No. 16-5202

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES HOUSE OF REPRESENTATIVES,
Plaintiff – Appellee,

v.

ALEX M. AZAR, II, in his official capacity as 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 STATES OF CALIFORNIA, NEW YORK, 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)

SUPPLEMENT IN SUPPORT OF
JOINT MOTION FOR REMAND

Pursuant to this Court's order of March 5, 2018, plaintiff-appellee, defendants-appellants, and intervenors submit this supplement in support of their joint motion to dismiss this appeal and remand the case to the district court ("Joint Motion"). This Court's order directs the parties "to explain what 'exceptional circumstances' justify partial vacatur." 3/5/2018 Order (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 29 (1994) ("*Bonner Mall*"). For

the reasons discussed below, we respectfully submit that the "exceptional circumstances" standard does not apply to the relief requested in the Joint Motion. The Joint Motion does not ask this Court to vacate any aspect of the district court's judgment but instead asks that the case be remanded to allow the district court to vacate its own injunction as an exercise of its authority under Rule 60(b) of the Federal Rules of Civil Procedure. As other courts of appeals have recognized, *Bonner Mall* expressly contemplates that district courts may vacate their own judgments under Rule 60(b) even when "exceptional circumstances" are not present.

Assuming, however, that the "exceptional circumstances" standard applies, that standard is met under the circumstances of this case. Vacatur of the injunction obviates any need for this Court to adjudicate a dispute between the political branches that those branches are prepared to resolve amicably, and clears the way for third parties to litigate the underlying merits in a case that is not complicated by the threshold justiciability issue present in this case. *Cf. Sands v. NLRB*, 825 F.3d 778, 786 (D.C. Cir. 2016) (concluding that "vacatur would serve the public interest by furthering the traditional purpose of the doctrine: clearing the path for future relitigation of the issues") (citing *Bonner Mall*, 513 U.S. at 22-23).

STATEMENT

A. This Suit and Related Litigation

This suit arose out of payments that were being made by the Departments of Health & Human Services ("HHS") and the Treasury (collectively, the "Agencies") for cost-sharing reductions ("CSRs") under the Patient Protection and Affordable Care Act ("ACA"). Between January 2014 and September 2017, the Agencies made those payments in reliance on a permanent appropriation for tax credits, 31 U.S.C. § 1324. The U.S. House of Representatives filed this suit in July 2014, alleging that there was no appropriation for CSR payments and that the Agencies' then-ongoing payments should be enjoined.

In its initial decision, the district court ruled that the House had standing and a cause of action and rejected the argument that separation-of-powers concerns required dismissal of the case. *See U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53 (D.D.C. 2015). On cross-motions for summary judgment, the district court ruled for the House on the merits. *See U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165 (D.D.C. 2016). The district court enjoined the Agencies from making further cost-sharing reduction payments until a valid appropriation is in place, but stayed its injunction pending appeal. *See id*.

The appeal was put into abeyance after the presidential election. On May 18, 2017, a coalition of States and the District of Columbia moved to intervene in

this appeal; and on August 1, 2017, this Court granted that motion. On October 11, 2017, in response to a request from the Agencies for a legal opinion, the Attorney General concluded "that the best interpretation of the law is that the permanent appropriation for 'refunding internal revenue collections,' 31 U.S.C. § 1324, cannot be used to fund the CSR payments to insurers authorized by 42 U.S.C. § 18071." Attorney General Letter at 1 (Oct. 11, 2017). The next day, October 12, HHS sent a memorandum to the Centers for Medicare & Medicaid Services ("CMS") explaining that "CSR payments are prohibited unless and until a valid appropriation exists." Memorandum from Acting Sec'y of HHS Eric Hargan to Adm'r of CMS Seema Verma, Payments to Issuers for Cost-Sharing Reductions (CSRs), at 1 (Oct. 12, 2017).[1]

Shortly after the announcement that CSR payments would cease, seventeen States and the District of Columbia—most of which are intervenors in this appeal—filed suit in the U.S. District Court for the Northern District of California, seeking declaratory and injunctive relief to compel the Agencies to resume making CSR payments. The district court denied the States' motion for a preliminary injunction. *See California v. Trump*, 267 F. Supp. 3d 1119 (N.D. Cal. 2017). That

[1] The Attorney General's letter, and the subsequent memorandum from the Acting HHS Secretary are available at https://www.hhs.gov/sites/default/files/csr-payment-memo.pdf.

litigation remains pending, and the district court has scheduled a hearing for July 12, 2018, on the parties' anticipated dispositive cross-motions.

In separate litigation, insurers have filed suits against the United States in the Court of Federal Claims, seeking to recover damages under the Tucker Act for breach of the alleged obligation to make CSR payments beginning in October 2017. *See Common Ground Healthcare Coop. v. United States*, No. 17-877C (Sweeney, J.); *Local Initiative Health Auth. v. United States*, No. 17-1542C (Wheeler, J.); *Maine Cmty. Health Options v. United States*, No. 17-2057C (Sweeney, J.); *Cmty. Health Choice, Inc. v. United States*, No. 18-5C (Sweeney, J.); *Mont. Health CO-OP v. United States*, No. 18-143C (Kaplan, J.); *Sanford Health Plan v. United States*, No. 18-136C (Firestone, J.); *Molina Healthcare of Cal., et al. v. United States*, No. 18-333C (Wheeler, J.); *Health All. Med. Plans, Inc. v. United States*, No. 18-334C (Campbell Smith, J.); *Blue Cross & Blue Shield of Vt. v. United States*, No. 18-373C (Horn, J.).[2]

B. The Conditional Settlement of this Case

In December 2017, a conditional settlement of this case was reached by the House, the Agencies, and the States that had intervened on appeal. *See* ECF

[2] Several of these Tucker Act suits have been stayed pending the Federal Circuit's decision in *Land of Lincoln Mutual Health Insurance Co. v. United States*, No. 17-1224, and/or *Moda Health Plan, Inc. v. United States*, No. 17-1994, which present related issues. The Federal Circuit heard oral argument in *Land of Lincoln* and *Moda* on January 10, 2018.

No. 83-1 (settlement agreement). The settlement agreement indicated that, in light of changed circumstances, the House, the Agencies, and the States had determined to resolve the dispute in this case. *See id*. at 1.

Pursuant to the terms of the settlement agreement, the House and the Agencies submitted a joint motion that asked the district court to issue an indicative ruling stating that, if this case were remanded by this Court, the district court would exercise its authority under Rule 60(b) to 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." *See* ECF No. 83 (joint motion for indicative ruling). The joint motion explained that under Rule 60(b) of the Federal Rules of Civil Procedure, the district court may authorize relief from a judgment on the grounds that "applying it prospectively is no longer equitable" or for "any other reason." *Id*. at 2 (quoting Fed. R. Civ. P. 60(b)(5) & (6)). The motion argued that equitable considerations strongly favored granting the requested relief, emphasizing that granting the relief requested "will obviate the need for the courts to decide a dispute between the political branches that those branches are now prepared to resolve amicably." *Id*. at 3. The motion indicated that the States supported the relief requested. *See id*. at 2. No third parties objected to the requested relief.

Based on its consideration of the parties' motion and the entire record, the district court issued an indicative ruling stating that if this case were remanded by this Court, the district court would grant the requested relief. *See* ECF No. 85. Pursuant to the terms of the settlement agreement, the House, the Agencies, and the States then filed the Joint Motion for Remand that is pending before this Court.

ARGUMENT

A. The "Exceptional Circumstances" Standard Does Not Apply To The Relief Requested In the Joint Motion.

This Court's order directs the parties "to explain what 'exceptional circumstances' justify partial vacatur." 3/5/2018 Order (quoting *Bonner Mall*, 513 U.S. at 29). As a threshold matter, we do not believe that the "exceptional circumstances" standard applies to the relief requested here. The Joint Motion does not ask *this Court* to vacate any aspect of the district court's judgment. The Joint Motion simply requests that this Court dismiss the appeal and remand the case to allow the *district court* to vacate its own injunction as an exercise of its authority under Rule 60(b) of the Federal Rules of Civil Procedure. Under the reasoning of *Bonner Mall*, that relief may be granted "in the absence of . . . extraordinary circumstances." *Bonner Mall*, 513 U.S. at 29.

In *Bonner Mall*, the Supreme Court addressed the authority of a reviewing court to vacate a judgment under review, when a case has become moot by reason of settlement. The Supreme Court stated that "mootness by reason of settlement

does not justify vacatur of a judgment under review" except in "exceptional circumstances." *Bonner Mall*, 513 U.S. at 29. The Supreme Court contrasted a reviewing court's authority with a district court's authority to vacate its own judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure:

> Of course even 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).

Id.

In light of this guidance from the Supreme Court, the Ninth Circuit held that "a district court may vacate its own decision in the absence of extraordinary circumstances." *Am. Games, Inc. v. Trade Prods., Inc.*, 142 F.3d 1164, 1168 (9th Cir. 1998). The Seventh Circuit has followed the Ninth Circuit's reasoning. *See Marseilles Hydro Power LLC v. Marseille Land & Water Co.*, 481 F.3d 1002, 1003 (7th Cir. 2007). Indeed, the Seventh Circuit emphasized that *Bonner Mall* "said that the court of appeals can remand a case even in the absence of such circumstances, 513 U.S. at 29, which would make no sense if the district court could not vacate its judgment in that absence." *Id*. The Eighth Circuit and Federal Circuit likewise have indicated that the "exceptional circumstances" standard does not govern the district court's authority to vacate its own judgment under Rule 60(b). *See Nahrebeski v. Cincinnati Milacron Mktg. Co.*, 41 F.3d 1221, 1222 (8th

Cir. 1994) (explaining that, although the court of appeals saw "no 'exceptional circumstances'" that would allow it to vacate the judgment below, the parties were free to ask the district court on remand to vacate its judgment pursuant to Rule 60(b)); *Zerowet, Inc. v. Bionix Dev. Corp.*, 56 F. App'x 499 (Fed. Cir. 2003) (concluding that vacatur by the court of appeals was not warranted under the *Bonner Mall* standard, but that "it is appropriate to grant the alternative motion to remand to allow the parties to ask the district court to vacate its decision").[3]

Although we are not aware of a decision of this Court explicitly addressing the issue, this Court has routinely remanded vacatur requests to the district court without suggesting that the "exceptional circumstances" standard applies. For example, in *Chekkouri v. Obama*, No. 10-5033, 2010 WL 2689100 (D.C. Cir. 2010) (per curiam), this Court ordered that "the case be remanded to the district court with instructions to consider the government's request for vacatur of the

[3] Although the Fourth Circuit, departing from these decisions, concluded that *Bonner Mall*'s "exceptional circumstances" standard governs a district court's authority to vacate a declaratory judgment under Rule 60(b)(6), *see Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116-21 (4th Cir. 2000), the Fourth Circuit did not explain how that conclusion could be reconciled with the Supreme Court's determination in *Bonner Mall* that a court of appeals may remand for a district court to consider vacatur under Rule 60(b) "even in the absence of . . . extraordinary circumstances," 513 U.S. at 29. In any event, the Fourth Circuit rejected application of the "exceptional circumstances" test in addressing a district court's authority to vacate an injunction under Rule 60(b)(5) on the basis of a significant change in fact or law, *see Valero Terrestial Corp.*, 211 F.3d at 121-22, which is the relief requested of the district court in this case.

memorandum opinion and order filed December 3, 2009." *Id*. at *1. Quoting *Bonner Mall*, this Court explained that "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." *Id*.; *see also Doe v. Rumsfeld*, 172 F. App'x 327 (D.C. Cir. 2006) (per curiam) (similar); *Nat'l Ass'n of Chain Drug Stores v. Thompson*, No. 03-5098, 2004 WL 574518 (D.C. Cir. 2004) (similar) (per curiam).

The Joint Motion asks this Court to follow the procedure that was specifically approved in *Bonner Mall*, which is to remand the case to permit the district court to consider a vacatur request as an exercise of its Rule 60(b) authority. As *Bonner Mall* made clear, the relief sought in the Joint Motion may be granted "in the absence of . . . extraordinary circumstances." *Bonner Mall*, 513 U.S. at 29.

B. The "Exceptional Circumstances" Standard Is Met Here.

Assuming that the "exceptional circumstances" standard applies, it is satisfied here. As explained above, this suit began as a challenge by the U.S. House of Representatives to then-ongoing cost-sharing reduction payments that were being made by the Executive Branch. The justiciability of this inter-branch dispute was contested.

After the Executive Branch ceased making the contested cost-sharing reduction payments, the original parties and the intervening States determined to resolve this dispute in light of the changed circumstances. By the time of the settlement agreement, the States had brought separate litigation in the Northern District of California in which they sought to compel the resumption of CSR payments. The vacatur of the injunction requested of the district court in the joint motion for an indicative ruling will clear the way for that litigation, in which the court's ability to reach the merits is not complicated by the threshold justiciability issue present in this case, and avert the risk that the Agencies could be subject to conflicting orders. Conversely, unless the district court's injunction is vacated, the States will object to dismissal of this appeal to ensure that their interests are not prejudiced. Vacatur therefore will "serve the public interest by furthering the traditional purpose of the doctrine: clearing the path for future relitigation of the issues." *Sands*, 825 F.3d at 786 (citing *Bonner Mall*, 513 U.S. at 22-23).

Vacatur is also appropriate here in light of the unique nature of this dispute. In *Bonner Mall*, the Court rejected vacatur in part on the ground that judicial precedents "'are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur,'" 513 U.S. at 26 (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)). But this is not a mere

private dispute, and the joint determination of the legislative and executive branches that the public interest would best be served by vacatur in light of the changed circumstances is worthy of judicial deference as a matter of inter-branch comity.

Furthermore, vacatur of the injunction would obviate any need for the Judiciary to decide the weighty threshold issues presented by the original dispute between the political branches. It is a well-established principle that the federal courts will not "decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States*, 196 U.S. 283, 295 (1905). Because the settlement is contingent on vacatur, and a remand will eliminate the need for this Court to resolve constitutional issues, the doctrine of constitutional avoidance supports a remand here.

As noted, moreover, the political branches now agree on the underlying merits, and the intervenors' merits challenge is already pending in a separate proceeding. Those changed circumstances provide further justification for the relief sought here. Thus, the parties and intervenors respectfully request that this Court dismiss this appeal and remand the case to the district court.

Respectfully submitted.

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April 11, 2018

CERTIFICATE OF COMPLIANCE

I certify that this supplement complies with the word limit of this Court's order of March 5, 2018 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 2,735 words.

/s/ Thomas G. Hungar
Thomas G. Hungar

CERTIFICATE OF SERVICE

I certify that on April 11, 2018, I caused the foregoing supplement to be filed via this Court's CM/ECF system, which I understand caused delivery of a copy to all registered parties.

/s/ Thomas G. Hungar
Thomas G. Hungar