

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.,

Respondents.

STATE OF ARKANSAS,

Petitioner,

v.

CHARLES GRESHAM, ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of
Appeals for the District of Columbia

**BRIEF OF *AMICUS CURIAE*
NEBRASKA APPLESEED
IN SUPPORT OF RESPONDENTS**

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Sarah Kliff and Margot Sanger-Katz, *Biden Administration Moves to End Work Requirements in Medicaid*, N.Y. TIMES, (Feb. 12, 2021)10

INTEREST OF AMICUS CURIAE¹

Nebraska Appleseed is a nonprofit, non-partisan public interest organization formed in 1996 that takes a systemic approach to complex issues, including affordable health care. For over a decade, Nebraska Appleseed has worked to ensure that all Nebraskans have access to quality, affordable health care through policy advocacy, litigation, and community education and organizing.

Medicaid plays a vital role in Nebraska’s health care system, ensuring that Nebraskans with low incomes have access to quality, affordable health care. Accordingly, Nebraska Appleseed has contributed to advocacy efforts in six legislative sessions and a successful statewide ballot initiative to expand Medicaid in Nebraska. After voters approved expanding Medicaid in November 2018, implementation of Medicaid expansion in Nebraska was delayed until October 2020 while the State pursued a complicated work requirements program, which included a Section 1115 waiver, known as the Heritage Health Adult Program (hereinafter “HHA Program”). The HHA Program is similar to the Arkansas and New Hampshire programs in that it denies benefits to those enrolled in Medicaid expansion coverage unless work and other requirements are met or an exemption is proved. Because Nebraska Appleseed’s mission is to ensure Nebraskans have access to quality, affordable health care, and Nebraska’s HHA Program denies benefits to

¹ Pursuant to this Court’s Rule 37.6, counsel for amicus curiae certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than amicus curiae or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

those with Medicaid expansion coverage, Nebraska Appleeed has an interest in this case.

SUMMARY OF ARGUMENT

The New Hampshire and Arkansas work requirements programs at issue in this case—which were authorized under Section 1115 waivers—take away coverage from Medicaid expansion enrollees. Nebraska’s Medicaid HHA Program, which includes a Section 1115 waiver, similarly removes coverage of important benefits from Medicaid expansion enrollees, contrary to the primary objective of Medicaid to “furnish...medical assistance on behalf of” enrollees “whose income and resources are insufficient to meet the costs of necessary medical services.” 42 U.S.C. § 1396-1. In its *amicus* brief, the State of Nebraska both mischaracterizes the impact of the HHA Program and asks the Court for an advisory opinion upholding the program. The HHA Program does not, as Nebraska asserts, add benefits. Indeed, Nebraska’s own estimates show massive coverage losses under the HHA Program. Furthermore, it would be inappropriate for this Court to address the HHA Program, let alone implicitly provide it with a stamp of approval. The administrative record is not before this Court, and significant events have recently occurred with the HHA Program that make relying on statements of the Secretary of Health and Human Services (hereinafter “Secretary”) approving the HHA Program inappropriate.

ARGUMENT

I. Contrary To The Purposes Of Medicaid, The HHA Program, Like The New Hampshire And Arkansas Programs, Removes Coverage Of Important Benefits.

Despite the contentions in Nebraska’s *amicus* brief and the Centers for Medicare & Medicaid Services (hereinafter “CMS”) Nebraska Approval Letter (hereinafter “Nebraska Approval Letter”), the HHA Program removes coverage of important benefits from Nebraska Medicaid expansion enrollees. *See* Br. Neb. as Amicus in Supp. Pet’rs (hereinafter “Neb. Br.”); Letter from Seema Verma, Adm’r, Centers for Medicare & Medicaid Servs., to Jeremy Brunssen, Interim Dir., Div. of Medicaid & Long-Term Care, Nebraska Dep’t of Health and Hum. Servs. (Oct. 20, 2020) <https://bit.ly/2ZDBsSE> (hereinafter “Neb. Approval Letter”).

A. Nebraska Designed The HHA Program To Remove Coverage Of Important Benefits.

The HHA Program was specifically designed to remove benefits from Medicaid expansion enrollees. Medicaid expansion was approved by Nebraska voters in 2018, under ballot Initiative 427, codified at Neb. Rev. Stat. § 68-992. The statute approved by the Nebraska voters states that “[n]o greater or additional burdens or restrictions on eligibility, enrollment, benefits, or access to health care services shall be imposed on persons eligible for medical assistance pursuant to this section than on any other population eligible for medical assistance.” Neb. Rev. Stat. §68-992(4). After voters approved Medicaid expansion, the state spent almost two years creating the HHA Program, a new,

two-tiered system to cover expansion enrollees—a system that was not described or approved as a part of the ballot initiative.

Instead of providing all Nebraska State Plan benefits to the Medicaid expansion group, Nebraska intentionally designed the HHA Program to default to providing fewer benefits to the Medicaid expansion group unless enrollees meet a number of requirements, including work requirements, or prove an exemption to the requirements. Under the HHA Program, Nebraska Medicaid expansion enrollees receive either “Prime” coverage or “Basic” coverage. While Prime coverage includes all benefits in the State Plan, Basic coverage does not, excluding “dental services, dentures, Early Periodic Screening, Diagnosis, and Treatment (EPSDT) services, eyeglasses, optometrist services, and over-the-counter (OTC) pharmacy services” (hereinafter “Prime-Only Benefits”) from coverage. 471 Neb. Admin. Code 39-002.02; 471 Neb. Admin. Code 39-002.03. In order to receive Prime coverage, enrollees must meet or prove an exemption to the requirements set forth in the HHA Program. Regardless of the way Nebraska and the Nebraska Approval Letter attempt to characterize the program, the HHA Program specifically denies many enrollees State Plan benefits.

B. Nebraska Mischaracterizes Prime-Only Benefits As Additional Benefits.

In its *amicus* brief, Nebraska asserts that Prime coverage under the HHA Program “includes all Medicaid benefits that are available under the Nebraska state plan to other full-benefit populations’ and adds ‘coverage of dental services, vision services, and OTC medications.’” Neb. Br. at 5 (quoting Neb. Approval Letter). This is an inaccurate description of the HHA

Program. The HHA Program does not allow Medicaid expansion enrollees to “earn” new benefits on top of State Plan benefits; rather, the program begins by taking away coverage of State Plan benefits.

Nebraska mischaracterizes the Nebraska Approval Letter by stating that Prime coverage includes all State Plan benefits and *adds* dental, vision, and over-the-counter drug coverage. Neb. Br. at 4 (emphasis added). On the contrary, the Nebraska Approval Letter specifically notes that Prime coverage includes all State Plan benefits *including* dental, vision and over-the-counter drug coverage. Neb. Approval Letter at 4 (emphasis added). Moreover, Nebraska state regulations clearly provide that Prime coverage includes all State Plan benefits but that Basic coverage includes all States Plan benefits *except* the Prime-Only Benefits. *See* 471 Neb. Admin. Code 39-002.02; 471 Neb. Admin. Code 39-002.03. The Nebraska Approval Letter and Nebraska state regulations clearly demonstrate that Nebraska State Plan benefits already include the Prime-Only Benefits. Nebraska is not adding additional benefits through the HHA Program.

C. Nebraska’s Own Projections Show Coverage Losses.

Nebraska’s own predictions show that the HHA Program causes massive coverage losses of State Plan benefits. Nebraska estimates that a significant portion of the Medicaid expansion enrollees will be denied Prime benefits. *See* Neb. Approval Letter at 5 (estimating that, of those that have not proven they are exempt, fifty-five percent will not receive “Prime” coverage—*i.e.*, the full State Plan benefits). In fact, Nebraska’s own projections show that a significant number of Nebraska Medicaid enrollees who were previ-

ously receiving full State Plan benefits would be transitioned to the HHA Program and lose those benefits. *See id.* The impact of these coverage losses cannot be overlooked. Substantial evidence demonstrates that dental, vision, and over-the-counter drugs are critical to overall health and wellbeing. *See Oral health: A window to your overall health*, MAYO CLINIC, (June 4, 2019), <http://mayocl.in/3sgxRpS>; Reena Mukamal and Dr. Rebecca Taylor, *Your Eyes Could Be the Windows to Your Health*, AMERICAN ACADEMY OF OPHTHALMOLOGY, (Dec. 3, 2014), <http://bit.ly/3pE5BM7>. The HHA Program denies expansion enrollees coverage of important benefits if enrollees do not meet or prove an exemption to the work requirements. Similar to the New Hampshire and Arkansas programs, the HHA Program thus causes coverage losses contrary to the purposes of Medicaid.

II. An Opinion From This Court Addressing Nebraska’s HHA Program Would Be Advisory.

In its *amicus* brief, Nebraska asks that “if the Court rules for respondents, it might consider illustrating the limits of its holding by pointing to Nebraska’s program as a materially different model.” Neb. Br. at 13. In other words, Nebraska is asking for this Court to implicitly find that Nebraska’s program is lawful. Such an opinion would be an unconstitutional advisory opinion. This Court must “not ‘decide questions that cannot affect the rights of the litigants in the case before them’ or give ‘opinion[s] advising what the law would be upon a hypothetical state of facts.’” *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (*per curiam*)). The HHA Program is not before this Court, and significant recent events make reliance on the Secretary’s statements approving the

HHA Program inappropriate. Accordingly, this Court should not consider Nebraska's program, let alone offer an opinion as to its legality.

A. This Court Cannot Properly Address Nebraska's HHA Program Because The Administrative Record Of The Program's Approval Is Not Before This Court.

Because the administrative record of the Secretary's approval of Nebraska's HHA Program is not before this Court, this Court cannot properly address Nebraska's program or opine on its legality. The central question in the case before this Court is whether the Secretary's approval of the "Medicaid demonstration projects in Arkansas and New Hampshire that condition health insurance coverage on satisfying work requirements was arbitrary and capricious, in violation of the Administrative Procedure Act." Brief for Respondents (hereinafter "Resp't Br.") at i. This is a question rooted in the lower courts' reviews and decisions based on the administrative record of the approval of these programs. Unlike the Arkansas and New Hampshire programs, the administrative record of the HHA Program's approval is not before this Court, and a decision addressing the legality of the HHA Program does not affect the rights of the litigants in the case before this Court.

The Secretary's limited authority to approve demonstrations reinforces the need for courts to review and carefully consider administrative records before affirming the legality of demonstrations. In asking this Court to uphold Nebraska's program along with Arkansas and New Hampshire's programs, Nebraska mischaracterizes the Secretary's authority as the ability to approve *any* demonstration project and

to approve the waiver of compliance with *any* Medicaid requirement. Neb. Br. at 9 (emphasis in brief). However, as Respondents describe in their brief, the authority of the Secretary in approving Medicaid demonstration projects is not boundless but rather is constricted in a number of ways. *See Resp't Br.* at 7–10.

The boundaries on the Secretary's authority are significant, as the Secretary's authority is not so unbridled as to allow this Court to address the legality of the HHA Program without the program's administrative record, which is not before this Court. The full administrative record would include not only the Nebraska Approval Letter, but also documents such as the program application and the hundreds of comments raised in the state and federal comment periods in opposition to the program due its potential harms, which have not been presented to this Court. For example, during the federal comment period alone, CMS received 425 public comments, and all but one comment opposed the waiver. Neb. Approval Letter at 11. Additionally, subject matter experts clearly opposed the waiver as “[a]ll comments from advocacy, research, legal and medical professional organizations” opposed the waiver or some aspect of the waiver. *Id.* at 13. The primary evidence Nebraska presents to demonstrate that the Secretary's approval of the HHA Program was lawful is the Secretary's own statements. In this case, where the central issue is whether the Secretary acted within the bounds of his discretion in approving two other states' work requirement programs, Nebraska is asking this Court to take the Secretary at his word and offer an opinion that Nebraska's program is lawful. To issue an opinion addressing the legality of the HHA program under these circumstances would be granting inappropriate

weight to the statements of an executive agency official without evidentiary support.²

B. Significant Recent Events Make Reliance On The Secretary’s Approval of the HHA Program Inappropriate.

The Secretary’s statements approving the HHA Program are drawn into serious question by recent events. Respondents describe in their brief that the context for the case before this Court has changed. Resp’t Br. at 23–27. Similarly, the context surrounding the HHA Program has changed.

First, on January 28, 2021, President Biden signed an executive order directing the Secretary, as well as other agency and executive department heads, to “review...demonstrations and waivers, as well as demonstration and waiver policies, that may reduce coverage or otherwise undermine Medicaid” or the Affordable Care Act. Exec. Order No. 14,009, 86 Fed. Reg. 7793 (Jan. 28, 2021) at § 3(ii). The executive order also directed a review of “policies or practices that may present unnecessary barriers to individuals and families attempting to access Medicaid.” *Id.* at § 3(iv). In a press release describing the executive order, the White House specified that Medicaid work requirements are among the policies that agencies will review. *Fact Sheet: President Biden to Sign Executive Orders Strengthening Americans’ Access to Quality, Affordable Health Care*, White House (Jan. 28, 2021), <http://bit.ly/2NvGOWN>.

² Nebraska’s unusual request for this Court to bless the HHA Program even though it is not the subject of this case also fails to account for the fact that there may be other legal challenges to the HHA Program that were not raised in the litigation over the Arkansas or New Hampshire programs.

Then, on February 12, 2021, CMS revoked its 2018 guidance document that encouraged states to implement work requirement programs. Sarah Kliff and Margot Sanger-Katz, *Biden Administration Moves to End Work Requirements in Medicaid*, N.Y. TIMES, (Feb. 12, 2021), <http://nyti.ms/3bxFWQy>. That day, CMS also sent states with work requirement programs letters describing the agency’s intent to re-examine and roll back approval for the programs. In the letter to Nebraska, CMS describes its “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 its authority to revoke approvals. Letter from Elizabeth Richter, Acting Adm’r, Centers for Medicare & Medicaid Servs., to Kevin Bagley, Dir., Div. of Medicaid & Long-Term Care, Neb. Dep’t of Health & Hum. Servs. (Feb. 12, 2021), <https://bit.ly/3ujWtjk>. CMS also described its “serious concerns about testing policies that condition receiving certain health care benefits on meeting work or other community engagement requirements” and announced that it “has preliminarily determined that allowing work and other community engagement requirements to take effect in Nebraska would not promote the objectives of the Medicaid program.” *Id.* at 1–2. CMS then notified Nebraska that CMS is starting a process to determine “whether to withdraw the authorities approved in the HHA demonstration that permit the state to require work and other community engagement activities as a condition of receiving the additional benefits and services available to other Nebraska Medicaid populations.” *Id.* at 2.

Accordingly, due to the recent actions of President Biden and CMS, this Court cannot simply rely on statements from the Secretary approving the HHA

Program to address the legality of the HHA Program, even if it could address the issue at all.

CONCLUSION

By design, Nebraska's HHA Program, like the New Hampshire and Arkansas work requirements programs, removes coverage of important benefits contrary to the purposes of Medicaid. Additionally, an opinion from this Court addressing the HHA Program would be advisory, as the administrative record is not before this Court, and significant recent events have called into question the Secretary's approval of the HHA Program. The judgments below should be affirmed.

Respectfully submitted.

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