[ORAL ARGUMENT NOT SCHEDULED]

**19-5905 & 19-5097**
**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**RONNIE MAURICE STEWART**, et al.,
Appellees

v.

**ALEX MICHAEL AZAR II**, in his official capacity
as Secretary of the United States
Department of Health and Human Services, et al.,

**THE COMMONWEALTH OF KENTUCKY**
Appellants.

*** *** *** ***

On appeal from the
United States District Court
for the District of Columbia
Case No. 1:18-cv-152

*** *** *** ***

# REPLY BRIEF FOR THE COMMONWEALTH OF KENTUCKY

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## Cases



## Statutes



[1] Authorities upon which we chiefly rely are marked with asterisks.

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## GLOSSARY

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|---|---|
| KRS | Kentucky Revised Statutes |
| Secretary | Secretary of the United States Department of Health and Human Services |
| TANF | Temporary Assistance for Needy Families |

## INTRODUCTION

A win for the Appellees would effectively write Section 1115 out of the Medicaid Act. Section 1115 allows the Secretary to test new ideas for improving Medicaid on a limited and temporary basis. This gives the Secretary leeway to experiment to see what works and what does not so as to inform Congress before it enacts permanent, nationwide changes to the Medicaid Act. If this lawsuit succeeds, this useful tool will be no more. Section 1115 will be reduced to only allowing the Secretary to approve projects that he knows the results of in advance and only if those projects increase Medicaid enrollment or perhaps keep enrollment constant. In this paradigm, the Secretary cannot try to improve the health and wellness of Medicaid enrollees under Section 1115, nor can the Secretary help enrollees who are able to do so move off of Medicaid and onto other health coverage. The Secretary will not even be able to meaningfully pursue making Medicaid more fiscally sustainable.

For these reasons, affirming the district court's judgment would nullify Section 1115 as applied to the Medicaid program. More specifically, it would ossify the Medicaid program, rob policymakers of real-world data that could improve Medicaid, and severely limit the states' ability to test new and tailored approaches to the problems that arise in administering Medicaid. Instead of going down this path, the Court should affirm the Secretary's authority and judgment and allow Kentucky HEALTH to go forward as a time-limited demonstration.

## ARGUMENT

### I. The Secretary correctly defined the objectives of Medicaid.

The Appellees start out by arguing that the Secretary did not properly ascertain the "objectives" of Medicaid. Resp. 25–37. Although the Appellees argued below that the Secretary cannot receive *Chevron* deference in this endeavor, they no longer press this argument. *See Pharm. Res. & Mfrs. of Am. v. Thompson*, 362 F.3d 817, 821–22 (D.C. Cir. 2004) (applying *Chevron* deference in an equivalent scenario).

The Appellees argue that the "objectives" of Medicaid are neatly listed in Section 1396-1 and that section alone. Resp. 25. That provision, however, is not the end-all-be-all of Medicaid's objectives. Section 1396-1 discusses the "purpose" of Medicaid appropriations *only* as applied to "families with dependent children . . . [and] aged, blind, or disabled individuals." 42 U.S.C. § 1396-1. Section 1396-1 does not discuss Medicaid's "objectives" more generally. More to the point, the Affordable Care Act did not amend Section 1396-1 to direct that Medicaid-expansion appropriations have the same "purpose." So the Appellees' use of bracketing in quoting Section 1396-1 to suggest otherwise does not accurately reflect Section 1396-1's content. Resp. 26.

The point is not that Section 1396-1 is altogether irrelevant to defining Medicaid's objectives. To the contrary, the Secretary mentioned that provision in his discussion of Medicaid's objectives. AR6719 [JA__]. But Section 1396-1 does not establish the universe of Medicaid's objectives.

The Appellees claim that promoting health and wellness is not a permissible objective of Medicaid. Resp. 28–30. In their view, Medicaid is almost solely concerned with paying for health care regardless of whether enrollees' health and wellness actually improve as a result. The Appellees have no answer to the Secretary's commonsense point that one objective of a *health care* program like Medicaid must be improving recipients' health and wellness. AR6719 [JA__] ("But there is little intrinsic value in paying for services if those services are not advancing the health and wellness of the individual receiving them . . . .").

Instead, the Appellees' primary rebuttal is that the Secretary has confused a "desirable result" of Medicaid with the "specific mechanisms Congress prescribed for achieving" that result. Resp. 28. The Appellees offer no reason why an admitted "desirable result" of Medicaid is not an objective of the program. In trying to draw such a distinction, the Appellees rely on this Court's conclusion that "agencies . . . 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) (citation omitted). But *Waterkeeper*'s rule has no bearing here, as Arkansas has explained. Ark. Op. Br. 34. The whole point of Section 1115 is to enable the Secretary to test *different means* on a temporary and limited basis. In other words, under Section 1115, the Secretary is not limited to the

means that Congress chose so long as, in the Secretary's judgment, a project is "likely to assist in promoting the objectives" of Medicaid. *See* 42 U.S.C. § 1315(a)(1).

Turning to fiscal sustainability as an objective of Medicaid, the Appellees do not meaningfully dispute the district court's conclusion that the "practicability" of a state providing medical assistance to its citizens "under the conditions in such [s]tate" is a relevant consideration under Section 1115. *Stewart v. Azar*, 366 F. Supp. 3d 125, 149 (D.D.C. 2019) (*Stewart II*). Indeed, Section 1396-1, on which the Appellees heavily rely to define Medicaid's objectives, says "practicab[ility]" is a concern. Instead, the Appellees claim that the Secretary "cannot place saving money on par with the Medicaid Act's primary objective of furnishing medical assistance." Resp. 33. This argument invites the Court to second-guess the Secretary's judgment. How the Secretary balances Medicaid's objectives for purposes of Section 1115 is left almost exclusively to him. *See Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999) ("When an agency must balance a number of potentially conflicting objectives . . . judicial review is limited to determining whether the agency's decision reasonably advances at least one of those objectives and its decisionmaking process was regular."); *Melcher v. FCC*, 134 F.3d 1143, 1154 (D.C. Cir. 1998) (similar).

The Appellees also argue that the Secretary's fiscal-sustainability rationale "would mean that any Section 1115 project that cut[s] Medicaid costs, even by slashing eligibility or reducing benefits, would promote the objectives of the program." Resp. 33. The

Secretary, however, has not taken that position here. As the federal government notes, the Secretary did not approve Arkansas's proposal to reduce income eligibility for the Medicaid expansion population from 133 percent to 100 percent of the federal poverty level. Fed. Op. Br. 37.

The Appellees also accuse the Secretary of taking a position without a limiting principle under which any benefits cut or eligibility reduction suffices as long as some Medicaid coverage is preserved. Resp. 36. That is not true. Although a pure benefits cut or eligibility reduction might increase fiscal sustainability in the abstract, such a project might ignore Medicaid's other objectives, creating potential problems under Section 1115. Kentucky HEALTH, by contrast, balances several Medicaid objectives, only one of which is improved fiscal sustainability. In sum, the Court can uphold Kentucky HEALTH while preserving a potential backstop against a future Section 1115 waiver that pushes fiscal sustainability much further than the Secretary does here.

The Appellees also suggest that the Commonwealth cannot leave expanded Medicaid without losing its federal funding for traditional Medicaid. Resp. 35–36. They cite *Stewart I* for this conclusion but fail to mention the district judge's discussion of this issue in *Stewart II*. *See* 366 F. Supp. 3d at 153 (concluding that it "may well be correct" that "Kentucky has the prerogative to de-expand"). The Appellees also argue that the unconstitutional-coercion discussion in *NFIB v. Sebelius*, 567 U.S. 519 (2012), does not apply when a state decides to un-expand, as opposed to when a state decides whether

to expand Medicaid in the first instance. This distinction makes no difference under *NFIB*'s reasoning. States deciding whether to expand Medicaid and states deciding whether to un-expand Medicaid face the same "gun to the head" that *NFIB* found to be unconstitutionally coercive. *See id.* at 581. In both circumstances, the state "stands to lose not merely 'a relatively small percentage' of its existing Medicaid funding, but *all* of it." *See id.* (emphasis in original).

The Appellees also distinguish *NFIB* on the basis that Kentucky "understood the bargain" before choosing to expand Medicaid. Resp. 35–36. That much is true, but not in the way that the Appellees suggest. When it expanded Medicaid, Kentucky specifically noted its prerogative to un-expand. Dkt. No. 50-3 at 3 [JA__] ("Kentucky can decide to pull back the expansion at any time should funding or circumstances warrant such a move."). The Commonwealth's view was fully consistent with federal guidance at the time. Dkt. No. 72-1 at 12 [JA__]; Dkt. No. 72-2 at 2 [JA__].

In a single sentence, the Appellees press a Kentucky-law argument for why, in their view, the Commonwealth "may" be unable to un-expand Medicaid. Resp. 36. The Appellees argue that even though the Commonwealth expanded Medicaid by executive action, Kentucky cannot un-expand Medicaid by that same route. For this confusing proposition, the Appellees cite Ky. Rev. Stat. (KRS) 205.520(3), which states that "it is the policy of the Commonwealth to take advantage of all federal funds that may be available for medical assistance." As a preliminary matter, the Appellees did not raise

this argument in their briefs to the district court. With good reason. The Appellees convinced the district court not to transfer this case to a Kentucky federal court, in part, because no questions of Kentucky law were at issue. *See Stewart v. Azar*, 308 F. Supp. 3d 239, 249 (D.D.C. 2018) ("[A] federal court need not wade into any particulars of state law to decide whether the Secretary can, under federal laws and regulations, permit certain state Medicaid proposals."). It is a reversal of positions to argue, as the Appellees do now, that Kentucky law is relevant to this case.

Regardless, KRS 205.520 does not affect Governor Bevin's executive order about Kentucky HEALTH and expanded Medicaid. *See* Dkt. No. 25-1 [JA__–__]. For one thing, KRS 205.520, which dates to 1966, predates expanded Medicaid by decades and therefore was not passed with it in mind. *See NFIB*, 567 U.S. at 584 (describing expanded Medicaid as a "new health care program"). For another, the statute states that the Commonwealth's policy is "to take *advantage* of all federal funds," not that the Commonwealth "must pursue" all federal funds. *See* KRS 205.520(3) (emphasis added). This distinction matters. The "take advantage" language leaves discretion for Kentucky's executive branch to determine what is *advantageous* for the Commonwealth and what is not.

Importantly, the Commonwealth has exercised, and continues to exercise, that discretion not to pursue some federal Medicaid dollars. For example, the Commonwealth does not cover certain optional Medicaid populations and certain

optional Medicaid benefits for which federal funding is available. In other words, the Commonwealth leaves certain federal funds on the table because they are not advantageous to Kentucky. Because *NFIB* effectively made the expansion population an optional Medicaid population, the Governor's executive order is consistent with this longstanding interpretation of KRS 205.520.

Were the Court to read KRS 205.520 as the Appellees do, the Commonwealth would have to pursue every available federal Medicaid dollar regardless of whether, in the judgment of Kentucky's executive branch, that federal funding is truly advantageous for Kentucky. Under that absolutist view, Kentucky would have to spend $99 (or more) of Kentucky's money to receive even $1 (or less) of federal funding. This interpretation of KRS 205.520 would require Kentucky, for example, to cover every optional Medicaid population and every optional Medicaid benefit. It might even require Kentucky to increase Medicaid reimbursements to providers so as to maximize the federal dollars that the Commonwealth receives, which is itself inconsistent with the statutory amounts appropriated for Medicaid benefits by the Kentucky General Assembly.

The Appellees also dispute whether promoting financial independence is an objective of Medicaid. Resp. 30–32. Adopting the Appellees' position requires concluding that the Medicaid Act is unconcerned with whether Medicaid recipients can move off of public assistance and thereby free up scarce dollars for those who most need Medicaid. This extreme view of Medicaid has never been sustained. *See Pharm. Res.*

*& Mfrs. of Am. v. Walsh*, 538 U.S. 644, 667 (2003) (plurality) (discouraging judicial interference in an attempt "to promote self-reliance and civic responsibility, to assure that limited welfare funds be spent on behalf of those genuinely incapacitated and most in need, and to cope with the fiscal hardships enveloping many state and local governments" (quoting *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 413 (1973))).

In arguing to the contrary, the Appellees minimize the fact that Medicaid's appropriation provision, from which they draw their favored Medicaid objective, specifically mentions helping some individuals attain or retain "independence." *See* 42 U.S.C. § 1396-1 (stating that Medicaid appropriations are to furnish "families with dependent children[,] [the] aged, [the] blind, or disabled individuals . . . rehabilitation and other services to help [them] attain or retain capability for *independence* or self-care" (emphasis added)). The Appellees counter that the type of "independence" mentioned in Section 1396-1 refers to "*functional* independence, not *financial* independence." Resp. 30–31. Before the district court, the Appellees argued that functional independence means "the capacity to accomplish the various activities of daily living, such as feeding, dressing, and bathing." Dkt. No. 33-1 at 17 [JA__]. The "functional" qualifier, however, is nowhere found in Section 1396-1. Also, interpreting "independence" to mean only functional independence makes Section 1396-1's mention of "independence" redundant of "self-care," which also is specifically referenced in Section 1396-1. *See*

*TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no . . . word shall be superfluous, void, or insignificant.'" (citation omitted)).

Applying the Appellees' contorted view of "independence" to the populations subject to Kentucky HEALTH also would render the statutory term useless. As Kentucky has explained, Ky. Op. Br. 7–14, Kentucky HEALTH only applies to the able-bodied enrollees in Kentucky's Medicaid program. These enrollees do not need help with functional independence; they can feed, dress, and bathe themselves with or without Medicaid. Thus, the Secretary correctly interpreted Section 1396-1's mention of "independence" to mean something more than functional independence.

In arguing that financial independence is not an objective of Medicaid, the Appellees also downplay the fact that the Medicaid Act already incorporates the work-oriented program from Temporary Assistance for Needy Families (TANF). As Kentucky and the federal government have explained, the 1996 welfare reforms allow a state to terminate Medicaid benefits if a participant's TANF benefits are terminated because of a "refus[al] to work." 42 U.S.C. § 1396u-1(b)(3)(A). The Appellees' response to this Medicaid provision is no response at all. Section 1396u-1(b), in their view, merely "balanc[es] . . . policy goals." Resp. 32. Try as they might, the Appellees cannot overcome the fact that Section 1396u-1(b) incorporates a work-oriented program as a permanent part of Medicaid for certain enrollees. This is not hiding an "elephant in [a]

mousehole[],'' as the Appellees claim. Resp. 32 (citation omitted). This is a decision that Congress made more than two decades ago. In light of this provision, if the Appellees' financial-independence position is sustained, the Medicaid Act will conflict with itself. In that scenario, the Medicaid Act will be altogether unconcerned with promoting financial independence but will permit some of its enrollees to have their Medicaid coverage terminated for failure to comply with TANF's work-oriented program.

## II. The Secretary amply considered potential coverage loss.

The Appellees claim that the Secretary merely "quibble[d] around the edges" in considering potential loss of Medicaid coverage. Resp. 41. However, the primary point of the *Stewart I* remand was to allow the Secretary to further consider this very issue, which he did in careful detail in reapproving Kentucky HEALTH. AR6718–37 [JA__–__].

The Appellees' response leaves the impression that a Section 1115 waiver can only be approved if the project will increase Medicaid enrollment or perhaps keep it at current levels. However, as the Secretary noted in his approval letter, Section 1115 itself envisions that changes in eligibility or enrollment may occur as a result of a Section 1115 waiver. AR6719 [JA__]. More specifically, Section 1115 states that a demonstration project may "result in an impact on eligibility, enrollment, benefits, cost-sharing, or financing." 42 U.S.C. § 1315(d)(1). Based upon this provision, the district court acknowledged that "coverage loss does not necessarily render a project unlawful,"

*Stewart II*, 366 F. Supp. 3d at 140—a point that the Appellees ignore. Because Section 1115 specifically envisions eligibility or enrollment changes, it follows that the question of coverage loss is a question of degree for the Secretary. Questions of degree, in turn, require the Secretary to exercise his judgment, to which the Court must give substantial deference. *See Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989) ("[T]he way in which the statute frames the issues for review does substantially restrict the authority of the reviewing court to upset the Secretary's determination.").

The Appellees persist in the narrative that "Kentucky itself estimated that its waiver project would cause loss equivalent to 95,000 adults losing coverage for an entire year." Resp. 2. This assertion has been thoroughly refuted. Ky. Op. Br. 46–49; Fed. Op. Br. 34–35. In nevertheless arguing to the contrary, the Appellees do not contest the point that the Secretary added additional guardrails to Kentucky HEALTH that post-date the "95,000 projection." Ky. Op. Br. 47–49. Nor do the Appellees substantively respond to the Commonwealth's explanation for why these additional safeguards are meaningful.

The Appellees also claim that the Court should affirm the district court's judgment because the Secretary did not consider Arkansas's limited experience with Arkansas Works when he re-approved Kentucky HEALTH. Resp. 22. But preliminary data from a different demonstration project in a different state with a different population is far from sufficient to invalidate Kentucky HEALTH before it even

begins, especially in light of the Secretary's careful attention to coverage-loss issues after the *Stewart I* remand. Moreover, to the extent that the online-portal reporting aspect of Arkansas Works contributed to any problems, Fed. Op. Br. 38, Kentucky HEALTH is not an online-only reporting program. *See* Kentucky HEALTH Frequently Asked Questions, *available at* https://kentuckyhealth.ky.gov/Pages/FAQ.aspx (last visited July 17, 2019) ("There are multiple ways a beneficiary may report their PATH Community Engagement hours each month.").

* * *

In sum, the Secretary considered the possibility of coverage loss from numerous different angles. His reasoning on this point was straightforward and rational, which is all that is required.

## III. The Secretary's predictive judgment should not be upset.

The Appellees also challenge the Secretary's judgment. Resp. 43–51. Although Kentucky has already explained how deferential the Court must be in this respect, Ky. Op. Br. 18–24, the Supreme Court's recent decision in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), reiterates this point. There, the Supreme Court held that an agency gets to decide "between reasonable policy alternatives in the face of uncertainty." *Id.* at 2570. The Court emphasized that "[i]t is not for [courts] to ask whether [the Secretary's] decision was 'the best one possible' or even whether it was

'better than the alternatives.'" *Id.* at 2571 (citation omitted). The Secretary must simply "consider the evidence and give reasons for his chosen course of action." *See id.*

The experimental nature of a Section 1115 project and its time-limited nature also cut in favor of unusually deferential review of the Secretary's judgment. In the seminal case interpreting Section 1115, Judge Friendly supported the conclusion that "it is legitimate for an administrator to set a lower threshold for persuasion when he is asked to approve a program that is avowedly experimental and has a fixed termination date." *Aguayo v. Richardson*, 473 F.2d 1090, 1103 (2d Cir. 1973). The Appellees do not even acknowledge *Aguayo*—the leading circuit precedent about Section 1115—much less try to distinguish it.

Under this unusually deferential standard, the Secretary's judgment as to Kentucky HEALTH must be upheld. The Appellees counter that the Secretary failed to identify studies that prove that his judgment ultimately will be correct. Resp. 43–44 ("The relevant research . . . does not support that conclusion."). Under Section 1115, the Secretary is not required to prove the correctness of his judgment beforehand, a showing that is at odds with the notion of an experimental project. In any event, with respect to community engagement, the Secretary in fact identified research to support his judgment. AR6733 [JA__] (collecting sources). He explained: "CMS has reviewed and considered the research cited to by commenters and notes that other research also shows a positive link between community engagement and improved health outcomes."

*Id.* By way of example only, the research identified by the Secretary states that "[t]here is a strong evidence base showing that work is generally good for physical and mental health and well-being. Worklessness is associated with poorer physical and mental health and well-being." AR5121 [JA__]. A literature review relied on by the Secretary summarizes that "[t]his systematic review indicates that employment is beneficial for health, particularly for depression and general mental health." AR5047 [JA__]. This review specifically noted the need for "more research" in this area—exactly what Kentucky HEALTH will facilitate.

The Appellees also criticize the Secretary's judgment as to premiums. Resp. 45. On this issue, the Secretary relied upon findings from Indiana. AR6734–35 [JA__–__]. Relying solely on comments, the Appellees disagree about what those findings show. Resp. 45. But the Court's job is not to decide who has the better view of Indiana's findings. At the very least, Indiana's experience with premiums gives the Secretary ample justification to keep testing the efficacy of premiums as part of Kentucky HEALTH. The Appellees make a similar error in criticizing the Secretary's judgment with respect to the waiver of retroactive coverage. On this point, they claim that there is an "obvious counterargument" to the Secretary's conclusion about retroactive coverage. Resp. 45 (quoting *Stewart II*, 366 F. Supp. 3d at 143). But a mere "obvious counterargument" cannot supplant the Secretary's judgment.

## CONCLUSION

The Court should reverse the district court's judgment.

Respectfully submitted,

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July 18, 2019

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 3,668 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

*/s/ Matthew F. Kuhn*
Matthew F. Kuhn

**CERTIFICATE OF SERVICE**

I certify that on July 18, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

*/s/ Matthew F. Kuhn*
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