

Nos. 20-37 and 20-38

In the Supreme Court of the United States

NORRIS COCHRAN, ACTING SECRETARY OF
HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

CHARLES GRESHAM, ET AL.

STATE OF ARKANSAS, PETITIONER

v.

CHARLES GRESHAM, ET AL.

*ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**MOTION TO VACATE THE JUDGMENTS OF THE
COURT OF APPEALS AND REMAND, TO REMOVE THE
CASES FROM THE MARCH 2021 ARGUMENT CALENDAR,
AND TO HOLD FURTHER BRIEFING IN ABEYANCE
PENDING DISPOSITION OF THIS MOTION**

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Pursuant to this Court's Rule 21.2(b), the Acting Solicitor General, on behalf of petitioners in No. 20-37, respectfully moves that the Court vacate the judgments of the court of appeals and remand with instructions that the underlying matters be remanded to the Secretary of Health and Human Services (HHS); remove the cases from the March 2021 argument calendar; and, pending the Court's disposition of this motion, hold further briefing in abeyance.

1. These cases concern actions by the Secretary to approve “demonstration project[s]” under the Medicaid program, 42 U.S.C. 1315(a)—time-limited experiments to test variations from the statutory requirements for States’ Medicaid plans. Section 1315(a) authorizes the Secretary to approve any “demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives” of Medicaid. *Ibid.* At issue are amendments approved by the Secretary in 2018 to existing demonstration projects in Arkansas and New Hampshire designed to test (*inter alia*) requirements that condition continued Medicaid coverage of certain adults on their performing a specified number of hours per month of work or certain other related activities. Gov’t Br. 14-16.

Individual Medicaid beneficiaries in both Arkansas and New Hampshire brought these suits challenging the Secretary’s approvals of those projects. The States intervened to defend HHS’s actions. The district court ruled for the plaintiffs in each case and vacated the Secretary’s approvals. Gov’t Br. 18-19; 20-37 Pet. App. (Pet. App.) 22a-59a, 64a-102a.

The court of appeals affirmed in separate decisions. Pet. App. 1a-19a, 20a-21a. In *Gresham*, addressing the Arkansas project, the court concluded (in relevant part) that Section 1315 did not authorize the Secretary to approve the demonstration project testing the work-related requirements. *Id.* at 9a-16a. The court held that “the principal objective of Medicaid is providing health care coverage,” but that the Secretary had improperly focused on promoting other, “alternative objectives,” such as “improving health outcomes.” *Id.* at 9a-10a, 12a (citation omitted). The court rejected the government’s contention that the requirements were designed to

promote the provision of health-care coverage by facilitating the transition of Medicaid beneficiaries to other coverage and improving their health. *Id.* at 13a-16a; see *id.* at 16a-19a (holding approval arbitrary and capricious).

In light of the court of appeals' decision in *Gresham*, the government moved unopposed for summary affirmance in *Philbrick* (concerning New Hampshire's project), without prejudice to seeking further review. 19-5293 Gov't C.A. Mot. for Summ. Affirmance 1-5. The court granted that motion. Pet. App. 20a-21a.

The government filed a petition for a writ of certiorari under Rule 12.4 to review the court of appeals' decisions in *Gresham* and *Philbrick*. 20-37 Pet. 1-35. New Hampshire supported that petition as to *Philbrick*. Cert. Br. 1-3. Arkansas filed a petition seeking review in *Gresham*. 20-38 Pet. 1-31. This Court granted both petitions and consolidated the cases. Opening briefs were filed on January 19, 2021.

2. The Arkansas and New Hampshire demonstration projects are among more than a dozen projects including work-related requirements that either have been approved by or are pending before HHS. Gov't Br. 15 & n.6. However, none of those projects' work-related requirements is currently operative. Arkansas was the only State to begin disenrolling beneficiaries for failing to satisfy its work-related requirements, and that implementation was halted in March 2019 following the district court's decision in *Gresham*. Pet. App. 6a. Since then, the COVID-19 pandemic has made implementing such requirements infeasible. In addition, implementation of such requirements is effectively precluded by legislation enacted in March 2020 that conditions a State's receipt of an increase in federal Medicaid funding during

the pandemic on its maintaining certain existing Medicaid parameters. Families First Coronavirus Response Act. Pub. L. No. 116-127, Div. F, § 6008(a) and (b), 134 Stat. 208; 42 C.F.R. 433.400(c)(2). This Office is informed by HHS that every State has accepted that increased funding and thus currently cannot implement work-related requirements like those in Arkansas and New Hampshire.

3. On February 12, 2021, HHS sent letters to Arkansas, New Hampshire, and other States with previously approved demonstration projects that include work-related requirements informing them that HHS has begun a process of determining whether to withdraw approval of those requirements. *E.g.*, Letter from Elizabeth Richter, Acting Administrator, Centers for Medicare & Medicaid Servs. (CMS), HHS, to Dawn Stehle, Director, Arkansas Medicaid 1-2 (Feb. 12, 2021) (Arkansas Letter), <https://go.usa.gov/xs4xu>; Letter from Elizabeth Richter, Acting Administrator, CMS, HHS, to Lori Shibinette, Commissioner, New Hampshire Dep't of Health & Human Servs. 1-2 (Feb. 12, 2021) (New Hampshire Letter), <https://go.usa.gov/xs4aq>.

HHS explained that it “has the authority and responsibility to maintain continued oversight of demonstration projects in order to ensure that they are currently likely to assist in promoting the objectives of Medicaid” and that HHS may withdraw approval of a project that it finds “is not likely to achieve the statutory purposes.” Arkansas Letter 1 (quoting 42 C.F.R. 431.420(d)(2) and citing 42 U.S.C. 1315(d)(2)(D)); see Exec. Order No. 14,009, § 3(a)(ii), 86 Fed. Reg. 7793 (Feb. 2, 2021) (following the change in Administration, directing HHS to “review” existing demonstration projects that “may re-

duce coverage under or otherwise undermine Medicaid,” particularly given the pandemic). HHS further explained that it “has serious concerns about testing policies that create a risk of a substantial loss of health care coverage in the near term” in light of the COVID-19 pandemic and its adverse effects on Medicaid beneficiaries’ health, economic opportunities, and access to transportation and affordable child care. Arkansas Letter 1. Those effects, HHS continued, “have greatly increased the risk that implement[ing]” work-related requirements “will result in unintended coverage loss.” *Id.* at 2; see New Hampshire Letter 1-2.

HHS informed each State that it has “preliminarily determined that allowing” work-related requirements “to take effect in” the States “would not promote the objectives of the Medicaid program,” and that it is “commencing a process of determining whether to withdraw” approval for those requirements. Arkansas Letter 2; New Hampshire Letter 2. HHS invited each State to submit any additional information that in the State’s view would warrant not withdrawing approval for work requirements within 30 days. *Ibid.* HHS explained that, if it ultimately determines to withdraw its approval of a State’s work-related requirements, it will notify the State and afford it an opportunity for a hearing to challenge that determination before it takes effect. *Ibid.*

4. In light of this intervening development, the government respectfully submits that these cases no longer present a suitable context for the Court to address the question presented concerning the scope of the Secretary’s authority to approve the Arkansas and New Hampshire demonstration projects under 42 U.S.C.

1315. The work-related requirements were the principal focus of the litigation and decisions below. HHS has now made a preliminary determination that allowing work-related requirements to take effect in Arkansas and New Hampshire would not promote the objectives of the Medicaid program and has commenced a process to determine whether to withdraw its approvals of those requirements. The agency actions under review in this Court have accordingly been overtaken by these changed circumstances. In addition, the approval of Arkansas's work-related requirements will expire by its own terms on December 31, 2021. Arkansas Letter 1.

The government respectfully submits that the appropriate course for the Court in such greatly changed circumstances is to vacate the judgments of the court of appeals and remand. Cf., e.g., *Madison Cnty. v. Oneida Indian Nation of New York*, 562 U.S. 42, 43 (2011) (per curiam) (vacating and remanding in light of “new factual development”); *Department of Justice v. City of Chicago*, 537 U.S. 1229 (2003) (intervening statute). The cases should be remanded with instructions that the underlying matters be remanded to the Secretary, so that the agency may complete the review process it has commenced and determine the appropriate path forward in the first instance, exercising the “judgment” Congress expressly vested in the agency with respect to demonstration projects. 42 U.S.C. 1315(a).

That course is especially warranted here because the decisions below, and particularly the court of appeals' decision in *Gresham*, have created uncertainty about the scope of the Secretary's authority to approve demonstration projects under Section 1315. The government previously argued (Br. 35-43) that the *Gresham* decision threatens to significantly curtail the

Secretary's authority. The private respondents have argued (*e.g.*, Br. in Opp. 22-23, 25-26; Br. 23, 49) that the decision should not be construed to restrict the Secretary's authority in the manner suggested by the government. Because these cases no longer present a suitable context for this Court to review that decision on the merits, the judgments below should be vacated to clear the path for the agency to determine and implement appropriate further action.

For similar reasons, the government respectfully submits that the cases should be removed from the Court's March 2021 argument calendar, and that further briefing be held in abeyance pending the Court's disposition of this motion.

5. We are authorized to state that the private respondents consent to the relief requested in this motion; New Hampshire takes no position; and Arkansas opposes and intends to file a response.

Respectfully submitted.

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FEBRUARY 2021