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

**SAMUEL PHILBRICK, *et al.*,**

Plaintiffs,

v.

**ALEX M. AZAR II, *et al.*,**

Defendants.

Civil Action No. 1:19-cv-00773 (JEB)

**REPLY IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

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## INTRODUCTION

The Secretary of Health & Human Services' (the "Secretary") approval of Granite Advantage is amply justified by the reasoning in his letter approving the project. As the Secretary explained, Granite Advantage's community-engagement requirement and retroactive eligibility waiver improve the fiscal sustainability of New Hampshire's Medicaid program. They help New Hampshire alleviate the financial burden of coverage for the adult expansion population and continue providing that optional coverage, which permits New Hampshire to furnish as much medical assistance to its citizens as possible. The Secretary's approval of Granite Advantage is also independently justified because the Secretary concluded the demonstration was likely to improve the health of coverage recipients.

Plaintiffs' contrary arguments fail. *First*, plaintiffs attempt to limit the Supreme Court's and D.C. Circuit's decisions recognizing that fiscal sustainability is an objective of Medicaid. But there is no meaningful basis for distinguishing those decisions, and their reasoning controls here. *Second*, Plaintiffs wrongly argue that, despite the Supreme Court's ruling in *National Federation of Independent Businesses v. Sebelius* ("*NFIB*") and the consistent position of the U.S. Department of Health and Human Services ("HHS") concerning the effect of that decision, a State might *not* have the option of terminating coverage for the Medicaid expansion population. That position is untenable. As HHS has consistently explained since 2012, *NFIB*'s holding invalidated the ACA-enacting Congress's attempt to mandate Medicaid expansion and empowered States to decide for themselves whether to expand Medicaid to cover the new adult group or, should they later change their minds, to end coverage for that group, without jeopardizing the rest of their Medicaid funding.

Plaintiffs' record-based arguments are equally meritless. The Secretary made a reasoned, predictive judgment that Granite Advantage is likely to promote Medicaid objectives, and that determination was not arbitrary or capricious. In arguing to the contrary, plaintiffs ask this Court to substitute its judgment for that of the Secretary, to ignore the flexible and experimental nature of

demonstration projects as set forth in 42 U.S.C. § 1315, and to prioritize plaintiffs' policy preferences. This Court should decline.

Finally, plaintiffs' challenge to a State Medicaid directors letter issued by the Secretary in January 2018 and their claim under the Constitution's Take Care Clause are both non-justiciable and meritless. Plaintiffs' arguments in support of those claims are far-fetched and merely retread the same ground covered in their opening brief.

## ARGUMENT

### I. THE SECRETARY REASONABLY DETERMINED THAT GRANITE ADVANTAGE IS LIKELY TO ASSIST IN PROMOTING THE OBJECTIVES OF MEDICAID.

#### A. The Secretary's assessment is committed to agency discretion by law or, at a minimum, should be accorded great deference.

As the federal defendants explained in their opening brief, in Section 1115 Congress used language that committed to agency discretion the Secretary's judgment about whether a particular demonstration project is likely to assist in promoting the objectives of Medicaid. *See* Defs.' Mem. 11–12, ECF No. 30-1. Even if that judgment were reviewable, however, the Secretary's discretionary determinations are at a minimum entitled to the utmost deference. Where a statute "draw[s] a … distinction between the objective existence of certain conditions and the Secretary's determination that such conditions are present," judicial deference is at its maximum. *Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1513 (D.C. Cir. 1989); *see also Stewart v. Azar*, 313 F. Supp. 3d 237, 243 (D.D.C. 2018) ("*Stewart I*") ("[T]he Secretary is afforded significant deference in his approval of pilot projects."); *Stewart v. Azar*, 366 F. Supp. 3d 125, 137 (D.D.C. 2019) ("*Stewart II*") (employing "the two-step Chevron framework" to evaluate whether the Secretary's construction of Medicaid's objectives was permissible), *appeals filed*, Nos. 19-5095 and 19-5097 (D.C. Cir. Apr. 11, 2019).

Plaintiffs disagree and, indeed, argue that the Secretary's judgment is not even entitled to deference under *Chevron v. NRDC*, 467 U.S. 837 (1984), because it presents a question of "deep

economic and political significance" and would "bring about an enormous and transformative expansion" in the agency's authority. Pls.' Reply 2, ECF No. 35 (citing *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) and *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014)). But this Court has already given the Secretary deference in interpreting the objectives of the Medicaid statute in accordance with the *Chevron* doctrine. *See Stewart I*, 313 F. Supp. 3d at 260, 270; *Stewart II*, 366 F. Supp. 3d at 137. Moreover, this case is about a time-limited demonstration project testing new approaches to Medicaid; it is not a "transformative" expansion of the Secretary's authority and is certainly not the "extraordinary . . . case" where "there may be reason to hesitate before concluding that Congress has intended . . . an implicit delegation." *King*, 135 S. Ct. at 2488–89.

In *King*, the Supreme Court concluded that Congress did not *implicitly* delegate to the IRS the authority to determine whether tax credits created under the ACA were available for participants in the federally run health insurance exchange. 135 S. Ct. at 2489. The Court reasoned that Congress could not have intended to delegate that authority, given that the IRS had "no expertise in crafting health insurance policy of this sort" and that the issue had "deep economic and political significance." *Id.* (citation and internal punctuation omitted). But here, by contrast, Congress *explicitly* delegated to "the Secretary broad power to authorize projects which do not fit within the permissible statutory guidelines of the standard public assistance programs." *Crane v. Mathews*, 417 F. Supp. 532, 539 (N.D. Ga. 1976). Congress conferred that authority to ensure federal requirements do not "stand in the way of experimental projects designed to test out new ideas and ways of dealing with the problems of public welfare recipients." S. Rep. No. 87-1589, at 19 (1962), *as reprinted in* 1962 U.S.C.C.A.N. 1943, 1961. Further, unlike the IRS in *King*, the Secretary *does* have expertise in health policy, including the specific expertise to determine whether community-engagement requirements are likely to help States furnish medical assistance to their citizens and to assist in promoting health and well-being.

Plaintiffs' reliance on *Utility Air* is even more misplaced. There, the challenged interpretation

of the Clean Air Act would have "be[en] inconsistent with—in fact, would [have] overthrow[n]—the Act's structure and design." *Util. Air*, 134 S. Ct. at 2442. Here, the Social Security Act expressly *permits* the Secretary to allow States to experiment with projects that would otherwise violate the Act. In *Utility Air*, moreover, the claimed interpretation would have "severely undermine[d] what Congress sought to accomplish" by allowing the agency to exercise "an extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute unrecognizable to the Congress that designed it." *Id.* at 2443–44. Nothing remotely like that occurred here. Plaintiffs' rhetoric notwithstanding, the Secretary's approval of Granite Advantage does not "render the statute unrecognizable." On the contrary, it does precisely what the statute contemplates: it authorizes New Hampshire to conduct an experimental demonstration that will test the hypothesis that the challenged requirements will both improve the health of New Hampshire's residents and ensure the overall fiscal sustainability of its Medicaid program. Allowing that demonstration is well within the express grant of authority to the Secretary in Section 1115.

Plaintiffs' argument that the Secretary has impermissibly "transform[ed]" the Medicaid statute ignores the statutory language. In plaintiffs' view, the Secretary may never waive the eligibility criteria in Section 1396a(a)(10)(A) as part of a demonstration project, because doing so goes against the objectives of Medicaid. *See* Pls.' Reply 2–3. That position cannot be squared with the plain text of Section 1115, which allows the Secretary to "waive compliance with *any* of the requirements" in § 1396a. *See* 42 U.S.C. § 1315(a)(1) (emphasis added). Indeed, this Court has already found the Secretary's interpretation of Medicaid's objectives as including fiscal sustainability to be reasonable, since Medicaid's appropriations statute charges states with furnishing medical assistance "as far as practicable under the conditions in such State." 42 U.S.C. § 1396-1; *see also Stewart II*, 366 F. Supp. 3d at 149. It is entirely consistent with the objectives of Medicaid for the Secretary to approve a project that promotes a State Medicaid program's fiscal sustainability by helping current Medicaid recipients

to achieve better health outcomes and to improve their employability. Although plaintiffs prefer a different policy, Section 1115 plainly authorizes the Secretary to waive compliance with the eligibility requirements for a demonstration project that he has determined is likely to assist in promoting the objectives of Medicaid. *See Brogan v. United States*, 522 U.S. 398, 408 (1998) ("Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so.").

**B. The community-engagement requirement furthers Medicaid's core objective of furnishing medical assistance because it is designed to help able-bodied adults transition to financial independence, which enhances the fiscal sustainability of the state Medicaid program.**

Because New Hampshire voluntarily chose to participate in the ACA's expansion of adult eligibility, it began providing Medicaid coverage to adults at or below 133% of the federal poverty line who were otherwise ineligible for Medicaid. The State is now testing innovative ways of promoting the employment and employability of these adults and thus making it more likely that they might transition to other forms of health coverage. To that end, the Granite Advantage demonstration project conditions Medicaid eligibility on performing and reporting 100 hours per month of community-engagement activities. This requirement is tailored to enable participants to succeed: it applies only to adults aged 19 to 64 in the Medicaid expansion population, and exempts categories of individuals who would be unlikely to be able to satisfy the requirement, including beneficiaries who are medically frail. And while plaintiffs call it a "work requirement," that is not what it is. In reality, the requirement covers a wide array of activities that include not only employment but also education, job-skills training, job-search activities, and caregiving, community service, and participation in substance-abuse treatment. If successful, the community-engagement requirement will help able-bodied adults transition from Medicaid to financial independence and potentially to other forms of health coverage, including the subsidized coverage that is available through the Affordable Care Act's health exchanges. The requirement thus will enhance the fiscal sustainability of New Hampshire's Medicaid program and preserve scarce resources for others in need.

Plaintiffs disagree, but their challenge to the approval of the community-engagement requirement rests on multiple errors of law. The central premise of their argument is that no Medicaid purpose is ever served by a demonstration project designed to stretch limited state resources by helping able-bodied adults transition out of Medicaid.

Plaintiffs are incorrect. Decisions of both the Supreme Court and the D.C. Circuit recognize that Medicaid eligibility is fluid, and that the long-term objectives of the program are served by reducing the need for borderline populations to receive Medicaid. The state Medicaid programs at issue in *PhRMA v. Thompson*, 362 F.3d 817 (D.C. Cir. 2004), and *PhRMA v. Walsh*, 538 U.S. 644 (2003), imposed burdens on Medicaid recipients (prior authorization for certain drugs) in order to induce drug manufacturers to provide benefits to persons who were not Medicaid-eligible (reduced drug prices). The plaintiffs there argued that those provisions were not "in the best interests of Medicaid recipients" because they burdened Medicaid recipients in order to benefit others. *Thompson*, 362 F.3d at 824 (quoting 42 U.S.C. § 1396a(a)(19)). The D.C. Circuit disagreed, accepting the Secretary's conclusion that such provisions "will further the goals and objectives of the Medicaid program." *Id.* at 825 (quoting a September 2002 HHS letter to State Medicaid Directors). "Specifically, the Secretary concluded that 'by making prescription drugs accessible to [borderline] populations,' it is 'reasonable to conclude that these populations . . . will maintain or improve their health status and be less likely to become Medicaid eligible.'" *Id.* (quoting the approval letter). "Conversely, in the Secretary's view, the failure to implement" the provision for these populations could "lead to a decline in their health status and resources that will result in Medicaid eligibility or increased Medicaid expenses." *Id.* (quoting the approval letter). Such "[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.* (quoting the approval letter).

The D.C. Circuit held that "[t]he 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 1396a(a)(19), is reasonable on its face." *Id.* The court explained that "[i]f 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.* The court also noted that "[s]ix Justices in *Walsh* acknowledged that such an effect can be in the best interests of Medicaid beneficiaries." *Id.* (describing the plurality and concurring opinions in *Walsh*). More generally, *Walsh* reaffirmed the point that the Supreme Court had recognized decades earlier in *N.Y. State Dept. of Soc. Servs. v. Dublino*, 413 U.S. 405 (1973): the objectives of a welfare program are served by provisions that "attempt to promote self-reliance and civic responsibility, to assure that limited state welfare funds be spent on behalf of those genuinely incapacitated and most in need." *Walsh*, 538 U.S. at 666-67 (discussing *Dublino*). Unlike plaintiffs here, the Supreme Court saw nothing nefarious in provisions that help individuals and families rise out of poverty and attain independence.

Plaintiffs never meaningfully grapple with the reasoning of *Thompson* and *Walsh*, both of which foreclose their assertion that "fiscal sustainability" is not a "goal in its own right" of Medicaid. Pls.' Reply at 7. Plaintiffs note that *Thompson* and *Walsh* did not involve Section 1115 projects, *see id.*, but ignore the reality that the reasoning of those decisions applies equally to the Section 1115 projects here. In *Thompson*, for example, the D.C. Circuit upheld the Secretary's conclusion that the challenged provision would "further the goals and objectives of the Medicaid program" by preventing borderline populations from becoming Medicaid eligible, and thus avoiding a strain on scarce state Medicaid resources. 362 F.3d at 825. And the language *Thompson* quoted parallels the language of Section 1115, which authorizes the Secretary to approve a demonstration project that, "in the judgment of the Secretary, is likely to assist in promoting the objectives" of Medicaid. 42 U.S.C. § 1315(a). Plaintiffs'

supposed distinction of *Thompson* and *Walsh*—that as a factual matter neither involved demonstration projects—is thus a distinction that makes no difference.[1] Plaintiffs next conflate (a) the D.C. Circuit's conclusion that Medicaid interests are served when a State devises a plan to prevent borderline Medicaid populations from having to access Medicaid with (b) the court's separate conclusion that the Secretary's approval of the State plan amendment in *Thompson* was not arbitrary or capricious. They do so by pointing to the record in *Thompson*, which "confirm[ed] that in practice the prior authorization requirement has proved neither burdensome nor overly time-consuming." *Thompson*, 362 F.3d at 827. But as the federal defendants already explained in their opening brief and discuss again below, Granite Advantage's community-engagement component is similarly designed to be "neither burdensome nor overly time-consuming" because it imposes requirements only on those who should be able to meet them. *See* Defs.' Mem. 17–26. Finally, Plaintiffs' assertion that no deference is owed to the Secretary's understanding of the Medicaid statute's objectives, *see* Pls.' Reply 5–7, is foreclosed by *Thompson*'s contrary holding, *see* 362 F.3d at 822, 825.

The Secretary's consideration of fiscal sustainability as an objective of Medicaid is also properly viewed in the context of New Hampshire's prerogative to end the adult eligibility expansion entirely. As of January 1, 2019, New Hampshire's Medicaid expansion covered more than 50,000 individuals per month. *See* N.H. Dep't of Health & Human Servs., New Hampshire Medicaid Enrollment Demographic Trends and Geography (January 2019) 2 (Feb. 4,

[1] Indeed, the federal government's amicus brief in *Walsh* relied in part on HHS's prior approval of comparable demonstration projects in many States. *See, e.g.*, Brief for the United States, *PhRMA v. Concannon*, No. 01-188, 2002 WL 31156279, at *27 (Sept. 20, 2002) (explaining that HHS had approved a Massachusetts demonstration project that provided benefits to non-Medicaid populations, because "[t]he cost reductions [under Medicaid] would be realized from a decrease in premature reliance on the Medicaid program due to avoidable deterioration in health conditions, reductions in utilization of community or institutional longterm care services, and delays in individual spend-downs into the Medicaid program") (quoting Letter from Wendy E. Warring, Comm'r Mass. Exec. Office of Health & Human Servs., to Melissa Harris, CMS (May 1, 2002)).

2019),https://www.dhhs.nh.gov/ombp/medicaid/documents/nhhpp-enroll-demo-013119.pdf (last visited June 23, 2019). Although Congress intended to make coverage of this adult expansion group mandatory when it enacted the ACA, the Supreme Court held in *NFIB* that Congress could not condition coverage of the adult expansion population on the State's preexisting Medicaid funding. The Supreme Court thus ruled that the Secretary "cannot . . . withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion." *NFIB v. Sebelius*, 567 U.S. 519, 585 (2012). In accordance with that holding, CMS assured States in 2012 that they would have "flexibility to start *or stop* the expansion." Centers for Medicare & Medicaid Services (CMS), *Frequently Asked Questions on Exchanges, Market Reforms, and Medicaid* (2012 CMS Guidance) 11 (2012) (emphasis added), ECF No. 30-3; *see also id.* at 12 ("A state may choose whether and when to expand, and, if a state covers the expansion group, it may later decide to drop the coverage."); Letter of Aug. 31, 2012 from CMS Administrator Cindy Mann to Arkansas Governor Mike Beebe, ECF No. 37-4 (same).

In response, Plaintiffs assert that *NFIB*'s holding does not necessarily mean that a State could decide to end its coverage of the Medicaid expansion population after having decided to opt in to the coverage because it did not specifically describe the expansion population as an optional coverage population under Medicaid. Pls.' Reply at 12–13. But this argument relies on an untenable reading of *NFIB*'s holding,[2] and makes little practical sense; rather, a natural reading of *NFIB* and the assurances CMS provided before certain States expanded Medicaid make clear that New Hampshire has the authority to eliminate coverage of the new adult group without putting the entirety of its Medicaid funding at risk.

And because the new adult population is receiving coverage only because New Hampshire has voluntarily chosen to provide it, that population is similar to the adult population receiving coverage

[2] *See, e.g.*, *NFIB*, 567 U.S. at 690 (Scalia, J., dissenting) (characterizing the Government's proposed remedy, which the majority accepted, as "mak[ing] the Medicaid Expansion optional").

under the pre-ACA Oregon demonstration project in *Spry v. Thompson*, 487 F.3d 1272 (9th Cir. 2007). There, the Ninth Circuit explained that people in a demonstration-only population were not "made worse off" by the challenged requirements because, "without the demonstration project, they would not be eligible for Medicaid at all." *Id.* at 1276. The circumstances here are similar, in the following sense. The adults receiving coverage under Granite Advantage are not "made worse off" by the challenged requirements because without New Hampshire's voluntary expansion—an expansion it may discontinue if it cannot implement the challenged requirements—those adults "would not be eligible for Medicaid at all." *Id.*

**C. The Secretary concluded that Granite Advantage is likely to improve beneficiary health, another important goal of the Medicaid program.**

As the Secretary explained in his approval of Granite Advantage, the project is also likely to improve the health of New Hampshire's Medicaid recipients. AR 4–6. The Secretary sensibly noted that furnishing medical assistance under Medicaid to individuals who cannot afford necessary medical services has "little intrinsic value" if that assistance does not "advance[e] the health and wellness of the individual[s] receiving" it. AR 1. Plaintiffs argue that "the Secretary has no authority to isolate [his] desired outcomes from the specific mechanisms Congress prescribed," Pls.' Reply at 15, but that is not what the Secretary did. Healthier people tend to need less medical care and may find employment that can lift them out of poverty and off of Medicaid altogether. AR 1–2. By approving a demonstration with the anticipated effect of improving beneficiary health, the Secretary allowed New Hampshire to implement changes that can ultimately improve the fiscal sustainability of the State's Medicaid program and enable New Hampshire to concentrate on furnishing more and higher-quality medical assistance to its most vulnerable residents. *See id.* Thus, by focusing on beneficiary health, Granite Advantage plainly *promotes* the goals of furnishing medical assistance and fiscal sustainability in accordance with Congress's directions in Section 1396-1.

**D. The community-engagement requirement is neither a "benefits cut" nor a "work requirement."**

Plaintiffs also mischaracterize the terms of the community-engagement requirement. They repeatedly liken the community-engagement requirement to the demonstration project that was at issue in *Beno*, 30 F.3d 1057, but the two projects have nothing relevant in common. The California demonstration project in *Beno* imposed an across-the-board reduction in AFDC benefits, with the aim of giving recipients an incentive to look for work. *See id.* at 1060–61. By its terms, the project was a benefits cut: California simply reduced AFDC spending to 11% below 1992 levels. *See id.* at 1062–63. In that context, the Ninth Circuit declared that a "simple benefits cut, which might save money, but has no research or experimental goal," does not satisfy the requirement that a demonstration project "test out new ideas and ways of dealing with the problems of public welfare recipients." *Id.* at 1069.

That reasoning does not apply to the community-engagement requirement here. First, while the demonstration project in *Beno* imposed an across-the-board reduction in state spending on AFDC, the community-engagement requirement does not, by its terms, cut benefits for anyone. Everyone who complies with the requirement will continue to receive the same Medicaid benefits they would receive absent the demonstration, and numerous safeguards are in place to make compliance achievable for all who are subject to the community engagement requirement. Second, while the California demonstration project purported to establish a "work incentive" for people who were unable to work—such as persons with disabilities and children—the community-engagement requirement is limited to able-bodied adults, exempting (among others) those who are medically frail. Furthermore, although plaintiffs label it a "work requirement," the adults who are subject to the community-engagement requirement can fulfill it through a wide array of activities other than working. And third, as explained below, there is no doubt that Granite Advantage's community-engagement component has experimental value, which New Hampshire will evaluate on a statewide basis. *Beno* is thus inapplicable to the community-engagement requirement here, which is, indeed, considerably

more flexible than the state work requirements upheld by the Supreme Court in *Dublino* and the Second Circuit in *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973).[3]

## II. PLAINTIFFS' STATUTORY AND RECORD-BASED ARGUMENTS FAIL.

### A. Granite Advantage is an "experimental, pilot, or demonstration project."

In his approval letter, the Secretary explained that the project was designed to "test policies that ensure the fiscal sustainability of the Medicaid program," thus better enabling New Hampshire, "as far as practicable under the conditions" in the state, "to furnish medical assistance." AR 2; *see also* AR 4–5 ("[T]he state and CMS are testing the effectiveness of an incentive structure."); AR 12 ("[T]he purpose of a demonstration is to test hypotheses and develop data that may inform future decision-making."). The community engagement requirement, for instance, seeks to "test" whether "coupling the requirements for certain beneficiaries to engage in community engagement activities with certain meaningful incentives to encourage compliance" will promote "fiscal sustainability" and lead to "improved health outcomes." AR 4. Likewise, the waiver of retroactive eligibility seeks to determine whether the requirement will reduce gaps in coverage by encouraging eligible beneficiaries to obtain coverage when healthy, thus "increas[ing] uptake of preventive services" and "improving beneficiary health." AR 12. These and other statements in the approval letter leave no doubt that the project has research and experimental goals, and that the Secretary determined the demonstration was likely to yield useful information furthering those goals.

Plaintiffs, for their part, concede that the community-engagement requirement is novel in the context of Medicaid, but nonetheless object that the Secretary has previously waived retroactive

[3] In *Stewart II*, this Court recognized that "as a technical matter," Kentucky's similar demonstration "d[id] not, on its face, simply cut benefits." 366 F. Supp. 3d at 150. However, the Court went on to find that Kentucky's demonstration amounted to "precisely what the Ninth Circuit said states cannot do with a § 1115 waiver." *Id.* To the extent *Stewart II* forecloses the argument that a demonstration like New Hampshire's is not analogous to those at issue in cases like *Beno*, the federal defendants respectfully disagree with the decision in *Stewart II*.

eligibility as part of demonstrations in other states. Pls.' Reply 17. But section 1115 nowhere states that a demonstration or the data it provides cannot be similar to that of prior experiments. Indeed, each State and State Medicaid program is different, and data from a range of States is useful to policymakers, especially if Congress might ultimately consider applying a demonstration-tested Medicaid policy nationwide, through legislation. What the statute requires is only that the project be "experimental," a "pilot," or a "demonstration"—not that it be unprecedented or even novel. 42 U.S.C. § 1315(a). New Hampshire's demonstration satisfies this standard, and the Secretary reasonably determined it to do so.

**B. The Secretary Properly Considered Potential Effects On Coverage.**

Plaintiffs repeat their argument that the Secretary has not adequately considered the effects of Granite Advantage on coverage. Pls.' Reply 18–22. But plaintiffs do not dispute that in his approval letter, the Secretary explained how Granite Advantage is likely to promote coverage by ensuring the fiscal sustainability of New Hampshire's Medicaid program. AR 6. Nor do they dispute that Section 1115 permits "demonstration projects that might adversely affect Medicaid enrollment or reduce healthcare coverage." *Stewart I*, 313 F. Supp. 3d at 272. They do not contest that a beneficiary who chooses not to comply with the community engagement requirement and accordingly loses coverage for a few months may simply complete 100 hours of community engagement in a given month and regain coverage once again. AR 28. They do not deny that the Secretary considered possible effects on coverage against the baseline of the State's choice to participate in the Medicaid expansion, or that the state "has informed CMS that, under its interpretation of state law, it would be required to terminate coverage for its expansion population should CMS not approve the demonstration extension." AR 6. And they do not point to any authority for the proposition that the Secretary in all cases must "quantify" *ex ante* the number of beneficiaries who will lose coverage under a demonstration. Pls.' Reply 20.

Rather than contest any of these points, plaintiffs' arguments reduce to little more than the assertion that because commenters predicted some beneficiaries will lose coverage at least temporarily under the project, and because the Secretary did not specifically recite and refute each of these comments, his approval was inconsistent with the APA. However, this Court recognized in *Stewart II* that such an estimate would be "admittedly subject to some uncertainty." 366 F. Supp. 3d at 141; *see also id.* ("[E]ven 'in the best of circumstances,' the agency 'has no access to infallible data.'" (quoting *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1314 (D.C. Cir. 2010)). And, again, it is permissible for demonstrations to have an adverse impact on coverage for some individuals. *See Stewart I*, 313 F. Supp. 3d at 272. Further, although the Secretary reviewed all of the comments submitted and did not "ignore" any of them, Pls.' Reply 18 (quoting *Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018)), he was not required to respond in writing *at all*, let alone respond to every single comment submitted in opposition to the proposed demonstration. Defs.' Mem. 26; *see also Stewart I*, 313 F. Supp. 3d at 263. Nor is it practical or even useful to attempt to predict precisely what effect a demonstration will have. The entire purpose of a *demonstration* project is to *test* the effects of a temporary change in policy. *See Cal. Welfare Rights Org. v. Richardson*, 348 F. Supp. 491, 498 (N.D. Cal. 1972). Indeed, several of the research articles considered by the Secretary expressly conclude that more research is needed to establish the very findings that plaintiffs insist are a prerequisite to a Section 1115 determination.[4]

[4] *See, e.g.*, AR 3693 ("To answer [] questions about the purpose, expected outcomes, and practical implementation, and associated costs of work requirements, *additional information is needed*." (emphasis added)); AR 3693 ("[I]nformation on the effectiveness of current work requirement policies is outdated or insufficient … . *More study is needed* to determine whether and how work requirements have the intended effects and produce any negative unintended consequence." (emphasis added)); AR 4364 ("Better understanding of how volunteer work fosters personal well-being would offer a positive theoretical complement to stress theory ….").

Plaintiffs may disagree with Granite Advantage as a policy matter. And as a predictive matter, they may think the project will fail. But those are not reasons to disregard the fact that the Secretary considered the issue of effects on coverage, and rationally determined that the demonstration would promote coverage.[5]

**C. The Secretary Has The Authority To Approve A Community-Engagement Requirement.**

Pursuant to the Section 1115 waiver provision,[6] the Secretary possesses the authority to approve a community-engagement requirement on an experimental basis if he finds that the requirement, in combination with the other features of a particular demonstration, would likely assist in promoting Medicaid's statutory objectives. 42 U.S.C. § 1315(a). That is precisely what the Secretary did here. Plaintiffs object that the Medicaid statute does not itself include a community engagement requirement, and that Congress has in recent terms rejected bills that would impose work requirements as a condition of Medicaid. Pls.' Reply 26–28. But as defendants have already explained, *see* Defs.' Mem. 22–24, plaintiffs confuse a temporary demonstration with a statutory amendment. The purpose of Section 1115 is to empower the Secretary to waive statutory requirements that would otherwise "stand in the way" of temporarily testing out new policy ideas. S. Rep. at 19. At any rate, Congress's failure to amend the Medicaid statute says little about how to interpret that statute, let alone how to interpret a provision elsewhere in the Social Security Act that gives the Secretary authority to waive provisions of the Medicaid statute. *See Mich. v. Bay Mills Indian Cmty.*, 572 U.S. 782, 826 (2014) ("We

[5] As noted in their earlier memorandum, Defs.' Mem. 22, the federal defendants recognize that the Secretary's analysis of coverage in his approval letter here is similar to the reasoning this Court rejected in *Stewart II*. *See* 366 F. Supp. 3d at 140–43. To the extent the Court's opinion in *Stewart II* forecloses the argument that the Secretary adequately considered coverage here, the federal defendants respectfully disagree with the decision in *Stewart II*.

[6] Contrary to plaintiffs' assertion, to the extent they interpret the waiver provision to bar approval of a community engagement requirement, defendants *do* contest plaintiffs' reading of the term "waive." Pls.' Reply 26.

walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle" (quoting *Helvering v. Hallock,* 309 U.S. 106, 121 (1940)).

**D. Plaintiffs' Challenge To The Waiver Of Retroactive Eligibility Is Non-Justiciable And Meritless.**

At the outset, because plaintiffs' fears of injury from the waiver of retroactive eligibility rest on a series of conjectures, they cannot challenge that component of the project. Every plaintiff is currently covered by Medicaid, so the waiver would not affect them unless, in the future, they happened to become disenrolled from Medicaid and then re-enroll subject to the waiver. *See generally* Philbrick Decl., ECF No. 19-2; Ludders Decl., ECF No. 19-3; Karin VLK Decl., ECF No. 19-4; Joshua VLK Decl., ECF No. 19-5. Plaintiffs assert a fear of being disenrolled by failing to meet Granite Advantage's community-engagement requirements. *See* Pls.' Reply at 5. But they would be only be disenrolled for this reason if all of the following occur: they are subject to the community-engagement requirement; will fail to comply with it; will fail to receive a good-cause exemption or cure the deficiency; will fail to succeed in the administrative appeals process that is available (at which point their coverage would be suspended, not terminated); and then would continue to be considered out of compliance with the community-engagement requirement at the point of their annual redetermination of Medicaid eligibility. *See* AR 13–14; 26–28. Plaintiffs further theorize that they will need medical care during the hypothetical time that they are disenrolled from Medicaid. Such speculation about attenuated possibilities cannot satisfy Article III's injury-in-fact requirement, even if some plaintiffs may "suffer from chronic conditions that require regular visits to specialists and prescription medication."[7] Pls.' Reply 5; *see Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("The injury

[7] As explained in their opening brief, Defs.' Mem. 24 n.6, the federal defendants recognize this Court has previously found standing for challenges to demonstrations in their entirety where a plaintiff has demonstrated an injury-in-fact from just one of the demonstration's components. *See, e.g.*, *Stewart I*, 313 F. Supp. 3d at 251. However, the federal defendants respectfully disagree with this Court's application of Article III, and maintain that plaintiffs must establish standing for each project

requirement will not be satisfied simply because a chain of events can be hypothesized in which the action challenged eventually leads to actual injury."); *see also Nw. Airlines, Inc. v. FAA*, 795 F.2d 195, 201 (D.C. Cir. 1986).

In any case, even if the Court were to find that plaintiffs had standing to challenge the waiver of retroactive eligibility, the Secretary clearly explained how the waiver would promote coverage. He described how the waiver would target a recurring problem among Medicaid programs: when individuals who are Medicaid eligible and can enroll when healthy "wait until they are sick" to enroll. AR 5. To address this persistent and costly problem, the Secretary sought to test whether reducing retroactive eligibility will encourage these individuals "to obtain and maintain health coverage, even when healthy," and whether there will be a reduction in "gaps in coverage when beneficiaries churn on and off Medicaid or sign up for Medicaid only when sick." AR 5, 12. In doing so, the waiver seeks to enable New Hampshire to better contain Medicaid costs and more efficiently focus resources on providing accessible and high-quality health care. AR 13. The Secretary explained that this would help "in making New Hampshire's Medicaid program fiscally sustainable over time, better ensuring continued coverage of individuals and services for which coverage is optional under Medicaid." *Id.* In New Hampshire, such optional coverage includes not only the new adult population—which, as explained, the state has informed CMS it would no longer cover should CMS not approve the instant demonstration extension, AR 6—but also vision and dental services.

While the federal defendants do not dispute that waiving retroactive coverage by definition eliminates *some* coverage, the Secretary clearly explained that he is testing whether the waiver will promote coverage *overall*. Plaintiffs simply ignore this explanation. Instead, they insist that the Secretary

component they wish to challenge. *See, e.g., Lewis v. Casey*, 518 U.S. 343, 358 (1996) (plaintiff lacked standing to challenge, and court lacked power to enjoin, practices that "ha[d] not been found to have harmed any plaintiff in this lawsuit").

produce evidence of the waiver's success before the experiment has even begun—a demand inconsistent with the purpose of Section 1115. Pls.' Reply 21 (citing *Stewart II*, 366 F. Supp. 3d at 143*; Stewart I*, 313 F. Supp. 3d at 265; *Gresham*, 363 F. Supp. 3d at 179). And although plaintiffs assert the Secretary left "unexplained" why he approved the waiver given that HHS had previously conditioned the waiver on New Hampshire meeting certain requirements, Pls.' Reply 21, the Secretary clearly explained that he approved the waiver because he believed it would promote coverage. That explanation is sufficient. While this is a change in position, "there's nothing unusual about a new cabinet secretary coming to office inclined to favor a different policy direction." *In re Dep't of Commerce*, 139 S. Ct. 16, 17 (2018) (Gorsuch, J., concurring in part and dissenting in part); *cf. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part, dissenting in part) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."); *Doe 2 v. Shanahan*, 917 F.3d 694, 729 (D.C. Cir. 2019) (Williams, J., concurring in the result) ("[N]ew administrative interpretations following new presidential elections should provide a reason to think deference appropriate rather than the opposite." (quoting Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2378 (2001)).

**E. Plaintiffs' Other Record Based Arguments Rest On Incorrect Premises.**

Plaintiffs present a series of other record-based arguments, none of which are persuasive. To start with, they quibble with the details of the studies relied on by the Secretary, Pls.' Reply 24–25, but are unable to deny the correlation between community engagement and health. Indeed, the record is replete with evidence that employment and volunteering are associated with positive health outcomes:

- "Overall, the beneficial effects of work outweigh the risks of work, and are greater than the harmful effects of long-term unemployment or prolonged sickness absence." AR 4080.
- "A good-paying job makes it easier for workers to live in healthier neighborhoods, provide quality education for their children, secure child care services, and buy more nutritious

food—all of which affect health … . Higher earning also translates to a longer lifespan . . . ." AR 4031.

- "[E]mployment significantly reduces the risk of depression … ." AR 4011; *see also* AR 4057 ("volunteering leads to lower rates of depression for individuals 65 and older").

- "Several studies have [] looked specifically at the effects of volunteering on those with chronic or serious illness. These studies have found that when these patients volunteer, they receive benefits beyond what can be achieved through medical care." AR 4061.

- Volunteering improves access to psychological and social resources, which are found to have a positive effect on health; increases physical and cognitive activity; and releases hormones that regulate stress and inflammation. AR 3787.

- "[V]olunteers had a 20 percent lower risk of death than their peers who did not volunteer. The study also found that volunteers had lower levels of depression, increased life satisfaction and enhanced well-being." AR 4004.

The Secretary reasonably relied on this and other evidence in the record supporting the conclusion that work and volunteering are likely to promote health, and the Court should uphold that determination. *See Mississippi v. EPA*, 744 F.3d 1334, 1348 (D.C. Cir. 2013). ("[I]t is not [this Court's] job to referee battles among experts; [it] is only to evaluate the rationality of [the agency's] decision."). Plaintiffs demand additional evidence, showing that "work *requirements*" are correlated with such outcomes, Pls.' Reply 24 (emphasis in original), but that is precisely the purpose of approving Granite Advantage—to test whether "coupling the requirements for certain beneficiaries to engage in community engagement activities with certain meaningful incentives to encourage compliance" will lead to desired outcomes. AR 4.

Plaintiffs similarly complain that there is insufficient record evidence to conclude that Granite Advantage would promote fiscal sustainability for New Hampshire's Medicaid program, but their arguments likewise fall short. Pls.' Reply 22–24. The State's demonstration application explained that, in recent years, New Hampshire's individual marketplace "has seen substantial upward rate pressure due to the inclusion of those receiving Medicaid services," and that, as a solution, the demonstration would "result in substantial savings for federal taxpayers." AR 4377; *see also* AR 4378 (explaining that

the project would result in "better integrating cost control"). In turn, the Secretary recognized that demonstrations like Granite Advantage would "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." AR 2.

Plaintiffs disagree, and assert that Granite Advantage will fail. But their argument misunderstands both the nature of a demonstration project and the standard of review. The APA does not require unanimous support in the administrative record for an agency's decision to be upheld. It requires only a "rational connection between the facts found and the choice made," which, for the reasons explained, is plainly present here. *Kisser v. Cisneros*, 14 F.3d 615, 619 (D.C. Cir. 1994). And while it is true that if experiments like Granite Advantage prove successful, they may prompt Congress to enact similar requirements as part of the Medicaid statute—just as demonstration projects like the one at issue in *Aguayo* informed Congress's decision to make work requirements a permanent part of TANF—even if Granite Advantage does not accomplish its objectives, the findings still provide valuable data that can inform future action by Congress. Section 1115 "experiments are supposed to demonstrate the failings or success of such programs." *C.K.*, 92 F.3d at 187; *see also Aguayo*, 473 F.2d at 1103 (explaining that the Administrator may set "lower threshold for persuasion" when evaluating experimental project of limited duration). Thus, the mere prospect that the project could fail cannot possibly mean its approval was deficient.

Plaintiffs attempt to avoid these points by urging the Court to take a different approach than the Second and Third Circuits in *Aguayo* and *C.K.*, arguing that those decisions "do not engage in the 'searching' review of the record required under subsequently decided Supreme Court and D.C. Circuit precedent." Pls.' Reply 25. But plaintiffs do not explain how a "searching" assessment of the record could be appropriate in light of Congress's use of language that, even if it does not commit the issue to the Secretary's discretion entirely, indicates that the utmost deference is due to the

Secretary's determination that a proposed demonstration meets the Section 1115 standard. *See* Defs.' Mem. 11–12; *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 821 (D.C. Cir. 1983) ("[P]redictive judgments about areas that are within the agency's field of discretion and expertise" are entitled to "particularly deferential" treatment.).[8]

## III. ANY RELIEF SHOULD BE LIMITED TO THE FOUR PLAINTIFFS AND TO PROJECT COMPONENTS THAT BOTH HAVE INJURED PLAINTIFFS AND ARE FOUND DEFICIENT.

Should this Court issue relief against defendants, any such relief should be subject to two limitations. First, it should be limited to the plaintiffs before the Court. Although plaintiffs may be willing to take the risk that New Hampshire will end the optional adult expansion, other members of that population may reject that risk. More fundamentally, neither Article III nor principles of equity permit relief "more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) ("A plaintiff's remedy must be tailored to redress the plaintiff's particular injury."). "This rule applies with special force where," as here, "there is no class certification." *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011). Indeed, plaintiffs pled this case as a putative class action and had an chance to seek class certification, *see* Fed. R. Civ. P. 23, but chose not to do so. That was their choice to make, but, their having made it, any injunction must "be limited to the inadequacy that produced the injury in fact" with respect to the plaintiffs. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996).

The fact that plaintiffs have raised claims under the APA does not change this result, as the APA preserves all ordinary principles of equity. *See* 5 U.S.C. § 702(1) ("Nothing herein affects . . . the

[8] This Court concluded in *Stewart II* that the Secretary was required to "estimate the number of people who will gain employment and move onto commercial coverage or otherwise attain financial independence," and to make a specific finding regarding "the savings that [the demonstration] could be expected to yield." 366 F. Supp. 3d at 147, 150. The federal defendants respectfully disagree that such an estimate is required under the APA or even feasible. *See* Defs.' Mem. 27 n.9.

power or duty of the court to . . . deny relief on any other appropriate legal or equitable ground[.]"); *see also id.* § 703. The equitable remedies permitted by the APA are discretionary, *see Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), and there is no equitable reason to disrupt the statewide implementation of Granite Advantage and thus jeopardize the expansion coverage for tens of thousands of individuals who are not before this Court. Nor does the APA's text permit, let alone require, relief beyond what is necessary to redress a plaintiff's own cognizable injuries. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) ("No statute expressly grants district courts the power to issue universal injunctions."); *see also Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664-65 (9th Cir. 2011) (vacating district court's grant of nationwide injunction in APA case); *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d379, 383 (4th Cir. 2001) (same).

The text of 5 U.S.C. § 706(2) also does not support plaintiffs' position that the Secretary's approval, if found deficient and meriting vacatur, should be "set aside" *on its face* rather than *as applied to the plaintiffs*. To the contrary, absent a statutory provision specifically authorizing review of the entire program, the application of the program to the plaintiffs would be the only proper ripe subject of review, *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990), and thus the outer limit of any relief. Likewise, in the absence of a clear and unequivocal statement in the APA that it displaces traditional rules of equity, the Court should construe the "set aside" language in section 706(2) as applying only to the Plaintiffs to this lawsuit. Plaintiffs' citations to non-binding district court decisions, *see* Pls.' Reply 32, and to a D.C. Circuit opinion that predates more recent Supreme Court jurisprudence on the matter, *see, e.g.*, *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998), do not change these conclusions.

Second, as set forth in the federal defendants' opening brief, Defs.' Mem. 28–29, the Court should also limit any relief to the particular component(s) of Granite Advantage that it finds have caused the plaintiffs' injury in fact and as to which they have raised a valid legal objection. *See Lewis*,

518 U.S. at 357–358 (plaintiff lacked standing to challenge, and court lacked power to enjoin, practices that "ha[d not been found to have harmed any plaintiff in this lawsuit"). The Supreme Court has emphasized that courts "have no business answering" questions about the validity of provisions that concern only "the rights and obligations of parties not before the Court," *Printz v. United States*, 521 U.S. 898, 935 (1997); *see also Murphy v. NCAA*, 138 S. Ct. 1461, 1485-87 (2018) (Thomas, J., concurring), and project components that injure only non-parties are not within the proper scope of the Court's remedial discretion.

This is not to say that *the Secretary* considers demonstration projects on a piecemeal basis. To the contrary, he considers demonstrations as a whole in determining which (if any) parts to approve and in turn which statutory requirements to waive under 42 U.S.C. § 1315(a). But, as previously stated, *see* Defs.' Mem. 29, that has no bearing on the constitutional and equitable limits on the authority of *a court* to grant relief beyond what is necessary to redress the plaintiffs' injuries, and provides no basis for the Court to issue relief regarding components not shown to injure any plaintiff. Thus, if a project component that causes a plaintiff injury is ruled invalid, the appropriate course would be to so declare and then remand to the agency so that the Secretary may determine how to proceed. In such event, the remand should be without vacatur. *See, e.g., Defs. of Wildlife v. Jackson*, 791 F. Supp. 2d 96, 118–19 (D.D.C. 2011) (mem.).[9]

## IV. PLAINTIFFS' CHALLENGE TO CMS'S LETTER TO STATE MEDICAID DIRECTORS IS NON-JUSTICIABLE AND MERITLESS.

As explained earlier, the State Medicaid Directors letter challenged by plaintiffs had no legal effect; the Secretary's approval of Granite Advantage did not turn on the letter; and plaintiffs cannot

[9] As mentioned in their opening brief, *see* Defs.' Mem. 29 n.11, the federal defendants recognize that in *Stewart I* and *Stewart II*, this Court vacated Kentucky HEALTH in its entirety and, in *Gresham*, the Court likewise vacated the amendments to Arkansas Works in their entirety. The federal defendants respectfully disagree with the remedies issued by this Court in those cases.

show that the letter caused their asserted injuries. Thus, they cannot challenge the letter even in the context of a challenge to Granite Advantage.

The letter is also not final agency action. Far from creating a binding rule, the letter announces CMS's support for demonstration projects with community-engagement components, stating that "a spectrum of additional work incentives, including those discussed in this letter," could further the aims of Medicaid, that "applications will be reviewed on a case-by-case basis," and that CMS "will evaluate each demonstration project application on its own merits." AR 59–60. This is a textbook example of non-final guidance in the form of "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666 (D.C. Cir. 1978) (internal citation omitted). Nor does the letter bind the agency. Nowhere does the letter state that certain projects will certainly be approved, and CMS remains free to approve or reject demonstration projects that propose work and community engagement requirements on a case-by-case basis. *See* AR 57–65. *See also Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014) (no binding effect where "States and permit applicants may ignore the Final Guidance without suffering any legal penalties or disabilities, and permit applicants ultimately may be able to obtain permits even if they do not meet the recommendations" in the guidance).

Finally, even if the letter could be deemed final agency action, it easily satisfies review on the merits. As a general statement of policy exempt from notice-and-comment procedures, the letter merely (1) "announc[ed] a new policy" to "support state efforts to test incentives that make participation in … community engagement a requirement for continued Medicaid eligibility or coverage for certain adult Medicaid beneficiaries in demonstration projects" and (2) "describe[d] considerations for states that may be interested in pursuing demonstration projects" that seek for "Medicaid beneficiaries to participate in work and community engagement activities." AR 57. *See Nat'l*

*Min. Ass'n*, 758 F.3d at 251. Further, the letter offered a "reasoned explanation" for the agency's policy shift towards supporting Medicaid demonstration projects with community-engagement components, thus plainly surviving arbitrary-and-capricious review. *See FCC v. Fox Television Stations*, 556 U.S. 502, 515–16 (2009). The letter describes the agency's policy view that it would be better to support demonstration projects that will help it determine whether community-engagement programs lead to better health outcomes, and provides reasoning to support this conclusion, including by relying on multiple studies that demonstrate a correlation between productive work and community engagement and positive health outcomes. *See* AR 57; *N. Am.'s Bldg. Trades Unions v. OSHA*, 878 F.3d 271, 303 (D.C. Cir. 2017). The agency's "reevaluation" of its policy, as supported by these scientific studies, "is well within [its] discretion." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032,1038 (D.C. Cir. 2012).

## V. THE TAKE CARE CLAUSE PROVIDES NO BASIS FOR RELIEF.

Nothing in the Take Care Clause authorizes a court to manage how federal officers implement the law or carry out Presidential directives, if those officers' actions are otherwise lawful, as they are here for all the reasons discussed above. The Clause applies to the President alone, and not to anyone else. Both *Printz v. United States*, 521 U.S. 898, 922 (1997), and *Util. Air*, 134 S. Ct. at 2446, stand for the unremarkable proposition that the President at times discharges his Take Care Clause duties by instructing his subordinates as to how they should perform their statutory responsibilities. Neither case, however, supports the notion that the Clause creates a cause of action against federal officers, or that such a cause of action would add anything to the remedies that plaintiffs already have against federal officers.

## CONCLUSION

For the foregoing reasons, the Court should dismiss plaintiffs' complaint or, in the alternative, grant summary judgment to the federal defendants.

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