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SUBSTANTIAL COMPLIANCE PERMITS SUBSTANTIAL SUFFERING: DEBUNKING THE MYTH OF A PRINCIPLED "SPLIT" IN THE CIRCUITS OVER MANDATORY TIMELINESS REQUIREMENTS IN FEDERAL BENEFITS LAW

ARMEN H. MERJIAN*

This case is about people - children and adults who are sick, poor, and vulnerable - for whom life, in the memorable words of poet Langston Hughes, "a in't been no crystal stair." It is written in the dry and bloodless language of "th e law" - statistics, acronyms of agencies and bureaucratic entities, Supreme Court case names. . . . But let there be no forgetting the real people to whom this dry and bloodless language gives voice: anxious, working parents who are too poor to obtain medications or heart catheter procedures or lead poisoning screens for their children, AIDS patients unable to get treatment, elderly persons suffering from chronic conditions like diabetes and heart disease who require constant monitoring and medical attention. Behind every "fa ct" found herein is a human face and the reality of being poor in the richest nation on earth.[1]

I. INTRODUCTION

Courts throughout the United States have long recognized that delays in providing public assistance benefits can cause recipients profound suffering and irreparable harm.[2] In the words of the United States Supreme Court, such delays "may deprive an *eligible* recipient of the very means by which to live while he waits."[3] To prevent such hardship, federal statutes governing public assistance programs, together with their implementing regulations, expressly provide

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[1] Salazar v. District of Columbia, 954 F. Supp. 278, 281 (D.D.C. 1996).

[2] *See infra* notes 3, 13-20 and accompanying text.

[3] Goldberg v. Kelly, 397 U.S. 254, 264 (1970); *see, e.g.*, White v. Mathews, 559 F.2d 852, 859 (2d Cir. 1977) ("When the government does not act with reasonable promptness, those claiming total disability are required to bear an unreasonable delay and suffer unwarranted deprivation of that which is lawfully theirs.").

maximum time frames for the provision of benefits such as Food Stamps, Medicaid, and Temporary Assistance to Needy Families ("TANF").[4] Notwithstanding these clear mandates, the question arises whether these statutes and regulations require strict, or merely substantial, compliance. Many courts and practitioners, upon a cursory review of the relevant case law, have concluded that that there is a "split of authority" in United States circuit courts on this issue.[5]

Upon closer examination, however, the notion of a split is highly misleading. In the earliest circuit court case to examine this issue, *Shands v. Tull*,[6] the Third Circuit ruled in 1979 that the regulations at issue merely required substantial, rather than strict compliance.[7] Since that time, every circuit court to address this issue, including the Fourth, Sixth, Seventh, and Ninth Circuits, has ruled that the governing statutes and regulations require strict compliance, with the First Circuit strongly suggesting the same. Conceptualizing the relevant circuit authorities as "split" therefore masks the reality that only one circuit court, and the very first of the six that have addressed the issue, has allowed substantial compliance. As we shall see, moreover, *Shands* was a poor test case upon which to establish the general rule.

Examining the relevant circuit court authorities, this article argues that, notwithstanding the common misconception, there is no principled divide on the question of strict or substantial compliance. In fact, *Shands* represents a single disfavored - indeed continuously rejected - exception to the well-reasoned consensus in favor of strict compliance. Not only did *Shands* involve unusual facts, but the court based its rejection of the explicit and controlling regulations upon statutory language that, as subsequent circuit courts and the Supreme Court[8] have recognized, did not govern the legal time frames at issue.

In addition, as the analysis reveals, there is no legal or statutory basis for the concept of substantial compliance - where the governing statute or regulation utilizes mandatory rather than precatory language, there is no basis, other than

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[4] In 1996, the Aid to Families with Dependent Children ("AFDC") program was replaced with TANF under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. 110 Stat. 2105; *see, e.g.*, Saenz v. Roe, 526 U.S. 489, 492-93 (1999). Because all of the circuit court cases discussed herein were decided before 1996, this article refers exclusively to the AFDC program.

[5] *See, e.g.*, Roberta G. v. Perales, 90 Civ. 3485, 1992 U.S. Dist. LEXIS 16304, at *12 (S.D.N.Y. Oct. 23, 1992) ("[T]here is a split among the circuits as to the level of compliance required in order for a State not to be in violation of requirements such as these."); Lynch v. King, 550 F. Supp. 325, 337 (D. Mass. 1982) ("There is a split of authority among the circuits on the question whether a district court has the power to require full compliance with the terms of a statute establishing a scheme of cooperative federalism, or may remedy only violations of such magnitude that it can be said that the state has not substantially complied with the requirements of the statute.").

[6] 602 F.2d 1156 (3d Cir. 1979).

[7] *See infra* notes 21-62 and accompanying text.

[8] *See infra* notes 41-42 and accompanying text.

judicial fiat, for permitting departure from the legal requirement of full compliance. Given the critical nature of the rights at stake and the potential for tremendous harm in the absence of compliance, a balance of the equities points in favor of full compliance with the explicit standards. Quite simply, substantial compliance permits substantial suffering.

Part II of this article briefly introduces the context in which the question of strict or substantial compliance arises in federal welfare litigation and provides an overview of the interests at stake in these cases. Part III then examines the first of the relevant circuit court cases, *Shands v. Tull*, the source of the "sp lit" in authorities. Finally, Part IV examines each of the relevant circuit court cases decided after *Shands*, in chronological order. Part V offers a brief conclusion.

II. BACKGROUND

A. The Legal Time Frames

Federal statutes, together with their governing regulations, routinely provide for maximum time frames in providing or determining eligibility for social welfare benefits. These statutes and regulations typically utilize mandatory, rather than precatory, language in prescribing these maximum time limits. To take a few examples from the cases discussed below, the federal statute governing Food Stamps provides that: "th e State agency *shall* . . . provide coupons *no later than* 7 days after the date of application to any household which [meets the enumerated eligibility standards]."[9] Similarly, the regulations governing eligibility for Medicaid, promulgated by the Department of Health and Human Services, expressly provide that a state agency "*mu st* establish time standards for determining eligibility and inform the applicant of what they are. These standards *may not exceed* - (1) Ninety days for applicants who apply for Medicaid on the basis of disability; and (2) Forty-five days for all other applicants."[10]

When a state systematically fails to provide benefits within the mandated time frames, injured parties many times file a class action seeking to compel the agency strictly to comply with the mandated time frames on behalf of similarly-situated recipients. To buttress their claim, plaintiffs proffer systemic evidence regarding the frequency of noncompliance. Examining the percentage of overall noncompliance, courts must then decide whether the governing statute and/or regulation requires strict, or merely "su bstantial," compliance with the mandated time frames.[11] Where the percentage of noncompliance is quite high - at least in

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[9] 7 U.S.C. § 2020(e)(10)(A) (2002) (emphasis added).

[10] 42 C.F.R. § 435.911(a)(1), (2) (2002) (emphasis added).

[11] In stark contrast to the explicit time frames set forth in the statutes and/or regulations at issue in these cases, the term "substa ntial compliance" evades precise definition. While the standard certainly permits less than 100% compliance, it is unclear how far below strict compliance an entity may fall and still be deemed in "su bstantial" compliance. In Shands

the double digits – courts can avoid making this threshold determination, because defendants have failed to achieve even substantial compliance.[12] Where the percentage of noncompliance is smaller, however, defendants are likely to argue that they have substantially complied, forcing the court to address the issue. Additionally, even where the issue has been avoided for the purposes of finding a violation, the question will often reemerge in fashioning an appropriate remedy.

Before turning to the cases, the following section briefly examines the interests typically at stake in these cases. As the discussion indicates, the question whether to require strict or substantial compliance implicates basic rights concerning access to, among other things, food, medicine, and shelter.

B. The Human Face of Noncompliance

Discussing violations in terms of percentages tends to sanitize the consequences of noncompliance, thus reducing the individuals often desperately seeking to obtain compliance to mere numbers. It is critical, however, to understand that every individual represented by percentages has a story to tell, and those stories are often compelling, if not harrowing. As the Seventh Circuit has observed, "delay beyond the time limits may nevertheless impose lingering, if not irreversible, hardships upon recipients."[13] This is evident from the stories of the named plaintiffs in these cases.

In a case challenging the failure timely to process applications for specific medical and dental services, for example, one plaintiff denied dental care "found it painful to chew solid food and, at times, to speak," and a three year-old child

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v. Tull, for example, the court found a figure of 96% compliance to constitute substantial compliance. 602 F.2d 1156 (3d Cir. 1979). The court based its decision, however, on a definition of substantial compliance that would permit upwards of 25% noncompliance. *See infra* notes 38-40 and accompanying text. Because, as this article demonstrates, the concept of substantial compliance with explicit time frames is a judicial construct wholly lacking in statutory basis, the definition will ultimately lie in the eye of the constructor. *See* Fortin v. Commissioner of Mass. Dep't of Pub. Welfare, 692 F.2d 790, 795 (1st Cir. 1982) (suggesting, in dicta: "[N]o particular percentage of compliance can be a safe-harbor figure, transferable from one context to another. Like reasonableness, substantiality must depend on the circumstances of each case, including the nature of the interest at stake and the degree to which noncompliance affects that interest.") (citation and internal quotations omitted).

[12] *See, e.g.*, Doe v. Chiles, 136 F.3d 709 (11th Cir. 1998) (involving system-wide delays of 8 to 10 years, despite 90-day requirement); Henrietta D. v. Giuliani, 119 F. Supp. 2d 181, 210-11 (E.D.N.Y. 2000) (failure to meet time frames in one-third of all cases); Morel v. Giuliani, 927 F. Supp. 622, 637 (S.D.N.Y. 1995) (preliminary injunction issued where city failed to meet time frames "in at least 10-12% of all cases"). It is noteworthy that while all of these cases avoided discussion of strict versus substantial compliance, all appear to have ordered strict compliance with the relevant time frames: the orders in question made no exception for "insubstantial" deviation.

[13] Smith v. Miller, 665 F.2d 172, 177 (7th Cir. 1981).

with a leg deformity "fr equently fell down and walked only with pain, while the Department delayed in processing her request for orthopedic shoes."[14] In another case, an individual living with AIDS waited six months for his Medicaid application to be processed. "Du ring that time, he was forced to spend at least $832 of his own funds and to volunteer for experimental drug trials in order to obtain needed prescriptions and pain medications."[15] Another plaintiff lacked benefits, including Food Stamps with which to feed herself and her son, for nearly six weeks despite timely requests for continuing aid.[16] Similarly, a plaintiff suffering from gestational diabetes during pregnancy required a 2,200 calorie-a-day diet, a diet she could not afford in the absence of a $50 monthly special needs grant that was wrongfully denied until the eighth month of her pregnancy.[17] In a class action brought by New York City residents living with AIDS that challenged the failure timely to provide benefits such as cash assistance, Food Stamps, and Medicaid, one plaintiff was unable to take his AIDS medication or to eat properly for two years, "cau sing his toenails, fingernails, and even his teeth to fall out."[18] Without Food Stamps, this individual "was forced 'to go to different churches and sit around the street and wait for people to come with bags so that [he] could get something to eat because [he] didn't know what [he]was going to do.'"[19]

Ultimately, all of these cases involve poor people waiting longer - often far longer - than they can afford to wait for critical benefits and services. Far from mere bureaucratic glitches, failures to comply with mandatory time frames can and do cause irreparable harm to fully eligible recipients of public benefits. As one court explained: "[T]h e consequences of those mistakes in the social service arena, are more harmful than if they are made in other government programs because the ability of poor people to survive may be jeopardized. In a just society, even a temporary undetermining of that ability is unacceptable and irreparable."[20] It is important to bear this in mind as we examine the relevant

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[14] *Id.* at 177 n.5.

[15] Salazar v. District of Columbia, 954 F. Supp. 278, 325 (D. D.C. 1996).

[16] Morel v. Giuliani, 927 F. Supp. 622, 629 n.3 (S.D.N.Y. 1995).

[17] Brown v. Giuliani, 158 F.R.D. 251, 259 (E.D.N.Y. 1994).

[18] Henrietta D. v. Giuliani, 119 F. Supp. 2d 181, 190 (E.D.N.Y. 2000).

[19] *Id.* at 191.

[20] Willis v. Lascaris, 499 F. Supp. 749, 760 (N.D.N.Y. 1980). *See, e.g.*, Salazar v. District of Columbia, 954 F. Supp. 278, 325 (D. D.C. 1996) ("Defen dants' failure to process Medicaid applications within the requisite 45 days is not simply an abstract bureaucratic irregularity. Rather, it has concrete and often-times devastating effects on poor, sick, vulnerable people."); Caswell v. Califano, 583 F.2d 9, 18 n.15 (1st Dep't 1978) ("We think that the severe hardships which must obviously attend the erroneously delayed payment of disability benefits distinguish this case from cases relied upon by the Secretary in which courts in the context of other varieties of administrative proceedings have found particular instances of delay not unreasonable.") (citations omitted); *Brown*, 158 F.R.D. at 265 ("For plaintiffs and members of the plaintiff class, public assistance benefits are the essential source of support that permit them to survive. The affidavits

cases.

III. THE SOURCE OF THE "SPLIT" IN AUTHORITIES: *SHANDS V. TULL*

In *Shands*,[21] the Third Circuit reviewed a district court order enjoining the State of New Jersey ("New Jersey") to take final administrative action within 90 days on any appeal from a denial of a claim under the Aid to Families with Dependent Children ("AFDC") program. The district court further ordered that, "in any case[] in which the ninety-day limit was exceeded, the State had to pay interim benefits to the aggrieved applicants while their appeals were pending."[22]

The statute at issue in *Shands* provided that the "State plan for aid and services to needy families with children *must* . . . provide . . . that aid to families with dependent children *shall* be furnished with reasonable promptness to all eligible individuals."[23] To implement this statute, the Department of Health, Education and Welfare ("HEW") issued a regulation requiring: "Prompt, definitive, and final administrative action *shall* be taken *within 90 days* from the date of the request for a hearing [to review administrative denial of a claim for benefits]."[24]

Plaintiffs in this class action demonstrated that in the period from November 1976 to January 1977, New Jersey failed timely to complete administrative appeals in 17% of all cases.[25] For the period June 1977 to August 1977, the proportion of untimely cases had narrowed to 4%, or a total of 17 out of 417 cases.[26] Plaintiffs alleged a violation, *inter alia*, of the governing HEW regulation.[27] The district court agreed, finding that "the federal regulation setting the ninety-day standard demanded total rather than substantial compliance."[28]

The Third Circuit reversed the district court ruling. The Third Circuit acknowledged that "[t]he federal regulation is mandatory."[29] The court disagreed, however, "with the district court's decision concerning what the regulation mandates."[30] Notwithstanding the unequivocal language of the

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submitted from the named plaintiffs vividly portray the irreparable consequences to them and their families and infant children when welfare moneys are not forthcoming in a timely fashion: going without food and clothing, lack of medicine for sick family members, risk of fire from candles used to replace electric light, and fears of eviction and foreclosure."); Pratt v. Wilson, 770 F. Supp. 539, 544 n.14 (E.D. Ca. 1991) ("Virtually any delay in the payment of benefits poses a substantial threat of imminent hardship to recipients."); *see supra* notes 2, 3, 13 and accompanying text.

[21] 602 F.2d 1156 (3d Cir. 1979).

[22] *Id.* at 1157.

[23] 42 U.S.C. § 602(a) (1976) (emphasis added).

[24] 45 C.F.R. § 205.10(a)(16) (1978).

[25] 602 F.2d at 1158.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 1160 (citations omitted).

[30] *Shands*, 602 F.2d at 1160.

governing regulation, the Third Circuit announced: "[W]e believe the scheme of the Social Security Act reveals a congressional intent to require only substantial compliance from the states."[31] As evidence, the court cited two AFDC provisions. First, the court cited 42 U.S.C. § 604(a)(2), which permitted HEW to discontinue federal support for a state's AFDC program when "in the administration of the plan there is a failure to comply [s]ubstantially with any provision required by section 602(a) of this title . . . ."[32] Second, the court cited 42 U.S.C. § 603(j), which "award s bonuses to states whose rate of error in determining eligibility is less than four percent."[33] Both of these provisions, the court asserted, "sh ow an implied intent to hold the states to a standard of substantial compliance and thus to make some allowance for the difficulties of administering an extensive bureaucracy."[34]

In vitiating an express and controlling regulation clearly mandating strict compliance with the 90-day time frame, the court did not find the regulation arbitrary or capricious, as established law requires.[35] Rather, the court abrogated this provision based upon what it deemed an "imp lied intent" to permit deviation from the mandatory time frames, set forth in provisions that said nothing of time frames. Indeed, the court itself recognized that the provisions it cited did not control the question at issue in *Shands*. As to section 604(a)(2), the court acknowledged: "It might be argued that the standard of substantial compliance governs only the discontinuation of federal funds and does not apply to other statutory sections concerning AFDC."[36] In fact, this point is beyond argument. Section 604(c)(2) only governed the relationship between the federal government and the states. That section essentially provided that if states wished to continue to receive federal funding, they were required substantially to comply with the rules established by federal law. Where a state failed substantially to do so, the federal government could withdraw federal funding from the state, which would be a drastic remedy.[37] The statute did not attempt, however, to govern or define the legal rights and responsibilities between the states and AFDC recipients - it is

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[31] *Id.* at 1161.

[32] *Id.* at 1160 (quoting 42 U.S.C. § 604(a)(2) (1976)).

[33] *Id.*; *see* 42 U.S.C. § 603(j) (1988).

[34] *Shands*, 602 F.2d at 1161.

[35] *See* Sullivan v. Zebley, 493 U.S. 521, 528 (1990); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984).

[36] 602 F.2d at 1161.

[37] Edelman v. Jordan, 415 U.S. 651, 692 (1974) (Marshall, J., dissenting) ("T he funding cutoff is a drastic sanction, one which HEW has proved unwilling or unable to employ to compel strict compliance with the Act and regulations.") (citation omitted); Fortin v. Commissioner of the Mass. Dep't of Pub. Welfare, 692 F.2d 790, 796 n.8 (1st Cir. 1982) ("HHS might be reluctant to exercise this power, however, because the remedy is drastic . . . ."); *see also* Dunn v. New York State Dep't of Labor, 474 F. Supp. 269, 275 n.6 (S.D.N.Y. 1979) ("[B]e cause decertification is a drastic remedy which benefits no one, I am unconvinced that inaction by the Secretary necessarily means that defendants are not violating the federal statute.").

the controlling HEW regulation that did so.

There is simply no basis to conclude that the drastic *remedy* that Congress provided to the federal government in the event that a state failed substantially to comply with its rules was meant to govern the *rights* of individual AFDC recipients as against the states.[38] Indeed, the fact that Congress was unwilling to reduce a state's funding over individual or "in substantial" violations in no way suggests that Congress intended that individuals should have no recourse against the state when their rights were violated. [39] The district court's order to reimburse these individuals, or to provide them with interim AFDC benefits beyond the 90-day limit, had the virtue of conferring justice upon the individuals harmed by the state's violations without reducing funding for the entire State AFDC program, a measure that likely would have caused further harm to those in need of AFDC benefits.

The only allowance for administrative difficulties, then, was that a state's federal funding would not be reduced if it substantially complied with federal requirements. This is entirely different from the proposition that a state can violate the rights of poor recipients with impunity unless the number of poor

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[38] *See* Freestone v. Cowan, 68 F.3d 1141, 1154 (9th Cir. 1995) ("[A]uthorizing penalties against participating states for 'substantial noncompliance,' seems intended to protect important *federal* interests, including prompt disbursement of federal funds to needy AFDC recipients as mandated by Congress, by ensuring that *overall* performance by the participating State does not fall below federally-prescribed levels. The private remedy afforded by § 1983, on the other hand, safeguards the *individual AFDC recipient's interests* in the timely receipt of the mandated federal benefits."); Ashish Prasad, *Rights Without Remedies: Section 1983 Enforcement of Title IV-D of the Social Security Act*, 60 U. CHI. L. REV. 197, 216 (1993) ("The 'substantial compliance' provision is better read not as a desire to preserve state flexibility in complying with Title IV-D requirements, but rather as a congressional recognition that the Secretary's review of cases cannot be expected to be accurate one hundred percent of the time.").

[39] Ironically, 18 years after *Shands*, the Supreme Court recognized this distinction in holding that an analogous substantial compliance clause in Title IV-D of the Social Security Act does not give rise to a private right of action. Blessing v. Freestone, 520 U.S. 329 (1997). In ruling that the clause "was not intended to benefit individual and children and custodial parents," the Supreme Court explained that "the substantial compliance standard is designed simply to trigger penalty provisions that increase the frequency of audits and reduce the State's AFDC grant by a maximum of five percent." *Id.* at 343-44. The Court noted, moreover, that "even when a State is in 'substantial compliance' with Title IV-D, any individual plaintiff might still be among the 10 or 25 percent of persons whose needs ultimately go unmet." *Id.* at 344. Of course, the plaintiffs in *Shands* did not sue under the substantial compliance provision, but under the provision mandating "reasonable promptness," 42 U.S.C. § 602(a), together with the HEW regulation mandating a 90-day time frame. 45 C.F.R. § 205.10(a)(16). The Supreme Court did not address, let alone foreclose individual enforcement under, these provisions. In fact, even with respect to Title IV-D, the Court expressly stated: "We do not foreclose the possibility that some provisions of Title IV-D give rise to individual rights." *Id.* at 345.

recipients whose rights are violated is large enough to demonstrate a lack of substantial compliance. Circuit courts addressing this issue after *Shands* have recognized this clear distinction.[40]

To conclude otherwise is to conclude that Congress intended to forfeit the rights of one out of every four recipients of the AFDC benefit, as substantial compliance was achieved under the AFDC statute by merely 75% compliance.[41] Since substantial compliance was measured in numbers of cases rather than by the degree - i.e., the number of days - of noncompliance,[42] such an interpretation would have permitted upwards of 25% of all recipients to wait prolonged periods of time, months or even years, without recourse. Among other things, such an interpretation violates the established principle that "statutes should be construed in the most beneficial way the language will permit to prevent absurdity, hardship, or injustice."[43]

Ironically, eighteen years after *Shands*, the Supreme Court recognized this distinction in holding that an analogous substantial compliance clause in Title IV-D of the Social Security Act does not give rise to a private right of action.[44] In ruling that the clause "was not intended to benefit individual children and custodial parents,"[45] the Supreme Court explained that "the substantial compliance standard is designed simply to trigger penalty provisions that increase the frequency of audits and reduce the State's AFDC grant by a maximum of five percent."[46] Of course, the plaintiffs in *Shands* did not sue under the

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[40] *See infra* notes 100, 123-24, and 131-32 and accompanying text.

[41] 45 C.F.R. § 305.20(d)(2) (2002). *See* Prasad, *supra* note 38, at 216 ("[A] state would always be able to argue that it was in compliance generally and that specific cases of noncompliance the Secretary might uncover were merely part of the excluded twenty-five percent."); Freestone v. Cowan, 68 F.3d 1141, 1150 (9th Cir. 1995) ("Under this reasoning, so long as the state meets the 75% requirement, no plaintiffs may sue, even if they fall within the 25% of cases not being serviced.") (citation omitted); *infra* note 42.

[42] *See* 45 C.F.R. § 305.20(d)(2) (2002) (to be found in substantial compliance, state must meet federal requirements "in at least 75 percent of the *cases* reviewed for each criterion . . . .") (emphasis added).

[43] Grebe v. Wheeler Catering Co., 172 F.2d 996, 999 (7th Cir. 1949) (quoting Helms v. American Sec. Co., 22 N.E.2d 822, 824 (Ind. 1939)). *Accord* United States v. Cooper Corp., 312 U.S. 600, 616 (1941) (Black, J., dissenting) ("the frequently declared rule that a statute should not be interpreted in such way as to produce an unreasonable or unjust result.") (citations omitted); Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315, 333 (1938) ("[T]o construe statutes so as to avoid results glaringly absurd, has long been a judicial function."); United States v. McKie, 112 F.3d 626, 631 (3d Cir. 1997) ("Such an interpretation would conflict with our obligation to construe statutes sensibly and avoid constructions which yield absurd or unjust results.") (citations omitted).

[44] Blessing v. Freestone, 520 U.S. 329 (1997).

[45] *Id.* at 343.

[46] *Id.* at 344. The Court noted that "even when a State is in 'substantial compliance' with Title IV-D, any individual plaintiff might still be among the 10 or 25 percent of persons whose needs ultimately go unmet." *Id.*

substantial compliance provision, but under the provision mandating "reaso nable promptness,"[47] together with the HEW regulation requiring a 90-day time frame.[48] The Supreme Court did not address, let alone foreclose enforcement, under these provisions.[49]

As to section 603(j), the Court acknowledged: "It might further be contended that the provision for bonuses does not concern the time taken for determinations of eligibility but rather has to do only with accuracy."[50] Here again there is no room for doubt: section 603(j), repealed in 1989,[51] applied only to "Pu erto Rico, Guam, and the Virgin Islands,"[52] and spoke only of the "d ollar error rate" in eligibility payments, i.e., errors such as in "p ayments to ineligible families" and "o verpayments to eligible families."[53] This extremely limited provision was not remotely related to time frames.[54] The Third Circuit did not, and could not, explain how a provision relating to the states' *accuracy* in determining eligibility in any way governed the legal *time frame* for making such determinations.

As a final piece of evidence in support of its decision, the Third Circuit cited a letter from HEW to the district court in which HEW asserted that it had fulfilled its "s tatutory responsibility to insure that the state defendant substantially complies with the requirements of 45 C.F.R. § 205.10(a)(16)."[55] The court noted that "an agency's interpretation of its own regulations is entitled to deference."[56] As the preceding discussion makes clear, HEW was indeed required to insist upon substantial compliance lest it impose the remedy of withdrawing federal funds. This is, however, irrelevant to the question of what compliance a *recipient* was entitled to insist upon before a court could impose a far less drastic remedy. That question was unambiguously answered by the mandatory language of the controlling regulation, drafted by HEW.

Curiously, the court cited the HEW letter as "[c]o nvincing evidence" of how HEW "*mig ht* interpret the regulation . . . to require only substantial compliance" while abrogating HEW's explicit regulation requiring strict compliance.[57] The inapposite letter was "en titled to deference," while the regulation, which should have been accorded controlling weight,[58] was simply ignored. As the Third

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[47] 42 U.S.C. § 602(a).

[48] 45 C.F.R. § 205.10(a)(16).

[49] In fact, even with respect to Title IV-D, the Court expressly stated: "We do not foreclose the possibility that some provisions of Title IV-D give rise to individual rights." *Blessing*, 520 U.S. at 345.

[50] *Shands*, 602 F.2d at 1160.

[51] Pub. L. No. 101-239, Title VIII, § 8004(b), Dec. 19, 1989, 103 Stat. 2460.

[52] 42 U.S.C. § 603(j) (1988).

[53] *Id.*

[54] *See id.*

[55] *Shands*, 602 F.2d at 1160.

[56] *Id.* (citing Udall v. Tallman, 380 U.S. 1, 16-17 (1965)).

[57] *Id.* (emphasis added).

[58] *See Zebley*, 493 U.S. at 528; *Chevron U.S.A. Inc.*, 467 U.S. at 843-44 ; *see, e.g.*, Withrow v. Concannon, 942 F.2d 1385, 1387 (9th Cir. 1991) ("F ederal regulations, which

Circuit explained, the district court in *Shands* "[i]nterpret[ed] this regulation to require actual compliance," while the Third Circuit interpreted it to mean most-of-the-time compliance.[59] Put another way, the Third Circuit ruled that the lower court erred in holding that the State must actually comply with a mandatory regulation.

There was no ambiguity in the governing regulation at issue in *Shands*. The regulation utilized mandatory, rather than precatory language, in consonance with the AFDC statute, which required that "aid *shall* be furnished with reasonable promptness to all eligible individuals . . . ."[60] Accordingly, there was not the slightest doubt what the regulation required- actual compliance.[61] The Third Circuit expressly recognized that "[t]he federal regulation is mandatory,"[62] and then proceeded to render it permissive.

Shands was, in addition, a poor test case for establishing the need for strict compliance. As the Third Circuit noted, the most recent statistics showed that the state met the mandatory time limit in 96% of the cases, or in 400 out of 417 cases.[63] The court explained, moreover, that the state continued to pay undiminished benefits in 5 of the 17 untimely cases during the appeals,[64] and that the named plaintiffs waited "no more than four to twenty-one days" past the ninety-day limit to receive benefits.[65] This is not to say that the court was in any way justified in essentially rewriting the governing statute, or that the suffering of even 12 indigent plaintiffs should have been so unjustifiably disregarded. The average class action suit, however, can involve hundreds, or even thousands of violations, even where there is "substantial" compliance, making the consequences harder to ignore.[66] Therefore, *Shands* should be limited to the facts

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have the force and effect of law, require each state agency to take final action within ninety days from the date a hearing is requested in the AFDC and Medicaid programs, and within sixty days in the Food Stamp program.") (citations omitted).

[59] *Shands*, 602 F.2d at 1160.

[60] 42 U.S.C. § 602(a) (1976) (emphasis added).

[61] *See* Suter v. Artist M., 503 U.S. 347, 368 (1992) (statute imposes binding obligation on the state because "it is cast in mandatory rather than precatory terms") (citation and internal quotations omitted); Wilder v. Virginia Hosp. Assoc., 496 U.S. 498, 512 (1990) (finding that a statute "cast in mandatory rather than precatory terms" "imposes a binding obligation on States"); Marie O. v. Edgar, 131 F.3d 610, 620 (7th Cir. 1997) (explaining that "the statutory language . . .is direct: if it uses 'shall' and 'required.' The natural meaning of these terms is mandatory, not precatory."); King v. Woods, 144 Cal. App. 3d 571, 576 (Cal. Ct. App. 1st App. Dist. 1983) ("To construe the language as merely directory would defeat the very purpose of the time limits.").

[62] *Shands*, 602 F.2d at 1160.

[63] *Id.* at 1158.

[64] *Id.*; *see also* Thompson v. Walsh, 481 F. Supp. 1170, 1176 (W.D. Mo. 1979) ("*Shands* involved only a handful of administrative appeals.").

[65] 602 F.2d 1161 (3d Cir. 1979).

[66] The First Circuit has also distinguished *Shands* on the grounds that it involved delays in hearing appeals from denials of AFDC benefits, rather than delays in initial

before the court, just as it should be limited to the specific statutory language, since repealed, upon which the decision was based.[67]

IV. POST-*SHANDS*: ALL CIRCUITS REQUIRE STRICT COMPLIANCE

Since *Shands*, every circuit court to consider the issue has rejected the Third Circuit's reasoning and has held that strict, rather than substantial, compliance with mandatory timeliness requirements is required. This includes the Fourth, Sixth, Seventh, and Ninth Circuits, with the First Circuit strongly suggesting the same. Each of the relevant cases is discussed below.

In *Peppers v. McKenna*,[68] decided just four months after *Shands*, the Sixth Circuit upheld a district court order[69] requiring the Ohio Department of Public Welfare ("Oh io") to achieve full compliance with federal regulations requiring timely provision of administrative hearings and decisions under the AFDC and Food Stamp programs. The record in this class action suit established that in 82.5% of cases, Ohio failed to provide Food Stamp recipients with administrative decisions within the 60-day period required by federal regulation.[70] For AFDC cases, the figure was 52.6%.[71]

Having chosen to participate in the AFDC and Food Stamp programs, the district court ruled that Ohio must comply with the "v alid regulations" promulgated by HEW and the Department of Agriculture.[72] Notably, the district court expressly rejected Ohio's mo tion for summary judgment on the basis that it was "in substantial compliance" with the timeliness provisions, and that it was working to solve the problems causing delay.[73] Rejecting substantial compliance as a benchmark, the district court ordered Ohio to "b e in full compliance with the federal regulations."[74] The district court also rejected Ohio's arg ument "th at it does not have sufficient funds to comply with federal law."[75] This argument, the court explained, "h as repeatedly been rejected by the courts to which it has been directed."[76]

In a one-page decision, the Sixth Circuit noted that Ohio raised the same arguments on appeal that the district court had considered and rejected, including the argument "th at appellees are in substantial compliance, and that the appellees

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determinations of eligibility. *See Fortin*, 692 F.2d at 795 (suggesting that delays in initial determinations implicate greater interests and portend more deleterious consequences, making compliance even more critical.).

[67] *See supra* note 4; *supra* note 47 and accompanying text.

[68] 611 F.2d 373 (6th Cir. 1979).

[69] Peppers v. McKenna, 81 F.R.D. 361 (1977).

[70] *Id.* at 364.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 366.

[74] Peppers v. McKenna, 81 F.R.D. 361, 367 (1977).

[75] *Id.* at 368.

[76] *Id.*

do not have the funds with which to comply with such federal regulations."[77] Rejecting these arguments, the Sixth Circuit ruled that Ohio is "bo und by the applicable federal regulations, the State of Ohio being a participant in these programs," and that the district court correctly based its order of *full compliance* upon these regulations.[78] The Sixth Circuit made no mention of *Shands* in its decision, but it clearly rejected the argument that mere substantial compliance suffices under the governing regulations.

In *Alexander v. Hill*,[79] the Fourth Circuit reviewed a compliance order that the district court entered against North Carolina state and county officials ("No rth Carolina") for chronically failing to bring the AFDC and Medicaid programs "in to full compliance with the time limits called for in the regulations."[80] On appeal to the Fourth Circuit, North Carolina challenged the district court's order of strict compliance with the mandatory time frames established by the governing regulations. The court made short work of this challenge:

The defendants' objection to the 100% applicability of the relief ordered, based on a claim that it is too Draconian, need not long detain us. The district court had wide discretion in fashioning a remedy which would achieve compliance with the law. The law itself compels 100% compliance.[81] The district court did not abuse its discretion when it required full compliance with the law and imposed a sanction for any failure to comply. We all are expected to abide fully by the law, and expose ourselves to sanctions whenever we fail to do so.[82]

In stark contrast to *Shands*, the court in *Alexander* refused to abrogate the express mandate of the law through judicial fiat by converting mandatory language into precatory language. The statute utilizes the word "sh all," not "may " or "sh ould." Indeed, the statute does not say that the benefits "sh all . . . be furnished with reasonable promptness to all eligible individuals" *most of the time*, or *in a substantial number of cases*.[83] The mandate is unequivocal and unrestricted. The implementing regulations are similarly uncompromising.[84] Hence, as the Fourth Circuit explained, the district court was merely enforcing the law - and everyone, especially governments, must follow the law.

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[77] 611 F.2d at 373.

[78] *Id.* (emphasis added).

[79] 707 F.2d 780 (4th Cir. 1983).

[80] *Id.* at 782. The regulations require that '[a]pplications are to be processed within 45 days of filing or, where disability is claimed, within 60 days." (citing 42 C.F.R. § 435.911; 206.10(a)(12)).

[81] *See, e.g.*, 42 U.S.C. § 602 ("[A]id to families with dependent children shall . . . be furnished with reasonable promptness to all eligible individuals.").

[82] 707 F.2d at 784; *see infra* note 134.

[83] *See* Alexander v. Hill, 549 F. Supp. 1355, 1359 (W.D.N.C. 1982) ("T he law requires that *all* applications – not merely a substantial percentage of them – be processed within the relevant time limits.").

[84] *See* 42 C.F.R. § 435.911; 45 C.F.R. § 206.10(a)(3).

The district court in *Alexander* issued its decision after North Carolina had repeatedly failed to achieve compliance.[85] The decision, however, was by no means limited to North Carolina's historical noncompliance.[86] The Fourth Circuit's decision was based upon the plain meaning of the law, as were the decisions of the Seventh and Ninth Circuits that followed.

The Fourth Circuit reaffirmed its position in *Robertson v. Jackson*,[87] upholding a district court order "re quiring the Commissioner [of the Virginia Department of Social Services] to bring about *full compliance* with federal timely processing and program access requirements."[88] The district court decision, upheld by the Fourth Circuit, firmly and expressly rejected defendant' s argument in favor of substantial compliance:

> The matters with which the parties to this suit are faced are ones of urgency, and while the Court will endeavor to formulate a decree that is reasonable in the exercise of its equitable powers, the Court deems it only fair and appropriate to put the defendant on notice that the Court rejects his contention that he need only bring Virginia's Food Stamp Program into "su bstantial compliance" with the federal timeliness requirements. The law requires *full* compliance absent what is hoped will be minimum human error. Lack of staff or funds is not legally excusable, and this Court will not consider these hurdles in formulating a decree that mandates full compliance with federal law.[89]

In *Haskins v. Stanton*,[90] the Seventh Circuit reviewed an injunction requiring various Indiana state and county officials ("I ndiana"), *inter alia*, timely to process applications for food stamps in compliance with the federal regulations promulgated by the United States Department of Agriculture.[91] These included the requirement that a state provide eligible applicants with an opportunity to obtain their food stamp allotments within 30 days of filing a properly completed

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[85] *Alexander*, 707 F.2d at 782.

[86] *See* Salazar v. District of Columbia, 954 F. Supp. 278, 325 (D.D.C. 1996) ("The Court recognizes that in Alexander the state and county officials had failed to comply with previous court orders over a period spanning several years. The instant case differs somewhat from *Alexander* in that, while Defendants have been violating the law for at least four years, there have been no previous court orders requiring compliance in this case. Nevertheless, *Alexander*'s holding that the federal statute itself demands 100% compliance was clearly not dependent upon the defendants' particular history of noncompliance with court orders.").

[87] 972 F.2d 529 (4th Cir. 1992).

[88] *Id.* at 536 (emphasis added).

[89] Robertson v. Jackson, 766 F. Supp. 470, 476 (E.D. Va. 1991), *aff'd*, 972 F.2d 529 (4th Cir. 1992).

[90] 794 F.2d 1273 (7th Cir. 1986).

[91] Haskins v. Stanton, 621 F. Supp. 622 (N.D. Ind. 1985), *aff'd*, 794 F.2d 1273 (7th Cir. 1986).

application,[92] and, in cases of urgent need, expedited benefits within five days of the initial application.[93] The evidence adduced at trial demonstrated that Indiana failed to issue benefits within the mandated time frames in 83 out of the 86 cases of urgent need studied.[94]

Indiana challenged the injunction on the basis that "th e harm to the plaintiffs does not outweigh the burden imposed on them by the injunction . . . ."[95] and further argued that it would "face co ntempt proceedings every time they ma[de] a mistake that result[ed] in an inadvertent delay in processing a food stamp application."[96] Upholding the injunction, the Seventh Circuit found that the failure to timely provide benefits would impose great hardship upon the plaintiff class: "We agree with the trial judge that the deprivation of food 'is extremely serious and is quite likely to impose lingering, if not irreversible, hardships upon recipients.'"[97] In contrast, the Seventh Circuit found that the injunction would not impose any burden upon Indiana.[98] Echoing, but not citing, the Fourth Circuit in *Alexander*, the Seventh Circuit explained:

> Because the defendants are required to comply with the Food Stamp Act under the terms of the Act, we do not see how enforcing compliance imposes any burden on them. *The Act itself imposes the burden; this injunction merely seeks to prevent the defendants from shirking their responsibilities under it.* We also fail to see how enforcing a statute designed to promote the public welfare disserves the public.[99]

The Food Stamp Act, the court explained, "literally requires strict compliance with its provisions."[100] The injunction merely enforced that requirement. The balance of hardships thus tipped completely in the plaintiffs' fav or.

In *Withrow v. Concannon*,[101] plaintiffs sought an injunction compelling defendants, Oregon State welfare officials, to hold hearings and issue administrative decisions within the time periods mandated by federal regulation for Oregon's Food Stamp, Medicaid, and AFDC programs. As the Ninth Circuit explained, "[f]ederal regulations, which have the force and effect of law, require each state agency to take final action within ninety days from the date a hearing is requested in the AFDC and Medicaid programs, and within sixty days

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[92] 7 C.F.R. §§ 273.2(g)(1) and (2).

[93] *Id.* § 273.2(i).

[94] 794 F.2d at 1277.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 1276-77 (quoting Haskins v. Stanton, 621 F. Supp. 622, 627 (N.D. Ind. 1985)).

[98] *Id.*

[99] Haskins v. Stanton, 794 F.2d 1273, 1277 (7th Cir. 1986) (emphasis added).

[100] *Id.*

[101] 942 F.2d 1385 (9th Cir. 1991).

in the Food Stamp program."[102] The district court granted defendants' motion for summary judgment on the grounds that defendants had substantially complied with the regulations.[103] The Ninth Circuit reversed.

"[T]h e federal agencies responsible for the administration of these programs have issued quite explicit regulations requiring compliance with specified deadlines," the Ninth Circuit explained.[104] Those regulations "requ ire compliance, not 'sub stantial compliance.'"[105] This is evident in the express language of the regulations:

The language of the federal regulations is unequivocal, and states that a decision "sh all" or "mu st" be made within the specified number of days. The regulations' commands effectuate the purposes of the federal categorical programs, to render reasonably prompt assistance to persons in dire need. From the standpoint of the applicants or recipients who are denied hearings and decisions within the time mandated by federal regulations, it is no comfort to be told that there is no federal remedy because the state is in " substantial compliance" with the federal requirements.[106]

What the federal regulations require, then, "is un equivocal," and mandatory.[107] Quoting *Haskins* at length the court observed that "requ iring adherence to the regulations . . . imposes no inappropriate obligation on the state."[108]

The court also rejected defendants' arg ument that Congress intended merely to require substantial compliance, as the Third Circuit found in *Shands*. The AFDC provision permitting the termination of federal support for a state's program was not intended to govern the rights of recipients to timely receipt of benefits:

We are not convinced, however, that the standard for termination of federal funding, a virtual death sentence for a state's program, is the appropriate one to define the rights of applicants and recipients of program benefits. *The funding standard is not intended to be the measure of what the regulations require; it is intended to measure how great a failure to meet those requirements should cause funds to be cut off.*[109]

Finally, the court rejected defendants' argument that total compliance was impractical, and that an injunction compelling total compliance was therefore improper.[110] "Imp ossibility of perfect compliance," the court explained, "may be a defense to contempt, but it does not preclude an injunction requiring compliance with the regulations when a pattern of non-compliance has been

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[102] *Id.* at 1387.

[103] *Id.* at 1386.

[104] *Withrow*, 942 F.2d at 1387 n.3.

[105] *Id.* at 1388.

[106] *Id.* at 1387, 1389 ("Plaintiffs are entitled under the regulations to compliance, not substantial compliance.").

[107] *Id.* at 1387.

[108] Withrow v. Concannon, 942 F.2d 1385, 1388 (9th Cir. 1991).

[109] *Id.* at 1387 (emphasis added).

[110] *Id.* at 1387-88.

shown to have existed."[111]

In dissent, Justice Trott protested that "th e majority hangs the specter of an injunction over the heads of state officials responsible for administering large bureaucracies," with the threat of contempt if they fail to comply "'as strictly as humanly possible.'"[112] Justice Trott's protest was, however, misplaced. The law itself unequivocally mandates strict compliance; the court merely enforced the law. Indeed, the "sp ectre" of an injunction exists for all who fail to comply with the law. As the Fourth Circuit explained in *Alexander*: "We all are expected to abide fully by the law, and expose ourselves to sanctions whenever we fail to do so."[113]

Justice Trott's concern with "th e spectre of an injunction" is difficult to comprehend, considering the voluntary nature of the federal benefits programs at issue. States electing to participate in the federal benefits programs are aware that they must abide by the regulations that govern these programs. "Particip ation by a given state in the AFDC program is voluntary, but if a state does participate, its plan must comply with the requirements of the Social Security Act and regulations promulgated thereunder."[114] Even if state officials violate the law, these officials face no personal deprivation, physical or financial, through an injunction.

By contrast, welfare recipients must rely upon programs such as Food Stamps and Medicaid for their very survival. Without an injunction to compel timely hearings and decisions, and thus the timely provision of such benefits, welfare recipients face "ling ering, if not irreversible, hardships."[115] As Justice Marshall, quoting the Seventh Circuit, has observed, without an injunction, recipients face the very real "sp ectre of a state, perhaps calculatingly, defying federal law and thereby depriving welfare recipients of the financial assistance Congress thought

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[111] *Id.* at 1388; *see also Fortin*, 692 F.2d at 796.

[112] *Id.* at 1389 (Trott, J., dissenting).

[113] 707 F.2d at 784.

[114] Cunningham v. Toan, 728 F.2d 1101, 1103 (8th Cir. 1984) (citation omitted). The same is true of the Food Stamp and Medicaid programs. *See, e.g.*, Stowell v. Ives, 976 F.2d 65, 68 (1st Cir. 1992); Gonzalez v. Pingree, 821 F.2d 1526, 1528 (11th Cir. 1987); Smith v. Miller, 665 F.2d 172, 175 (7th Cir. 1981). *See also* Lynch v. King, 550 F. Supp. 325, 339 (D. Mass. 1982) ("T he Commonwealth voluntarily undertook to fulfill those requirements as a condition of receiving federal money.").

[115] *Haskins*, 794 F.2d at 1276-77 (quoting Haskins v. Stanton, 621 F. Supp. 622, 627 (N.D. Ind. 1985)) (internal quotations omitted). *See* Robidoux v. Kitchel, 876 F. Supp. 575, 580 (D. Vt. 1995) ("In establishing a processing deadline for all applications, the federal government recognized the interest of all applicants in a timely decision. Individuals deemed eligible for benefits need assistance quickly. Those who are found to be ineligible need to seek alternative resources, and potentially pursue an appeal, as soon as possible. In light of these interests, the federal government set a deadline, which participating states are legally bound to follow, for both grants and denials of applications for benefits.").

it was giving them."[116] A balance of these "sp ectres," or hardships, points decidedly in favor of the recipients, particularly since, as the majority concluded, "req uiring adherence to the regulations . . . imposes no inappropriate obligation on the state."[117]

Justice Trott also objected to the financial and administrative costs that strict compliance would impose, labeling it as "fo lly in a time of shrinking revenues."[118] Yet, it is established that the rights of the poor do not shrink with shrinking revenues, and that administrative cost or burden does not outweigh the right of recipients to timely receipt of the benefits to which they are entitled.[119]

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[116] *Edelman*, 415 U.S. at 692 (Marshall, J., dissenting) (quoting Jordan v. Weaver, 472 F.2d 985, 995 (7th Cir. 1972)).

[117] *Withrow*, 942 F.2d at 1388; *see* Hess v. Hughes, 500 F. Supp. 1054, 1059 (D. Md. 1980) ("In balancing the likelihood of irreparable harm to the plaintiffs versus the injury to the defendants . . . it is clear that any administrative hardship to the State . . . is grossly outweighed (assuming non-compliance by the defendants) by the obvious deleterious effect to the plaintiffs - the lack of food."); Dunn v. New York State Dep't of Labor, 474 F. Supp. 269, 275 (S.D.N.Y. 1979) ("[W]hile I may sympathize with the state's budgetary problems, it is my job to balance these considerations against the hardships experienced by plaintiffs who may face months without benefits because the State does not act with reasonable promptness. In my view, problems with funding and staffing simply do not outweigh the necessity to promptly determine whether plaintiffs are entitled to unemployment benefits.").

[118] *Withrow*, 942 F.2d at 1390 (Trott, J., dissenting).

[119] *See, e.g.*, Doe v. Chiles, 136 F.3d 709, 722 (11th Cir. 1998); Tallahassee Memorial Regional Med. Ctr. v. Cook, 109 F.3d 693, 704 (11th Cir. 1997); Amisub (PSL), Inc. v. State of Col. Dep't of Soc. Svcs., 879 F.2d 789, 800 (10th Cir. 1989) ("[B]ud getary constraints cannot excuse noncompliance with federal Medicaid law."); Coalition for Basic Human Needs v. King, 654 F.2d 838, 841 (1st Cir. 1981) ("[T]he law governing AFDC payments recognizes no justification for extended delays even as the result of administrative inconvenience."); Alabama Nursing Home Assoc. v. Harris, 617 F.2d 388, 396 (5th Cir. 1980) ("Ina dequate state appropriations do not excuse noncompliance [with federal standards for Medicaid]."); Boulet v. Cellucci, 107 F. Supp. 2d 61, 79-80 (D. Mass. 2000) ("[A]s several courts have pointed out, inadequate funding does not excuse failure to comply with the reasonable promptness requirement.") (citation omitted); Blanchard v. Forrest, C.A. No. 93-3780 Sec. "L" (C)(4), 1994 U.S. Dist. LEXIS 10336, at *11 (E.D. La. July 28, 1994) ("[I]nade quate funding by a state does not excuse noncompliance with medicaid regulations.") (citation omitted); Robertson v. Jackson, 766 F. Supp. 470, 476 (E.D. Va. 1991) ("L ack of staff or funds is not legally excusable, and this Court will not consider these hurdles in formulating a decree that mandates full compliance with federal law."); Harley v. Lyng, 653 F. Supp. 266, 272 (E.D. Pa. 1986) ("Full access to expedited procedures may not be restricted based on inadequate staffing, scheduling problems, or unexpected seasonal influxes of applicants."); *Haskins*, 621 F. Supp. at 629 ("The Court recognizes that granting injunctive relief may cause an increase in administrative work and may require changes in State agency personnel and procedures to correct the violations of the Food Stamp Act. This inconvenience cannot and does not outweigh the rights and needs of low-income households who are eligible for relief but

Finally, Justice Trott argued that "in dividuals aggrieved by episodic or sporadic failures in Oregon are not without remedy."[120] Citing defendants' b rief, Justice Trott asserted that recipients have the right to sue in state court to compel the agency to issue a decision.[121] Justice Trott, yet, did not mention that "[p]laintiffs dispute[d] the effectiveness of this remedy."[122] Quite simply, forcing individuals to resort to individual lawsuits provides no systemic fix to the state's ongoing violations. If the court had adopted the standard of substantial compliance, as Judge Trott urged, then large numbers of recipients would continue to have their rights violated routinely, by the state. After-the-fact adjudication in each of these instances would do nothing to root out the systemic and continuous violations of the mandatory time frames.[123] As the Seventh Circuit, examining a similar argument that recipients resort to administrative

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whose relief has been blocked or delayed by defects in the Indiana DPW's application procedures."), *aff'd*, 794 F.2d 1273 (7th Cir. 1986); King v. Woods, 144 Cal. App. 3d 571 (Ct. App. Cal., 1st App. Dist. 1983) ("While we acknowledge that the additional items necessary to achieve 100 percent compliance may involve additional expense, this additional expense does not justify violating the due process rights of welfare applicants and recipients."); Hess v. Hughes, 500 F. Supp. 1054, 1059 (D. Md. 1980) (ordering strict compliance and holding: "There is authority to the effect that there is no exception in the Food Stamp Act or its legislative history . . . for bureaucratic difficulties or administrative backlog.") (citations omitted); *Peppers*, 81 F.R.D. at 368 (rejecting state's argument that it lacked sufficient funds to comply fully with federal regulations regarding mandatory time frames), *aff'd*, 611 F.2d 373 (6th Cir. 1979); *see also* Gutierrez v. Butz, 415 F. Supp. 827, 831 (D.D.C. 1976) ("[T] he Congressional guarantee of a nutritionally adequate diet does not provide an exception for bureaucratic difficulties.").

[120] 942 F.2d at 1390-91 (Trott, J., dissenting).

[121] *Id.* at 1391 (Trott, J., dissenting).

[122] *Id.* at 1387 n.5.

[123] *See also* Maria Fazzolari, *The* Brown v. Giuliani *Injunction: Combating Bureaucratic Disentitlement*, 23 FORDHAM URB. L.J. 413, 423 (1996) (" Nor do these hearings address the high system-wide level of erroneous denials. Instead, welfare hearings provide only for the post hoc correction of the wrongful termination or reduction of individual welfare grants. Even if successful, these hearings do nothing to prevent the same type of error from occurring again to other recipients, particularly when the error will reduce welfare costs.") (citation and internal quotations omitted); Karen Terhune, Comment, *Reformation of the Food Stamp Act: Abating Domestic Hunger Means Resisting "Legislative Junk Food,"* 41 CATH. U.L. REV. 421, 444 (1992) ("[W]hile a fair hearing in some instances resolves an individual's claim, the process does not correct state or local administrative practices that conflict with federal requirements."); Lucie E. White, Goldberg v. Kelly *on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 868 (1990) ("N or do welfare appeal statutes provide for classwide structural relief. Instead, welfare hearings provide only for the post hoc correction of the wrongful termination or reduction of individual welfare grants. A trickle of fair hearings will not deter a welfare agency from systematically misreading the law, particularly when the error will reduce welfare costs."). Individual lawsuits to compel compliance are as ineffective as individual, post-deprivation hearings in rooting out systemic violations.

hearings to challenge untimely decisions on their applications, explained: "[T]he administrative hearings do nothing to redress violations of the Act that prevent applicants from obtaining a timely decision on their initial food stamp application."[124] Furthermore, the award of ongoing and/or retroactive benefits cannot compensate recipients for the irreparable harm, stress, and fear suffered in the period during which their benefits were wrongfully withheld.[125]

In addition, Justice Trott's proposal would force indigent recipients, in each instance, to secure legal counsel for their lawsuit, file suit, and, if the state failed to comply, bring contempt proceedings.[126] Most indigent recipients, however, fail to pursue legitimate legal claims regarding their entitlements.[127] Even assuming that all aggrieved recipients filed suit, and assuming full access to legal assistance exists for all indigent recipients,[128] recipients would be forced repeatedly to

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[124] *Haskins*, 794 F.2d at 1276 (citation omitted); *see, e.g.*, Morel v. Giuliani, 927 F. Supp. 622, 629 (S.D.N.Y. 1995) ("Ms. Simmons therefore lacked benefits for nearly six weeks despite requesting a hearing after three days and filing a second request three weeks later.").

[125] *See* Fazzolari, *supra* note 122, at 423 ("Even if a welfare recipient files an individual suit, she will most likely be undercompensated. Most mistreatment by the local agency results in irreparable harm, because recipients depend on welfare benefits as a sole source of income."). Fair hearings, additionally, "which can reinstate benefits wrongfully denied, will also not compensate welfare recipients for any insulting or demeaning treatment they may have faced during the course of a wrongful denial." *Id.*; *see, e.g.*, Schweiker v. Chilicky, 487 U.S. 412, 428 (1988) ("We agree that suffering months of delay in receiving the income on which one has depended for the very necessities of life cannot be fully remedied by the 'belated restoration of back benefits.'"); Brown v. Luna, 735 F. Supp. 762, 767 (M.D. Tenn. 1990) ("retroactive benefits cannot fully remedy delayed eligibility determinations"); Quinones v. Coler, 651 F. Supp. 1028, 1032 (N.D. Ill. 1987) ("Belated reimbursement in the form of food stamps should not be viewed as a full remedy under those circumstances."); Lyons v. Weinberger, 376 F. Supp. 248, 262-63 (S.D.N.Y. 1974) ("retroactive [welfare] payments could not adequately compensate claimants").

[126] 942 F.2d at 1391 (Trott, J., dissenting) ("[T]his statute would be enforceable through contempt proceedings.").

[127] *See* William H. Simon, *The Rule of Law and the Two Realms of Welfare Administration*, 56 BROOK. L. REV. 777, 786 (1990) ("We do not know the magnitude of erroneous denials of benefits that do not make it into the hearing system, but it seems likely to be very large. While reversal rates in welfare hearings are generally substantial, appeal rates tend to be small. For example, in AFDC on average only about one to two percent of application denials and benefit terminations are appealed."); Joel F. Handler, *Continuing Relationships and the Administrative Process: Social Welfare*, 1985 WIS. L. REV. 687, 690 (1985) ("Procedural due process requires a complaining client, but in order to complain, the client has to be aware that a wrong has been committed, that there exists a remedy, how to pursue the remedy, and that the benefits of pursuing the remedy outweigh the costs. All of these conditions are significant barriers, especially for the less well-off, and all have to be satisfied or the remedy will fail.").

[128] *See* Rebecca E. Zietlow, *Giving Substance to Process: Countering the Due Process*

undertake prolonged legal proceedings to secure rights expressly set forth in federal law. This would be manifestly impractical and unfair, to say nothing of the substantial waste of time and money.

Finally, in two decisions, the First Circuit has firmly rejected the argument upon which *Shands* was based - that Congress intended to require only substantial compliance, as evidenced by the termination of funding provision. In *Fortin v. Commissioner of the Massachusetts Department of Public Welfare*,[129] the First Circuit upheld the district court's enforcement of a consent decree requiring strict compliance with legal time frames established for making eligibility determinations for AFDC and state public assistance. Although *Fortin* involved contempt proceedings for violation of a consent decree, the decision is important for the First Circuit's rejection of a substantial compliance defense based upon *Shands*, and for the court's suggestion that the underlying statutes themselves require strict compliance.

In *Fortin*, the Massachusetts Department of Public Welfare ("Massach usetts") appealed the district court's finding of contempt based upon statewide averages of compliance that generally ranged from 90% to 97% of the applicable time frames, with regional rates of compliance, in the months leading to the court action, as low as 77%.[130] Massachusetts argued that the finding of contempt was legally incorrect "b ecause the compliance statistics met the legal standard of substantiality, and its diligence and improvement in compliance precluded contempt."[131] Citing *Shands*, Massachusetts argued that its compliance rate "sh ould be deemed substantial because of the inaction of the Department of Health and Human Services ("HHS"), which has the authority to withhold federal funding when states fail to comply with federal timeliness standards."[132]

The First Circuit rejected the federal termination provision as a guideline for determining compliance. "HHS might be reluctant to exercise this power," the court explained, "b ecause the remedy is drastic; in any case its failure to

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Counterrevolution, 75 DENV. U.L. REV. 9 (1997) ("[P oor people] cannot afford to buy procedural protections. For example, they cannot afford to hire a lawyer to help them enforce their rights."); Simon, *supra* note 126, at 786 ("I n order to pursue an appeal, a claimant needs either professional assistance or the information to identify that she has a claim as well as the ability to negotiate the appellate procedures and articulate her claim. *Goldberg* recognized that, in fact, beneficiaries often lack such resources."); White, *supra* note 122, at 868 ("Empirical studies show that when a welfare recipient has a lawyer, she has a good chance of reversing a wrong decision on appeal. But few welfare recipients have lawyers, and procedural statutes rarely permit claimants to aggregated their claims."). This situation has only worsened with the recent cuts to legal services to the poor, which "thre aten to deprive poor people of the primary access that they have to an attorney, further limiting their ability to participate effectively in decisions that affect their lives." Zietlow, *supra*, at 33.

[129] 692 F.2d 790 (1st Cir. 1982).

[130] *Id.* at 794 n.3.

[131] *Id.* at 794.

[132] *Id.* at 795 (citing *Shands*, 602 F.2d at 1161).

withhold does not insulate the Department's actions from federal judicial review."[133] The court also ruled that, under the circumstances, "th e 96% compliance rate in *Shands* . . . cannot be a touchstone of substantiality."[134] Unlike *Shands*, which involved delays in appeals from the denial of AFDC benefits, *Fortin* involved initial eligibility determinations, thus, the consequences of failure to comply were greater.[135]

The court explained that "'s ubstantiality' must depend on the circumstances of each case, including the nature of the interest at stake and the degree to which noncompliance affects that interest."[136] The court did not suggest, however, that substantial compliance under any circumstances would suffice. In fact, in addition to rejecting the Third Circuit's reasoning in *Shands*, the court indicated that the underlying statutes themselves require strict compliance: "[W]e need not consider the plaintiffs' argument that absolute compliance should be required here, where *the decree, whose language is absolute, merely restates the statutory requirements* and where individual entitlements are involved."[137] Brushing aside the Department's evidence of administrative efforts achieve full compliance, the court stated: "*Th ese efforts*, however, *are simply what the law demands* and what the Department agreed to do."[138]

Eleven years later, in *Albiston v. Maine Commissioner of Human Services*,[139] the First Circuit again rejected the federal termination provision under the AFDC program as a measure of a state's obligation to recipients. The court explained that the federal regulation imposing a 15-day compliance time frame was based upon mandatory language in the AFDC statute. The federal regulation therefore "tak es precedence over the more general 'sub stantial compliance' directive . . . ."[140] "[T]h e 'su bstantial' compliance required to avoid administrative penalties," the court explained, "is independent of, and narrower than, the State's direct obligation to AFDC recipients."[141] Although the court did not reach the issue of strict compliance, it once again rejected an argument for substantial compliance based upon the AFDC's federal te rmination provision.

V. CONCLUSION

The question whether to order strict or substantial compliance with federal timeliness requirements implicates basic rights to such essentials as food, medical

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[133] *Id.* at 796 (citation omitted).

[134] Fortin v. Commissioner of Mass. Dep't of Pub. Welfare, 692 F.2d 790, 796 (1st Cir. 1982).

[135] *Id.* at 795.

[136] *Id.* at 795.

[137] *Id.* at 795 n.6 (emphasis added).

[138] 692 F.2d at 797 (emphasis added).

[139] 7 F.3d 258 (1st Cir. 1993).

[140] *Id.* at 266.

[141] *Id.* (citations omitted).

care, and shelter for potentially hundreds, or even thousands, of indigent recipients. Yet, as the Fourth Circuit has observed, this question "need not long detain" the courts.[142] Where the governing statutes and regulations utilize mandatory rather than precatory language, there is simply no basis upon which to permit deviation: "The law itself compels 100% compliance."[143] To rule otherwise is to rewrite the express governing provisions, and to declare that governments are above the law.

It also violates the spirit and purpose of federal benefits law, whether it be to feed, clothe, or provide medical care to the poor. For example, "[t]he declared congressional purpose behind the Food Stamp Act is to 'alleviate such hunger and malnutrition . . . which (would) (enable) low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation.'"[144] The statute conveys Congress' explicit intent to assist "*all* eligible households who apply for participation,"[145] not merely a substantial number of such households.[146] As the

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[142] *Alexander*, 707 F.2d at 784.

[143] *Id.* at 784. *Accord* Robertson v. Jackson, 766 F. Supp. 470, 476 (E.D. Va. 1991), *aff'd*, 972 F.2d 529 (4th Cir. 1992) ("The law requires full compliance . . . ."); *Haskins*, 794 F.2d at 1277 ("The Act itself imposes this burden; this injunction merely seeks to prevent the defendants from shirking their responsibilities under it."); *Withrow*, 942 F.2d at 1388 (the regulations "require compliance, not 'substantial compliance.'"); Robidoux v. Kitchel, 876 F. Supp. 575, 579 (D. Vt. 1995) (rejecting Vermont's argument in favor of substantial compliance and explaining: "[T]he law requires full compliance, absent a minimum of human error.") (citing Alexander v. Hill, 549 F. Supp. 1355, 1359 (W.D.N.C. 1982)); Hess v. Hughes, 500 F. Supp. 1054, 1060 n.8 (D. Md. 1980) ("[T]he pivotal question is whether there has been compliance and not how close the State may be to full compliance."); *Hess*, 500 F. Supp. at 1060 ("Regardless of the defendants' spurious argument that the statute and regulations only require substantial compliance, a reasonable interpretation of the act, regulations and applicable case law require[s] mandatory compliance."); Tyson v. Norton, 390 F. Supp. 545, 569 (D. Conn. 1975) ("The regulation requires that each application shall be processed within 30 days and to the extent that there are cases in which this is not being done, the defendants are acting in derogation of the regulatory mandate."); Jeffries v. Swank, 337 F. Supp. 1062, 1066 (N.D. Ill. 1971) (" The wording of both the statute and the regulation is mandatory on its face. No evidence is offered to indicate a contrary intention by the Secretary of HEW."); *see also* Brown v. Luna, 735 F. Supp. 762 (M.D. Tenn. 1990) (following *Alexander* and ordering strict compliance with 90-day time frame).

[144] *Hess*, 500 F. Supp. at 1058 (quoting 7 U.S.C. § 2011) (internal citation omitted). The court added that "[t]his avowed intention has been scrupulously followed in the regulations and in judicial decision." *Id.*

[145] 7 U.S.C. § 2011 (2002) (emphasis added).

[146] *See, e.g.*, Franklin v. Kelly, Civ. A. No. 90-3124, 1992 WL 276949, at *3 (D.D.C. Sept. 24, 1992) ("The District Defendants' lack of compliance has resulted in class members being denied their right to assistance in obtaining food, thus thwarting a principal Congressional purpose in enacting the Food Stamp Act: to alleviate hunger and malnutrition.") (citing 7 U.S.C. § 2011); Wilkinson v. Smith, 81 F.R.D. 52, 56 (E.D. Pa.

Ninth Circuit has observed, the mandatory timeliness regulations effectuate the purpose of the federal benefits programs "to render reasonably prompt assistance to persons in dire need."[147] For recipients denied critical benefits within these time frames, "it is no comfort to be told that there is no federal remedy because the state is in 'substantial compliance' with the federal requirements."[148]

It is therefore not surprising that, because the Third Circuit decided *Shands* in 1979, every circuit court to address the issue has rejected the concept of substantial compliance. Meanwhile, the basis of Third Circuit's ruling has been soundly rejected by both the circuit courts and by the Supreme Court.[149] Rather than a split in the authorities, then, there is uniform circuit court support over the past 22 years for strict rather than substantial compliance with federal timeliness requirements. This interpretation is both mandated by the law and compelled by the facts.

1978) ("[U]nreasonable delays in scheduling hearings and making disbursements to eligible applicants violates the language and purpose of the Social Security Act.") (citations omitted); King v. Woods, 144 Cal. App. 3d 571, 576 (Cal. Ct. App. 1st App. Dist. 1983) ("To construe the language as merely directory would defeat the very purpose of the time limits.").

[147] 942 F.2d at 1387.

[148] *Id.* at 1387; *see* Jeffries v. Swank, 337 F. Supp. 1062, 1066 (N.D. Ill. 1971) ("The regulation is clearly reasonable when one considers the dependence of recipients on welfare assistance, the economic hardship of delay in final determination of claims, and the clear statutory intent to provide meaningful access to administrative appellate remedies.").

[149] *See* Part IV.