UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAMUEL PHILBRICK et al., Plaintiffs, v. ALEX M. AZAR et al., Defendants.	)	Civil Action No. 1:19-CV-00773 (JEB)

THE NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNT II OF THE PLAINTIFFS' COMPLAINT AND RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNT II OF THE PLAINTIFFS' COMPLAINT

For the reasons explained in the attached brief, the Court should grant New Hampshire's motion for partial summary judgment as to count II of the plaintiffs' complaint and deny the plaintiff's motion for partial summary judgment as to count II of the plaintiffs' complaint. *See* Fed. R. Civ. P. 56.

Respectfully submitted,

NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES

By its attorney,

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Dated: June 6, 2019

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by ECF on June 6, 2019, to counsel of record.

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BRIEF IN SUPPORT OF THE NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNT II OF THE PLAINTIFFS' COMPLAINT AND RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNT II OF THE PLAINTIFFS' COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

This action is an attempt by the plaintiffs to undermine an important New Hampshire legislative policy designed to expand work and community engagement opportunities for certain able-bodied Medicaid recipients and to provide such medical assistance to thousands of New Hampshire adults in a fiscally sustainable way. The plaintiffs are four individuals currently receiving Medicaid who are not impacted by New Hampshire's elimination of retroactive coverage. One plaintiff is exempt from the community engagement requirement; one plaintiff likely qualifies for an exemption but has not applied for it; two others do not believe that they should be held to a work and community engagement requirement.

The Medicaid Act requires State plans to contain methods and procedures designed to eliminate and safeguard against the unnecessary utilization of Medicaid care and services. 42 U.S.C. § 1396a(a)(30)(A). The Granite Advantage program is such a requirement. It seeks to provide medical care and services to low-income, able-bodied adults in a manner that incentivizes them to seek financial independence from the Medicaid safety net by connecting them with opportunities that will build self-sufficiency in the long term. And, Granite Advantage's elimination of retroactive coverage will encourage persons to sign up before they are ill, thereby ensuring recipients receive preventative care and potentially avoid expensive medical interventions as the result of not having continuous healthcare. In doing so, Granite Advantage contains many exemptions and exceptions, all of which serve to safeguard against unwarranted suspension or termination of beneficiaries from the Medicaid program. Such a result is not consistent with the core objective of the Medicaid Act.

The Secretary has thus reasonably concluded that New Hampshire's Granite Advantage program is likely to advance Medicaid's objectives by eliminating retroactive coverage and

instituting community-engagement requirements for certain able-bodied adults. That decision is entitled to substantial deference and should be sustained. Additionally, the Medicaid Act does not prohibit the imposition of community engagement or similar requirements as a matter of law. Accordingly, the defendants are entitled to summary judgment on Count II of the plaintiffs' complaint, and the plaintiffs' partial motion for summary judgment as to count II should be denied.[1]

STATEMENT OF FACTS

I. State Statutory Background

On June 28, 2018, Governor Christopher Sununu signed Senate Bill 313 into law, An Act to "refor[m] New Hampshire's Medicaid Premium Assistance Program . . . ." S.B. 313, 2018 Sess. (N.H. 2018). The statute, N.H. Rev. Stat. § 126-AA *et seq.*, extended New Hampshire's participation in Medicaid expansion for low-income, able-bodied adults, while moving health care coverage for the expansion population from the Premium Assistance Program (PAP) to Medicaid managed care under the newly created "New Hampshire Granite Advantage Health Care Program" (hereinafter "Granite Advantage"). The statute provided that health care coverage for the expansion population would be provided by managed care organizations (MCOs) that, in the past, had only provided coverage to traditional Medicaid recipients. N.H. Rev. Stat. § 126-AA:2, I. The statute also made certain changes to the funding for the state's share of Medicaid expansion, N.H. Rev. Stat. § 126-AA:3,I; established a community engagement requirement for certain adults in the expansion population, N.H. Rev. Stat. § 126-AA:2, III(a); and, required the Commissioner of the Department of Health and Human Services ("DHHS") to seek a waiver from the Centers for Medicare & Medicaid Services (CMS) "of the

[1] As count II of the plaintiffs' complaint is the only count pertaining to Granite Advantage, this motion seeks summary judgment as to count II only. For the same reasons, this response to the plaintiffs' motion for summary judgment only concerns the arguments made with respect to count II of the plaintiffs' complaint.

requirement to provide 90-day retroactive coverage," among other things. N.H. Rev. Stat. § 126-AA:2,I.

A. Community Engagement Requirement.

Under Senate Bill 313,

> Newly eligible adults who are unemployed shall be eligible to receive benefits under this paragraph if the commissioner finds that the individual is engaging in at least 100 hours per month based on an average of 25 hours per week in one or more work or other community engagement activities, as follows:
>
> (1) Unsubsidized employment including by nonprofit organizations.
>
> (2) Subsidized private sector employment.
>
> (3) Subsidized public sector employment.
>
> (4) On-the-job training.
>
> (5) Job skills training related to employment, including credit hours earned from an accredited college or university in New Hampshire. Academic credit hours shall be credited against this requirement on an hourly basis.
>
> (6) Job search and job readiness assistance, including, but not limited to, persons receiving unemployment benefits and other job training related services, such as job training workshops and time spent with employment counselors, offered by the department of employment security. Job search and job readiness assistance under this section shall be credited against this requirement on an hourly basis.
>
> (7) Vocational educational training not to exceed 12 months with respect to any individual.
>
> (8) Education directly related to employment, in the case of a recipient who has not received a high school diploma or a certificate of high school equivalency.
>
> (9) Satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence, in the case of a recipient who has not completed secondary school or received such a certificate.
>
> (10) Community service or public service.

(11) Caregiver services for a nondependent relative or other person with a disabling medical or developmental condition.

(12) Participation in substance use disorder treatment.

N.H. Rev. Stat. § 126-AA:2, III(a).

B. Exemptions from Community Engagement Requirement.

"If an individual in a family receiving benefits under [N.H. Rev. Stat. § 126-AA:2, III] fails to comply with the work or community engagement activities required in accordance with [N.H. Rev. Stat. § 126-AA:2, III], the assistance shall be terminated." N.H. Rev. Stat. § 126-AA:2, III(b). However, "[a]n individual may apply for good cause exemptions which shall include, at a minimum, the following verified circumstances:"

(1) The beneficiary experiences the birth or death of a family member living with the beneficiary.

(2) The beneficiary experiences severe inclement weather, including a natural disaster, and therefore was unable to meet the requirement.

(3) The beneficiary has a family emergency or other life-changing event such as a divorce.

(4) The beneficiary is a victim of domestic violence, dating violence, sexual assault, or stalking consistent with definitions and documentation required under the Violence Against Women Reauthorization Act of 2013 under 24 C.F.R. section 5.2005 and 24 C.F.R. section 5.2009, as determined by the commissioner pursuant to rulemaking under RSA 541-A.

(5) The beneficiary is a custodial parent or caretaker of a child 6 to 12 years of age who, as determined by the commissioner on a monthly basis, is unable to secure child care in order to participate in qualifying work and other community engagement either due to a lack of child care scholarship or the inability to obtain a child care provider due to capacity, distance, or another related factor.

Id.

C. Persons To Whom Community Engagement Requirement Is Inapplicable.

In addition to exemptions, the community engagement requirement is inapplicable to certain persons. Specifically, the community engagement requirement does not apply to:

(1) A person who is unable to participate in the requirements under subparagraph (a) due to illness, incapacity, or treatment, including inpatient treatment, as certified by a licensed physician, an advanced practice registered nurse (APRN), a licensed behavioral health professional, a licensed physician assistant, a licensed alcohol and drug counselor (LADC), or a board-certified psychologist. The physician, APRN, licensed behavioral health professional, licensed physician assistant, LADC, or psychologist shall certify, on a form provided by the department, the duration and limitations of the disability.

(2) A person participating in state-certified drug court program, as certified by the administrative office of the superior court.

(3) A parent or caretaker as identified in RSA 167:82, II(g) where the required care is considered necessary by a licensed physician, APRN, board-certified psychologist, physician assistant, or licensed behavioral health professional who shall certify the duration that such care is required.

(4) A custodial parent or caretaker of a dependent child under 6 years of age or a child with developmental disabilities who is residing with the parent or caretaker; provided that the exemption shall only apply to one parent or caretaker in the case of a 2-parent household.

(5) Pregnant women.

(6) A beneficiary who has a disability as defined by the Americans with Disabilities Act (ADA), section 504 of the Rehabilitation Act, or section 1557 of the Patient Protection and Affordable Care Act and is unable to meet the requirement for reasons related to that disability; or who has an immediate family member in the home with a disability under federal disability rights laws and who is unable to meet the requirement for reasons related to the disability of that family member, or the beneficiary or an immediate family member who is living in the home or the beneficiary experiences a hospitalization or serious illness.

(7) Beneficiaries who are identified as medically frail, under 42 C.F.R. section 440.315(f), and as defined in the alternative benefit plan and in the state plan and who are certified by a licensed physician or other medical professional to be unable to comply with the work and community engagement requirement as a result of their condition as medically frail.

> The department shall require proof of such limitation annually, including the duration of such disability, on a form approved by the department.
>
> (8) Any beneficiary who is in compliance with the requirement of the Supplemental Nutritional Assistance Program (SNAP) and/or Temporary Assistance to Needy Families (TANF) employment initiatives.

N.H. Rev. Stat. § 126-AA:2, III(d).

II. November 30, 2018, CMS Waiver

Senate Bill 313 required the Commissioner to "implement the work and community engagement requirement . . . beginning January 1, 2019 in accordance with the terms and conditions of any waiver approved by the CMS." N.H. Rev. Stat. § 126-AA:2, IV. Accordingly, the Commissioner applied to CMS for a waiver under section 1115(a) of the Social Security Act to deviate from certain Medicaid state plan requirements, in order to implement Granite Advantage. Following the public comment period, on November 30, 2018, CMS notified DHHS that it had granted its request for a waiver. AR 0001.

A. Objectives of Medicaid

The waiver identifies the objectives of the Medicaid Program that Senate Bill 313 helps achieve. Specifically, the waiver identifies one of the primary purposes of Medicaid, which is to "enabl[e] each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, and disabled 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." AR 0001.

The waiver explains that Section 1115 demonstration projects like Granite Advantage "provide an opportunity for states to test policies that ensure fiscal sustainability of the Medicaid program, better 'enabling each [s]tate, as far as practicable under the conditions in such [s]tate'

to furnish medical assistance, . . . while making it more practicable for states to furnish medical assistance to a broader range of persons in need." AR 0002 (quoting Act § 1901). It further states that "measures that have the effect of helping individuals secure employer-sponsored or other commercial coverage or otherwise transition from Medicaid eligibility may decrease the number of individuals who need financial assistance, including medical assistance, from the state." *Id.* "Such measures may enable states to stretch their resources further and enhance their ability to provide medical assistance to a broader range of persons in need, including by expanding the services and populations they cover." *Id.* "By the same token, such measures may also preserve states' ability to continue to provide the optional services and coverage they already have in place." *Id.*

B. Waiver of Retroactive Coverage

The waiver permits DHHS to eliminate retroactive coverage for certain beneficiaries. AR 0003. Specifically, under the retroactive coverage waiver, "[t]he state will not provide medical coverage to adults under the demonstration for any month prior to the month in which a beneficiary's Medicaid application is filed," except for the following individuals: (1) pregnant women, including during the 60 day postpartum period; (2) "an infant under age 1"; (3) "a child under age 19"; (4) "a parent or caretaker relative"; or, (5) "an individual eligible in aged, blind, or disabled eligibility groups (including those who are applying for long-term care determination)." AR 0023–24; *see id.* 0003. In other words, under the waiver, retroactive coverage is eliminated only for healthy, able-bodied, non-disabled adults, who are not pregnant, and who are not parents or caretakers.

C. Determination that Granite Advantage is likely to assist in promoting Medicaid's objectives.

In reviewing the Granite Advantage program, the Secretary found that the program's community engagement requirements "are designed to encourage beneficiaries to obtain employment and/or undertake other community engagement activities that may lead to improved health and wellness and increased financial independence for beneficiaries." AR 0004. The Secretary found that this "demonstration will . . . help the state and CMS evaluate whether the community engagement requirement helps adults in this population transition from Medicaid to financial independence and commercial insurance, including the federally subsidized coverage that is available through the Exchanges." *Id.*

While persons who fail to meet the community engagement requirements could have their Medicaid enrollment terminated or suspended, the Secretary noted the numerous exemptions and exceptions built into the Granite Advantage program (*see* N.H. Rev. Stat. § 126-AA:2, III(b, d)) to make compliance with the program's community engagement requirements achievable. AR 0004–5.

D. Determination that Granite Advantage will furnish medical assistance in a manner that improves the sustainability of the safety net.

In his waiver approval, the Secretary found that "New Hampshire's stated goals for the extension of the Granite Advantage demonstration program align with the goals of the Medicaid program," including "improv[ing] beneficiary health and wellness" and "increas[ing] financial independence." AR 0006. The Secretary further explained that "to the extent . . . the community engagement requirements help individuals achieve financial independence and transition into commercial coverage, the demonstration may reduce dependency on public assistance while still promoting Medicaid's purpose of helping states furnish medical assistance by allowing New

Hampshire to stretch its limited Medicaid resources." *Id.* "Helping the state stretch its limited Medicaid resources will assist in ensuring the long-term fiscal sustainability of the program and preserving the health care safety net for those New Hampshire residents who need it most." *Id.*

While the community engagement requirements may impact overall coverage levels if individuals perfectly capable of complying with them choose not to do so, "the demonstration as a whole is expected to provide greater access to coverage for low-income individuals than would be available absent the demonstration." *Id.* The Secretary further found that "[i]t furthers the Medicaid programs objectives to allow states to experiment with innovative means of deploying their limited state resources in ways that may allow them to provide services beyond the legal minimum." *Id.* As the Secretary explained, "[e]nhancing fiscal sustainability allows the state to provide services to Medicaid beneficiaries that it could not otherwise provide." *Id.*

III. Critical Dates

Retroactive coverage ended for the non-exempt adults on January 1, 2019. Starting in June 2019, non-exempt adults must begin completing work activities to fulfill the community engagement requirements. ECF No. 1 at 5. Under the waiver, non-exempt adults "will have 75 calendar days after the start date of the community engagement requirements . . . before they must begin to meet the community engagement requirement or qualify for an exemption." AR 0029. Thus, as of August 1, 2019, coverage of non-exempt adults may be terminated for not complying with the community engagement requirements. ECF No. 1 at 5.

IV. Procedural Posture

On March 20, 2019, the plaintiffs filed the present action against Alex M. Azar, II, Secretary of the United States Department of Health and Human Services, Seema Verma, Administrator of the Centers for Medicare & Medicaid Services, and the United States

Department of Health and Human Services (collectively, the "Federal Defendants"). ECF No. 1. Their complaint alleges: (1) a violation of the federal Administrative Procedure Act ("APA") with respect to a January 11, 2018, State Medicaid Director letter (Count I); (2) a violation of the APA with respect to the Secretary's Section 1115 waiver decision for the Granite Advantage program (Count II); and, (3) a violation of the Take Care Clause, Article II, Section 3, Clause 5, of the United States Constitution (Count III). *Id*. On April 25, 2019, New Hampshire filed a motion to intervene in this action, which the Court granted. ECF No. 15.

The plaintiffs are four individuals who allege they have been adversely impacted by the Federal Defendants' decisions. Specifically, Plaintiff Philbrick is a twenty-six-year old man who lives at home with his parents. ECF No. 19-2 at 1. He has an associate's degree from a local community college and works at a retail store. *Id*. Plaintiff Philbrick is a current Medicaid beneficiary who is concerned about the difficulties in coordinating his schedule to ensure that he meets the 25-per week requirement to keep his Medicaid. *Id*.at 1–2.

Plaintiff Ludders is a forty-year-old man who "live[s] in a small cabin on a land trust." ECF No. 19-3 at 1. He has "chosen to live a subsistence lifestyle that prioritizes . . . living off the land." *Id*. Plaintiff Ludders is a current Medicaid beneficiary who is concerned that the community engagement requirements could interfere with his lifestyle. *Id*. at 2–3.

Plaintiff K. VLK is a thirty-six-year-old married woman with three children. ECF No. 19-4 at 1. Plaintiff K. VLK alleges she cannot complete community engagement requirements because she is disabled. *See id*. Plaintiff K. VLK is a current Medicaid beneficiary who is concerned that obtaining paperwork from her doctor's office to demonstrate she qualifies for an exemption is too inconvenient. *Id*. at 3.

Plaintiff J. VLK is a thirty-year old married male with three children. ECF Doc. 19-5 at 1. Plaintiff J.VLK is a current Medicaid beneficiary. *Id*. He is exempt from the community engagement requirements but is concerned that he does not know what he needs to do to remain exempt. *Id*. at 2.

The plaintiffs have moved for summary judgment on Counts I and II of their complaint. As to the only count pertaining to New Hampshire and its demonstration project, Count II, the plaintiffs argue that: (1) the Secretary lacked the statutory authority to approve the community engagement requirements, *see* ECF No. 19-1 at 33; (2) the Secretary's approval of Granite Advantage was unlawful because the objectives cited by the Secretary are not objectives of the Medicaid Act, *see id*. at 15; and, (3) the Secretary acted in an arbitrary and capricious manner in approving the Granite Advantage demonstration project because the Secretary did not consider the potential loss of coverage to beneficiaries and, even if the Secretary's stated objectives are valid objectives of the Medicaid Act, the Secretary "could not have reasonably concluded that Granite Advantage was likely to promote the objectives of the Medicaid Act." *See id*. at 15, 20–28.

STANDARD OF REVIEW

This case concerns the review of a final agency decision under the Administrative Procedure Act (APA), 5 U.S.C. § 706. Accordingly, "[s]ummary judgment . . . serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006) (internal citations omitted). "Under the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas 'the function of the district court is to determine whether or not as

a matter of law the evidence in the administrative record permitted the agency to make the decision it did.'" *Id.* (internal citations omitted).

"The APA requires that the Court 'hold unlawful and set aside agency action, findings, and conclusions'" that exceed the agency's statutory authority or are "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id*. (internal citations omitted); 5 U.S.C.§ 706(2)(A). "The 'scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.'" *Sierra Club*, 459 F. Supp. 2d at 90 (internal citations omitted). "The court must be satisfied that the agency has 'examine[d] the relevant data and articulate[d] satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id*. (internal citations omitted) (brackets in original). "[T]he ultimate standard of review is a narrow one" and [t]he agency's decisions are entitled to a 'presumption of regularity.'" *Id*. (internal quotations and citations omitted).

ARGUMENT

I. The Secretary correctly identified the Granite Advantage program as advancing the objectives of the Medicaid program.

The overall objective of the Medicaid program is to furnish medical assistance to eligible persons in a fiscally responsible and sustainable way. This objective is not divisible; it is the predominant objective of the Medicaid Act. The Secretary clearly identified this objective as a major objective of the Granite Advantage program in his November 30, 2018 letter. *See, e.g.*, AR 0001–13. This objective is also well-grounded in the plain language of the Medicaid Act itself.

Specifically, 42 U.S.C. § 1396-1 provides that the Medicaid Act exists "[f]or the purpose of enabling each State, ***as far as practicable under the conditions in such State***, to furnish (1)

medical assistance on behalf of families with dependent children and of aged, blind, or disabled 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, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter." (emphasis added).

42 U.S.C. § 1396a(a) contains provisions enabling States to manage their Medicaid programs in a fiscally responsible and sustainable way. Specifically, 42 U.S.C. § 1396a(a)(14) permits States to "provide that enrollment fees, premiums, or similar charges, and deductions, cost sharing, or similar charges, may be imposed . . . as provided in section 1396o of this title."

42 U.S.C. § 1396a(a)(17) requires that "[a] State plan for medical assistance must . . . include reasonable standards . . . for determining eligibility for ***and the extent of*** medical assistance under the plan which . . . are consistent with the objectives of this subchapter . . . ." 42 U.S.C. § 1396a(a)(17) (emphasis added). "This language confers broad discretion on the States to adopt standards for determining the extent of medical assistance, requiring only that such standards be 'reasonable' and 'consistent with the objectives' of the Act." *Beal v. Doe*, 432 U.S. 438, 444 (1977). "On the face of (a)17, the direct beneficiaries of this statute are Medicaid recipients and . . . the general public and public fisc." *Prestera Center for Mental Health Servs., Inc. v. Lawton*, 111 F.Supp.2d 768, 777 (S.D. W. Va. 2000).

42 U.S.C. § 1396a(a)(30)(A) ("Section 30(A)") also requires a State to provide methods and standards relating to the utilization of care and services that safeguard against unnecessary utilization of such care and services. Section 30(A) states:

A state plan for medical assistance must –

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary ***to safeguard against unnecessary utilization of such care and services*** . . . .

(emphasis added). The "unnecessary utilization" provision of Section 30(A) "is intended, as appears on its face, to contain costs and guard against fraud." *Prestera Center for Mental Health Servs., Inc.*, 111 F. Supp. 2d at 776.

The case law also confirms that the core objective of the Medicaid Act is the provision of medical assistance by the States in a fiscally sustainable way. For example, in *Pharmaceutical Research Manufacturers of America v. Thompson*, 362 F.3d 817 (D.C. Cir. 2004), the D.C. Circuit relied on the Supreme Court's decision in *PhRMA v. Walsh*, 538 U.S. 644 (2003), to accept as reasonable the Secretary's conclusion that measures aimed at conserving scarce state Medicaid resources "further[s] the goals and objectives of the Medicaid program." *Thompson*, 362 F.3d at 825. At issue in *Thompson* was a state measure that made getting certain drugs more difficult for Medicaid recipients by requiring a prior authorization, which was meant to encourage drug companies to give rebates for those not receiving Medicaid. *See id.* at 820. The Secretary reasoned that this measure helped to keep non-Medicaid beneficiaries from becoming Medicaid eligible. *Id*. at 825. The Secretary argued that this program was consistent with Medicaid's "goals and objectives" because "[i]ncreased Medicaid enrollments and expenditures for newly qualified Medicaid recipients will strain already scarce Medicaid resources in a time of State budgetary shortfalls." *Id*. (emphasis added). The D.C. Circuit found this interpretation to be reasonable:

> The Secretary's conclusion that a prior authorization program that serves Medicaid goals in this way can be consistent with Medicaid recipients' best interests, as required by section 1396(a)(19), is reasonable on its face. If the prior authorization program prevents borderline populations in Non-Medicaid programs from being displaced into a state's Medicaid program, more resources will be available for existing Medicaid beneficiaries.

Id.

In reaching this conclusion, *Thompson* relied heavily on the plurality's analogous conclusion in *Walsh*. *See* 538 U.S. at 663 ("[T]here is the possibility that, by enabling some borderline aged and infirm persons better access to prescription drugs earlier, Medicaid expenses will be reduced. If members of this borderline group are not able to purchase necessary prescription medicine, their conditions may worsen, causing further financial hardship and thus making it more likely that they will end up in the Medicaid program and require more expensive treatment."). Further, *Thompson* also noted Justice O'Connor's separate opinion in *Walsh* "suggested that this rationale, although 'not self-evident,' would suffice if supported by facts in the record." *Thompson*, 362 F.3d at 825. *Thompson* and *Walsh* thus confirm that a valid objective of Medicaid is ensuring Medicaid's sustainability by conserving scare state resources.

At least two district courts have reached an identical conclusion in upholding Section 1115 demonstration projects. Specifically, in *Crane*, the district court concluded:

> The public purse, both that of the state and even of the United States, is not absolutely unlimited. Accordingly, public officials must make some effort to provide the greatest good possible at the least possible costs. That appears to be the underlying motive behind this project, and it is one to be commended, and not one to be criticized.

Crane v. Mathews, 417 F. Supp. 532, 540 (N.D. Ga. 1976). Similarly, in *Richardson*, the district court upheld a Section 1115 waiver, noting that "[t]he stated purposes of the . . . experiment might be expressed as an attempt to see how imposition of some cost-sharing will decrease utilization of program benefits, and, consequently, costs." *California Welfare Rights Org. v. Richardson*, 348 F. Supp. 491, 496 (N.D. Cal. 1972).

The Granite Advantage program is designed to expand Medicaid coverage in New Hampshire in a fiscally sustainable way. Specifically, Granite Advantage provides medical

assistance to low-income, able-bodied adults who may be capable of achieving financial independence so they may someday no longer require the Medicaid safety net. The plain language of the program, as embodied in N.H. Rev. Stat. § 126-AA, *et seq.*, establishes as much. Such a measure is a "reasonable standard for determining . . . the extent of medical assistance under the plan which . . . [is] consistent with the objectives of [the Medicaid Act]" and the other subparts of Section 1396a(a)(17). 42 U.S.C. §1396(a)(17). Such a measure also helps safeguard against the unnecessary utilization of Medicaid care and services by persons who are capable of achieving financial independence, like Plaintiffs Philbrick and Ludders. While Plaintiffs Philbrick and Ludders may find compliance with the Granite Advantage program's requirements or exemptions inconvenient, permitting them to utilize a safety net program in perpetuity when they have the ability and potential to attain financial independence and move off of the program in the future would not adequately and reasonably safeguard the State's Medicaid program against unnecessary utilization of care and services.

The Granite Advantage program includes exemptions and exceptions to ensure that those vulnerable persons who are unable to achieve financial independence, either temporarily or permanently, will remain within the safety net program, like Plaintiffs VLK or Plaintiff Philbrick (if his chronic insomnia interferes with his employment). While Plaintiff K. VLK may find it inconvenient to have to ask her medical providers to fill out exemption paperwork for her, the requirement is minimal and reasonable and helps ensure the program's integrity. The Secretary reviewed the Granite Advantage program's exemptions and exceptions against the public comments and reasonably found that the program's exemptions, exceptions, and other safeguards adequately protected against persons being unnecessarily or improperly suspended or terminated from the program.

Despite this, the plaintiffs argue that the Secretary's approval is unlawful because he did not base that approval on actual objectives of the Medicaid Act. *See* ECF No. 19-1 at 15 (citing 5 U.S.C. § 706(2)(a)). As the above analysis reflects, the plaintiff's stunted-view of the Medicaid Act's objectives is incorrect. While the Medicaid Act does not expressly define its objectives, the Medicaid Act plainly advances the principal objective of providing medical assistance to eligible populations in a fiscally responsible and sustainable way. The Granite Advantage program gives effect to that core objective in a manner consistent with New Hampshire's broad discretion under the Medicaid Act. *See Alexander v. Choate*, 469 U.S. 287, 303 (1985) (explaining that the Medicaid Act "gives the States substantial discretion to choose the proper mix of amount, scope, and duration limitations on coverage, as long as care and services are provided in 'the best interest of the recipients.'").

Nonetheless, to the extent the Medicaid Act is ambiguous with respect to its objectives, the Secretary reasonably interpreted those objectives to encompass the provision of medical assistance to eligible populations in a fiscally responsible and sustainable manner. This interpretation of the Medicaid Act is entitled *Chevron* deference and prevails under that standard. "Under *Chevron* review, [courts] first assess whether the statute directly speaks 'to the precise question at issue' so as to foreclose (or compel) the agency's interpretation." *SoundExchange, Inc. v. Copyright Royalty Board*, 904 F.3d 41, 55 (D.C. Cir. 2018) (quoting *Chevron , U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 457 U.S. 837, 842 (1984)). "If so, [courts] 'must give effect to the unambiguously expressed intent of Congress.'" *Id*. (quoting *Chevron*, 457 U.S. at 842. However, "[i]f a statute contains an ambiguity, *Chevron* directs courts to construe the ambiguity as 'an implicit delegation from Congress to the agency to fill in the statutory gaps.'" *Guesdes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 22 (D.C. Cir. 2019) (quoting

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)). "If there is ambiguity, the meaning if the statute becomes whatever the agency decides to fill the gaps with, as long as the agency's interpretation is reasonable and 'speaks with the force of law.'" *Id*. (internal citations omitted).

New Hampshire does not dispute that Medicaid is concerned with furnishing medical assistance certain eligible populations to pay for healthcare services. 42 U.S.C. § 1396-1. However, the reference in the appropriations provision to "medical assistance" cannot be divorced from that part of the statute requiring medical assistance to be provided "as far as practicable under the conditions in such State." *Id.* Congress expressly provided that practicability under the "conditions in each State" inform how each State may administer its Medicaid program. Consequently, 42 U.S.C. §1396-1 advances a more complex objective than the plaintiffs assert, one that the Secretary has reasonably interpreted.

II. The Secretary's approval of Granite Advantage was the product of reasoned decision-making.

The plaintiffs ask this court to set aside the Secretary's approval of the waiver for Granite Advantage, arguing that his approval was arbitrary and capricious. *See* 5 U.S.C. § 706(2)(a). In support, the plaintiffs claim that the Secretary "did not reasonably conclude that his approval of Granite Advantage is a valid experiment likely to promote the objectives of the Medicaid Act." ECF No. 19-1 at 20. The plaintiffs advance this contention on the back of their erroneous view that the only objective of the Medicaid Act is to provide coverage, *see supra*, and "[t]he Secretary failed to consider whether the project would cause Medicaid coverage loss or promote Medicaid coverage." ECF No. 19-1 at 21. The plaintiffs also assert that, even assuming the objectives advanced by the Secretary are valid objectives, the Secretary "did not reasonably determine that Granite Advantage was likely, on balance" to achieve the stated objectives. ECF

No. 19-1 at 28. These arguments are materially flawed because the Medicaid Act's core objective is the provision of medical assistance to certain eligible populations in a fiscally sustainable manner. That objective cannot be divided and then balanced against different fragments of itself. Section 1115 does not contemplate such an analysis nor does any other portion of the Medicaid Act.

"In an arbitrary and capricious challenge, the core question is whether the agency's decision was 'the product of reasoned decisionmaking.'" *Post Acute Medical at Hammond, LLC v. Azar*, 311 F.Supp. 3d 176, 182 (D.D.C. 2018) (internal citations omitted). "The court's review is 'fundamentally deferential—especially with respect to matters relating to an agency's areas of technical expertise.'" *Id*. (internal quotations and citations omitted). This court cannot "substitute its judgment for that of the agency." *Id*. (internal quotations and citations omitted). "An agency action is arbitrary and capricious if the agency 'entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before[it], or [the explanation is so implausible that that it could not be ascribed to a difference in view or the produce of agency expertise." *Id*. (internal quotations and citations omitted).

A. Granite Advantage is likely to assist in promoting the objective of furnishing medical assistance in a fiscally sustainable way.

The Secretary rationally concluded that, in his view, Granite Advantage is likely to assist in promoting the objectives of furnishing medical assistance in the State of New Hampshire in a fiscally sustainable manner. The Secretary reviewed the goals and objectives of the Medicaid Act and reasonably distilled and applied them to the Granite Advantage program. In doing so, the Secretary observed the many ways in which able-bodied, healthy, non-disabled adults in the expansion population, with no minor dependents under age 6 or disabled dependents, could meet

the community engagement requirement. The Secretary also evaluated the numerous exemptions and exceptions for individuals and found that those exemptions and exceptions adequately safeguarded beneficiaries against unwarranted suspensions or terminations in benefits. Indeed, as the Secretary observed, the only way the Granite Advantage program may impact overall coverage levels "is if the individuals subject to the requirements choose not to comply with them." AR 0006. Finally, the Secretary thoroughly reviewed the public comments submitted and reasonably explained why the Granite Advantage program's many safeguards ensured that the Granite Advantage program "as a whole is likely to assist in promoting the objectives of the Medicaid program." AR 0007.

Similarly, the waiver concerning retroactive coverage only eliminates retroactive coverage for healthy, able-bodied, non-disabled adults, who are not pregnant, and who are not parents or caretakers. As the Secretary stated, "[i]n evaluating the impact of a waiver of retroactive coverage, it is important to keep in mind that the new adult group members affected by the waiver are eligible for coverage now, and should have an incentive to obtain it, rather than waiting until they get sick to apply and having their bills retroactively covered." AR 0013.

It was also reasonable for the Secretary to conclude that Granite Advantage advanced the objective of furnishing medical assistance in a fiscally sustainable way by promoting beneficiary health and wellness through community engagement and encouraging individuals to enroll in Medicaid to receive preventative care. *See* AR 0001–2 ("[T]here is little intrinsic value in paying for services if those services are not advancing the wellness of the individual receiving them, or otherwise helping the individual attain independence."). The administrative record supports the Secretary's conclusion that community engagement improves health and wellness of

beneficiaries. *See* AR 4010, 4013–14, 4022–23, 4026, 4031, 4058–61, 4117–19. Improved health and wellness, in turn, reduces healthcare costs. *See* AR 4026.

Accordingly, the Secretary reasonably concluded, from the face of the Granite Advantage program, including what it does and how it is intended to operate, as well as from the information contained in the administrative record, that the Granite Advantage program furthers the Medicaid Act's core objective of providing medical assistance to eligible populations as far as practicable in New Hampshire, *i.e.*, in a manner that is fiscally responsible and sustainable.

III. The Secretary's approval of community engagement requirements does not exceed his statutory authority as a matter of law.

Finally, the plaintiffs ask this court to set aside the Secretary's approval of the waiver for Granite Advantage, arguing that the Secretary cannot, as a matter of law, approve a waiver for a demonstration project containing ***any*** community engagement requirements because doing so would "comprehensively transform Medicaid," thereby exceeding his statutory authority. ECF . No. 19-1 at 34; *see* 5 U.S.C. § 706(2)(C). Under the plaintiff's view, then, any demonstration project that reduces, even if slightly, the numbers of persons covered by Medicaid cannot *as a matter of law* promote Medicaid's objectives—even if it ensures the program is fiscally sustainable so that others may continue to obtain benefits.

That position is incorrect as a matter of law. The Medicaid Act confers broad discretion on the States to fashion their Medicaid programs to provide medical assistance to eligible populations in a fiscally responsible and sustainable way. It contains a finite list of conditions of eligibility which a State may not impose. Specifically, 42 U.S.C. § 1396a(b) provides that:

> The Secretary shall approve any plan which fulfills the conditions specified in subsection (a), except that he shall not approve any plan which imposes, as a condition of eligibility for medical assistance under the plan –
>
> (1) an age requirement of more than 65 years; or

> (2) any residence requirement which excludes any individual who resides in the State, regardless of whether or not the residence is maintained permanently or at a fixed address; or
>
> (3) any citizenship requirement which excludes any citizens of the United States.

Congress could have easily added community engagement or similar employment conditions to this list, but evidently chose not to do so.

Consequently, the Medicaid Act does not curtail the rights of the States to impose common-sense measures designed to provide medical assistance to eligible populations in a fiscally responsible and sustainable manner. To hold otherwise would be to endorse the absurd view that the States must continually furnish medical assistance in unsustainable ways until such time as their Medicaid programs are no longer viable and the States must leave the program altogether, creating a public health crisis. That is not a logical, sensible, or rational view of the Medicaid Act, but it is the plaintiffs' view, and it is a view that the plaintiffs can only advance by trying to convince this Court that the Medicaid Act's only (or predominate) objective is to furnish medical assistance to certain eligible populations.

Rather, the broad discretion afforded the States under the Medicaid Act provides ample breathing space for the existence of community engagement requirements capable of meeting the core objective of the Act, which is to furnish medical assistance to eligible populations in a fiscally responsible and sustainable way, *i.e.*, "as far as practicable under the conditions in each State." Section 1115 specifically permits the Secretary to approve demonstration project waivers for experimental state programs likely to advance the Medicaid Act's objectives. The Secretary reasonably concluded that the Granite Advantage program is "likely to promot[e] the objectives of the Medicaid program" of "furnishing medical assistance," "advanc[ing] health and wellness

needs of . . . beneficiaries," promoting "financial independence," and "improv[ing] the sustainability of the safety net." AR 0002–6.

Accordingly, the Medicaid Act provides broad statutory authority sufficient to enable the States to impose sensible community engagement requirements. Summary judgment should therefore be entered against the plaintiffs and for the defendants with respect to this claim.

CONCLUSION

The Medicaid Act provides ample statutory authority for the imposition of sensible and appropriate community engagement requirements through a Section 1115 demonstration project waiver. Additionally, the Secretary's approval of the Granite Advantage program was reasonable and was not arbitrary and capricious. Specifically, the Secretary reasonably concluded that the Medicaid Act advances in the objective of enabling the States to furnish medical assistance to certain eligible populations within their borders in a fiscally responsible and sustainable way. The Secretary also reasonably reviewed the Granite Advantage program and explained how the program's many exemptions and exceptions would appropriately safeguard against the unwarranted suspension or termination of Medicaid benefits. Thus, because the Secretary's decision was rational and reasonable, and not arbitrary and capricious, it should be upheld. The plaintiffs' motion for summary should therefore be denied, and summary judgment should be entered for the defendants on Count II of the plaintiffs' complaint.

Respectfully submitted,

NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES

By its attorney,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by ECF on June 6, 2019, to counsel of record.

/s/ Anthony J. Galdieri
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