

[NOT SCHEDULED FOR ORAL ARGUMENT]

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

SAMUEL PHILBRICK, et al.,

Plaintiffs-Appellees,

v.

ALEX M. AZAR II, et al.,

Defendants-Appellants.

Nos. 19-5293 & 19-5295

UNOPPOSED MOTION FOR SUMMARY AFFIRMANCE

On February 14, 2020, this Court issued its decision in *Gresham v. Azar*, Nos. 19-5094 & 19-5096. The same day, this Court directed the parties to file motions to govern further proceedings in this case, which was held in abeyance pending the *Gresham* decision. For the reasons set out below, the federal government recognizes that this Court's *Gresham* decision controls the disposition of this case. We thus move for summary affirmance of the district court's judgment, without prejudice to seeking further review if authorized by the Solicitor General.

1. The Department of Health & Human Services (HHS) has approved several state applications to conduct Medicaid demonstration projects that, *inter alia*, require certain adult Medicaid recipients to engage in work-oriented activities as a condition

of eligibility. The approvals were challenged by Medicaid recipients. As relevant here, various plaintiffs challenged the approvals of Arkansas, Kentucky, and New Hampshire demonstration projects.

In letters approving the demonstrations, HHS explained that the work-oriented requirements are designed to help able-bodied adults transition from Medicaid to independence and commercial coverage. HHS further explained that work-oriented activities correlate with improved beneficiary health. HHS elaborated on these two points in letters re-approving the Kentucky demonstration and approving the New Hampshire demonstration. HHS explained that the cost savings that a State would realize if Medicaid recipients transition to commercial coverage, or if Medicaid recipients are healthier and thus less expensive to cover, in turn would enable the State to stretch its limited resources and expand or maintain optional coverage for other Medicaid recipients, including the adult population that was made eligible for Medicaid by the Patient Protection and Affordable Care Act (ACA).

2. The district court (Boasberg, J.) vacated the approvals of the Arkansas, Kentucky and New Hampshire demonstrations. In *Gresham v. Azar*, the district court vacated the approval of the Arkansas demonstration, incorporating the reasoning of its decisions in *Stewart v. Azar*, 313 F. Supp. 3d 237 (D.D.C. 2018) (*Stewart I*), and *Stewart v. Azar*, 366 F. Supp. 3d 125 (D.D.C. 2019) (*Stewart II*), which vacated the approvals of the Kentucky demonstration. In this case, the district court vacated the

approval of the New Hampshire demonstration, in an opinion that incorporated the reasoning of its *Gresham* and *Stewart* opinions. See *Philbrick v. Azar*, 397 F. Supp. 3d 11 (D.D.C. 2019).¹

The Secretary appealed all three decisions. The appeals in *Gresham* and *Stewart* were fully briefed. The *Philbrick* appeal was held in abeyance pending the resolution of the other appeals. After briefing and argument, Kentucky determined that it no longer wished to pursue its demonstration project and withdrew the demonstration, rendering the *Stewart* case moot.

3. On February 14, this Court issued its *Gresham* opinion, which affirmed the district court's judgment vacating the approval of the Arkansas demonstration. This Court stated, as a preliminary matter, that it would not consider the Secretary's reasoning in the letter re-approving the Kentucky demonstration, on the ground that reasons discussed in the letter were "post hoc rationalizations for the Secretary's decision." Slip Op. 14 (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)). The Court's application of *State Farm* was mistaken. *State Farm* referred not to reasoning provided by the responsible agency but to "appellate counsel's" post hoc rationalizations for agency action. 463 U.S. at 50. The Supreme Court has made clear that a court should consider subsequent

¹ Two other cases, involving Michigan and Indiana demonstrations, are pending before Judge Boasberg. See *Rose v. Azar*, No. 1:19-cv-2848 (D.D.C.) (Indiana); *Young v. Azar*, No. 1:19-cv-3526 (D.D.C.) (Michigan).

explanations provided by the agency itself. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 660 & n.5 (2007). That error did not affect the judgment, however, because this Court went on to reject the rationale that HHS provided in the letter re-approving the Kentucky demonstration. Summing up, the panel stated: “In short, we agree with the district court that the alternative objectives of better health outcomes and beneficiary independence are not consistent with Medicaid,” and that “[t]he text of the statute indicates one primary purpose, which is providing health care coverage without any restriction geared to healthy outcomes, financial independence or transition to commercial coverage.” Slip Op. 16. The Court thus rejected the agency’s view that these are valid objectives for a demonstration project because they are potential means of achieving the concededly valid purpose of providing more health care coverage to the needy in a world of limited resources.

4. That holding controls the disposition of this case, because the reasoning in HHS’s letter approving the New Hampshire demonstration largely tracks the reasoning of HHS’s letter re-approving the Kentucky demonstration. Thus, we move for summary affirmance of the district court’s judgment in this case, without prejudice to seeking further review if authorized by the Solicitor General.

5. Counsel for the state defendants authorized us to state that this motion for summary affirmance is unopposed, on the understanding that the summary affirmance will be without prejudice to the State’s ability to seek further review if authorized by the New Hampshire Attorney General. Counsel for the plaintiffs-

appellees authorized us to state that this motion for summary affirmance is unopposed.

Respectfully submitted,

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MARCH 2020

CERTIFICATE OF COMPLIANCE

I certify that this motion 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 838 words.

/s/ Alisa B. Klein

Alisa B. Klein

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2020, I electronically filed the foregoing motion 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