[NOT YET SCHEDULED FOR ORAL ARGUMENT]

Nos. 19-5094 & 19-5096 (Gresham); Nos. 19-5095 & 19-5097 (Stewart)

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

CHARLES GRESHAM, et al.,
Plaintiffs-Appellees,

- v.-

ALEX M. AZAR II, Secretary of Health & Human Services, et al.,
Defendants-Appellants,

STATE OF ARKANSAS,
Intervenor-Defendant-Appellant.

RONNIE MAURICE STEWART, et al.,
Plaintiffs-Appellees,

- v.-

ALEX M. AZAR II, Secretary of Health & Human Services, et al.,
Defendants-Appellants,

COMMONWEALTH OF KENTUCKY,
Intervenor-Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RESPONSE BRIEF FOR PLAINTIFFS-APPELLEES

Thomas J. Perrelli
Ian Heath Gershengorn
Devi M. Rao
Natacha Y. Lam
Zachary S. Blau
Jenner & Block LLP
1099 New York Avenue, N.W.
Suite 900, Washington, DC 20001
Phone: 202-639-6004
TPerrelli@jenner.com
IGershengorn@jenner.com
DRao@jenner.com
NLam@jenner.com
ZBlau@jenner.com

Counsel to National Health Law Program

Samuel Brooke
Emily C.R. Early
Neil K. Sawhney
Ellen Degnan
Southern Poverty Law Center
400 Washington Avenue
Montgomery, AL 36104
Phone: 334-956-8200
samuel.brooke@splcenter.org
emily.early@splcenter.org
neil.sawhney@splcenter.org
ellen.degnan@splcenter.org

Jane Perkins
Catherine McKee
Elizabeth Edwards
National Health Law Program
200 N. Greensboro Street, Suite D-13
Carrboro, NC 27510
Phone: 919-968-6308 (x101)
perkins@healthlaw.org
mckee@healhtlaw.org
edwards@healthlaw.org

Kevin De Liban
Trevor Hawkins
Legal Aid of Arkansas
310 Mid-Continent Plaza, Suite 420
West Memphis, AR 72301
Phone: 870-732-6370 (x2206)
kdeliban@arlegalaid.org
thawkins@arlegalaid.org

Ben Carter
Betsy Davis Stone
Kentucky Equal Justice Center
222 South First Street, Suite 305
Louisville, KY 40202
502-468-9403
859-582-2285
ben@kyequaljustice.org
betsy@kyequaljustice.org

Counsel for Appellees

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

All parties, intervenors, and amici appearing before the district court and this court are listed in the Brief for Federal Appellants. All references to the rulings at issue appear in the Brief for Federal Appellants. These cases were not previously before this Court. Substantially similar issues appear in *Philbrick v. Azar*, No. 1:19-cv-773 (D.D.C.) (Boasberg, J.), which is pending in district court.

June 20, 2019 /s/ Jane Perkins

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

TABLE OF AUTHORITIES iv

GLOSSARY OF TERMS ix

INTRODUCTION 1

STATEMENT OF THE ISSUE 5

RELEVANT STATUTES 5

STATEMENT OF THE CASE 5

I. THE FEDERAL MEDICAID PROGRAM 5

II. SECTION 1115 OF THE SOCIAL SECURITY ACT 7

III. THE ADMINISTRATION'S USE OF SECTION 1115 MEDICAID WAIVERS 8

A. The Kentucky HEALTH Approvals 10

B. The Arkansas Works Amendment 14

SUMMARY OF ARGUMENT 16

ARGUMENT 18

I. THE APA REQUIRES MEANINGFUL REVIEW OF THE SECRETARY'S ACTIONS. 18

II. THE SECRETARY IGNORED THE STATUTORY PURPOSE OF MEDICAID AND FAILED TO ADDRESS THE IMPACT OF THE PROJECTS ON COVERAGE 24

A. The Secretary Sought To Rewrite The Purposes Of The Act. 25

1. The Text Of The Act Specifies That The Purpose Of Medicaid Is The Provision Of Medical Assistance To Low-Income Individuals. 26

2. The Secretary's "Alternative" Medicaid Objectives Represent Unreasonable Interpretations Of The Statute. 28

B. The Secretary Failed To Adequately Examine If Kentucky HEALTH And The AWA Were Likely To Promote Coverage. 37

C. Even If The Secretary Could Properly Consider His Alternative Objectives, He Did Not Reasonably Determine The AWA And Kentucky HEALTH Are Likely To Promote Them. 43

III. THE DISTRICT COURT CORRECTLY VACATED THE PROJECTS IN THEIR ENTIRETY. 51

CONCLUSION 54

TABLE OF AUTHORITIES*

CASES

Americans for Clean Energy v. EPA, 864 F.3d 691 (D.C. Cir. 2017).....30

Animal Legal Defense Fund, Inc. v. Perdue, 872 F.3d 602 (D.C. Cir. 2017).....18

**Beno v Shalala*, 30 F.3d 1057 (9th Cir. 1994)..... 19, 20, 21, 25, 37, 38, 50, 51

Catholic Social Service v. Shalala, 12 F.3d 1123 (D.C. Cir. 1994).....54

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).....21

Claybrook v. Slater, 111 F.3d 904 (D.C. Cir. 1997).....20

Cyan, Inc. v. Beaver County Employees Retirement Fund, 138 S. Ct. 1061 (2018).....32

Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir. 1995).....21

Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767 (2018).....31

Drake v. FAA, 291 F.3d 59 (D.C. Cir. 2002).....19, 20

Fred Meyer Stores, Inc. v. NLRB, 865 F.3d 630 (D.C. Cir. 2017).....18

Genuine Parts Co. v. EPA, 890 F.3d 304 (D.C. Cir. 2018).....18, 44

Getty v. Federal Savings & Loan Insurance Corp., 805 F.2d 1050 (D.C. Cir. 1986).....51

Hawaiian Dredging Construction Co. v. NLRB, 857 F.3d 877 (D.C. Cir. 2017).....44

Huron v. Cobert, 809 F.3d 1274 (D.C. Cir. 2016).....54

International Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795 (D.C. Cir. 1983).....22

Jones v. T.H., 425 U.S. 986 (1976).....7

* Authorities upon which we chiefly rely are marked with an asterisk.

Lincoln v. Vigil, 508 U.S. 182 (1993) 19

Marshall County Health Care Authority v. Shalala, 988 F.2d 1221 (D.C. Cir. 1993) 20

Music Choice v. Copyright Royalty Board, 774 F.3d 1000 (D.C. Cir. 2014) 22

NAACP v. Trump, 298 F. Supp. 3d 209 (D.D.C. 2018).....52

National Federal of Independent Business v. Sebelius, 567 U.S. 519 (2012).....6

National Lifeline Ass'n v. FCC, 921 F.3d 1102 (D.C. Cir. 2019).....23

National Mining Ass'n v. United States Army Corps of Engineers, 145 F.3d 1399 (D.C. Cir. 1998).....52

New York v. United States Department of Commerce, 351 F. Supp. 3d 502 (S.D.N.Y. 2019), *cert. granted on other grounds*, 139 S. Ct. 853 (2019).....52

New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973).....33, 34

Newton-Nations v. Betlach, 660 F.3d 370 (9th Cir. 2011) 37, 51

Pharmaceutical Research & Manufacturers of America v. Thompson, 362 F.3d 817 (D.C. Cir. 2004).....34

Pharmaceutical Research & Manufacturers of America v. Walsh, 538 U.S. 644 (2003).....34, 35, 38, 51

Rollins Environmental Services (NJ) Inc. v. United States EPA, 937 F.2d 649 (D.C. Cir. 1991).....54

Susquehanna International Group, LLP v. SEC, 866 F.3d 442 (D.C. Cir. 2017) 39

Texas Tin Corp. v. United States EPA, 992 F.2d 353 (D.C. Cir. 1993) 45

United Technologies Corp. v. United States Department of Defense, 601 F.3d 557 (D.C. Cir. 2010).....46

Waterkeeper Alliance v. EPA, 853 F.3d 527 (D.C. Cir. 2017) 29

STATUTES

5 U.S.C. § 706(2) 52

5 U.S.C. § 706(2)(A) 18

7 U.S.C. § 2015(d) 31

7 U.S.C. § 2015(o) 31

42 U.S.C. §§ 301-1397mm 5

42 U.S.C. § 601(a)(2) 31

42 U.S.C. § 602(19) (1996) 31

42 U.S.C. § 607 31

42 U.S.C. § 1315 5

*42 U.S.C. § 1315(a) 7, 19, 23, 24, 25, 37

42 U.S.C. § 1315(a)(1) 7, 8

42 U.S.C. § 1315(d) 8

42 U.S.C. § 1315(d)(2)(B)(ii) 8

42 U.S.C. § 1396-1396w-5 5

42 U.S.C. § 1396-1 ..... 1, 5, 7, 26, 30

42 U.S.C. § 1396a(a)(10)(A) 7

42 U.S.C. § 1396a(a)(10)(A)(i) 5

42 U.S.C. § 1396a(a)(10)(A)(ii) 6

42 U.S.C. § 1396a(a)(10)(B) 7

42 U.S.C. § 1396a(a)(10)(C) 6

42 U.S.C. § 1396a(a)(34) 7

42 U.S.C. § 1396b-1396w-5 7

42 U.S.C. § 1396d(a) 7

42 U.S.C. § 1396o 7

42 U.S.C. § 1396o-1 7

Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, 102 Stat. 683 (1988) 6, 27

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) 6, 30

Ky. Rev. Stat. Ann. § 205.520 36

LEGISLATIVE MATERIALS

American Health Care Act, H.R. 628, 115th Cong., §117 (2017) 27-28

The Fiscal Year 2020 HHS Budget: Hearing Before Subcomm. on Health of the H. Comm. On Energy & Commerce, 115th Cong. (Mar. 12, 2019) (Testimony of Secretary Alex Azar) 39

Medicaid Reform and Personal Responsibility Act of 2017, S. 50, 115th Cong. (2017) 28

Secretary of Health & Human Services Sylvia Burwell, Hearing on The President's Fiscal Year 2017 Budget, Responses to Additional Questions for the Record, U.S. House of Rep. Energy & Commerce Health Subcommittee (Feb. 24, 2016), https://bit.ly/2KbKP6A 8

OTHER AUTHORITIES

42 C.F.R. § 435.1010 31

Arkansas Center for Health Improvement, *Arkansas Health Care Independence Program ("Private Option") Section 1115 Demonstration Waiver Interim Report* (2016), http://bit.ly/2qpPNjU 15

Arkansas Department of Human Services, Arkansas Works Program (Dec. 2018), https://humanservices.arkansas.gov/images/uploads/011519_AWReport.pdf.....13, 16

Joseph Benitez et al., *Kentucky's Medicaid Expansion Showing Early Promise on Coverage and Access to Care*, 35 Health Aff. 528 (2016).....10

Department of Health & Human Services, *FY 2020 Budget in Brief* (Mar. 11, 2019), https://www.hhs.gov/sites/default/files/fy-2020-budget-in-brief.pdf.....23

Executive Order No. 13765, Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal, 82 Fed. Reg. 8351 (Jan. 20, 2017).....9

The Future of: Health Care, Wall St. J. (Nov. 10, 2017), https://on.wsj.com/2AMeGMW.....9

Dan Goldberg, *Verma: Court ruling won't close door on other Medicaid work requests*, Politico (July 17, 2018), https://politi.co/2RsJhIF.....12

Amy Goldstein & Juliet Eilperin, *Affordable Care Act Remains "Law of the Land," but Trump Vows to Explode It*, Wash. Post (Mar. 24, 2017), https://wapo.st/2Zm95Gj.....8

Colby Itkowitz, *The Health 202: Trump administration 'undeterred' by court ruling against Medicaid work requirements*, Wash. Post (July 25, 2018), https://wapo.st/2I6Zz4k.....12

Speech: Remarks by Administrator Seema Verma at the National Association of Medicaid Directors (NAMD) 2017 Fall Conference, CMS.Gov (Nov. 7, 2017), https://go.cms.gov/2PELxLW.....9

Benjamin D. Sommers et al., *Changes in Utilization and Health Among Low-Income Adults After Medicaid* Expansion *or Expanded Private Insurance*, 176 JAMA Internal Med. 1501 (2016).....10, 15

GLOSSARY OF TERMS

Acronym	Definition
AAR	Arkansas Administrative Record
KAR	Kentucky Administrative Record
ACA	Patient Protection and Affordable Care Act
AFDC	Aid to Families with Dependent Children
AWA	Arkansas Works Amendment
CMS	Centers for Medicare and Medicaid Services
FPL	Federal Poverty Level
NEMT	Non-Emergency Medical Transportation
NFIB	*National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012)
SNAP	Supplemental Nutrition Assistance Program
TANF	Temporary Assistance for Needy Families

INTRODUCTION

This case challenges the efforts of the Executive Branch to bypass the legislative process and act unilaterally to "comprehensively transform" Medicaid, a cornerstone of the social safety net that currently provides health insurance coverage to more than 65 million low-income individuals. Purporting to invoke Section 1115 of the Social Security Act, which allows only "experimental, pilot, or demonstration" projects "likely to assist in promoting the objectives" of Medicaid, the Secretary of the Department of Health and Human Services approved projects in Kentucky and Arkansas that, for the first time, require individuals to meet a work requirement to maintain eligibility for medical assistance, and that do so as part of a package of eligibility restrictions, penalty provisions, and benefit reductions that substantially limit health coverage and access to care. In so doing, the Secretary effectively rewrote the Medicaid Act by regulatory fiat, overturned a half-century of administrative practice, ignored swaths of social science evidence and data, and threatened irreparable harm to the health and welfare of tens of thousands of people.

Congress enacted Medicaid for the express statutory purpose of enabling states to "furnish medical assistance" and "rehabilitation and other services" to families and individuals "whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396-1. Medicaid offers a deal for states. If a state chooses to participate, the federal government contributes the lion's

share of the costs of providing care. In return, the state agrees to pay the remainder of those costs and follow all federal requirements, including those regarding the scope of and eligibility for the program. The Secretary has authority to "waive" certain Medicaid requirements, but only when likely to both promote the objectives of the Medicaid Act and serve an experimental purpose.

The government defends the Secretary's waiver approvals here as narrow "experiments" that are "carefully tailored," Fed. Br. 2, but the reality is far different. The approvals strike at the heart of the Act: the Secretary has approved a collection of restrictions with the purpose and effect of substantially reducing Medicaid coverage for an eligible population. The coverage loss imposed by the "experiments" is massive: Kentucky itself estimated that its waiver project would cause coverage loss equivalent to 95,000 adults losing coverage for an entire year, JA __-__ (KAR 5419-23), and in Arkansas more than 18,000 people (about 25% of those subject to the work requirement) lost coverage as a result of the project in just five months of partial implementation. And work requirements are available nationwide: The Secretary has approved waivers in ten states so far; seven more are pending; and the Secretary has made clear that the waivers are available to all comers.

Against that backdrop, the district court (Boasberg, J.) correctly concluded that the far-reaching waivers granted here clearly violate the APA. In approving these projects, the Secretary ignored the core purpose that Congress set forth in the

Medicaid Act—to enable states to "furnish medical assistance" and "rehabilitation and other services" to low-income people—and he failed to confront the reality that the projects inhibit, rather than "promote," this core objective. Indeed, the Secretary did not seek to furnish assistance at all, but instead purported to pursue other objectives such as "strengthening workforce participation," "improving health and wellness," and "familiarizing beneficiaries with . . . the commercial market." Those are not, however, the purposes Congress set forth in the Act.

Moreover, even if the Secretary *had* the authority to consider these alternative objectives, the administrative records in these cases do not allow this Court to bless his paper-thin reasoning and stunted decision-making process. The Secretary ignored the wealth of record evidence setting forth why the projects will reduce coverage, harm health, and exacerbate financial instability, and therefore do not meet the Section 1115 requirements. As the district court correctly recognized, this ostrich-like adjudication is the very definition of arbitrary and capricious decision-making.

On appeal, the Secretary attacks the district court's decisions as merely an effort to "second-guess" the Secretary's "predictive judgments." But that is a distortion of the district court's opinions, plain and simple. The district court did not vacate the Secretary's waivers because of some disagreement about how the projects would pan out. Rather, the projects were vacated because Congress identified

providing health coverage as the core purpose of the Act, and the Secretary failed entirely to confront the massive coverage loss that was obvious from the face of the proposals, that commenters noted would occur, that Kentucky's own application conceded, and that actually occurred in Arkansas. As the district court realized, it is the essence of arbitrary decision-making to fail to consider an important part of the problem, and particularly so when (as here) that failure guts the principal purpose of the Act.

In the end, there is no mystery about what the government is trying to accomplish. Kentucky's Governor touted his proposal as an effort to "fundamentally transform Medicaid"; Administrator Seema Verma announced her intent to "reform" and "restructure the Medicaid program" because Congress's decision to expand Medicaid to "able-bodied individual[s]" "does not make sense"; and Secretary Azar noted that the Administration is "now overseeing the next great transformation in Medicaid, through our efforts to encourage work and other forms of community engagement." But transforming and restructuring the social safety net is a job for Congress, not the Secretary. Because the Secretary broadly overstepped his authority under the Social Security Act and failed to adequately support or explain his conclusions, the decisions of the district court should be affirmed.

STATEMENT OF THE ISSUE

Whether the Secretary's approval of Kentucky HEALTH and the Arkansas Works Amendment complied with Section 1115 of the Social Security Act, 42 U.S.C. § 1315, and the Administrative Procedure Act.

RELEVANT STATUTES

Pertinent provisions are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

I. THE FEDERAL MEDICAID PROGRAM

The Social Security Act establishes a number of public benefit programs to support low-income people. *See* 42 U.S.C. §§ 301 to 1397mm. Each program has its own purpose, such as welfare (cash) assistance, nutrition assistance, and housing. Title XIX of the Act establishes a health insurance program known as Medicaid. *See id.* §§ 1396 to 1396w-5. Congress passed Medicaid "[f]or the purpose of enabling each State, as far as practicable . . . to furnish (1) medical assistance on behalf of" families and individuals "whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care." *Id.* § 1396-1.

States participating in Medicaid must provide medical assistance to individuals described in 42 U.S.C. § 1396a(a)(10)(A)(i), and have options to cover

additional populations, *see id.* §§ 1396a(a)(10)(A)(ii), 1396a(a)(10)(C). In the past, the covered groups included only families with dependent children and individuals who are aged, blind, or disabled. Eligibility depended in large part on being eligible for another public benefit program, such as Aid to Families with Dependent Children ("AFDC"). Beginning in the 1980s, Congress decoupled Medicaid eligibility from these welfare programs and tied it instead to income (expressed as a percentage of the federal poverty level ("FPL")). *See, e.g.*, Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, § 302, 102 Stat. 683, 750 (1988) (codified at 42 U.S.C. §§ 1396a(a)(10)(A)(i)(IV)).

The Affordable Care Act ("ACA") added another mandatory group, and required states to cover adults who are under age 65, not eligible for Medicare or another Medicaid eligibility category, and have household income below 133% of the FPL. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2001, 124 Stat. 119, 271 (2010) (adding 42 U.S.C. §§ 1396a(a)(10)(A)(i)(VIII), (e)(14)). This change expanded Medicaid "into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level." *Nat'l Fed. of Indep. Bus. v. Sebelius* (*NFIB*), 567 U.S. 519, 575 (2012). Although *NFIB* prohibited the Secretary from pulling Medicaid funding from states that do not adopt the Medicaid expansion, *id.* at 585, the expansion population continues to be described as a mandatory coverage group in the Medicaid Act.

The Medicaid Act requires states to cover all members of a covered population group. *See* 42 U.S.C. § 1396a(a)(10)(B). States cannot impose eligibility requirements not explicitly allowed. *Id.* § 1396a(a)(10)(A); *see, e.g.*, *Jones v. T.H.*, 425 U.S. 986 (1976) (affirming holding that a state regulation was inconsistent with Title XIX because it added a requirement for obtaining medical assistance). States must provide retroactive eligibility for care provided within three months before an enrollee's application if the enrollee would have been eligible for Medicaid at the time the services were received. 42 U.S.C. §§ 1396a(a)(34), 1396a(a)(10)(A), 1396d(a). The Medicaid Act also requires states to cover certain health services and gives them options to cover additional services, *id.* §§ 1396a(a)(10)(A), 1396d(a), and it sharply limits states' options for imposing premiums and cost sharing on enrollees, *id.* §§ 1396o, 1396o-1.

II. SECTION 1115 OF THE SOCIAL SECURITY ACT

Section 1115 of the Social Security Act authorizes the Secretary to "waive compliance" with certain requirements of the Medicaid Act in certain circumstances. *See id.* § 1315(a). First, Section 1115 allows the Secretary to grant a waiver only for an "experimental, pilot, or demonstration" project. *Id.* Second, that project must be "likely to assist in promoting the objectives" of the Medicaid Act. *Id.* Third, the Secretary may waive compliance with the requirements of only Section 1396a of the Medicaid Act. *Id.* § 1315(a)(1); *see id.* §§ 1396-1, 1396b to 1396w-5 (setting forth

additional requirements). Finally, the Secretary may grant a waiver only to the extent and for the period necessary to enable the state to carry out the experiment. *Id.* § 1315(a)(1).

In the ACA, Congress amended Section 1115 to require the Secretary to enact regulations to ensure a transparent application process. *Id.* § 1315(d). Congress envisioned that the Secretary would assess information concerning "the expected State and Federal costs and *coverage projections* of the demonstration project." *Id.* § 1315(d)(2)(B)(ii) (emphasis added).

When reviewing past applications under Section 1115, the Centers for Medicare & Medicaid Services ("CMS") recognized that work requirements are not "consistent with the purposes of the Medicaid program." *See, e.g.*, JA __ (*Gresham* ECF 1-6); *see also* Sec'y of Health & Human Services Sylvia Burwell, Hearing on The President's Fiscal Year 2017 Budget, Responses to Additional Questions for the Record, U.S. House of Rep. Energy & Commerce Health Subcommittee at 35 (Feb. 24, 2016), https://bit.ly/2KbKP6A.

III. THE ADMINISTRATION'S USE OF SECTION 1115 MEDICAID WAIVERS

After he took office, President Trump vowed to "explode" the ACA, including the Medicaid expansion. Amy Goldstein & Juliet Eilperin, *Affordable Care Act Remains "Law of the Land," but Trump Vows to Explode It*, Wash. Post (Mar. 24, 2017), https://wapo.st/2Zm95Gj. An Executive Order called on federal agencies to

unravel the ACA. Exec. Order No. 13765, Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal, 82 Fed. Reg. 8351 (Jan. 20, 2017).

CMS Administrator Seema Verma, in turn, repeatedly criticized the Medicaid expansion, advocating for lower Medicaid enrollment and outlining plans to "reform" Medicaid through agency action. *See, e.g.*, JA __-__ (KAR 115-16) (referring to the expansion as "a clear departure from the core, historical mission of the program"). She declared that the ACA's decision to "move[] millions of working-age, non-disabled adults into" Medicaid "does not make sense" and announced that CMS would resist that change by approving state waiver projects that contain work requirements. Speech: Remarks by Administrator Seema Verma at the National Association of Medicaid Directors (NAMD) 2017 Fall Conference, CMS.gov (Nov. 7, 2017), https://go.cms.gov/2PELxLW. Administrator Verma announced that CMS meant to "restructure the Medicaid program." *The Future of: Health Care*, Wall St. J. (Nov. 10, 2017), https://on.wsj.com/2AMeGMW.

Following through on Administrator Verma's promise, on January 11, 2018, CMS issued a State Medicaid Director Letter "announcing a new policy" that allows states to impose "work and community engagement" requirements on "non-elderly, non-pregnant adult Medicaid beneficiaries who are eligible for Medicaid on a basis other than disability." JA __-__ (KAR 90-99). So far, the Administration has

approved work requirements in Kentucky, Arkansas, Arizona, Indiana, New Hampshire, Maine, Michigan, Ohio, Utah, and Wisconsin; seven more applications are pending.

A. The Kentucky HEALTH Approvals

Kentucky chose to expand Medicaid, effective January 1, 2014. Over the next year, the percentage of low-income adults in Kentucky without insurance plummeted from 35% to under 11%. Joseph Benitez et al., *Kentucky's Medicaid Expansion Showing Early Promise on Coverage and Access to Care*, 35 Health Aff. 528 (2016). The expansion yielded many positive outcomes in Kentucky, including increased use of preventive services, decreased reliance on emergency rooms, fewer medications skipped due to cost, lower out-of-pocket spending on care, and improved self-reported health. *See, e.g.*, Benjamin D. Sommers et al., *Changes in Utilization and Health Among Low-Income Adults After Medicaid Expansion or Expanded Private Insurance*, 176 JAMA Internal Med. 1501, 1505-06 (2016). Hospitals' uncompensated care costs were $1.15 billion lower in the first three quarters of 2014 than in the first three quarters of 2013. JA __ (KAR 5004). And Medicaid expansion created more than 12,000 jobs in health care and related fields in 2014 alone. JA __-__ (KAR 4996-97).

Despite the success of the Medicaid expansion, Governor Bevin announced plans to "comprehensively transform Medicaid" through a Section 1115 project

called Kentucky HEALTH. JA __ (KAR 5447). The Commonwealth estimated that Kentucky HEALTH would jettison the equivalent of 95,000 people for a year, with approximately 20% of those individuals coming from groups not enrolled through the expansion. JA __-__ (KAR 5419-23). The Secretary approved the project on January 12, 2018, one day after the agency announced its new work-requirements policy. JA __ (KAR 0001). The approval authorized Kentucky to require 80 hours of work a month as a condition of Medicaid eligibility; charge monthly premiums of up to 4% of household income (with a range of consequences for inability to pay, including termination of coverage and a six-month lockout penalty); impose a six-month lockout on individuals who do not renew eligibility or timely report changes in circumstances affecting eligibility; charge heightened cost sharing for non-emergency use of the emergency room; and eliminate retroactive coverage and non-emergency medical transportation ("NEMT") for certain enrollees. JA __-__, __-__ (KAR 13-15, 34-35).

Sixteen Kentuckians challenged the approval of Kentucky HEALTH under the Administrative Procedure Act ("APA") and the U.S. Constitution. On June 29, 2018, the district court vacated and remanded the approval, holding that "the Secretary never adequately considered whether Kentucky HEALTH would in fact help the state furnish medical assistance to its citizens, a central objective of Medicaid." *Stewart v. Azar* (*Stewart I*), 313 F. Supp. 3d 237, 243 (D.D.C. 2018).

The government's focus on alternative objectives—promoting health and financial independence and preserving resources—"[wa]s no substitute for considering Medicaid's central concern: covering health *costs*. . . ." *Id.* at 266 (citation and quotation marks omitted). Because the district court held that HHS acted arbitrarily and capriciously in failing to sufficiently consider whether the waiver would promote Medicaid's objectives, it did not address plaintiffs' additional arguments that the Secretary lacked the statutory and constitutional authority to approve the project. *See id.* at 272.

In response, Administrator Verma reiterated that CMS is "very committed" to work requirements and would "push ahead with our policy initiatives and goals." Dan Goldberg, *Verma: Court ruling won't close door on other Medicaid work requests*, Politico (July 17, 2018), https://politi.co/2RsJhIF. Secretary Azar agreed: "We are undeterred . . . . We're fully committed to work requirements and community participation in the Medicaid program . . . ." Colby Itkowitz, *The Health 202: Trump administration 'undeterred' by court ruling against Medicaid work requirements*, Wash. Post (July 27, 2018), https://wapo.st/2I6Zz4k.

Consistent with this resolve, after "further review," the Secretary re-approved Kentucky HEALTH with insignificant changes on November 20, 2018. *See* JA __ (KAR 6723 (noting changes)). The Secretary largely repeated the rationale he used in the initial approval, with one remarkable exception. He emphasized that any

coverage loss the project may produce is irrelevant because Kentucky threatened to end the expansion entirely if its waiver was not approved. *See* JA __, __-__ (KAR 6729, 6731-32). Notably, when the Secretary re-approved Kentucky HEALTH, the work requirements in Arkansas had already caused thousands of people to lose their Medicaid coverage. *See* Ark. Dep't of Human Servs., Arkansas Works Program 8 (Dec. 2018), https://humanservices.arkansas.gov/images/uploads/011519_AWReport.pdf.

The district court again vacated and remanded the approval, holding that it was both contrary to the statute and arbitrary and capricious. *Stewart v. Azar* (*Stewart II*), 366 F. Supp. 3d 125, 131 (D.D.C. 2019). First, the court reiterated that "a central objective of the [Medicaid] Act is 'furnishing medical assistance' to needy populations." *Id.* at 138 (quoting 42 U.S.C. § 1396-1 (alteration adopted)). In contrast, the court held that promoting health, untethered to medical assistance, was *not* a permissible purpose of Medicaid. Congress's aim in enacting Medicaid was "in making healthcare more *affordable* for [low-income] people." *Id.* at 144 (quoting *Stewart I*, 313 F. Supp. 3d at 267). "Treating health—rather than the furnishing of medical services—as the Act's ultimate goal is nothing 'more than a sleight of hand.'" *Id.* (quoting *Stewart I*, 313 F. Supp. 3d at 266).

The court found that the Secretary again did not adequately examine the effect of Kentucky HEALTH on coverage, *id.* at 138, and instead "continue[d] to press"

his alternative justifications, *id.* at 139. The court held that the Secretary's failure to examine coverage, and the Secretary's failure to weigh his many other considerations against the likely impact the projects would have on coverage, rendered his approval arbitrary and capricious. *See id.* Moreover, the court not only rejected financial independence as a permissible purpose of Medicaid, *id.* at 146, but found the record lacked any evidence showing that requiring work will help individuals shift to private coverage or gain financial independence, and faulted the Secretary for failing to balance any conceivable financial-independence benefit against coverage loss, *id.* at 147-48.

The court stated the Secretary may "take into account fiscal sustainability" when evaluating whether a demonstration project will promote Medicaid. *Id.* at 149. But the court rejected the argument that "the Secretary need not grapple with the coverage-loss implications of a state's proposed project as long as it is accompanied by a threat that the state will de-expand" without the project in place. *Id.* at 131; *see also id.* at 153. The court could not "concur that the Medicaid Act leaves the Secretary so unconstrained, nor that the states are so armed to refashion the program Congress designed in any way they choose." *Id.* at 131.

B. The Arkansas Works Amendment

Arkansas expanded its Medicaid program to include the expansion population, effective January 1, 2014. Through a Section 1115 project, Arkansas has

enrolled most individuals in the expansion population in private health plans, with the Medicaid program covering their premiums and cost sharing. In 2014 and 2015, more than 225,000 Arkansans received medical assistance through the Medicaid expansion. Ark. Ctr. for Health Improvement, *Ark. Health Care Independence Program ("Private Option") Section 1115 Demonstration Waiver Interim Report* 16, 21 (2016), http://bit.ly/2qpPNjU. During that period, Arkansas saw "a reduction in the uninsured rate for adults from 22.5 percent to 9.6 percent, the largest reduction observed nationwide." *Id.* at 20; *see also* Sommers, *supra* at 10 (detailing the health and financial benefits of expansion in Arkansas).

Against this backdrop, Governor Hutchinson submitted a request to the Secretary to amend the project, by that time called Arkansas Works. JA __ (KAR 2057). Unlike Kentucky, Arkansas did not submit coverage projections. The Secretary approved the Arkansas Works Amendment ("AWA") on March 5, 2018, authorizing Arkansas to require individuals ages 19 to 49 to engage in 80 hours of work activities each month to maintain Medicaid coverage; terminate coverage of individuals not meeting the work requirements for any three months of the calendar year and prohibit re-enrollment for the rest of the year; and limit retroactive coverage to one month. JA __-__ (AAR 2-9). Arkansas began implementing the work requirement in June 2018 for individuals ages 30 to 49. By the end of the year,

Arkansas had terminated the Medicaid coverage of over 18,000 individuals for failure to meet the work requirements. Ark. Dep't of Human Servs., *supra* at 13.

Arkansas Works enrollees challenged the approval under the APA and U.S. Constitution. On the day it issued *Stewart II*, the district court vacated and remanded the AWA, noting that "[i]t's déjà vu all over again." *Gresham v. Azar*, 363 F. Supp. 3d 165, 175 (D.D.C. 2019). As in *Stewart I*, the court found that the Secretary "entirely failed to consider" whether the project would "help or hurt [Arkansas] in funding . . . medical services for the needy." *Id.* at 176 (internal quotation marks and citations omitted). The court again rejected the government's attempt to fabricate new purposes for the Act. And the court rejected the government's effort to justify the AWA approval based on the rationale it used in the Kentucky HEALTH re-approval. *Id.* at 180-81. Finally, as in *Stewart I*, the district court addressed only plaintiffs' argument that HHS acted arbitrarily and capriciously in failing to sufficiently consider whether the waiver would promote Medicaid's objectives and not plaintiffs' additional arguments that the Secretary lacked the authority to approve the project. *Id.* at 175.

SUMMARY OF ARGUMENT

The Kentucky HEALTH and AWA approvals are contrary to law and arbitrary and capricious under the APA. Contrary to the federal government's assertions, Section 1115 waiver approvals are reviewable under usual

administrative-law principles. The statute requires the Secretary to find that the waiver is a valid experiment likely to further Medicaid's objectives, and it provides the Court with a standard by which to review the Secretary's decisions here.

All parties agree that a core purpose of Medicaid is to furnish medical assistance to people with incomes too low to meet the costs of necessary care. But the Secretary brushed this statutory objective aside and justified his approvals by fabricating alternative purposes—improving health and wellness, increasing self-sufficiency, and saving money. These are not standalone purposes of Medicaid, as the text makes clear. Congress did not give—and could not have given—the Secretary the authority to pursue such broad goals through any means he chooses, much less at the expense of providing medical assistance.

Moreover, the Secretary ignored or unreasonably dismissed the likely impact these approvals would have on coverage. In fact, robust evidence in the administrative records reveals that, instead of helping Kentucky and Arkansas furnish medical assistance, the projects will likely strip Medicaid coverage from thousands of individuals. Nor do the records support findings that the projects will achieve even the Secretary's alternative objectives. In short, the Secretary's decisions represent an attempt to comprehensively transform Medicaid over the will of Congress while disregarding the predictably disastrous effect these projects will

have on the very individuals the Medicaid Act was enacted to protect. The district court correctly vacated these waivers in their entirety.

ARGUMENT

I. THE APA REQUIRES MEANINGFUL REVIEW OF THE SECRETARY'S ACTIONS.

Under the APA, this Court must "hold unlawful and set aside agency action" that it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Agency action is arbitrary and capricious 'if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency.'" *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 611 (D.C. Cir. 2017) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (alteration adopted)). In addition, the agency must "reflect upon the information contained in the record and grapple with contrary evidence." *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017). Where "the agency has failed to 'examine the relevant data' or failed to 'articulate a rational explanation for its actions,'" its decision cannot stand. *Genuine Parts Co. v. EPA*, 890 F.3d 304, 311-12 (D.C. Cir. 2018) (quoting *Carus Chem. Co. v. EPA*, 395 F.3d 434, 441 (D.C. Cir. 2005) (alterations adopted)).

Seeking to avoid even these most basic constraints on arbitrary government action, the government offers three principal responses. First, it argues that the Secretary's actions are unreviewable. But every court to consider a challenge to a Section 1115 approval has rejected this argument. *See Beno v Shalala*, 30 F.3d 1057, 1067 & n.24 (9th Cir. 1994) (collecting cases). The APA "embod[ies] a 'basic presumption of judicial review.'" *Lincoln v. Vigil*, 508 U.S. 182, 190 (1993) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)). Thus courts may review agency action except "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971)).

The statute here is not one of those rare instances. Congress set forth the relevant standard: Section 1115 waivers are allowed only for experimental projects "which, in the judgment of the Secretary, [are] likely to assist in promoting the objectives" of the Medicaid Act. 42 U.S.C. § 1315(a). Congress gave content to that standard by establishing the Act's core "objectives." Courts are fully capable of assessing whether any given approval complies with those congressional standards and is likely to advance the specified congressional objectives. As the Ninth Circuit held in finding a Section 1115 approval subject to judicial review, "the mere fact

that a statute contains discretionary language does not make agency action unreviewable." *Beno*, 30 F.3d at 1067.

Invoking *Drake* and *Claybrook v. Slater*, 111 F.3d 904, 908 (D.C. Cir. 1997), the government suggests that Section 1115 approvals are nonetheless unreviewable because the waiver standard depends on the subjective "judgment of the Secretary." Fed. Br. 21. Those cases are easily distinguishable. *Drake* held unreviewable a challenge to the Federal Aviation Administrator's decision to dismiss a complaint alleging a carrier violated FAA regulations, a decision this Court viewed as "equivalent to a decision not to commence an enforcement action." 291 F.3d at 70-72. *Claybrook* challenged the Federal Highway Administrator's failure to adjourn "in the public interest" an advisory committee meeting before the committee voted on a resolution. 111 F.3d at 905. Neither case involved assessing whether an agency appropriately followed statutory requirements incorporating specific congressional objectives.

Moreover, this Court has already rejected the government's argument that a statutory reference to the subjective views of the agency renders an agency decision under that statute *per se* unreviewable. *Marshall County Health Care Authority v. Shalala*, 988 F.2d 1221, 1224 (D.C. Cir. 1993), for example, refused to hold unreviewable the grant of an exception to certain provisions of the Medicare Act even though the Act provided for "such other exceptions . . . *as the Secretary deems*

appropriate" (emphasis added). And in *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995), this Court rejected the "similar linguistic argument" that agency action was unreviewable because the statute gave the agency discretion to act when "*it* finds it to be in the interests of justice," *id.* at 1402. The same result is appropriate here.[1]

Second, the Secretary seeks "heightened deference" for his supposed exercise of "predictive judgment." *See, e.g.*, Fed. Br. 22. But Judge Boasberg did not reject the Secretary's "predictive judgment." Instead, he rejected the Secretary's failure to consider coverage—which all parties agree is the core objective of the Medicaid Act—and record evidence indicating the projects would result in massive coverage loss. *Stewart I*, 313 F. Supp. 3d at 243, 261-62; *Gresham*, 363 F. Supp. 3d at 175. And he rejected the Secretary's creation of new, extra-textual purposes of Medicaid to justify the approvals. *Stewart II*, 366 F. Supp. at 139; *Stewart I*, 313 F. Supp. 3d at 265-66; *Gresham*, 363 F. Supp. 3d at 179. In other words, the Secretary simply made no "predictive judgment" as to whether the waivers would further the *actual* objectives of Medicaid.

[1] The Government also suggests that the Secretary need not explain the approvals because he only needs to follow procedural requirements outlined in Section 1115 regulations. *See* Fed. Br. 19-20. But the agency's regulations do not supplant the APA rules of reasoned decision making. *See, e.g.*, *Beno*, 30 F.3d at 1067. *Cf. Overton Park*, 401 U.S. at 415 (regardless of whether formal agency findings were necessary, court should review agency action).

Regardless, heightened deference for predictive judgments cannot save the Secretary. "[M]aking a predictive judgment" is not a get-out-of-APA-free card whereby the agency "need not engage in reasoned decisionmaking." *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 821 (D.C. Cir. 1983); *see also Music Choice v. Copyright Royalty Bd.*, 774 F.3d 1000, 1015 (D.C. Cir. 2014) (predictive judgment must be based "on sufficient evidence" (quoting *SoundExchange, Inc. v. Librarian of Cong.*, 571 F.3d 1220, 1225 (D.C. Cir. 2009))). Thus, "the predictive nature of the judgment" cannot be treated "'as though it were a talisman under which any agency decision is by definition unimpeachable.'" *Donovan*, 722 F.2d at 821 (quoting *State Farm*, 463 U.S. at 50). The agency still must show "it identified all relevant issues, gave them thoughtful consideration duly attentive to comments received, and formulated a judgment which rationally accommodates the facts capable of ascertainment and the policies slated for effectuation." *Id.* at 822 (quoting *Telocator Network of Am. v. FCC*, 691 F.2d 525, 544 (D.C. Cir. 1982)). Here, the Secretary entirely failed to do so, even when faced with data showing many thousands of enrollees were not meeting the Arkansas work requirements when he re-approved Kentucky HEALTH. *See, e.g.*, JA __-__, __, __-__ (KAR 12826-27, 13558, 16711-12 (describing data at *id.* at 19568-84)).

Third, the government claims the projects are time-limited experiments, the results of which are unpredictable and unknowable. *See* Fed. Br. 28-29. But under

the statute, the Secretary must determine whether the projects are "likely to assist in promoting the objectives" of the Medicaid Act. 42 U.S.C. § 1315(a). He cannot escape that obligation by simply declaring the outcomes of the projects are uncertain. *See* Fed. Br. 36. That is especially so where, as here, a mountain of evidence indicated that the projects would impose severe harm on those whose incomes are too low to afford necessary care. *See Nat'l Lifeline Ass'n v. FCC,* 921 F.3d 1102, 1113 (D.C. Cir. 2019) (finding predictive judgments are only given deference when supported by substantial evidence).

Moreover, the record suggests that these are not valid experiments at all. The Secretary approved Kentucky HEALTH and the AWA without having a valid experimental design in hand. *See* Amicus Br. of Deans, Chairs and Scholars, *Stewart* ECF 95-1, at 7, 16; Amicus Br. of Deans, Chairs and Scholars, *Gresham* ECF 33 at 18-20. And while the government's brief emphasizes the need to "try new approaches in state-level experiments," *see* Fed. Br. 18, the administration has already stated its intent to impose work requirements immediately nationwide, *see* Dep't of Health & Human Servs., *FY 2020 Budget in Brief* 100 (Mar. 11, 2019), https://www.hhs.gov/sites/default/files/fy-2020-budget-in-brief.pdf; *see also* JA __-__ (Ky. AR 90-99) (announcing new policy to allow any state to add work requirements so long as certain conditions are met).

In short, the Secretary had no excuse: He needed to reasonably weigh the evidence in the record regarding the likely outcomes of the project. As described below, he did not do so.

II. THE SECRETARY IGNORED THE STATUTORY PURPOSE OF MEDICAID AND FAILED TO ADDRESS THE IMPACT OF THE PROJECTS ON COVERAGE.

As the district court correctly decided, the Secretary did not reasonably conclude that either Kentucky or Arkansas proposed a valid experiment that "is likely to assist in promoting the objectives" of the Medicaid Act. 42 U.S.C. § 1315(a). The Secretary's approvals of Kentucky HEALTH and AWA are fundamentally flawed in three respects.

First, the Secretary attempted to rewrite the Medicaid Act, fashioning new purposes for the program. These alternatives—improving health, increasing financial independence, and cutting costs—are invalid. To justify these alternative purposes, the government repeatedly analogizes to the work requirements in TANF and SNAP. But there are no analogous work requirements in Medicaid, and Congress established for Medicaid a statutory purpose that is distinct from the purposes it chose for TANF and SNAP.

Second, the Secretary failed to consider the devastating impact these projects would have on coverage. Substantial evidence showed that the projects would strip Medicaid coverage from tens of thousands of people. The purpose of Medicaid is to

furnish medical assistance to those whose incomes are too low to afford necessary care. Failure to consider whether the projects will actually furnish assistance or will instead—as the record evidence shows—result in widespread coverage loss is arbitrary and capricious.

Lastly, record evidence does not support the Secretary's conclusion that Kentucky HEALTH and the AWA are likely to further even the alternative purposes of Medicaid the Secretary concocted. Each record "contains a rather stunning lack of evidence" that the Secretary actually considered the record before him. *Beno*, 30 F.3d at 1074. For these reasons, the Secretary's approvals cannot stand.

A. The Secretary Sought To Rewrite The Purposes Of The Act.

The Secretary may grant a Section 1115 waiver only for an experiment that is "likely to assist in promoting the objectives" of the Medicaid Act. 42 U.S.C. § 1315(a). As the district court correctly observed, one need not look far to find those objectives; Congress specified them in the statute. *See Gresham*, 363 F. Supp. 3d at 176 (citing 42 U.S.C. § 1396-1). In approving the AWA and Kentucky HEALTH, the Secretary attempted to sidestep the plain text of the Act and invented new purposes for Medicaid. His attempt to rewrite the statute cannot survive.

1. The Text Of The Act Specifies That The Purpose Of Medicaid Is The Provision Of Medical Assistance To Low-Income Individuals.

Section 1396-1 states that Congress appropriates Medicaid funds "[f]or the purpose of enabling each State, as far as practicable . . . to furnish (1) medical assistance on behalf of [individuals] whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care." 42 U.S.C. § 1396-1. The district court's conclusion that Medicaid's objective is to "furnish medical assistance" "followed ineluctably from § 1396-1 of the Act." *Gresham*, 363 F. Supp. 3d at 176.

The location of this provision within the Medicaid Act further reinforces the district court's conclusion. Because Medicaid is a spending program, Congress appropriates funds to states and attaches conditions to those appropriations. And it is in the section of the statute entitled "appropriations" that Congress set out Medicaid's purpose. *See* 42 U.S.C. § 1396-1. As the district court observed, "[w]hat better place could the purpose of a spending program be found than in the provision that sets up the 'purpose' of the appropriations?" *Gresham*, 363 F. Supp. 3d at 180. The purposes identified in Section 1396-1 are the purposes of the program.

The government has previously agreed that Section 1396-1 sets forth the "core objective" of the Medicaid Act. *See Gresham*, 363 F. Supp. 3d at 176. And

notwithstanding its insinuations to the contrary, *see* Fed. Br. 5 (calling the expansion "in essence a new program"), there is no doubt that Medicaid's core purpose of furnishing medical assistance applies equally to all Medicaid recipients, including the expansion population. As the district court correctly observed, "as amended, one objective of Medicaid thus became 'furnishing . . . medical assistance' for this new group of low-income individuals." *Stewart I*, 313 F. Supp. 3d at 261; *see id.* at 270 (explaining that over time, Congress has amended the Act to expand coverage to various populations, and while none of those populations is mentioned in Section 1396-1, "it is inconceivable that Congress intended to establish separate Medicaid programs, with differing purposes, for each"). The ACA did not create two parallel forms of Medicaid—it added a new population to the existing Medicaid program.

Further, Congress gave Medicaid a specific objective—furnishing medical assistance to low-income individuals—meant to address the specific problem of covering medical costs. Although Congress included work requirements in SNAP and TANF, it chose not to add them to Medicaid. Beginning in the 1980s, Congress had actively set Medicaid apart from these broader, work- and wealth-oriented programs by decoupling participation in one program from eligibility in the other. *See, e.g.*, Medicare Catastrophic Coverage Act of 1988, § 302, 102 Stat. at 750 (codified at 42 U.S.C. § 1396a(a)(10)(A)(i)(IV)). And even recently Congress decided not to add work requirements to Medicaid. *See* American Health Care Act,

H.R. 628, 115th Cong., §117 (2017); Medicaid Reform and Personal Responsibility Act of 2017, S. 50, 115th Cong. (2017). Despite the government's attempt to cast Medicaid as just another "public welfare" program like AFDC or TANF, Fed. Br. 7-8, Medicaid is a fundamentally different program Congress developed to target a fundamentally different problem.

2. The Secretary's "Alternative" Medicaid Objectives Represent Unreasonable Interpretations Of The Statute.

Notwithstanding the clarity of the text, the Secretary focuses on a different slate of objectives: "promot[ing] beneficiary health and financial independence," *Stewart II*, 366 F. Supp. 3d at 134 (citing JA __-__ (KAR 6723-24)); *Gresham*, 363 F. Supp. 3d at 176-77 (citing JA __ (AAR 4)); preparing low-income adults for commercial coverage, *Stewart II*, 366 F. Supp. 3d at 145 (citing JA __ (KAR 6725)); JA __ (AAR 5); and, for Kentucky, conserving resources to improve the long-term fiscal sustainability of Medicaid, JA __ (KAR 6726). But Congress did not authorize these objectives. Nor is it the Secretary's role to redefine Medicaid's very purpose.

Promoting Health. Appellants argue that promoting beneficiary health, unrelated to the provision of medical assistance, is a purpose of Medicaid. *See* Fed. Br. 40; Ark. Br. 37; Ky. Br. 29. But that is wrong. While improving health outcomes is clearly a desirable *result* of furnishing medical assistance, the Secretary lacks authority to isolate that desired outcome from the specific mechanisms Congress prescribed for achieving it. "[A]gencies are . . . bound not only by the ultimate

purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *Waterkeeper Alliance v. EPA*, 853 F.3d 527, 535 (D.C. Cir. 2017) (quoting *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139-40 (D.C. Cir. 2006)). "To the extent Congress sought to 'promote health' and 'well-being' here, it chose a specific method: covering the *costs* of medical services." *Stewart I*, 313 F. Supp. 3d at 267. Improving "beneficiary health," without regard to coverage of medical services or the cost of those services, is not an "objective[] of the Act in [its] own right." *Stewart II*, 366 F. Supp. 3d at 138.

Indeed, if the Government were correct, the Secretary could approve any policy he concludes may improve health and wellness. He could, for example, authorize states to require individuals to eat certain vegetables, adopt certain exercise regimens, work in certain jobs, or live in certain areas to maintain their health coverage, all in the pursuit of better health outcomes. *See Stewart*, 313 F. Supp. 3d at 267-68. Surely that is not the law. As the district court recognized, given the statute's stated objective of "furnishing medical assistance," the invocation of "promoting beneficiary health" as a freestanding objective is "far afield of the basic purpose of Medicaid," *Stewart II*, 366 F. Supp. 3d at 145, and well "outside 'the bounds of reasonableness,'" *id.* at 144 (quoting *Abbott Labs. v. Young*, 920 F.2d 984, 988 (D.C. Cir. 1990)). "[T]he fact that [the Secretary] thinks [the statute] would

work better if tweaked does not give [him] the right to amend the statute." *Ams. for Clean Energy v. EPA*, 864 F.3d 691, 712 (D.C. Cir. 2017).[2]

Financial Independence. Likewise, promoting "financial independence" and facilitating the transition of low-income adults from Medicaid to commercial coverage are not freestanding objectives of Medicaid. Medicaid exists to ensure that people have access to needed care when their incomes are too low to afford it. Congress did not enact Medicaid to reduce beneficiary reliance on governmental assistance.

Appellants offer two main arguments to the contrary, neither of which are persuasive. First, they seize on Section 1396-1's reference to "independence." 42 U.S.C. § 1396-1 (defining one purpose of Medicaid as furnishing "rehabilitation and other services to help . . . families and individuals attain or retain capability for independence or self-care"). Read in context, however, the independence and self-

[2] The Secretary cites ACA, § 4108, 124 Stat. at 561-64 (codified at 42 U.S.C. § 1396a note), to support his argument that health promotion is a standalone Medicaid objective for purposes of Section 1115, Fed. Br. 39-40. That provision has nothing to do with Section 1115 demonstrations. It required the Secretary to make time-limited grants available to states to carry out initiatives targeted to Medicaid beneficiaries and including both Medicaid and non-Medicaid participating providers. *See* ACA, § 4108(a). Congress carefully defined the scope of the initiatives, permitting states to offer incentives only for participation in evidence-based programs with demonstrated success in controlling smoking, weight, cholesterol levels, blood pressure levels, or diabetes. *Id.* The initiatives could not affect Medicaid eligibility. *Id.* § 4108(e). With this provision, Congress in no way gave the Secretary a green light to promote health at the expense of the health coverage of tens of thousands of Medicaid beneficiaries.

care referenced here relate to medical and rehabilitative services—*i.e.*, *functional* independence, not *financial* independence. *See Stewart II*, 366 F. Supp. 3d at 146 (interpreting "independence" to mean financial independence "is an unreasonable reading of the relevant provision because it is incompatible with the surrounding statutory language and aims").[3]

Second, the government argues that Section 1396u-1 makes financial independence a standalone objective of the Medicaid program, Fed. Br. 23-24, and characterizes Medicaid as a pillar of a trio of "public welfare" programs meant to promote work, Fed. Br. 7, 23-24. This is wrong. In 1996, Congress established TANF, a cash assistance program, with a stated purpose "to end the dependence of needy parents on government benefits programs by promoting job preparation, work, and marriage." 42 U.S.C. § 601(a)(2). To that end, Congress included work requirements in the TANF statute, *see id.* § 607, as it had in the predecessor program (AFDC), *see id.* § 602(19) (1996), and imposed work requirements in SNAP, 7 U.S.C. § 2015(d), (o).

Notably, Congress did *not* impose work requirements in Medicaid to mirror SNAP and TANF and did *not* amend Medicaid's objectives to mirror those in TANF. *See, e.g.*, *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) ("When

[3] Medicaid regulations use "independence" to refer to functional independence. *See, e.g.*, 42 C.F.R. § 435.1010 (focusing on "substantial functional limitations" in defining eligibility for institutional-level care).

Congress includes particular language in one section of a statute but omits it in another, this Court presumes that Congress intended a difference in meaning." (quoting *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (alterations adopted))). Rather, Congress enacted one narrow provision—Section 1396u-1—that permits states to coordinate eligibility for Medicaid and TANF for people participating in both programs.

This single provision does not transform the core objectives of the statute. *See Stewart II*, 366 F. Supp. at 147. Instead, Section 1396u-1(b) simply reflects Congress's desire to balance the policy goals of Medicaid (furnishing medical assistance) with the policy goals of TANF (including promoting job preparation) and to ensure that the two programs do not conflict. It does not give the Secretary carte blanche to import the TANF objectives into the Medicaid program and thus impose work requirements broadly across the program to populations that do not interact with TANF at all. As the Supreme Court has repeatedly observed, "Congress does not hide elephants in mouseholes." *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund.*, 138 S. Ct. 1061, 1071 (2018) (internal quotation marks and citations omitted).

Long-Term Fiscal Sustainability. Finally, the Secretary cannot justify the approvals on the grounds that they "enable states to stretch their resources" and "ensure the fiscal sustainability of the Medicaid program." JA __ (KAR 6719). Even if the Secretary may properly consider fiscal concerns when evaluating Section 1115

proposals, he cannot place saving money on par with the Medicaid Act's primary objective of furnishing medical assistance. Section 1396-1's requirement for a state to furnish assistance "as far as practicable" does not change the analysis. That provision simply "qualif[ies] . . . the extent to which states must furnish medical assistance." *Stewart*, 366 F. Supp. 3d at 149. It certainly does not give the Secretary free rein to pursue fiscal sustainability at the expense of coverage. To hold otherwise would mean that any Section 1115 project that cut Medicaid costs, even by slashing eligibility or reducing benefits, would promote the objectives of the program. That cannot be correct.[4]

None of the cases the government cites support its argument. Fed. Br. 25-26. At the outset, none of those cases involved Section 1115 projects. None held that fiscal sustainability is an independent objective of the Medicaid Act, much less one that may eclipse the core objective of the program. *N.Y. State Dep't of Soc. Servs. v. Dublino*, for example, arose from implementation of work requirements in the AFDC program, not Medicaid. 413 U.S. 405, 408 (1973). In upholding a New York law requiring individuals to engage in work activities to retain AFDC benefits, the Supreme Court focused on the text of the AFDC statute, which—in stark contrast to

[4] As Judge Boasberg observed, because the Medicaid Act establishes mandatory floors for benefits and coverage populations, the statutory purpose of furnishing assistance "as far as practicable" is easily understood as directing states to maximize their medical assistance efforts. *Stewart*, 366 F. Supp. 3d at 149.

the Medicaid Act—included work requirements and listed promoting work as a purpose of the program. *Id.* at 419-20. Although the Court acknowledged that a state may consider fiscal sustainability, it stated that such considerations cannot lead to "interpret[ing] federal statutes to negate their own stated purposes." *Id.* Thus, per *Dublino*, a state may *not* pursue fiscal sustainability at the expense of the program objectives established by Congress.

Similarly, neither *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644 (2003), nor *Pharmaceutical Research & Manufacturers of America v. Thompson*, 362 F.3d 817 (D.C. Cir. 2004), helps the government here. These cases examined whether the Medicaid Act preempted state statutes that established prescription drug rebate programs designed to reduce drug costs for individuals not on Medicaid. *See Walsh*, 538 U.S. at 653-54; *Thompson*, 362 F.3d at 821 & n.4. The courts explained that state statutes aiming to provide broader access to prescription drugs did not conflict with the objectives of the Medicaid program and indeed served "some Medicaid-related goals." *See Walsh*, 538 U.S. at 662-63. Notably, the programs restricted Medicaid enrollees' access to prescription drugs only in a way already explicitly allowed in Medicaid. *Id.* at 664; *Thompson*, 362 F.3d at 823. Further, a plurality of the Court stated that providing cheaper drugs to individuals not enrolled in Medicaid and cutting Medicaid costs "would not provide a sufficient basis for upholding the [supplemental drug rebate] program if it severely

curtailed recipients' access to" Medicaid services. 538 U.S. at 664-665. Thus, these cases "do not suggest that Medicaid recipients can be significantly burdened—that is, for example, their eligibility significantly restricted or benefits significantly cut—in the name of saving money." *Stewart II*, 366 F. Supp. 3d at 152.

Finally, in an argument the federal government barely bothers to defend, Kentucky presses the fiscal sustainability argument in a different way: Because Kentucky threatened to withdraw expansion-population coverage *entirely* if its waiver request were denied, JA __, __, __-__ (KAR 6726, 6729, 6731-32), the Secretary properly concluded the approval actually *promotes* coverage overall, given the alternative and notwithstanding its devastating effect on current Medicaid recipients, Ky. Br. 35-36; Fed. Br. 25. Kentucky's threat to eliminate the Medicaid expansion cannot justify the waiver here.

First, it is by no means clear that Kentucky could lawfully (or would in fact) follow through on its threat. The expansion population is a "mandatory" Medicaid population, and a State is not generally free to drop mandatory populations. *NFIB* is not to the contrary. Although *NFIB* prohibited the government from withholding funds from states that refused to implement the Medicaid expansion, it did not rewrite the Medicaid statute to render the expansion population optional. Following enactment of the ACA in 2010 and *NFIB* in 2012, states that opted into the expansion, such as Kentucky and Arkansas, understood the bargain (including its

generous, over 90%, federal funding) before choosing to expand. There is no unconstitutional coercion in treating the expansion population on an "equal footing" with "traditional" Medicaid populations once the State has exercised the option to expand in exchange for increased funding. *Stewart I*, 313 F. Supp. 3d at 269; *see also id.* at 242 ("Although it may choose not to cover the ACA expansion population, . . . if the state decides to provide coverage, those individuals become part of its mandatory population." (citing *NFIB*, 567 U.S. at 587)). What is more, despite the Kentucky Governor's proclamation, state law may independently prevent Kentucky from terminating the expansion population. *See* Ky. Rev. Stat. Ann. § 205.520 ("[I]t is the policy of the Commonwealth to take advantage of all federal funds that may be available for medical assistance.").

Second, because Medicaid itself is a voluntary program, Kentucky's argument has no bounds. *Cf.* Fed. Br. 25; Ky. Br. 5-6, 38. As the district court correctly noted, "taken to its logical conclusion," the theory would allow—indeed require—the Secretary to approve any project if a state threatened to cut any population or "do away with all of Medicaid" without the approval. *Stewart II*, 366 F. Supp. 3d at 154. Medicaid would become an à la carte menu, with states permitted to mix and match coverage as they wish so long as some number of individuals remain enrolled in the program. Notably, before the district court the Secretary could not identify a single limiting principle to its argument, *see id.*, and the Secretary makes no effort to offer

one here, *see* Fed. Br. 36-37. This cannot be what Congress intended. *See Beno*, 30 F.3d at 1068-69 ("[W]e doubt that Congress would enact such comprehensive regulations, frame them in mandatory language, require the Secretary to enforce them, and then enact a statute allowing states to evade these requirements with little or no federal agency review.").

* * *

In short, "'focus[ing] on health [or other non-coverage objectives] is no substitute for considering Medicaid's central concern: covering health costs' through the provision of free or low-cost health coverage." *Gresham*, 363 F. Supp. 3d at 179 (quoting *Stewart I*, 313 F. Supp. 3d at 266). Before approving an experiment that imposes benefit cuts, penalty provisions, and eligibility restrictions, the Secretary must consider their cumulative impact on furnishing medical assistance to the individuals that the Medicaid program was enacted to protect. *See Newton-Nations v. Betlach*, 660 F.3d 370, 381 (9th Cir. 2011). The Secretary did not do so here.

B. The Secretary Failed To Adequately Examine If Kentucky HEALTH And The AWA Were Likely To Promote Coverage.

As the district court correctly decided, the Secretary did not reasonably conclude that either Kentucky HEALTH or the AWA "is likely to assist in promoting the objectives" of the Medicaid Act. 42 U.S.C. § 1315(a). Each record contains substantial evidence showing that the proposed project would strip Medicaid coverage from substantial numbers of low-income people. And each

record "contains a rather stunning lack of evidence" that the Secretary actually considered that evidence. *Beno*, 30 F.3d at 1074. That is no surprise—the approvals were based principally on the desire to advance a different slate of objectives. But given that the core objective of the Medicaid Act is to furnish medical assistance to low-income individuals, the Secretary had to at least assess whether each proposed project "would cause recipients to lose coverage [and] whether the project would help promote coverage." *Stewart* II, 366 F. Supp. 3d at 140 (citing *Stewart I*, 313 F. Supp. 3d at 262); *see also Walsh*, 538 U.S. at 664-65 (noting that a project that cut costs by severely curtailing Medicaid coverage would not serve the objectives of Medicaid). The Secretary failed to do so, rendering the approvals arbitrary and capricious.

Coverage Loss. The record contains substantial, unrefuted evidence indicating that the AWA and Kentucky HEALTH would cause massive coverage losses. *See, e.g.*, JA __-__, __-__, __-__ (KAR 26308-11, 15482-83, 14664-65); JA __-__, __-__, __, __-__ (AAR 1269-70, 1277-78, 1285, 1294-95).[5] With respect to

[5] With respect to Kentucky HEALTH, commenters explained that each of the features of the project would limit coverage and/or restrict access to services. *See, e.g.*, JA __-__, __, __-__, __, __-__ (KAR 16708-11, 19954, 14043-63, 18404-05) (work requirements); *id.* at __-__, __, __-__, __-__, __-__ (KAR 19976-78, 15485, 26310-11, 18613-14, 13139-49) (premiums); *id.* at __-__, __-__, __, __, __-__ (KAR 16723-24, 20291-92, 15152, 18309, 19983-85) (eliminating retroactive eligibility); *id.* at __-__, __-__, __-__ (KAR 15485-86, 16714-15, 17460-61) (administrative lockouts); *id.* at __, __-__, __-__, __-__, __-__, __, __ (KAR 13566, 15151-52, 19988-91, 16724-25, 17463-64, 20292, 13174) (eliminating NEMT).

the Arkansas application, Judge Boasberg correctly found that the Secretary "entirely failed to consider" its effect on coverage, *Gresham*, 363 F. Supp. 3d at 176, and the government has conceded as much, *id.* at 177; *see* JA __ (AAR 4) (listing the objectives the Secretary did consider).

Arkansas argues the Secretary did not need to engage with comments predicting coverage loss because neither the State nor the commenters quantified that loss. Ark. Br. 53-54. But multiple commenters provided credible forecasts that the AWA would cause significant coverage loss. Moreover, commenters' forecasts proved accurate—in just five months, over 18,000 Arkansans lost coverage for failure to meet the work requirements.[6]

Alternatively, Arkansas claims that the Secretary fulfilled his responsibility by acknowledging that commenters were concerned work requirements could create barriers to coverage. Ark. Br. 51. Mere acknowledgment is no substitute for reasoned consideration. *See, e.g.*, *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 446 (D.C. Cir. 2017) ("[S]tating that a factor was considered . . . is not a substitute for considering it." (quoting *Gerber v. Norton*, 294 F.3d 173, 185 (D.C. Cir. 2002))). In fact, the record shows the Secretary simply dismissed commenters' concerns.

[6] Although the government asserts that coverage losses were "due in large part" to the online reporting requirement, Fed. Br. 38, the Secretary admitted the agency has no data on why these individuals lost their Medicaid coverage, The Fiscal Year 2020 HHS Budget: Hearing Before the Subcomm. on Health of the H. Comm. On Energy & Commerce, 115th Cong. (Mar. 12, 2019) (Testimony of Secretary Alex Azar).

Without speaking to "the risk of coverage loss those requirements create," *Gresham*, 363 F. Supp. 3d at 177, the Secretary declared that work requirements "create appropriate incentives" for enrollees, JA __ (AAR 6). That is no response at all.

Nor can the government prevail by suggesting that the presence of "beneficiary protections" in the approval would minimize coverage loss. *See* Ky. Br. 44; Fed. Br. 35. There is no dispute that these "protections" were in the AWA application, *see* JA __-__, __, __, __ (AAR 2080-82 (exemptions and good cause exceptions), 2107 (outreach and education efforts), 2114 (online reporting), 2069 (ability to terminate waivers at any time)), meaning that commenters made their estimates of massive coverage loss with these features in mind. *See Gresham*, 363 F. Supp. 3d at 177. Still, the government offered no response.

In approving Kentucky HEALTH, the Secretary fared no better. The government argues the Secretary satisfied his duty to consider the effect on coverage by noting that, without the project in place, the Commonwealth might terminate coverage for the entire expansion population and cut optional services. Fed. Br. 36-37; Ky. Br. 34-36. For the reasons articulated above, that logic cannot carry the day. The Secretary needed—and failed—to reasonably evaluate, based on the evidence in the record, how Kentucky HEALTH would affect Medicaid coverage "as compared to compliance with the statute's requirements." *Stewart II*, 366 F. Supp. 3d at 154.

While the Secretary acknowledged that some individuals "may lose coverage" due to the project, JA __, __ (KAR 6729, 6726), he did not engage with the evidence that these losses would be dramatic. For example, the Secretary ignored the loss estimates submitted by health policy experts, *see, e.g.*, JA __-__, __-__, __, __-__ (KAR 19194-205, 13437-40, 15482, 14654-58), and the emerging data from Arkansas, where thousands of enrollees were not meeting the work requirements, *see, e.g.*, JA __, __, __-__ (KAR 12826-27, 13558, 16711-12 (describing data at KAR 19568-84)). Nor did his invocation of "guardrails" excuse his failure to engage: Those guardrails predated the comments, and commenters took care to explain why they would not prevent substantial coverage loss. *See* JA __-__, __-__, __, __-__, __-__, __, __, __-__, __ (KAR 15150-51, 19982-83, 20011, 20820-21, 26304-05, 12967, 14685, 13561-62, 16715) (raising concerns about the exemptions, good cause exceptions, and/or "on-ramps").

Rather than actually engaging with the projections of coverage losses, the Secretary chose instead to quibble around the edges. The government thus suggests that the estimate provided by Kentucky did not mean 95,000 people would "completely lose coverage and not regain it," JA __ (KAR 6731), and it claims—incorrectly—that the district court assumed that coverage losses would result only from noncompliance with Kentucky HEALTH requirements, *compare* Fed. Br. 34 *with* 366 F. Supp. 3d at 142 (acknowledging claim that coverage loss could reflect

individuals transitioning to commercial coverage but finding the Secretary failed to offer any evidence or other reasoned basis for that statement).[7] But that is all beside the point, because the bottom line is clear: The record "indisputably reflects that a substantial number of people will lose coverage," and the Secretary "'granted the waivers with no idea of how many people might lose Medicaid coverage.'" *Stewart II*, 366 F. Supp. 3d at 141-42 (quoting *Stewart I*, 313 F. Supp. 3d at 264). The district court was thus correct to conclude that the Secretary "failed to consider an important aspect of the problem." *Stewart I*, 313 F. Supp. 3d at 264 (quoting *State Farm*, 463 U.S. at 43); *see also Stewart II*, 366 F. Supp. 3d at 142-43 (quoting same).

Coverage promotion. Likewise, the district court correctly determined the Secretary failed to adequately examine whether the AWA and Kentucky HEALTH would promote Medicaid coverage. *Gresham*, 363 F. Supp. 3d at 179; *Stewart II*, 366 F. Supp. 3d at 143. The Secretary and Arkansas do not engage with that finding. Kentucky emphasizes that the Secretary noted the project is designed to help enrollees successfully transition to commercial coverage. Ky. Br. 45 (citing JA __-__, __ (KAR 6724-25, 6731)). But for the reasons discussed below, the Secretary

[7] *See also* JA __-__, __-__, __-__, __-__, __-__ (KAR 12823-25, 12967-72, 25693-94, 16715-18, 17924-40) (noting that even individuals who fulfill the work requirements will not have family income above the Medicaid eligibility level or access to commercial coverage).

lacked evidence to support his findings that the AWA and Kentucky HEALTH would promote even that alternative purpose.

C. Even If The Secretary Could Properly Consider His Alternative Objectives, He Did Not Reasonably Determine The AWA And Kentucky HEALTH Are Likely To Promote Them.

Even if the Secretary could have properly considered health, financial independence, and fiscal sustainability, he did not reasonably determine that the AWA and Kentucky HEALTH are likely to achieve them. Further, he did not rationally weigh any advances on these fronts "against the consequences of lost coverage, rendering his determination arbitrary and capricious." *Stewart II*, 366 F. Supp. 3d at 149.

Health. The Secretary did not reasonably determine that the AWA and Kentucky HEALTH are likely to result in better health outcomes. First, the Secretary vastly overstated any health benefits that could accrue to individuals who manage to meet the new eligibility restrictions. *See, e.g.*, JA __-__ (AAR 4-5); JA __, __, __-__ (KAR 6724 (retroactive eligibility), 6733 (work requirements), 6734-35 (premiums)).[8] The Secretary made a simple causal argument: forcing Medicaid enrollees to work or volunteer to maintain Medicaid eligibility will improve the health of those who comply. The relevant research, including articles cited by the

[8] The government ignores the projects' other restrictions and focuses on only work requirements. Fed. Br. 38.

Secretary, does not support that conclusion. *See, e.g.*, JA __-__, __-__, __-__, __-__, __-__, __-__, __-__ (KAR 12789-92, 14666-67, 16718-19, 17454-55, 19746-48, 19973-74, 13432-35 (noting that unstable, low-wage work is associated with similar or even poorer health outcomes than no work at all, and citing a new, comprehensive literature review at KAR 19209-25 undermining the claim that work causes better health)); JA __, __, __, __ (AAR 1691, 2040, 1694, 1791) (portions of studies discussing health selection effects and/or describing a complex relationship between work activities and health). In approving the AWA, the Secretary misconstrued the evidence. *See Genuine Parts Co.*, 890 F.3d at 313 (finding arbitrary and capricious an agency "rely[ing] on portions of studies in the record that support its position, while ignoring [portions] in those studies that do not"). And his approval of Kentucky HEALTH simply asserted that the literature is not "definitive[]" and therefore, a "demonstration is appropriate." JA __ (KAR 6733). But the presence of some uncertainty does not relieve the Secretary of his responsibility to "adequately engage[] the record evidence." *Hawaiian Dredging Constr. Co. v. NLRB*, 857 F.3d 877, 885 (D.C. Cir. 2017). Even if it were true that any kind of work leads to better health, the Secretary did not rationally find that the work requirements would materially increase work among Medicaid enrollees, as discussed below.

Kentucky argues the Secretary rationally determined that other components of Kentucky HEALTH—elimination of retroactive eligibility and imposition of

mandatory premiums—are likely to improve health outcomes. Ky. Br. 32. Regarding retroactive eligibility, the approval's cursory statement that eliminating retroactive eligibility will "encourage more individuals to seek preventive care," *see* JA __ (KAR 6724), does not suffice, particularly given the "obvious counterargument," *Stewart II*, 366 F. Supp. 3d at 143. Regarding premiums, Kentucky cites an evaluation from Indiana that purportedly shows requiring enrollees to pay monthly premiums makes them healthier. Ky. Br. 32. As commenters explained, the evaluation shows no such thing. *See, e.g.*, JA __ (KAR 19979). *See Tex. Tin Corp. v. EPA*, 992 F.2d 353, 355-56 (D.C. Cir. 1993) (rejecting agency prediction where its reading of the studies "confuses correlation with causation").

In addition to inflating any health benefits that would accrue to individuals who manage to remain enrolled in Medicaid, the Secretary failed to weigh those benefits against "the harms to the health of those who might lose their coverage." *Stewart II*, 366 F. Supp. 3d at 125. The record shows that the AWA and Kentucky HEALTH would cause massive coverage loss. It also contains substantial, unrefuted evidence indicating that coverage loss has devastating repercussions on people's health. *Id.*; *see, e.g.*, JA __, __-__, __, __-__, __ (KAR 12821, 12916-17, 19985, 18207-08, 14065, 26311); JA __-__, __, __, __, __ (AAR 1265-66; 1295, 1320,

1314).[9] Notwithstanding this evidence, the Secretary did not bother to estimate how many individuals would lose coverage for failure to comply with the various eligibility restrictions. As a result, he could not have assessed the magnitude of the health harms the projects would cause. Nor could he have weighed those harms against any health benefits. *See Stewart II*, 366 F. Supp. 3d at 125. In arguing otherwise, Arkansas and Kentucky point to "conclusory or unsupported suppositions" made by the Secretary, and that is not enough. *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 562 (D.C. Cir. 2010). *See* Ark. Br. 45-46 (citing JA __ (AAR 7)); Ky. Br. 33 (citing JA __ (KAR 6731)).

Alternatively, Arkansas claims the Secretary did not need to balance health benefits against coverage loss. Ark. Br. 47. The district court correctly rejected that argument. *See Stewart II*, 366 F. Supp. 3d at 146 (finding that considering health does not "excuse" the Secretary from considering coverage, especially given the conflict between promoting health and promoting coverage). The Medicaid Act does

[9] Commenters also explained that even individuals who maintain their coverage under Kentucky HEALTH may suffer negative health effects. For example, individuals under 100% of FPL who do not pay monthly premiums will lose access to vision and dental services, *see* JA __, __-__, __-__, __-__, __-__ (KAR 18175, 14662-63, 17462-63, 12889-91, 21510-16) (highlighting the importance of those services), and will be subject to cost sharing, *see* JA __, __, __ (KAR 18320, 19978, 20686) (noting that cost sharing limits access to medically necessary care). Likewise, eliminating NEMT will reduce access to medically necessary services. *See, e.g.*, JA __, __-__, __-__, __-__, __-__, __, __ (KAR 13566, 15151-52, 19988-91, 16724-25, 17463-64, 20292, 13174).

not reference "improved health and wellness" as an objective, and nothing in logic or case law suggests that the Secretary could consider that objective while entirely ignoring the core objective that Congress identified.

Financial independence. Similarly, the Secretary did not reasonably conclude that the AWA and Kentucky HEALTH are likely to improve the financial status of low-income individuals. While the Secretary presented the work requirements as a means to "promote beneficiary independence," JA __ (AAR 6); *see also* JA __ (KAR 6727), substantial evidence in the record indicates they will not have that effect, *see, e.g.*, JA __-__, __-__, __-__, __-__, __-__, __-__, __-__ (KAR 12792-94, 19198-99, 19963-67, 12970-71, 16720-21, 20002-03, 20265-66); JA __-__, __, __-__, __-__, __-__ (AAR 1312-14, 1285, 1303-04, 1336-38, 1416-21). The Secretary completely ignored that evidence. *See Stewart II*, 366 F. Supp. 3d at 147-48 (finding the Secretary did not make "any attempt" to estimate the number of people who will attain financial independence or to explain "the mechanism by which they are likely to do so"). Further, "[e]ven if some number of beneficiaries were to gain independence, the Secretary [did] not weigh the benefits of their self-sufficiency against the consequences of coverage loss, which would harm and undermine the financial self-sufficiency of others." *Id.* at 148; *see also* JA __-__, __, __-__ (KAR 19986-87, 26311, 18182-83); JA __, __-__ (AAR 1320, 1287-88) (all discussing the financial benefits of coverage).

The government contends that the Secretary could ignore the evidence questioning the efficacy of work requirements because it is "at odds with Congress's judgment as embodied in [TANF and SNAP]." Fed. Br. 29-31. But that is nonsense. As noted, the purposes of SNAP and TANF are fundamentally different from the purposes of Medicaid. Any judgment Congress made about work requirements in TANF and SNAP is simply irrelevant for Medicaid.

Nor could the government ignore these comments on the ground that they are contradicted by other evidence in the record suggesting that the AWA and Kentucky HEALTH will increase self-sufficiency. *See* Fed. Br. 30. First, the Secretary himself never explained what evidence he relied on to find that the work requirements are likely to increase self-sufficiency; counsel's post hoc rationalizations for the approvals are no substitute. Second, even the scant evidence the government now identifies is unavailing. The government cites the Kentucky HEALTH application, which in turn cites evidence that volunteer experience makes it easier to find a job and having a high school diploma leads to higher earnings. *See* Fed. Br. 31 (citing JA __, __ (KAR 25513, 25519)). Those points say nothing about whether the work requirements are likely to cause individuals not otherwise participating in work or other work-related activities to do so. Nor do they address the financial costs incurred by individuals who lose coverage for failure to meet any of the eligibility restrictions added by the AWA and Kentucky HEALTH.

Likewise, the commission report on which the government relies, *see* Fed. Br. 30, does not refute the evidence commenters cited. The report examines research on TANF and notes disagreement about the extent to which the enactment of TANF, as opposed to "general economic trends," led to an increase in work post-1996. JA __ (KAR 4764). And the report highlights—though the government ignores—research showing that even individuals who met the work requirements generally did not earn enough to bring "family income above the poverty line." JA __ (KAR 4766). The report also specifically questions the availability of job and volunteer opportunities in Kentucky. JA __ (KAR 4765). *See also* JA __, __ (KAR 12971, 18180); JA __, __ (AAR 1308, 1326). The Secretary did not rationally conclude that the AWA or Kentucky HEALTH will promote financial independence.

Fiscal sustainability. Finally, the Secretary did not rationally conclude that Kentucky HEALTH is likely to promote fiscal sustainability or that, on balance, it promotes the objectives of the Act.[10] *See Stewart II*, 366 F. Supp. 3d at 149.

First, the Secretary "made no finding that Kentucky HEALTH would save the Commonwealth any amount of money or otherwise make the program more sustainable in some way." *Id.* Kentucky argues the Secretary cannot second-guess the fiscal sustainability of Medicaid in Kentucky because it is for the Commonwealth

[10] The Secretary did not approve the AWA based on concerns about the sustainability of Arkansas's Medicaid program. *Gresham*, 363 F. Supp. 3d at 180.

alone to decide how to "order its policy priorities in order to adjudge the sustainability of its Medicaid program." Ky. Br. 38. But when a state seeks to "deviate from the minimum requirements which Congress has determined are necessary prerequisites to federal funding," the Secretary must evaluate the deviation. *Beno*, 30 F.3d at 1068 ("[F]ederalism arguments have less weight in the context of a waiver of a congressional requirement."). Section 1115 directs the Secretary to assess the likely effect of the proposed project. *Id.* Given that mandate, he cannot simply accept the Governor's conclusory statements that the project is necessary to cut costs. *Cf.* Ky. Br. 37-38 (citing JA __ (KAR 5432)). That is particularly so given the evidence in the record demonstrating the positive effect of Medicaid expansion on the Commonwealth's economy, *see Stewart II*, 366 F. Supp. 3d at 150 (citing JA __, __ (KAR 4974-75)), and the massive administrative costs associated with implementing Kentucky HEALTH, *see, e.g.*, JA __, __, __ (KAR 12886, 18180, 20875); *see also* JA __, __-__, __-__, __ (KAR 18602-03, 16796) (showing that Kentucky will actually lose money by eliminating NEMT). "[W]ithout a finding about the savings that Kentucky HEALTH could be expected to yield—the Secretary could not make a reasoned decision that it would promote fiscal sustainability." *Stewart II*, 366 F. Supp. 3d at 150.

Second, the Secretary "did not compare the benefit of savings to the consequences for coverage," rendering his decision arbitrary and capricious. *Stewart*

II, 366 F. Supp. 3d at 150; *see also Walsh*, 538 U.S. at 664-65. Kentucky contends that the Secretary did compare the two because the Secretary said he did. Ky. Br. 39. However, "[s]tating that a factor was considered . . . is not a substitute for considering it. *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986). Without assessing how much money (if any) Kentucky HEALTH would save, and without any effort to estimate how many individuals would lose Medicaid coverage as a result of the project, the Secretary could not have rationally balanced the two issues. *See Stewart II*, 366 F. Supp. 3d at 152.

The AWA and Kentucky HEALTH do not seek to balance the competing concerns of coverage and costs. They are, instead, ham-handed attempts at cutting costs by restricting access and cutting services. But Section 1115 does not permit the Secretary to pursue cost savings at the expense of access to medical assistance. *See Newton-Nations*, 660 F.3d at 381; *Beno*, 30 F.3d at 1068-70. The district court so concluded, and that conclusion should be affirmed.

III. THE DISTRICT COURT CORRECTLY VACATED THE PROJECTS IN THEIR ENTIRETY.

The government argues that the district court's order was erroneous because it extended relief to non-parties and was overbroad. Fed. Br. 42-47; *see also* Ky. Br. 3 n.2; Ark. Br. 2 n.1. Both arguments fail.

The government's first argument misunderstands a basic principle of administrative law. This Court "ha[s] made clear that 'when a reviewing court

determines that agency regulations are unlawful, the ordinary result is that the regulations are vacated—not that their application to the individual petitioners is proscribed.'" *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) (alteration adopted)); *see also id.* (noting "view of all nine Justices" that in an APA action, "'a single plaintiff . . . may obtain "programmatic" relief that affects the rights of parties not before the court'" (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting))).

Indeed, the government's argument implausibly "implies that the judicial review provision of the APA is inconsistent with Article III." *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 673, 674 (S.D.N.Y. 2019), *cert. granted on other grounds*, 139 S. Ct. 953 (2019). If the Medicaid enrollees have established Article III standing to sue, as they have here, "a court has both the power *and* the duty to order the remedy Congress created." *Id.* at 675; *see* 5 U.S.C. § 706(2) (requiring reviewing courts to "hold unlawful and set aside" arbitrary and capricious agency action). It is thus no surprise that APA cases continue to "reject the government's invitation to confine its grant of relief strictly to the plaintiffs." *NAACP v. Trump*, 298 F. Supp. 3d 209, 243 (D.D.C. 2018).

The additional factors that the government suggests weighed against "wholesale" vacatur, *see* Fed. Br. 43-44, likewise lack merit. As the district court

noted, vacatur "will have little lasting impact" on the governments' interests in experimentation: If the governments prevail, they can move ahead with the projects as approved. *Gresham*, 363 F. Supp. 3d at 183-84. And the vacatur does not put the coverage of non-parties at risk, because eliminating coverage for those in the expansion population would be impermissible, as noted above. *Supra* at 35-37.

The government's second argument—that the district court erred in failing to confine relief to the particular components of the Section 1115 waivers that it found had caused Plaintiffs' injuries—is waived and meritless. Before the district court, the government argued that "demonstrations must be judged based on whether the project *as a whole* would promote the objectives of Medicaid, and not whether each component in isolation would do so," JA __ (*Stewart* ECF 107 at 27 (citing *Stewart I*, 313 F. Supp. 3d at 257)),[11] and that if any "specific portion of [the waiver] is invalid," the appropriate remedy would be to "remand the *whole* demonstration project back to the Secretary so that" the state "may decide whether to proceed with the rest of the project," JA __ (*Stewart* ECF 108-1 at 42 & n.11). But now that the district court has done exactly what the government requested, the government argues the opposite position, insisting the court should have invalidated only those

[11] *See also Stewart I*, 313 F. Supp. 3d at 257 (acknowledging concession that challenge to waiver as a whole is proper); *Gresham* ECF 39-1 at 22 (arguing that demonstration projects must be evaluated as a whole); *cf. Gresham*, 363 F. Supp. 3d at 174 (acknowledging Defendants' lack of objection to Plaintiffs' standing to challenge Secretary's approval of the AWA as a whole).

"components [] shown to injure any plaintiff." Fed. Br. 46. This argument is waived. *See, e.g.*, *Huron v. Cobert*, 809 F.3d 1274, 1280 (D.C. Cir. 2016) ("It is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal." (quoting *Dist. of Colum. v. Air Fla., Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984))).

Regardless, this argument is unavailing. The district court concluded that the approvals of the AWA and Kentucky HEALTH as a whole were arbitrary and capricious. It necessarily follows that there is no part of the approvals that can be separated and retained; the only remedy is to invalidate them in their entirety. *See Catholic Soc. Serv. v. Shalala*, 12 F.3d 1123, 1128 (D.C. Cir. 1994) (noting that partial invalidation was appropriate solely "where only a part is invalid, and where the remaining portion may sensibly be given independent life").[12]

CONCLUSION

The judgment of the district court should be affirmed.

[12] The district court declined to remand without vacatur. Defendants make only one indirect reference to district court briefing on the issue, *see* Fed. Br. 46 (citing JA __-__ (*Stewart* ECF 122 at 22-23)), and thus they have not properly presented the argument here. *See Rollins Envtl. Servs. (NJ) Inc. v. EPA*, 937 F.2d 649, 653 n.2 (D.C. Cir. 1991). If this Court wishes to entertain the argument, Appellees similarly incorporate briefing below. *See* JA __-__ (*Stewart* ECF 91-1, at 49-51); JA __ (*Stewart* ECF 119 at 50); JA __-__ (*Gresham* ECF 42, at 41-44 (arguing that vacatur is appropriate remedy)).

Dated: June 20, 2019

Respectfully submitted,

Thomas J. Perrelli
Ian Heath Gershengorn
Devi M. Rao
Natacha Y. Lam
Zachary S. Blau
Jenner & Block LLP
1099 New York Avenue, N.W.
Suite 900, Washington, D.C. 20001
Phone: 202-639-6004
TPerrelli@jenner.com
IGershengorn@jenner.com
DRao@jenner.com
NLam@jenner.com
ZBlau@jenner.com

Counsel to National Health Law Program

Samuel Brooke
Emily C.R. Early
Neil K. Sawhney
Ellen Degnan
Southern Poverty Law Center
400 Washington Avenue
Montgomery, AL 36104
Phone: 334-956-8200
samuel.brooke@splcenter.org
emily.early@splcenter.org
neil.sawhney@splcenter.org
ellen.degnan@splcenter.org

By: /s/ Jane Perkins
Jane Perkins
Catherine McKee
Elizabeth Edwards
National Health Law Program
200 N. Greensboro Street, Suite D-13
Carrboro, NC 27510
Phone: 919-968-6308 (x101)
perkins@healthlaw.org
mckee@healthlaw.org
edwards@healthlaw.org

Ben Carter
Betsy Davis Stone
Kentucky Equal Justice Center
222 South First Street, Suite 305
Louisville, KY 40202
502-468-9403
859-582-2285
ben@kyequaljustice.org
betsy@kyequaljustice.org

Kevin De Liban
Trevor Hawkins
Legal Aid of Arkansas
310 Mid-Continent Plaza, Suite 420
West Memphis, AR 72301
Phone: 870-732-6370 (x2206)
kdeliban@arlegalaid.org
thawkins@arlegalaid.org

Counsel for Appellees

CERTIFICATE OF COMPLIANCE

In reliance on the word count of the word processing system used to prepare this brief, I certify that the foregoing brief complies with the type-volume limitation established by Federal Rule of Appellate Procedure 32(a)(7). The brief contains 12,908 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14 point font.

June 20, 2019 /s/ Jane Perkins

CERTIFICATE OF SERVICE

I certify that, on June 20, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the appellate CM/ECF system, and the document is being served on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

June 20, 2019 /s/ Jane Perkins

ADDENDUM

42 U.S.C. § 1315(a), (a)(1):

> (a) In the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of subchapter I, X, XIV, XVI, or XIX, or part A or D of subchapter IV, in a State or States—
>
> (1) the Secretary may waive compliance with any of the requirements of section 302, 602, 654, 1202, 1352, 1382, or 1396a of this title, as the case may be, to the extent and for the period he finds necessary to enable such State or States to carry out such project

42 U.S.C. § 1396-1:

> For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for medical assistance.