[NOT SCHEDULED FOR ORAL ARGUMENT]

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

CHARLES GRESHAM, et al.,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
v.	)	Nos. 19-5094 & 19-5096
	)	
ALEX M. AZAR II, et al.,	)	
	)	
Defendants-Appellants,	)	
_____	)	
	)	
RONNIE MAURICE STEWART, et al.,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
v.	)	Nos. 19-5095 & 19-5097
	)	
ALEX M. AZAR II, et al.,	)	
	)	
Defendants-Appellants.	)	

APPELLEES' RESPONSE IN OPPOSITION TO
APPELLANTS' MOTION TO EXPEDITE RELATED APPEALS

INTRODUCTION

Plaintiffs oppose the government's request for expedition. Although plaintiffs are prepared to meet any schedule for briefing and argument adopted by the Court, this case does not meet any of the Court's usual criteria for expedition. As the Court's rules make clear, a motion for expedition is intended to identify the "very rare[]" and "compelling" cases in which the court's usual procedures and schedules

must give way; it is not to give the government an E-Z Pass through the courts of appeals any time federal agency action is invalidated or generally to privilege the government's cases above all others in the queue.

Expedition is not appropriate here. As part of a purported "experiment" to "advance the purposes of Medicaid," the Secretary has for the first time in the 53-year history of the Medicaid Act approved packages of eligibility restrictions, penalty provisions, and benefit reductions that will eliminate or substantially limit both access to care and health coverage for tens of thousands of Medicaid recipients in Kentucky and Arkansas. The core of the "experiment" is the imposition of work requirements as a condition to continued Medicaid coverage—a condition that Congress has never authorized and that prior administrations have concluded was beyond the scope of their authority. That experiment will have a devastating effect on Medicaid recipients: In Kentucky, the government itself (under)estimated that 95,000 people will lose coverage; in Arkansas, in a partial implementation of the project, upwards of 20% of the affected population lost coverage, more than 18,000 Medicaid recipients in total.

Against that backdrop, the government cannot make the showing for expedited consideration this Court traditionally requires. The case does not involve any subject (such as national security) that would normally be the basis for expedited review. The government is seeking massive change, not continuity, introducing a

requirement that has never been imposed in Medicaid's history. And the government cannot—and does not even try to—show that the usual briefing schedule will cause irreparable injury.

Moreover, the government's principal justification for expedition—that the decisions below effectively stopped the Administration's effort to implement work requirements *nationwide*—is a basis for denying the motion, not for granting it. The waiver authority the Secretary is purporting to exercise was intended to allow limited experiments for limited time periods. It would thus be perverse to grant the government expedited consideration on the ground that the government is eager to use its waiver authority to bypass Congress and "fundamentally transform Medicaid" by imposing work requirements on Medicaid recipients nationwide. Expedition is manifestly unwarranted.

BACKGROUND

As part of a comprehensive social safety net, Congress passed Medicaid "[f]or the purpose of enabling each State, as far as practicable . . . to furnish (1) medical assistance on behalf of" families and individuals "whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care." 42 U.S.C. § 1396-1. Section 1115 of the Social Security Act allows the Secretary to "waive compliance" with certain Medicaid requirements

if a state wishes to implement an "experimental, pilot, or demonstration" project that is "likely to assist in promoting the objectives" of Medicaid. 42 U.S.C. § 1315(a).

Purporting to exercise this limited waiver authority, the Secretary granted Section 1115 waivers to allow the implementation of Kentucky HEALTH, the Arkansas Works Amendment, and several similar projects. Both Kentucky HEALTH and the Arkansas Works Amendment, the two projects at issue in this litigation, impose heightened barriers on access to healthcare under the guise of testing whether restricting access to healthcare and coverage "advance[s] the health and wellness needs" of beneficiaries in a manner divorced from the actual provision of medical services. Ky. AR 6719; *see* Ark. AR 0004 (examining if program "was likely to assist in improving health outcomes"). The core of both the Kentucky and Arkansas projects is the imposition of work requirements as an eligibility restriction for obtaining coverage. In Kentucky, the project imposed a series of other barriers to coverage, including (a) premiums up to 4% of income, the highest imposed on a mandatory population in the history of the Act; (b) the elimination of three months of coverage that Medicaid recipients would otherwise be entitled to; and (c) substantial lockout penalties of six months for failing to meet administrative deadlines and premium obligations. Dkt. No. 132, Mem. Op. at 5-6, *Stewart v. Azar*, No. 18-152 (JEB) (D.D.C. Mar. 27, 2019) ("Ky. Mem. Op."). In Arkansas, the work requirements are paired with a draconian penalty provision for non-compliance—

missing the requirements for three months results in loss of coverage for the rest of the year—and the elimination of two months of retroactive coverage. Dkt. No. 58, Mem. Op. at 8-9, *Gresham v. Azar*, No. 18-1900 (JEB) (D.D.C. Mar. 27, 2019) ("Ark. Mem. Op.").

The Secretary asserts that Kentucky HEALTH promotes the fiscal sustainability of Medicaid because restricting participation in Medicaid "may enable states to stretch their resources further and enhance their ability to provide medical assistance to a broader range of persons in need." Ky. AR 6719-20. Or, in plain English: Kicking recipients off of Medicaid will allow States to save money. In Kentucky, the State itself estimated that 95,000 individuals would lose coverage over the course of the "experiment," and outside commenters put the coverage losses at several times that. Ky. Mem. Op. at 18-19; *see also id.* at 21-22 (discussing figure in more detail). In Arkansas, in the first year of partial implementation of the program, more than 18,000 recipients—almost 20% of the Medicaid population covered by the "experiment"—lost coverage. Ark. Mem. Op. at 9.[1]

Although couched as a limited "experiment," there is little doubt that the goals are much broader, reflecting hostility to Congress's decision in the Affordable Care Act to expand coverage to all adults below 133% of the federal poverty line.

[1] Judge Boasberg noted that 16,900 people lost coverage through November 2018. Ark. Mem. Op. at 9. An additional 1,232 people lost coverage in December, pushing the total over 18,000.

Administrator Seema Verma called the Medicaid expansion a "major, fundamental flaw" and vowed to use "administrative actions to fundamentally transform Medicaid." *The Future Of: Healthcare*, Wall St. J. (Nov. 10, 2017), http://www.wsj.com/video/the-future-of-health-care/D5B767E4-B2F2-4394-90BB-37935CCD410C.html; Seema Verma, *Lawmakers have a rare chance to transform Medicaid. They should take it*, Wash. Post (June 27, 2017), https://www.washingtonpost.com/opinions/lawmakers-have-a-rare-chance-to-transform-medicaid-they-should-take-it/2017/06/27/f8e5408a-5b49-11e7-9b7d-14576dc0f39d_story.html. Kentucky stated in its application that it sought to "comprehensively transform Medicaid," Ky. AR 5447, and it threatened to withdraw coverage to the expansion population if its waiver requests were unsuccessful, Dkt. No. 25-1, Amicus Curiae Br. of Ky., ex rel. Matthew G. Bevin, In Supp. Of. Defs.' Mot. To Transfer, Ex. 1 at 4, *Stewart v. Azar*, No. 18-152.

In careful, thoughtful, and thorough opinions, the district court (Boasberg, J.) vacated the Secretary's approvals of the Kentucky HEALTH and Arkansas Works Amendment projects. Although a complete summary of those opinions can await the merits briefing, the core of both opinions was that the Secretary had failed entirely to grapple with or adequately consider the massive loss in coverage that the purported experiments would cause. With respect to Arkansas, the Secretary failed to do more than acknowledge coverage loss in a conclusory manner. Ark. Mem. Op.

at 19. With respect to Kentucky (on remand from Judge Boasberg's initial decision, which the government did not appeal), the Secretary's principal theory was that the experiment both saved money (because fewer people would be on Medicaid) and actually *increased* coverage, because the Governor of Kentucky had threatened to withdraw Kentucky entirely from the Medicaid expansion if its waiver request were denied. Ky. Mem. Op. at 33-34.

Judge Boasberg concluded that both justifications were arbitrary and capricious. With respect to "fiscal sustainability," that was so because the Secretary failed to "compare the benefit of savings to the consequences for coverage." *Id.* at 37. And with respect to the notion that the coverage losses would actually *increase* coverage by persuading Kentucky to continue the Medicaid expansion, Judge Boasberg concluded that such reasoning would effectively eliminate any constraints on the Secretary's waiver authority: "Under [the Secretary's] reasoning, states may threaten that they wish to de-expand, or indeed do away with all of Medicaid . . . if the Secretary does not approve whatever waiver of whatever Medicaid requirements they wish to obtain. The Secretary could then always approve those waivers, no matter how few people remain on Medicaid thereafter because *any* waiver would be coverage promoting compared to a world in which the state offers no coverage at all." *Id.* at 43.

As Judge Boasberg recognized, Kentucky HEALTH has not been implemented, so vacating Kentucky's waiver approval preserves the status quo. The Arkansas Works Amendment began implementation last year. In deciding to vacate the Arkansas waiver approval, Judge Boasberg noted the government's contention that a stay might cause disruption. But "the disruptions to Arkansas's administration of its Medicaid program must be balanced against the harms that Plaintiffs and persons like them will experience if the program remains in effect." Ark. Mem. Op. at 32. Under the Arkansas Works Amendment, individuals who fail to meet the project's work requirement for three months in a calendar year are disenrolled from Medicaid and unable to re-apply until the next calendar year. Over 18,000 individuals were disenrolled from Medicaid in 2018 for this reason. 2019, however, presented a new calendar year. Everyone who had been disenrolled could re-apply for Medicaid, and individuals aged 19 to 29 became subject to work requirements for the first time. No one risked disenrollment until the end of March 2019, when those who failed to meet the project's work requirements in January, February, and March 2019 would have been disenrolled. The lower court's vacatur prevented this first round of disenrollment. As a result, under the current state of affairs no one risks losing valuable health coverage during this appeal.

ARGUMENT

This Court's rules on expedition are clear. Expedition is granted "very rarely," and the reasons supporting the request for expedition "must be strongly compelling." U.S. COURT OF APPEALS FOR THE D.C. CIR., HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES, VIII.B (as amended through Dec. 1, 2018). The movant must "demonstrate that the delay will cause irreparable injury and that the decision under review is subject to substantial challenge." *Id.* Alternatively, the Court also may expedite cases "in which the public generally, or in which persons not before the Court, have an unusual interest in prompt disposition." *Id.* The government cannot meet these requirements here.

First, these consolidated cases are nothing like the cases in which the government ordinarily seeks expedition. The decisions below involve no aspect of national security. They do not involve the military. They strike down no congressional statute. And they put no individual at risk of harm. Unless this Court is prepared to adopt the view that any invalidation of federal agency action is subject to expedited consideration, expedition here is unwarranted.

Second, the government is seeking massive disruption, not continuity. It is undisputed that the U.S. Department of Health and Human Services (HHS) has *never*, in the history of the Medicaid program, permitted a State to impose a work requirement on recipients as a condition of eligibility. Nor is there any dispute that

prior administrations had concluded that imposing such requirements would be unlawful. The Kentucky project has never been in effect, and thus the status quo remains in place there. Although Arkansas had begun to implement its work requirements, the project had gone into effect for only a portion of the population, and all of the individuals who had been disenrolled in 2018 were eligible for Medicaid again at the start of this year. Judge Boasberg's ruling merely prevented Arkansas from restarting its cull of the Medicaid rolls.

Third, the government nowhere contends that the decision below risks "irreparable injury" while on appeal. Its brief does not even mention that phrase. And although the government vaguely references "uncertainty" and "the harm[] that would be caused by delay," Dkt. No. 1782525, Mot. to Expedite at 7, those harms are entirely self-inflicted. The requirements here under the Administrative Procedure Act are not a mystery, particularly after the lower court's first decision in this matter. Had the Secretary wanted to limit delay or uncertainty, he could have complied in the first instance, or at least the second, with the fundamental requirements of administrative law. His failure to do so here cannot justify expedition.[2]

[2] In the district court, the parties agreed to briefing schedules designed to permit the district court to rule before any aspect of the Kentucky project, and before the full Arkansas project, would be implemented. That prevented substantial irreparable harm to the tens of thousands of Medicaid recipients who otherwise might have lost coverage.

The government's principal argument is that expedition is nevertheless required because the decision below vacating the Secretary's waivers for Kentucky HEALTH and the Arkansas Works Amendment effectively has stopped the Secretary's authority nationwide. But that is the failing in the government's argument, not its salvation. The waiver authority gives the government an important but limited authority to try to advance the purposes of the Medicaid Act for a limited period of time. The waiver authority was never intended to be a source of authority to bypass Congress and effect changes in Medicaid on a national scale, much less in a way that (as Judge Boasberg correctly recognized) strikes at the heart of the Act. The government's contention that the decisions below threaten their cookie-cutter waivers in Arizona, Indiana, Michigan, New Hampshire, Ohio, Utah, and Wisconsin is an admission that the Secretary was not approving "experiments," but was instead invoking his waiver authority to "transform" a congressionally enacted program. The government's candid admission that it seeks permission to misuse the waiver authority as quickly and as broadly as possible is no basis for expedition.

CONCLUSION

The motion to expedite should be denied.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing response complies with the type-volume limitation established by Federal Rule of Appellate Procedure 27(d)(2)(A). The response contains 2,321 words, excluding the accompanying documents authorized by Federal Rule of Appellate Procedure 27(a)(2)(B), and excluding the parts of the response exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

This response complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), which apply to motions under Federal Rule of Appellate Procedure 27(d)(1)(E). The response has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14 point font.

April 15, 2019 */s/ Jane Perkins*

CERTIFICATE AS TO PARTIES

I certify that all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Federal Defendants' Motion To Expedite Related Appeals. Because none of the appellees are nongovernmental corporate parties, no disclosure statement is necessary under Circuit Rule 26.1.

April 15, 2019 */s/ Jane Perkins*

CERTIFICATE OF SERVICE

I certify that, on April 15, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the appellate CM/ECF system, and the document is being served on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF. Per Circuit Rule 27(b) and Circuit Rule 32(d)(2), I also filed the original document and four copies with the Clerk of this Court. Filing of the paper copies was effected, in accordance with this Court's Order, by hand delivery.

April 15, 2019 */s/ Jane Perkins*