

441 G St. N.W.
Washington, DC 20548

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November 15, 2021

The Honorable Ron Wyden
Chairman
The Honorable Mike Crapo
Ranking Member
Committee on Finance
United States Senate

The Honorable Frank Pallone, Jr.
Chairman
The Honorable Cathy McMorris Rodgers
Republican Leader
Committee on Energy and Commerce
House of Representatives

Subject: *Department of Health and Human Services: Fiscal Year 2022 Medicaid Allotment for Puerto Rico*

This legal opinion responds to section 3105(b) of the Extending Government Funding and Delivering Emergency Assistance Act, which provides for GAO to conduct a review of the Department of Health and Human Services' (HHS) determination of the fiscal year (FY) 2022 allotment of federal Medicaid funds for Puerto Rico.¹ The federal allotments available to help finance Medicaid programs in the five U.S. territories, including in Puerto Rico, are determined according to section 1108(g) of the Social Security Act (Act).² As summarized below and discussed in the attached appendix, we conclude that section 1108(g) requires that HHS base its calculation of the FY 2022 allotment for Puerto Rico on the territory's allotment for FY 2019, rather than FY 2020. Accordingly, HHS's FY 2022 allotment of \$2,943,000,000 for Puerto Rico was not authorized.

It is well established that where the language of a statute is plain and unambiguous, the plain terms of the statute must prevail.³ Section 1108(g) of the Act directs HHS to disregard identified statutory language in determining the allotments for Puerto Rico and the other four territories for years after FY 2021. As written, the statute requires HHS to base Puerto Rico's FY 2022 allotment on its allotment for FY 2019 and the allotments for the other four territories, which are not at issue here, on their allotments for FY 2021.

¹Pub. L. No. 117-43, § 3105(b), 135 Stat. 344, 380 (2021).

²Social Security Act, § 1108(g) (classified as amended at 42 U.S.C. § 1308(g) (2020)).

³*Carcieri v. Salazar*, 555 U.S. 379, 387 (2009).

HHS, however, did not apply the plain language of the statute, asserting that it would produce an “absurd result”—a “drastic reduction” in funding for Puerto Rico and a “modest increase” in funding for the other territories.⁴ Instead, HHS adopted an interpretation of section 1108(g) that resulted in modest adjustments in funding for all five territories.

Courts have recognized an exception to the plain meaning rule where the application of the statutory text produces a result that is so absurd that Congress could not have intended it.⁵ Those seeking to disregard a statute’s plain language on the grounds of absurdity must meet a high bar beyond merely undesirable, harsh, or odd policy consequences.⁶ That standard has not been met here. Courts are unwilling to override statutory text on the basis of a preferable outcome, as opposed to an absurd one, stating, “we are not free to rewrite the statute that Congress has enacted.”⁷ Accordingly, HHS should base the calculation of Puerto Rico’s FY 2022 allotment on the territory’s FY 2019 allotment as required by the plain language of section 1108(g) of the Act.

We are not expressing an opinion on the policy question of federal funding for Puerto Rico’s or the other territories’ Medicaid programs. That is clearly a matter for Congress. Our conclusion is one of statutory interpretation, and the plain meaning of the language of the statute is clear.

If you have questions about this opinion, please contact Helen T. Desaulniers, Managing Associate General Counsel at (202) 512-4740, or Sandra C. George, Assistant General Counsel at (202) 512-8215.

Sincerely yours,



Edda Emmanuelli Perez
General Counsel

Attachment

⁴Letter from Acting General Counsel, HHS, to Assistant General Counsel, GAO, 5 (Oct. 22, 2021) (on file with GAO).

⁵See *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (“It is well established that when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” (internal quotations omitted)).

⁶See, e.g., *Dodd v. U.S.*, 545 U.S. 353, 359 (2005) (rejecting a policy argument that to interpret a statute of limitations to toll before the cause of action accrues is absurd, finding “the disposition required by the text here, though strict, is not absurd”).

⁷See *id.*

APPENDIX

This legal opinion responds to section 3105(b) of the Extending Government Funding and Delivering Emergency Assistance Act, which provides for GAO to conduct a review of the Department of Health and Human Services' (HHS) determination of the fiscal year (FY) 2022 allotment of federal Medicaid funds for Puerto Rico.⁸ In accordance with our regular practice, we contacted HHS to obtain additional factual information and its legal views on this matter.⁹ HHS provided us with information and its legal views.¹⁰

The federal allotments available to help finance Medicaid programs in the five U.S. territories, including in Puerto Rico, are determined according to section 1108(g) of the Social Security Act (Act).¹¹ As discussed below, we conclude that section 1108(g) requires that HHS base its calculation of the FY 2022 allotment for Puerto Rico on the territory's allotment for FY 2019, rather than FY 2020. Accordingly, HHS's FY 2022 allotment of \$2,943,000,000 for Puerto Rico was not authorized.

BACKGROUND

Statutory Framework for Federal Medicaid Allotments for the Territories

The Medicaid programs in the five U.S. territories—American Samoa, the Commonwealth of the Northern Mariana Islands (CNMI), Guam, Puerto Rico, and the U.S. Virgin Islands—receive federal Medicaid funding under section 1108 of the Act. Section 1108(g) establishes a cap on the amount of federal Medicaid funding available to a territory for a particular fiscal year. This cap, known as an allotment, is generally based on the territory's allotment for the prior fiscal year, adjusted for inflation, and rounded to the nearest \$100,000 (for Puerto Rico) or \$10,000 (for each of the other four territories). At times, including for FY 2020 and FY 2021, Congress specifies in law an allotment for particular years, rather than use of this statutory formula for calculating the territories' allotments.

⁸Pub. L. No. 117-43, § 3105(b), 135 Stat. 344, 380 (2021).

⁹GAO, Procedures and Practices for Legal Decisions and Opinions, GAO-06-1064SP (Sept. 2006), *available at* <http://www.gao.gov/assets/210/203101.pdf>; Letter from Assistant General Counsel, GAO, to Acting General Counsel, HHS (Oct. 6, 2021) (on file with GAO).

¹⁰Letter from Acting General Counsel, HHS, to Assistant General Counsel, GAO (Oct. 22, 2021) (on file with GAO) (hereinafter, HHS Response).

¹¹Social Security Act, § 1108(g) (classified as amended at 42 U.S.C. § 1308(g) (2020)).

FY 2020 and FY 2021 Allotments

Section 1108(g)(2) contains five subparagraphs—one for each territory.¹² In December 2019, the Further Consolidated Appropriations Act, 2020, amended these subparagraphs to establish specific allotments for all five territories for FY 2020 and FY 2021.¹³ This was accomplished in the statute by inserting clauses within each of the subparagraphs. Specifically, each clause (i) provided for the statutory formula for calculating the annual allotment for the respective territory, with the prior year serving as the base year, and each clause (ii) provided for specific amounts for FY 2020 and FY 2021. For the territories other than Puerto Rico, the specific amounts were provided for in the new clause (ii) of each subparagraph. By contrast, Puerto Rico’s clause (ii) provided for the directed allotments through a cross-reference to a subsequent paragraph—1108(g)(6)—which set out the specific amounts for both years, FY 2020 in subparagraph (A)(i) and FY 2021 in subparagraph (A)(ii).

The Further Consolidated Appropriations Act, 2020, also established how allotments are to be calculated after FY 2021.¹⁴ Specifically, it provided for HHS to calculate the allotment for each territory in FY 2022 and future years using the statutory formula specified in clause (i). It also directed HHS to disregard the amounts for FY 2020 and FY 2021, and to instead calculate the allotments for FY 2022 using a base year of FY 2019, adjusted for inflation—effectively reducing the allotments to what they would have been had the increases for FY 2020 and FY 2021 not been enacted. This was accomplished in the statutory text through the insertion of a provision that follows the subparagraphs of section 1108(g)(2) and is flush with the margin, hence known as “the flush language.” It provides:

For each fiscal year after fiscal year 2021, the total amount certified for Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa under subsection (f) and this subsection for the fiscal year shall be determined as if the preceding subparagraphs were applied to each of fiscal years 2020 through 2021 without regard to clause (ii) of each such subparagraph.

A few months later, in March 2020, the Families First Coronavirus Response Act increased the specified FY 2020 and FY 2021 allotments for each of the five territories in response to the COVID-19 pandemic.¹⁵ This was accomplished through the addition of a new clause (iii) pertaining to FY 2021 for four of the territories, but not Puerto Rico. For Puerto Rico, the law simply increased the FY 2020 and FY 2021 allotment amounts located in sections 1108(g)(6)(A)(i) and (ii). The Families First Coronavirus Response

¹²That is, the allotment for Puerto Rico is at section 1108(g)(2)(A), the U.S. Virgin Islands at section 1108(g)(2)(B), Guam at section 1108(g)(2)(C), CNMI at section 1108(g)(2)(D), and American Samoa at section 1108(g)(2)(E).

¹³Pub. L. No. 116-94, div. N. tit 1, subtit. B, § 202, 133 Stat. 2534, 3103-04 (2019).

¹⁴*Id.* § 202(a)(1)(G), 133 Stat. at 3104.

¹⁵Pub. L. No. 116-127, § 6009, 134 Stat. 178, 209 (2020).

Act did not amend the flush language. At issue here is the question of which allotments the flush language eliminates for purposes of determining the base year on which Puerto Rico's FY 2022 allotment is calculated.

HHS FY 2022 Allotments for the Territories

In a letter dated September 24, 2021, the Centers for Medicare & Medicaid Services (CMS) notified Puerto Rico's Medicaid Director that the territory's FY 2022 allotment would be \$2,943,000,000.¹⁶ CMS explained that it based this allotment on Puerto Rico's FY 2020 allotment amount. CMS also described the other four territories' FY 2022 allotments, which the agency noted it based on their FY 2021 allotments.

DISCUSSION

It is well established that statutory analysis "begins with the plain language of the statute."¹⁷ If the statutory language is clear and unambiguous on its face, then the plain meaning of that language controls.¹⁸ Here, the language governing Puerto Rico's allotment for FY 2022 is quite clear. As detailed above, the flush language at the end of section 1108(g)(2) provides, in relevant part, that for FY 2022,

the total amount certified for Puerto Rico . . . for the fiscal year shall be determined as if the *preceding subparagraphs* were applied to each of fiscal years 2020 through 2021 without regard to clause (ii) of each such subparagraph.

(emphasis added). In this provision, the phrase "preceding subparagraphs" necessarily refers to the subparagraphs that come immediately before the flush language. Subparagraph (A), pertaining to Puerto Rico, contains both a clause (i), which provides for the inflation adjustment to the previous fiscal year's allotment, and a clause (ii), which states, "for each of fiscal years 2020 through 2021, the amount specified in paragraph (6) for each such fiscal year." Giving effect to the directive in the flush language to disregard clause (ii) of the prior subparagraph pertaining to Puerto Rico results in disregarding the allotments for FY 2020 and FY 2021 contained in paragraph (6) when determining the FY 2022 allotment. This application of the statute's plain meaning leads to a requirement to use FY 2019 as the base year for the calculation of Puerto Rico's FY 2022 allotment.

HHS acknowledges that this approach would lead to the use of FY 2019 as the base year for Puerto Rico's FY 2022 allotment, which HHS calculated would produce an

¹⁶Letter from Deputy Administrator and Director, CMS, to Medicaid Director, Puerto Rico Medicaid Program, 2 (Sept. 24, 2021) (on file with GAO).

¹⁷*Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009); see also *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) ("The starting point in discerning congressional intent is the existing statutory text . . .").

¹⁸*Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) ("When a statute's text is plain and unambiguous . . . the statute must be applied according to its terms . . ." (internal quotations omitted); *U.S. v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.").

amount of \$406,400,000.¹⁹ HHS contends that such a “drastic reduction” in federal funding for Puerto Rico in comparison to the “modest increases” in funding for the other four territories is “an absurd result” that necessitates an alternate approach.²⁰ On this basis, HHS departed from the plain language of the statute and disregarded clause (ii) of a subsequent subparagraph—section 1108(g)(6)(A)—rather than clause (ii) of the preceding subparagraph—section 1108(g)(2)(A)—when determining the FY 2022 allotment for Puerto Rico.

The courts have recognized an exception to the plain meaning rule when application of the statutory text produces a result so absurd that Congress could not have intended it.²¹ The exception is limited and courts have imposed a high bar for setting aside a statute’s plain meaning as absurd, doing so only in “rare and exceptional circumstances” in which the absurdity is “so gross as to shock the general moral or common sense.”²² For example, in a foundational case applying the absurdity doctrine, the Supreme Court held that a statute making it a criminal offense to knowingly and willfully obstruct or retard a driver or carrier of the mails did not apply to a sheriff who arrested a mail carrier who had been indicted for murder.²³ More recent decisions have rejected merely undesirable, harsh, or odd policy consequences as insufficient to override the plain text of the law.²⁴

¹⁹HHS Response, at 4 (“If the flush language were applied to disregard section [1108(g)(2)(A)(ii)], then Puerto Rico’s amounts certain for both FY 2020 and FY 2021 would be disregarded in the determination of its allotment for FY 2022, and the allotment for FY 2022 would be based on the allotment for FY 2019, increased by the percentage increase in CPI-M and rounded to the nearest \$100,000. . . . [W]e calculated that Puerto Rico’s FY 2022 allotment amount would be \$406,400,000 . . .”).

²⁰HHS Response, at 5. HHS notes that Puerto Rico would receive an approximately 86.5 percent cut in its allotment compared to FY 2021, whereas the other four territories would each receive an increase of approximately 2.7 percent.

²¹*Lamie*, 540 U.S. at 534 (“It is well established that when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” (internal quotations omitted)).

²²*Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) (“[T]o justify departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense.”); *U.S. v. Lopez*, 998 F.3d 431, 438, 440 (9th Cir. 2021) (In holding that “this case lacks the rare and exceptional circumstances that allow a court to disregard Congress’s clear and unambiguous statute via the absurdity canon,” the Ninth Circuit explained that “the absurdity canon is confined to situations where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone.” (internal quotations and emphasis omitted)); *Texas Brine Co. v. Am. Arbitration Ass’n*, 955 F.3d 482, 486 (5th Cir. 2020) (“The absurdity bar is high, as it should be.”).

²³See *U.S. v. Kirby*, 74 U.S. 482 (1868). In *Kirby*, the Court extended a presumption that the legislature intends exceptions to its language to avoid absurd consequences, recalling that a statute prohibiting a prisoner’s escape from prison did not apply to a prisoner who breaks out when the prison is on fire, “for he is not to be hanged because he would not stay to be burnt.” *Id.* at 487 (quoting another source).

²⁴See, e.g., *Dodd v. U.S.*, 545 U.S. 353, 359 (2005) (rejecting a policy argument that to interpret a statute of limitations to toll before the cause of action accrues is absurd, finding the “disposition required by the text here, though strict, is not absurd”); *Barnhart v. Thomas*, 540 U.S. 20, 29 (2003) (finding that undesirable consequences are not the equivalent of absurd consequences); *Texas Brine*, 955 F.3d at 486 (“In statutory interpretation, an absurdity is not mere oddity.”).

Although HHS may have policy concerns regarding the decrease in Puerto Rico’s FY 2022 allotment in comparison to increases for the other four territories, such concerns involve policy considerations within the purview of Congress. Regardless of how compelling the policy arguments may be, courts are unwilling to override statutory text on the basis of a preferable outcome, as opposed to an absurd one, stating, “we are not free to rewrite the statute that Congress has enacted.”²⁵ As the Supreme Court has noted, it is “unwilling to soften the import of Congress’ chosen words,” even if they lead to a harsh outcome, out of “deference to the supremacy of the Legislature” that had voted on the language of the bill.²⁶

HHS notes that, apart from the instruction in the statute, there is no evidence that Congress intended to treat the territories so disparately.²⁷ This, however, is not the test articulated by the courts for disregarding the plain meaning of a statute. Instead, recognizing that the language of a statute is the clearest expression of congressional intent, the courts have stated that the proper question is whether the result is so absurd it could not have been intended by Congress.²⁸ We do not find the result here so bizarre that Congress could not have intended it. Indeed, legislation reported out of the Committee on Energy and Commerce of the House of Representatives in July 2021, also would make Medicaid funding distinctions between Puerto Rico and the other territories, effectively leading to the same type of result that HHS asserts here is absurd.²⁹

CONCLUSION

We find that section 1108(g), by its plain language, directs HHS to use FY 2019 as the base year for determining Puerto Rico’s FY 2022 federal Medicaid allotment. The fact

²⁵*Dodd*, 545 U.S. at 359 (“Although we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that Congress has enacted.”); see also *Baker Botts L.L.P. v. ASCARO L.L.C.*, 576 U.S. 121, 134-35 (2015) (“Whether or not the Government’s theory is desirable as a matter of policy, Congress has not granted us ‘roving authority . . . to allow counsel fees . . . whenever [we] might deem them warranted.’” (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 260 (1975))).

²⁶*Lamie*, 540 U.S. at 538 (internal quotations omitted).

²⁷HHS Response, at 5.

²⁸See *Barnhart*, 540 U.S. at 28 (rejecting application of absurdity doctrine when there was one plausible reason Congress might have intended the result); *Lopez*, 998 F.3d at 438 (“[T]he absurdity canon is confined to situations where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone.” (internal quotations and emphasis omitted)); *Texas Brine*, 955 F.3d at 486 (holding that for absurdity doctrine to apply, the “result must be preposterous” and one that “no reasonable person could intend.” (internal quotations omitted)). In 2011, the Court found a statute’s result “not so bizarre that Congress could not have intended it” despite acknowledging that any rationale Congress may have had eluded it. *CSX Transp. v. Ala. Dep’t of Revenue*, 562 U.S. 277, 295 (2011).

²⁹In particular, the legislation specifies increased allotments for all five territories beginning in FY 2022, but provides Puerto Rico increased allotments for only five years, while providing the other four territories increased allotments for eight years. Under the legislation, Puerto Rico’s allotment for FY 2027 would be based on its FY 2019 allotment, adjusted for inflation, while the other territories would continue to receive increased allotments through FY 2029. See Supporting Medicaid in the U.S. Territories Act of 2021, H.R. 4406, 117th Cong. § 2(b) (as reported by H. Comm. on Energy & Commerce, July 21, 2021).

that this results in a decrease in funding for Puerto Rico, whereas the other four territories receive increases in funding, does not meet the high bar of absurdity the courts have established and, therefore, does not justify a departure from the plain language of the statute. As a result, we conclude that section 1108(g) requires that HHS base its calculation of the FY 2022 allotment for Puerto Rico on the territory's allotment for FY 2019, rather than FY 2020. Accordingly, HHS's FY 2022 allotment of \$2,943,000,000 for Puerto Rico was not authorized.

We are not expressing an opinion on the policy question of federal funding for Puerto Rico's or the other territories' Medicaid programs. That is clearly a matter for Congress. Our conclusion is one of statutory interpretation, and the plain meaning of the language of the statute is clear.