

[NOT SCHEDULED FOR ORAL ARGUMENT]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CHARLES GRESHAM, et al.,
Plaintiffs-Appellees,

v.

ALEX M. AZAR II, et al.,
Defendants-Appellants,

Nos. 19-5094 & 19-5096

RONNIE MAURICE STEWART, et al.,
Plaintiffs-Appellees

v.

ALEX M. AZAR II, et al.,
Defendants-Appellants.

Nos. 19-5095 & 19-5097

REPLY IN SUPPORT OF MOTION TO EXPEDITE RELATED APPEALS

Plaintiffs offer no sound reason to reject the reasonable timetable for briefing and argument proposed by the government. They do not suggest that they would be prejudiced by the briefing schedule, which allows them 35 days to prepare their brief after the opening briefs are filed. The proposed expedition is more modest than the expedition to which the government agreed below in these cases, and to which the government agreed today in the analogous suit challenging New Hampshire's project.

Plaintiffs wrongly assert that these cases are not important enough to warrant expedition. As plaintiffs recognize, the district court halted in its tracks Arkansas's demonstration project, which has been in effect for more than ten months, and

prevented Kentucky from undertaking a project that was scheduled to commence this month. These are rulings of major significance with immediate impact on the state programs. Although plaintiffs do not believe that expedition is appropriate to address disruption and delay in state programs, they offer no reason or authority for that proposition.

Relatedly, plaintiffs are wrong when they declare that “[t]he government’s principal argument is that expedition” is warranted because the district court’s decision “effectively has stopped the Secretary’s authority *nationwide*.” Opp. 3. Expedition is warranted because of the immediate impact on the two state projects halted by the district court’s rulings. It is also appropriate, however, to take into account the uncertainty generated for other States. Although plaintiffs refer derisively to the potential impact on “cookie-cutter waivers in Arizona, Indiana, Michigan, New Hampshire, Ohio, Utah, and Wisconsin,” Opp. 11, the fact that the rulings are of concern to multiple States clearly militates in favor of expedition.

Plaintiffs are similarly wide of the mark when they urge that expedition is unwarranted because “the government is seeking massive disruption, not continuity.” Opp. 9. That type of argument is ordinarily made to oppose a stay pending appeal, not an expedition request. Moreover, it misunderstands the nature of demonstration projects. Demonstration projects are experiments proposed by States that allow the federal government to evaluate the strengths and flaws of a particular course of action before it is established at a national level. For example, plaintiffs cite statistics

indicating that upon the rollout of the Arkansas project approximately 18,000 beneficiaries lost coverage (which has since been made available again to all who initially lost it). But as plaintiffs acknowledged below, those coverage losses were due in large part to the fact that participants could report compliance through an online portal only, a problem that Arkansas addressed by expanding the reporting options to allow reporting by phone and in person. *See Gresham v. Azar*, ___ F. Supp. 3d ___, 2019 WL 1375241, *6. The experience with the rollout of the Arkansas project only underscores the value of testing experiments at the local level before policies are established nationwide.

Plaintiffs also misunderstand the significance of a figure they derived from Kentucky's budget neutrality table, which projected a reduction in coverage over the course of the five-year project that is the equivalent of one year of coverage for 95,000 individuals. Although plaintiffs and the district court assumed that such coverage losses would result from noncompliance with the community-engagement requirement, the goal of that requirement is to help able-bodied adults succeed in transitioning from Medicaid to financial independence. Even plaintiffs presumably would regard this as a good outcome. Plaintiffs contend that the community-engagement requirements will fail to achieve this goal. Although they argued below that the TANF requirements on which the community-engagement requirements are modeled are counterproductive, *see, e.g., Gresham*, 2019 WL 1375241, *15 (Appendix A), Congress evidently does not share that view. And while plaintiffs

emphasize that HHS has not previously approved demonstration projects that establish community-engagement requirements for Medicaid, the ACA's adult eligibility expansion for the first time brought large numbers of able-bodied adults within the scope of state Medicaid programs.

Plaintiffs disagree with the decision to approve the Kentucky and Arkansas demonstration projects, and briefing and argument will allow the Court to evaluate their contentions and the merits of the Secretary's decisions. The only issue before the Court now is whether the briefing and argument should proceed on an expedited basis. It plainly should.

CONCLUSION

The expedition motion should be granted.

Respectfully submitted,

MARK B. STERN

s/ Alisa B. Klein

ALISA B. KLEIN

(202) 514-1597

Attorneys, Appellate Staff

Civil Division

U.S. Department of Justice

950 Pennsylvania Ave., NW, Rm. 7235

Washington, DC 20530

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CERTIFICATE OF COMPLIANCE

I certify that this reply complies with the word limit of Fed. R. App. P. 27(d)(2)(C) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 704 words.

s/ Alisa B. Klein

Alisa B. Klein

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2019, I electronically filed the foregoing reply with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Alisa B. Klein

Alisa B. Klein