and Human Services; STEVEN T. MNUCHIN, in his official capacity as Secretary of the Treasury; U.S. Department of the Treasury, *Defendants*.	Case No. 14-cv-01967-RMC

JOINT MOTION FOR INDICATIVE RULING

Pursuant to Federal Rules of Civil Procedure 60(b) and 62.1 and the attached conditional settlement agreement, and in light of changed circumstances, Plaintiff the U.S. House of Representatives and Defendants Eric D. Hargan, Acting Secretary of Health and Human Services, the U.S. Department of Health and Human Services, Steven T. Mnuchin, Secretary of the Treasury, and the U.S. Department of the Treasury (collectively, "the parties") respectfully request that this Court issue an indicative ruling stating that, if the case is remanded by the court of appeals, this Court will vacate the portion of its final order providing that "reimbursements paid to issuers of qualified health plans for the cost-sharing reductions mandated by Section 1402 of the Affordable Care Act, Pub. L. 111-148, are ENJOINED pending an appropriation for such payments." ECF No. 74, *United States House of Representatives v. Burwell, et al.*, No. 1:14-cv-

01967-RMC (D.D.C.). The States that intervened on appeal have authorized the parties to represent that the States support this motion.

The Federal Rules authorize relief from a judgment on the grounds that "applying it prospectively is no longer equitable" or for "any other reason." Fed. R. Civ. P. 60(b)(5) & (6). The law is clear that district courts possess equitable discretion to grant vacatur of judgments in appropriate circumstances, including at the request of the parties in furtherance of a settlement. *See, e.g.*, *Doe v. U.S. Dep't of Labor*, No. Civ.A. 05-2449(RBW), 2007 WL 1321116 (D.D.C. Mar. 22, 2007); *Kim v. United States*, 903 F. Supp. 1546 (S.D.N.Y. 1995); *see also U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 29 (1994) ("[E]ven in the absence of, or before considering the existence of, extraordinary circumstances, a court of appeals presented with a request for vacatur of a district-court judgment may remand the case with instructions that the district court consider the request, which it may do pursuant to Federal Rule of Civil Procedure 60(b)."). Partial vacatur of judgments or orders in furtherance of settlement is likewise permissible. *See, e.g.*, *Hospira, Inc. v. Sandoz Inc.*, No. 09-4591 (MLC), 2014 WL 794589 (D.N.J. Feb. 27, 2014); *Fund for Animals v. Babbitt*, 967 F. Supp. 6 (D.D.C. 1997).

Where a district court cannot modify its order because it has been divested of jurisdiction by a pending appeal, it may nonetheless issue an "indicative ruling" indicating that it would do so if the court of appeals remanded for such purpose. *See* Fed. R. Civ. P. 62.1 ("If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may . . . state . . . that it would grant the motion if the court of appeals remands for that purpose . . . ."); *Hoai v. Vo*, 935 F.2d 308, 312 (D.C. Cir. 1991) ("[W]hen both a Rule 60(b) motion and an appeal are pending simultaneously, appellate review may continue uninterrupted. At the same time, the District Court may consider the 60(b) motion

and, if the District Court indicates that it will grant relief, the appellant may move the appellate court for a remand in order that relief may be granted."); *West v. Holder*, 309 F.R.D. 54, 56 (D.D.C. 2015) (same); *see also* 11 Charles Alan Wright et al., *Federal Practice & Procedure* § 2911 (3d ed.) (discussing Rule 62.1).[1]

Equitable considerations strongly favor granting the requested relief here. The parties have reached a negotiated resolution of their dispute, contingent on partial vacatur of the judgment. "Settlement is highly favored," *United States v. Hyundai Motor Co.*, 77 F. Supp. 3d 197, 199 (D.D.C. 2015), because "[n]ot only the parties, but the general public as well, benefit from the saving of time and money that results from the voluntary settlement of litigation." *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983). That is particularly true here, because granting the relief requested in order to effectuate the parties' conditional settlement will obviate the need for the courts to decide a dispute between the political branches that those branches are now prepared to resolve amicably. Accordingly, the relief requested by the parties is clearly in the public interest.

For the foregoing reasons, the Court should issue an indicative ruling stating that, if the case is remanded by the court of appeals, in furtherance of the parties' conditional settlement agreement this Court will vacate the portion of its final order providing that "reimbursements paid to issuers of qualified health plans for the cost-sharing reductions mandated by Section 1402 of the Affordable Care Act, Pub. L. 111-148, are ENJOINED pending an appropriation for such

[1] Pursuant to Federal Rule of Appellate Procedure 12.1, if the district court states that it would grant the motion, the court of appeals may then "remand for further proceedings but retain[] jurisdiction unless it expressly dismisses the appeal."

payments." ECF No. 74, *United States House of Representatives v. Burwell, et al.*, No. 1:14-cv-01967-RMC (D.D.C.).

Respectfully submitted.

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December 15, 2017

CERTIFICATE OF SERVICE

I certify that on December 15, 2017, I caused the foregoing Joint Motion to be filed via the Court's CM/ECF system, which I understand caused delivery of a copy to all registered parties.

/s/ Thomas G. Hungar
Thomas G. Hungar

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES HOUSE OF REPRESENTATIVES, *Plaintiff*, v. ERIC D. HARGAN, in his official capacity as Acting Secretary of Health and Human Services; U.S. Department of Health and Human Services; STEVEN T. MNUCHIN, in his official capacity as Secretary of the Treasury; U.S. Department of the Treasury, *Defendants*.	Case No. 14-cv-01967-RMC

EXHIBIT A

SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is entered into by and between (a) the United States House of Representatives (the "House"); (b) the United States Department of Health and Human Services, the United States Department of the Treasury, and their respective Secretaries (the "Agencies"); and (c) the States of California, New York, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, New Mexico, North Carolina, Pennsylvania, Vermont, Virginia, and Washington, and the District of Columbia (the "States").

1. In light of changed circumstances, the House, the Agencies, and the States have determined to resolve the dispute that is pending before the U.S. Court of Appeals for the D.C. Circuit ("Court of Appeals") in *United States House of Representatives v. Hargan, et. al*, No. 16-5202 (D.C. Cir.).

2. By no later than two business days after execution of this Agreement, the House and the Agencies (collectively, "the Parties") will submit to the district court a request that the district court issue an indicative ruling pursuant to Rule 62.1 of the Federal Rules of Civil Procedure stating that, if the case is remanded by the court of appeals, the district court will vacate the portion of its final order providing that "reimbursements paid to issuers of qualified health plans for the cost-sharing reductions mandated by Section 1402 of the Affordable Care Act, Pub. L. 111-148, are ENJOINED pending an appropriation for such payments." ECF No. 74, *United States House of Representatives v. Burwell, et al.*, No. 1:14-cv-01967-RMC (D.D.C.). If the district court grants that motion, the Parties and the States will file a motion that asks the court of appeals to remand the case to allow the district court to grant the motion as provided in its indicative ruling.

3. The Parties recognize that the Executive Branch of the United States Government ("Executive Branch") continues to disagree with the district court's non-merits holdings, including its conclusion that the House had standing and a cause of action to bring this suit. The Parties agree that because subsequent developments have obviated the need to resolve those issues in an appeal in this case, the district court's holdings on those issues should not in any way control the resolution of the same or similar issues should they arise in other litigation between the House and the Executive Branch. The Parties also recognize that the States continue to disagree with the district court's merits holding. Accordingly, if the court of appeals grants the Joint Motion, the Parties agree that the district court's holding on the merits should not in any way control the resolution of the same or similar issues should they arise in other litigation, and hereby waive any right to argue that the judgment of the district court or any of the district court's orders or opinions in this case have any preclusive effect in any other litigation.

4. If the district court grants the motion described in paragraph 2 above and, following remand from the D.C. Circuit, the district court vacates its injunction in accordance with its indicative ruling, the Parties and the States agree that this litigation will have been resolved. The Parties and the States will bear their own fees and costs.

5. If the district court declines to grant the motion described in paragraph 2 above, or indicates that it would enter other relief not jointly supported by the Parties, this Agreement shall be of no force and effect and the Parties and the States shall be returned to their respective positions prior to execution of this Agreement.

6. FULL AUTHORITY TO SIGN. Each person signing this Agreement represents and warrants that he or she has full authority to execute the Agreement on behalf of himself or herself, or on behalf of the party or entity on whose behalf he or she signs this Agreement.

7. EXECUTION IN COUNTERPARTS AND ELECTRONIC SIGNATURES. This Agreement may be executed and delivered in counterparts, and may be executed by electronic signature, and if so, shall be considered an original. Each counterpart, when executed, shall be considered one and the same instrument, which shall comprise the Agreement, which takes effect on the date of execution by all parties to the Agreement.

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