

[ORAL ARGUMENT HEARD ON OCTOBER 11, 2019]

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

CHARLES GRESHAM, et al.,
Plaintiffs-Appellees,

v.

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

Nos. 19-5094 & 19-5096

RONNIE MAURICE STEWART, et al.,
Plaintiffs-Appellees

v.

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

Nos. 19-5095 & 19-5097

**RESPONSE TO KENTUCKY'S MOTION
TO DISMISS THE *STEWART* APPEALS**

The Commonwealth of Kentucky has moved to dismiss its appeal and the federal government's appeal in *Stewart*, explaining that the case is moot in light of the Commonwealth's decision to withdraw the demonstration at issue.

The federal government does not oppose dismissal of the *Stewart* appeals. We ask, however, that the Court address, in its *Gresham* opinion, the reasoning of the district court's opinion in *Stewart* and the underlying November 2018 HHS approval of the Kentucky demonstration. As the Court is aware, the district court's *Gresham* opinion incorporated the reasoning of its *Stewart* opinion. As noted in our reply brief (p.9 n.2), HHS elaborated on points made in its Arkansas approval letter when

HHS issued the November 2018 letter approving the Kentucky demonstration, and thus rendered harmless any failure to elaborate on those points in the context of the Arkansas approval. *See, e.g., National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659-60 & n.5 (2007). And as we explained in moving to expedite these appeals, this Court's rulings are of concern to multiple States with similar demonstrations, making it important that the Court address the cross-cutting issues as expeditiously as possible.

We further ask that, in dismissing the *Stewart* appeals as moot, this Court vacate the district court's judgment against the federal defendants, which became unreviewable for reasons outside the federal defendants' control. *See U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24-25 (1994) (indicating that vacatur of an adverse judgment is appropriate under such circumstances).

Respectfully submitted,

MARK B. STERN

/s/ Alisa B. Klein

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DECEMBER 2019

CERTIFICATE OF COMPLIANCE

I certify that this response complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 255 words.

/s/ Alisa B. Klein

Alisa B. Klein

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2019, I electronically filed the foregoing response with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Alisa B. Klein
Alisa B. Klein