No. 12-15478

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD FOURNIER, Plaintiff, and
DELORES BERG and THOMAS DiCECCO, JR.,
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, Secretary of the
Department of Health and Human Services,

Defendant-Appellee.

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

BRIEF OF *AMICUS CURIAE* NATIONAL SENIOR CITIZENS LAW CENTER IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING OR FOR REHEARING EN BANC

David B. Bergman
Dirk C. Phillips
Laura K. D'Allaird
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000

Lisa Hill Fenning
ARNOLD & PORTER LLP
777 South Figueroa Street
Los Angeles, California 90071
(213) 243-4000

Counsel for Amicus Curiae
National Senior Citizens Law Center

CORPORATE DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* National Senior Citizens Law Center ("NSCLC") certifies that it is a registered 501(c)(3) nonprofit organization. NSCLC further certifies that it has no parent corporation and no publicly held corporation holds 10 percent or more of NSCLC's stock.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

NSCLC is a nationwide nonprofit organization that advocates for the independence and well-being of low-income older persons. NSCLC seeks to ensure that low-income older adults have access to high quality, affordable health benefits from programs such as Medicare and Medicaid. For over 40 years, NSCLC has served low-income older persons through advocacy, litigation, and the education and counseling of local advocates nationwide.

NSCLC works to preserve and strengthen Medicaid, Medicare, Social Security, and Social Security's Supplemental Security Income Program—benefits programs that allow low-income older adults to live with dignity and independence. In addition, NSCLC seeks to ensure that low-income older adults have ready access to the courts. NSCLC is profoundly concerned about the impact of the panel's decision in this case and the effect it may have on the ability of NSCLC's clients to enforce their rights before the agencies responsible for administering federal benefits programs.

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[1] No party's counsel authored this brief in whole or in part. No party or a party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus curiae* or its counsel made such a monetary contribution.

INTRODUCTION

The panel's decision in this case is unprecedented. It held, for the first time, that Medicare manual provisions are entitled to *Chevron* deference, supposedly because they "gain the force of law through the process of [administrative] adjudication of a 'vast number of claims.'" *Fournier v. Sebelius,* No. 12-15478, 2013 WL 2364070, at *8 (9th Cir. May 31, 2013). The panel did not specify the level or consistency of administrative review sufficient to entitle manual provisions to *Chevron* deference. Nor did it cite, much less discuss, any decisions of the Medicare Appeals Council ("MAC"),[2] which represents the highest level of administrative review to resolve such claims. Moreover, the panel misread *Barnhart v. Walton*, 535 U.S. 212 (2002), in holding that the process of adjudication entitles agency manual interpretations to *Chevron* deference. Nothing in *Barnhart* supports this holding. *See infra*, at 6-8.

As the panel and the litigants all agreed, it is well settled that agency manuals such as the one at issue here are not entitled to *Chevron* deference, and for

[2] MAC is the final level of administrative review in the Medicare appeals process. 42 C.F.R. § 405.904(a)(2). The Medicare appeals process involves several levels of review before reaching the MAC. First, a Medicare contractor makes an initial determination and a redetermination at the beneficiary's request. *Id.* If certain requirements are met, a Qualified Independent Contractor ("QIC") performs a reconsideration of the claim, after which an Administrative Law Judge ("ALJ") may then conduct a hearing if the amount in controversy and other requirements are met. *Id.* If the beneficiary is dissatisfied with the ALJ's decision, he or she may appeal to the MAC. *Id.*

good reason—they are not subject to public notice and comment and their interpretations are not binding on other agency components. It also is undisputed that an agency's interpretation of its own formally adopted administrative regulations, implemented only after public notice and opportunity for comment, are entitled to *Chevron* deference. But, unlike *Barnhart*, no formal regulations that codified the interpretation under review were in effect in this case. Moreover, rulings from both this Court and the Supreme Court emphasize that non-precedential administrative decisions are not entitled to *Chevron* deference. *See infra*, at 9-10. The panel's ruling to the contrary must be vacated.

In addition to being incorrect as a matter of law, the panel's decision to grant *Chevron* deference to agency manual provisions based on a "process of adjudication" also runs afoul of a number of important policy considerations. First, such administrative decisions are not subject to public comment, and many years of MAC decisions, let alone lower level reviews, are not readily available to the public. Currently, they are not comprehensively compiled in a publicly accessible database. Even if such a database existed, given the vast number of these decisions it would be difficult—if not impossible—for individuals or organizations such as NSCLC to determine which agency interpretations are sufficiently settled, thus warranting *Chevron* deference under the panel's nebulous manual plus "process of adjudication" standard, and which are not. Unlike the

regulation under consideration in *Barnhart*, neither MAC nor lower level administrative decisions involve any formal codification, binding effect, or public participation or comment.

An even more important policy consideration is the possibility that the panel's broad holding could be applied in other contexts where agencies rely on guidance contained in manuals and construed in part through administrative review. If permitted to stand, this holding may have a significant adverse effect on the ability of Medicare and Social Security beneficiaries such as those NSCLC represents to challenge agency interpretations. In sum, this holding improperly elevates the importance of manual provisions in direct contravention of the holding in *Christensen v. Harris County,* 529 U.S. 576, 587 (2000), that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, *agency manuals*, and enforcement guidelines, all of which lack the force of law—*do not warrant Chevron-style deference*." (emphasis added).

ARGUMENT

I. THE PANEL ERRED IN EXTENDING *CHEVRON* DEFERENCE TO AN AGENCY MANUAL PROVISION.

A. Agency Manuals Do Not Have The Force Of Law.

When reviewing an agency's interpretation of a statute that it is charged with administering, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), when a statute is silent or ambiguous as to the question

at issue, a court must consider "whether the agency's answer is based on a permissible construction of the statute," and uphold the agency's construction if it is reasonable. 467 U.S. at 842-44. This second step of *Chevron* applies only when (1) "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law" and (2) "the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

It is undisputed that the Secretary's interpretation of the statutory provision at issue here, 42 U.S.C. § 1395y(a)(12), is contained in the Centers for Medicare and Medicaid Services *Medicare Benefit Policy Manual* ("CMS Manual"), but has never been the subject of formal regulations. It also is undisputed that "the CMS Manual does not by itself carry the force of law" because interpretations in agency manuals are not entitled to *Chevron* deference. *Fournier,* 2013 WL 2364070, at *7 (noting the agency's agreement that manual does not have the force of law); *see also Christensen,* 529 U.S. at 587 (agency manuals lack the force of law and are not entitled to *Chevron* deference).

B. The "Process Of Adjudication" Does Not Infuse Agency Manuals With The Force Of Law.

1. *Barnhart Does Not Hold Or Imply That An Administrative "Process Of Adjudication" Can Provide Agency Manuals With The Force Of Law.*

The panel misread and misapplied *Barnhart* in ruling that Medicare manual provisions are entitled to the same deference as a formally adopted Social Security Administration regulation that codifies a prior precedential ruling.

The panel correctly began with the basic principle that interpretations in agency manuals are not entitled to *Chevron* deference. *Fournier,* 2013 WL 2364070, at *7. However, it then concluded that the CMS manual provision at issue in this case nevertheless "gain[ed] the force of law" and was entitled to *Chevron* deference. *Id.* at *8. The panel grounded this holding on its misreading of *Barnhart*. The panel read *Barnhart* broadly to conclude that "[b]oth [rulings and manual provisions] gain the force of law through the process of adjudication of a 'vast number of claims' under [42 U.S.C.] § 405(b)." *Id.*

This was error. Unlike this case, in which no regulations have ever adopted the Secretary's interpretation, *Barnhart* deferred to an agency's interpretation of its own formally adopted regulation, which allows for a heightened level of deference. 535 U.S. at 217 (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency's interpretation of its own regulations is controlling unless it is "plainly erroneous or inconsistent with the regulation."). Because the regulation in question had only

recently been adopted (implicitly to address the very issues in the case), the *Barnhart* Court emphasized that the "regulations reflect the Agency's own long-standing interpretation," as evidenced by the Court's citation of historical references to the interpretation at issue that had appeared in the agency's rulings, letters, and manuals going back decades. *Id.* at 219-20. The panel's decision in this case ignored *Barnhart's* critical context in interpreting the "longstanding duration" of the interpretation as sufficient absent the formally adopted regulation. Nothing in *Barnhart* stands for the proposition that longevity is considered *in the absence of a formally adopted regulation.*

Furthermore, *Barnhart* includes no discussion of the "process of adjudication" or otherwise implies that such a process can infuse agency manuals or otherwise non-precedential adjudicative interpretations with the force of law. Indeed, *Barnhart* makes no mention whatsoever of the "process of adjudication."

Finally, the panel erred in equating the *Barnhart* Court's citation to an older Social Security ruling with the Secretary's unilateral interpretation in the CMS Manual, stating that both gain the force of law through the "process of adjudication." *Fournier,* 2013 WL 2364070, at *8. Unlike agency manuals, Social Security rulings *are* binding on all components of the agency and "represent precedent[ial] final opinions . . . and statements of policy and interpretations that

[the Social Security Administration has] adopted." 20 C.F.R. § 402.35(b)(1).[3] The precedential value of agency interpretations is a key consideration when granting *Chevron* deference. *See infra*, at 9-10. In contrast, the CMS Manual is neither precedential nor binding on agency components. 42 C.F.R. § 405.1062. The panel acknowledged this fact in observing that the CMS Manual—absent the "process of adjudication"—does not carry the force of law. *Fournier*, 2013 WL 2364070, at *7 (citing 42 C.F.R. § 405.1062(a): "ALJs and the MAC are not bound by . . . manual instructions."). *Barnhart* simply does not stand for the proposition that non-precedential manual interpretations are sufficient for *Chevron* deference. It follows that there is no sound basis for concluding that the addition of a non-precedential adjudicative process alters that outcome.

2. *The Medicare Appeals Process Does Not Have The Force Of Law.*

Agency manual provisions that are not entitled to *Chevron* deference on their own cannot be boosted to the level of force of law by agency decisions that are not themselves entitled to *Chevron* deference. Here, MAC decisions sit at the apex of the internal Medicare review process but, like lower level decisions, they are still not precedential or binding on third parties. Nor are they even binding on

[3] Medicare rulings, not manual provisions, are the equivalent of Social Security rulings. *See* 42 C.F.R. §§ 401.108(c) and 405.1063(b) (Medicare rulings are binding on other agency components).

subsequent MAC panels: MAC decisions bind only the parties in the litigation for purposes of that litigation. 42 C.F.R. §§ 405.1048, 405.1130. As stated by the Department of Health and Human Services:

> After thorough consideration, [the Department of Health & Human Services] determined that it is neither feasible, nor appropriate at this time to confer binding, precedential authority upon decisions of the MAC. Because *MAC decisions are not given precedential weight*, it would be impractical and illogical to afford any form of deference to ALJ decisions.

Medicare Program: Changes to the Medicare Claims Appeal Procedures, 74 Fed. Reg. 65296, 65327 (Dec. 9, 2009) (to be codified at 42 C.F.R. pt. 405) (emphasis added).

Controlling precedent establishes that non-precedential administrative decisions are not entitled to *Chevron* deference. In *Mead*, the Supreme Court explained that a Customs classification ruling did not contain the force of law because the "letter's binding character as a ruling stops short of third parties" and has no "lawmaking pretense." *Mead Corp.*, 533 U.S. at 233. This Circuit has applied *Mead* to treat the precedential value of an agency decision as the essential factor in determining whether *Chevron* deference is appropriate. *Garcia v. Holder*, 659 F.3d 1261, 1266 (9th Cir. 2011) (J. Gould) ("BIA 'interpretations promulgated in a non-precedential manner' are not subject to *Chevron* deference."); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 648 (9th Cir. 2004) (denying *Chevron* deference when agency was "not acting with the force of law . . . not acting in a

way that would have precedential value for subsequent parties."); *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1067 (9th Cir. 2003) (en banc) (J. Gould) (denying *Chevron* deference when agency action was "not an interpretation of a statute that will have the force of law generally for others in similar circumstances"); *Hall v. EPA*, 273 F.3d 1146, 1156 (9th Cir. 2001) ("Interpretations of the Act set forth in such non-precedential documents are not entitled to *Chevron* deference.")

NSCLC is aware of no other Supreme Court or Ninth Circuit precedent stating that an administrative process of review that is neither precedential nor binding on third parties infuses agency manual provisions with the force of law. In the closest analogous circumstance—cases involving *Chevron* deference to an agency's litigating position—the Supreme Court and this Circuit hold that agency litigating positions with respect to statutory interpretations are not entitled to *Chevron* deference. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (agency litigating position with respect to interpretation of statute is not entitled to *Chevron* deference); *Mead Corp.*, 533 U.S. at 238 n.19 (noting that *Chevron* deference would not be accorded to the agency's litigating position advanced in its brief); *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 826-27 (9th Cir. 2012) (en banc) (noting that agencies do not adopt litigating positions through any "relatively formal administrative procedure, but through internal

decisionmaking not open to public comment") (citing *Mead Corp.*, 533 U.S. at 230); *see also Chao v. Occupational Safety & Health Review Comm'n*, 540 F.3d 519, 527 (6th Cir. 2008) (Secretary of Labor's litigating position was not entitled to *Chevron* deference in interpreting a statute); *Rhodes-Bradford v. Keisler*, 507 F.3d 77, 80 (2d Cir. 2007) ("The agency's claim that the BIA has the power to do so is merely a litigation position taken before this Court, and, as such, is not entitled to *Chevron* deference."); *S. Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 828 (10th Cir. 2000) ("The agency's litigation position in this court thus lacks the requisite formality for *Chevron* deference under step two [of the *Chevron* analysis]."). No basis exists for a contrary result here.

II. THE PANEL'S RULING CONTRAVENES IMPORTANT POLICY CONSIDERATIONS.

As an advocate on behalf of low-income older persons, NSCLC is deeply concerned that, under the panel's formulation, NSCLC's clients—and the public in general—will not be able to determine when an agency intends to promulgate an interpretation, what that interpretation is expected to be, and how the public's concerns can be heard and considered in the rule-making process, before that interpretation has the force of law that binds the federal courts to *Chevron* deference.

MAC decisions are not binding on third parties, and there is no process through which the public may comment on MAC decisions before they are issued.

Instead, like the agency litigating positions discussed in *Price*, MAC decisions are reached "through internal decisionmaking not open to public comment or determination." 697 F.3d at 826-27. Public policy does not justify granting such deference to non-precedential agency decisions:

> "[I]nitial decisions by ALJs ... often are not treated as binding precedent by the agency itself. In other words, they are not regarded as legally binding inside the agency in future proceedings raising the same issue. Such decisions also do not qualify for *Chevron* deference. Indeed, it would be extremely odd to give ALJ decisions greater legal force in court than they have within the agency itself.

Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 908 (2001) (footnote omitted). It similarly would be odd to grant MAC decisions greater legal force in court than they have within the agency itself, as the panel's decision does in this case.

Most MAC decisions, let alone lower level reviews, are not readily available to the public. Indeed, it is not clear how the public may even access "long-standing" interpretations in MAC decisions. While Westlaw began carrying MAC decisions relatively recently, access to prior opinions is limited. *See Medicare Appeals Council Decisions*, http://www.hhs.gov/dab/divisions/medicareoperations/macdecisions/mac_decisions.html (noting that MAC began posting "certain significant decisions and actions on the web site of the Departmental Appeals

Board (of which it is a component)" in January 2003, and that Westlaw began carrying MAC decisions in October 2010).

Even if NSCLC were able to search for recent MAC decisions, third parties to the particular claim review would not usually have any way to identify pending or incipient MAC cases (as opposed to already rendered decisions), and would have no ability to make a timely argument against the Secretary's interpretation in that particular appeal. This situation contrasts with the process of promulgating regulations, which require public notice, posted deadlines for comments, and other procedural protections. *See, e.g.*, 42 U.S.C. § 1395hh(b) (providing for public notice and comment with respect to Secretary of Health and Human Services' proposed regulations). Finally, even if NSCLC found out about a pending MAC matter and had the right to participate and be heard, NSCLC still would not know whether the Secretary's litigation position in that particular MAC was intended to be a generally applicable interpretation that would be implemented through vast numbers of appeals, as contemplated by the panel. In short, individuals and organizations such as NSCLC would lack any meaningful way to know when they must challenge agency interpretations that purportedly have been implemented in a "vast number of claims" over a long period of time.

This case is a good example. Medicare claimants would have had extreme difficulty ascertaining the Secretary's "longstanding" position with respect to the

interpretation at issue in this very case. Although the Health and Human Services Department website states that it posts MAC decisions that "involve the adjudication of issues that may be of interest to various stakeholders in the Medicare appeals process," NSCLC can find no such decisions on the website that involve facts similar to the instant case and discuss the Secretary's CMS Manual interpretation of 42 U.S.C. § 1395y(a)(12). Indeed, the panel's decision in this very case fails to cite a single MAC decision that includes a discussion of the Secretary's interpretation in the CMS Manual.

The panel's proposed "standard" is too vague and unpredictable. The panel decision is silent as to how old an interpretation must be before it is considered "long-standing," or how many cases must adopt the same interpretation to be considered "well-established." The panel states that the Secretary first adopted the interpretation under review in this case in 1967. *Fournier*, 2013 WL 2364070, at *9. Yet MAC decisions are not widely available before late 2010, and none that is readily identifiable on the website actually addresses this issue. In short, Medicare beneficiaries would simply have no way to determine that a manual interpretation had been consistently implemented in sufficient numbers of appeals over a sufficiently long period of time to be on the threshold of becoming a "law" of agency interpretation that will be entitled to *Chevron* deference in subsequent court cases.

In addition to a lack of full public availability, the Medicare appeals system processes a staggering number of claims on a yearly basis. This high volume, coupled with the non-precedential status of MAC decisions, invariably leads to inconsistent applications. For example, in fiscal year 2012, Administrative Law Judges[4] decided over 64,000 appeals, involving more than 184,000 individual claims.[5] Tom Herrmann, *The Medicare Appeals Process - Is it Working in 2013?* (Mar. 2013) (former MAC judge), http://www.compliance.com/the-medicare-appeals-process-is-it-working-in-2013. In the same year, the MAC decided 2,515 appeals involving more than 26,000 individual claims. *Id.*

It is impractical to attempt to extract clear legal principles from informal, non-precedential agency decisions issued at such a high volume each year. *See Mead Corp.*, 533 U.S. at 238 n.19 ("there would have to be something wrong with a standard that accorded the status of substantive law to every one of 10,000

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[4] ALJs are the level of administrative review below MAC. 42 C.F.R. § 405.904(a)(2).

[5] Most claims are filed by Medicare providers, not beneficiaries. Herrmann, *supra*, at 15. Because there is no statutory authorization for attorneys' fees for successful Medicare claimants, most Medicare beneficiaries are not able to obtain an attorney in their appeals, and only a small number of non-profit organizations like the Center for Medicare Advocacy and NSCLC are able to represent Medicare beneficiaries *pro bono*. *See* Alfred J. Chiplin, Jr., *Attorneys Fees and Medicare Representation: The Problem of the Fee Structure and Limitation of Title II of the Social Security Act and Medicare Representation* (Jan. 2001), http://medicareadvocacy.org/news/Archives/WAUpdate_AttorneysFees.pdf.

'official' customs classifications rulings turned out each year from over 46 offices placed around the country . . . ."). Even assuming that all MAC decisions were available to the public, it would be difficult for an individual or an organization such as NSCLC to understand and digest the high volume of decisions produced in the Medicare appeals process to determine whether holdings coalesced sufficiently in one direction so as to warrant *Chevron* deference under the panel's decision. The imposition of any such requirement would lead to countless sub-issues, each of which also would have to be litigated: How many proceedings must be decided before a particular proposition is sufficiently well-established to warrant *Chevron* deference? How old must the decisions be? Do all agency decisions have to reach the same result? If not, what percentage of decisions must reach the agency's desired result in order for *Chevron* deference to apply?

These questions are far from theoretical. The large numbers of claims and appeals cited above undoubtedly have led to numerous inconsistencies, as none of these decisions is binding on any other litigants or agency components. The Office of Inspector General for the Department of Health and Human Services issued a recent report in which it noted a number of problems with the Medicare appeals process:

> Differences between ALJ and QIC [the level of review below the ALJ] decisions were due to *different interpretations of Medicare policies* and other factors. In addition, the favorable rate varied widely by ALJ. When CMS participated in appeals, ALJ decisions were less likely to be favorable to appellants.

Improvements are Needed at the Administrative Law Judge Level of Medicare Appeals (Nov. 2012), OEI-02-10-00340, at 2, *available at* https://oig.hhs.gov/oei/reports/oei-02-10-00340.asp. In response, the OIG made a number of recommendations, including "(1) develop[ing] and provid[ing] coordinated training on Medicare policies to ALJs and QICs, [and] (2) *identify[ing] and clarify[ing] Medicare policies that are unclear and interpreted differently*." *Id.* (emphasis added).[6]

The panel's decision is also problematic because it has the potential consequence of being applied in similar contexts. For example, the Social Security Administration issues a Program Operations Manual System ("POMS") that is not binding on either ALJs or the Social Security Appeals Council. *Lockwood v. Comm'r*, 616 F.3d 1068, 1072 (9th Cir. 2010). In NSCLC's experience, a number of substantive POMS sections are not available to the public. The Social Security Administration also provides a process of adjudication that, as in the Medicare

[6] The unwieldy nature of the Medicare appeals process has been widely acknowledged. "The OIG's 2002 finding that the Medicare appeals system is 'backlogged, overwhelmed, and untimely' remains valid today. More resources are needed to ensure that Medicare appeals are decided in a timely and comprehensive way." Herrmann, *supra*, at 15.

process, is neither precedential nor binding on third parties. *See* 20 C.F.R. §§ 404.981, 404.966. Furthermore, these decisions are largely unavailable to the public. *See* 42 U.S.C. § 1306(a) (prohibiting the Social Security Administration from disclosing information in its possession unless the disclosure is set out in regulations or otherwise provided by federal law, where information includes any "file, record, report, or other paper."). As with the Medicare appeals system, the Social Security appeals process involves an enormous number of appeals. In fiscal year 2012, the Social Security Appeals Council reviewed more than 173,000 cases. *See Brief History and Current Information About the Appeals Council,* http://www.ssa.gov/appeals/about_ac.html.

The panel's holding—that an agency manual provision is entitled to the force of law because the agency has an administrative process of adjudication—conceivably could be read as entitling POMS interpretations to the force of law, as the Social Security Administration arguably also provides a process of adjudication for a "vast number of claims." Indeed the panel's holding potentially could apply to any context where the federal agency uses an agency manual and has an administrative adjudicative process. Such application would dramatically reduce beneficiaries' access to judicial review of agency action—replicating the problems noted above with respect to myriad issues across a wide range of federal benefits programs. This result is untenable and must be rectified.

CONCLUSION

For the foregoing reasons, the Appellants' petition for rehearing should be granted and the panel's opinion should be vacated.

Respectfully submitted,

/s/ Lisa Hill Fenning
Lisa Hill Fenning
ARNOLD & PORTER LLP
777 South Figueroa Street
Los Angeles, California 90017
(213) 243-4000
(213) 243-4199 (fax)

David B. Bergman
Dirk C. Phillips
Laura K. D'Allaird
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000
(202) 942-5999 (fax)

Counsel for Amicus Curiae
National Senior Citizens Law Center

Dated: July 22, 2013

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 29(c)(7) and 32(a)(7)(C) and Circuit Rule 29-2(c)(2), I certify that this brief complies with the applicable type-volume limitations. Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief contains 4180 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2007) used to prepare the text of this brief.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionately-spaced typeface using Word in 14-point type, Times New Roman font.

/s/ Lisa Hill Fenning
Lisa Hill Fenning

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Gil Deford
Wey-Wey Kwok
Alice Bers
Center for Medicare Advocacy, Inc.
P.O. Box 350
Willimantic, CT 06226

Sushma Soni
U.S. Department of Justice
Civil Division Appellate Staff
950 Pennsylvania Avenue NW, Room 7218
Washington, DC 20530-0001

Michael Raab
U.S. Department of Justice
Civil Division Appellate Staff
950 Pennsylvania Avenue NW, Room 7237
Washington, DC 20530-0001

Michael A. Johns
Office of the U.S. Attorney
Two Renaissance Square
40 N. Central Avenue
Phoenix, AZ 85004-4408

Jose de Jesus Valdez Rico
Arizona Center for Disability Law
Suite 305
100 N. Stone Ave.
Tucson, AZ 85701

/s/ Lisa Hill Fenning
Lisa Hill Fenning