[NOT SCHEDULED FOR ORAL ARGUMENT]

Nos. 19-5094 & 19-5096 (Gresham); Nos. 19-5095 & 19-5097 (Stewart)

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

CHARLES GRESHAM, et al.,
Plaintiffs-Appellees
v.
ALEX M. AZAR II, Secretary of Health & Human Services, et al.,
Defendants-Appellants

STATE OF ARKANSAS,
Intervenor-Defendant-Appellant

RONNIE MAURICE STEWART, et al.,
Plaintiffs-Appellees
v.
ALEX M. AZAR II, Secretary of Health & Human Services, et al.,
Defendants-Appellants

COMMONWEALTH OF KENTUCKY,
Intervenor-Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE FEDERAL APPELLANTS

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GLOSSARY

ACA	Patient Protection and Affordable Care Act
AFDC	Aid to Families with Dependent Children
APA	Administrative Procedure Act
HHS	U.S. Department of Health & Human Services
SNAP	Supplemental Nutrition Assistance Program
TANF	Temporary Assistance for Needy Families

INTRODUCTION

As our opening brief explained, the adult-eligibility expansion authorized by the Patient Protection and Affordable Care Act (ACA) for the first time brought large numbers of working-age, nondisabled adults into state Medicaid programs. The state demonstrations at issue here test work and work-related requirements for these newly eligible adults, with exemptions for (among others) persons who are medically frail, experiencing an acute medical condition, or full-time students. The requirements are modeled on similar requirements that, since 1996, have been a part of the Temporary Assistance for Needy Families (TANF) program and the Supplemental Nutrition Assistance Program (SNAP), and, like those statutory requirements, they are tailored to apply only to those adults who can reasonably be expected to fulfill them. If the demonstrations prove successful, they will help able-bodied adults transition to financial independence and commercial coverage, thus preserving scarce Medicaid resources for other needy persons. In addition, they will improve the health of Medicaid beneficiaries, which reduces program expenses and likewise conserves scarce resources.

Plaintiffs' response to this showing is more notable for what it omits than for what it says. Plaintiffs declare that the demonstrations are "ham-handed attempts at cutting costs by restricting access and cutting services" rather than legitimate experiments. Pl. Br. 51. They assert that, by approving the demonstrations, the Secretary "effectively rewrote the Medicaid Act by regulatory fiat" and "overturned a

half-century of administrative practice." Pl. Br. 1. But plaintiffs make little attempt to square these pronouncements with the actual features of the demonstrations or the historical exercise of the Section 1115 authority.

Although plaintiffs describe the demonstrations as a radical departure from past administrative practice, they do not dispute that the work requirements of TANF and SNAP were themselves informed by demonstrations under the Aid for Families with Dependent Children (AFDC) program. Indeed, Kentucky notes that 27 States had such AFDC waivers, and "these pre-1996 waivers were a major reason why policymakers supported work-oriented welfare reform in the 1990s." Kentucky Br. 20 (quoting Rebecca M. Blank, *Evaluating Welfare Reform in the United States*, 40 J. of Econ. Literature 1105, 1106, 1122 (Dec. 2002)). Judge Friendly's decision in *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973)—which upheld such an AFDC waiver—is the seminal case on the scope of the Section 1115 authority, yet plaintiffs do not cite *Aguayo* in their brief.

Nor do plaintiffs argue that work requirements are inherently incompatible with Medicaid. On the contrary, they acknowledge that the Medicaid statute allows States to terminate the medical assistance of adults who fail to comply with the TANF work requirements. Pl. Br. 32. Plaintiffs do not suggest that the characteristics of the adults who are subject to the demonstrations make them less suited to perform work and related activities than the adults subject to the requirements of TANF and SNAP.

At bottom, plaintiffs believe that it is poor policy to require any welfare recipient to engage in the activities mandated by TANF and SNAP. Plaintiffs rely on literature critical of those statutory requirements, and argue that the similar requirements of the demonstrations cannot succeed. Their quarrel is with Congress. Consistent with Congress's judgment, the Department of Health & Human Services (HHS) reasonably determined that the potential benefits of the demonstrations outweigh the risks that coverage will be lost due to noncompliance. Although plaintiffs describe the demonstrations as "benefit cuts," Pl. Br. 37, the conditions are no more "benefit cuts" than any other condition that beneficiaries must satisfy. And, as HHS emphasized, the demonstrations are tailored to minimize coverage losses due to noncompliance.

The Secretary thus had ample basis to conclude that the demonstrations are "likely to assist" in promoting Medicaid's objectives, 42 U.S.C. § 1315(a). That standard is not onerous, because the purpose of a demonstration is to test a hypothesis and thereby inform future policy. Moreover, in considering the potential impact on coverage, HHS properly took into account the fact that the coverage at issue here is optional. Plaintiffs are quite wrong to argue that the optional nature of their coverage was not a permissible consideration. Their contention that States that elect to participate in the ACA's expansion thereby forfeit the prerogative to opt out, *see* Pl. Br. 35-36, is flatly at odds with the holding of *National Federation of Independent*

Business v. Sebelius, 567 U.S. 519, 585 (2012) (*NFIB*), and HHS's express assurances that States "have flexibility to start *or stop* the expansion," HHS, Centers for Medicare & Medicaid Services, *Frequently Asked Questions on Exchanges, Market Reforms, and Medicaid* 11 (Dec. 10, 2012) (2012 HHS Guidance) (emphasis added).[1]

ARGUMENT

I. HHS Acted Within Its Section 1115 Authority In Approving The Demonstrations Proposed By Kentucky and Arkansas.

A. Section 1115 Waivers Have Long Been Used To Test Innovations In Public-Welfare Programs.

Section 1115 authorizes HHS to approve a demonstration that, "in the judgment of the Secretary," is "likely to assist" in promoting the program's objectives, and to waive compliance with program requirements "to the extent and for the period he finds necessary" to enable a State to carry out the demonstration. 42 U.S.C. § 1315(a). Approval of the demonstrations at issue here has not in any sense "overturned a half-century of administrative practice." Pl. Br. 1. The purpose of the Section 1115 authority is to allow States "to test out new ideas and ways of dealing with the problems of public welfare recipients," S. Rep. No. 87-1589, at 19 (1962), and such waivers have long been used to test innovations in public-welfare programs.

[1] https://go.usa.gov/xmN4j

For example, before the 1996 welfare reform legislation was enacted, 27 States had AFDC waivers that required recipients to work, and "these pre-1996 waivers were a major reason why policymakers supported work-oriented welfare reform in the 1990s." Blank, *supra*, at 1106, 1122. Moreover, the ACA's Medicaid expansion was itself the offspring of Section 1115 waivers that allowed States to provide coverage to expansion populations—the expense of which was often financed by reduced benefits and/or increased cost sharing for Medicaid beneficiaries. Jonathan R. Bolton, *The Case of the Disappearing Statute: A Legal & Policy Critique of the Use of Section 1115 Waivers to Restructure the Medicaid Program*, 37 Colum. J.L. & Soc. Probs. 91, 102 (2003) (cited in *Stewart v. Azar*, 366 F. Supp. 3d 125, 138 (D.D.C. 2019) (*Stewart II*).

Under plaintiffs' reasoning, it is difficult to see how those formative AFDC and Medicaid demonstrations could have gotten off the ground. Indeed, the pre-ACA Medicaid waivers were criticized in terms similar to those used by plaintiffs here. *See* Bolton, *supra*, at 108 (quoting 2002 testimony before Congress that characterized the pre-ACA waivers as a "wholesale restructuring of Medicaid" not "contemplated when the 1115 waiver system was created by Congress"). Congress, however, did not accept such characterizations of the waivers or otherwise curtail the Secretary's Section 1115 authority. The ACA's amendments to Section 1115 retained the broad delegation of authority and confirmed that demonstrations may "result in an impact on eligibility, enrollment, benefits, cost-sharing, or financing." ACA § 10201(i).

Nor is there any requirement that a demonstration be supported by "record evidence" before it can be approved. Pl. Br. 25. The purpose of a demonstration is to gather data that can be used to inform national policy. Thus, the Third Circuit emphasized, even unsuccessful demonstrations can be useful, because "experiments are supposed to demonstrate the failings or success of such programs." *C.K. v. New Jersey Dep't of Health & Human Servs.*, 92 F.3d 171, 187 (3d Cir. 1996). Assuming *arguendo* that Section 1115's grant of authority leaves room for judicial review, the only question is "whether the Secretary had a rational basis for determining that the programs were 'likely to assist in promoting the objectives'" of the statute. *Aguayo*, 473 F.3d at 1105. As Judge Friendly explained, it is "legitimate for an administrator to set a lower threshold for persuasion when he is asked to approve a program that is avowedly experimental and has a fixed termination date." *Id.* at 1103.

Plaintiffs do not take issue with these precedents; indeed, they decline to cite them. Some amici implicitly criticize these precedents (without citing them), asserting that Section 1115 was meant to allow only research that is "narrow, technical, and beneficent." Deans, Chairs, and Scholars Br. 5. But as Judge Friendly emphasized, the statutory text shows that "the only limitation imposed on the Secretary was that he must judge the project to be 'likely to assist in promoting the objectives' of the designated parts of the Social Security Act." *Aguayo*, 473 F.3d at 1105.

Although plaintiffs refer derisively to the Secretary's "paper-thin reasoning," Pl. Br. 3, they do not dispute that the reasoning here is considerably more extensive than in prior approvals of Medicaid demonstrations. Section 1115 does not require HHS to set out its reasons for approving a demonstration. To increase transparency, the ACA amended Section 1115 by requiring two opportunities for public comment on a proposed demonstration (one at the state level and one at the federal level). ACA § 10201(i). The ACA did not direct HHS to address the comments, however, and the implementing regulations—which are unchallenged—provide that HHS "will review and consider" comments on proposed demonstrations but "will *not* provide written responses to public comments." 42 C.F.R. § 431.416(d)(2) (emphasis added).

Accordingly, HHS gave little explanation for its 2015 approval of a demonstration that allowed Indiana to charge premiums to Medicaid recipients; restrict their free choice of providers; limit coverage of non-emergency medical transportation; charge copayments for non-emergency use of the emergency department; and limit retroactive eligibility. *See* JA __-__ [ECF 51-8 at 7-8]. And HHS gave essentially no explanation for approving other Medicaid demonstrations between 2012 and 2015. *See* JA __-__ [ECF 51-4 at 2-5] (2012 approval of a Kansas demonstration); JA __-__ [ECF 51-7 at 4-6] (2015 approval of a Montana demonstration); JA __-__ [ECF 51-10 at 2-3] (2013 approval of a Wisconsin demonstration).

Although plaintiffs do not discuss these prior approvals, plaintiffs suggest that they were procedurally infirm under the APA for failing to include a statement of reasons. *See* Pl. Br. 21 n.1. That is incorrect. Although the APA requires an agency to provide a statement of the basis and purpose of a rule, *see* 5 U.S.C. § 553(c), the approval of a demonstration is not a rulemaking, and a court may not add to the procedural requirements of the APA, *see Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 544, 549 (1978).

B. HHS Reasonably Determined That The Demonstrations Are Likely To Enable The States To Stretch Limited Resources And Thereby Extend Or Preserve Coverage.

1. Stretching state resources furthers Medicaid's objectives.

There should be no doubt that "the Secretary had a rational basis for determining" that the demonstrations at issue here are "likely to assist in promoting the objectives" of the Medicaid statute. *Aguayo*, 473 F.3d at 1105. HHS determined that the work and work-related requirements of the Kentucky and Arkansas demonstrations may enable adults to transition out of Medicaid to financial independence and commercial coverage, including the subsidized coverage that is available on the ACA's Exchanges. KY AR 6724-25; Ark. AR 2. Such transitions conserve finite state resources and free up funds that can be used to serve other needy

persons, including by expanding or maintaining coverage for optional populations and optional services. KY AR 6719-20; Ark. AR 2057.[2]

Plaintiffs do not dispute that freeing up state resources in this manner would further the objectives of the Medicaid program. They declare that a demonstration would not serve the program's objectives if it simply "cut Medicaid costs" by "slashing eligibility or reducing benefits," Br. 33, but that is not what the Kentucky and Arkansas demonstrations do. Instead, they require able-bodied, working-age beneficiaries to engage in work or other activities that enhance their employability, such as education, job-skills training, and community service. Everyone who complies with these requirements will continue to receive benefits under the demonstrations. And if the demonstrations achieve their goals, a significant number

[2] Plaintiffs incorrectly state (Br. 49 n.10) that HHS did not consider these points in approving the Arkansas demonstration. HHS's approval letter explained that the Arkansas demonstration attempts to facilitate transitions between and among Arkansas Works, employer-sponsored insurance, and the Arkansas Marketplace, *i.e.*, the Exchange. Ark. AR 2. And Arkansas's underlying application explained that the amendments to its demonstration are designed to "increase the sustainability of the Arkansas Works program," "test innovative approaches to promoting personal responsibility and work," "encourag[e] movement up the economic ladder, and facilitat[e] transitions from Arkansas Works to employer-sponsored insurance and Marketplace coverage." Ark. AR 2057. Moreover, assuming elaboration on these points was needed, HHS elaborated when it approved the Kentucky demonstration. Thus, any failure to do so in the context of the Arkansas approval was harmless. Indeed, the district court did not suggest that it would have halted the ongoing Arkansas demonstration if it had upheld HHS's approval of the Kentucky demonstration.

of Medicaid beneficiaries will transition to financial independence and commercial coverage, thus enabling the States to stretch their limited resources.

It is well established that States may "attempt to promote self-reliance and civic responsibility" in order "to assure that limited state welfare funds be spent on behalf of those genuinely incapacitated and most in need." *New York State Dep't. of Soc. Servs. v. Dublino*, 413 U.S. 405, 413 (1973). As Judge Friendly noted, "common sense would lead to that conclusion" even if it were not reflected in statutory text. *Aguayo*, 473 F.2d at 1104. In fact, the Medicaid statute recognizes the imperative of stretching limited state resources. It appropriates "[f]or the purpose of enabling each State, *as far as practicable under the conditions in such State*, to furnish" medical assistance to needy individuals. 42 U.S.C. § 1396-1 (emphasis added). Congress thus recognized that state spending on Medicaid is constrained by the practicalities of limited budgets and competing priorities.

It is therefore unsurprising that this Court and the Supreme Court have concluded that Medicaid's objectives are served by requirements that enable States to conserve limited Medicaid funds. *See Pharmaceutical Research & Mfrs. of Am. v. Thompson*, 362 F.3d 817 (D.C. Cir. 2004); *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003). The value of stretching limited state resources is especially evident for Medicaid, where most state spending is for optional populations and optional benefits. In 2007, for example, optional coverage accounted for 60% of

all Medicaid spending. *See* Kaiser Comm'n on Medicaid & the Uninsured, *Medicaid Enrollment and Expenditures by Federal Core Requirements and State Options* 1 & app. B, tbl. 1 at 17 (Jan. 1, 2012).[3] In addition, coverage of the ACA's adult expansion population became optional as the result of the Supreme Court's decision in *NFIB*. *See infra,* p.20. And even with respect to mandatory coverage, the Medicaid statute gives States substantial discretion to set limits on the amount, scope and duration of coverage, as long as the care and services are provided in the best interests of the beneficiaries. *See Alexander v. Choate*, 469 U.S. 287, 303 (1985).[4]

Contrary to plaintiffs' suggestion (Br. 50), the issue is not whether Kentucky or Arkansas is confronting an immediate fiscal crisis that would require the elimination of particular benefits if the demonstrations were not approved. The issue is whether the conservation of scarce resources can help to expand or preserve coverage in the long term—which unquestionably promotes the Medicaid program's objectives—and the Secretary reasonably determined that it would. *See, e.g.*, KY AR 6720 (noting that Kentucky covers optional populations such as the medically needy, lawfully residing

[3] https://www.kff.org/wp-content/uploads/2013/01/8239.pdf

[4] Because most state spending on Medicaid is optional, plaintiffs' assertion that the "as far as practicable" language in 42 U.S.C. § 1396-1 "is easily understood as directing states to maximize their medical assistance efforts," Pl. Br. 33 n.4, is clearly incorrect. The district court did not accept that argument, nor has any other court suggested that a State could be directed to maximize its Medicaid spending at the expense of other state programs.

immigrant children under age 19, and the ACA's adult expansion group, and covers optional services such as over-the-counter drugs, vision benefits, and dental benefits).[5]

2. Plaintiffs' critiques of the work requirements of TANF and SNAP are contrary to Congress's judgment.

Plaintiffs' central contention is that the demonstrations will fail to help beneficiaries transition to financial independence and commercial coverage. Their argument relies heavily on critiques of the longstanding work and work-related requirements in TANF and SNAP. For example, plaintiffs rely (Br. 47) on a comment before HHS that purported to describe "[r]esearch on the trajectory of TANF recipients after welfare reform." KY AR 12792. That comment stated that this research "suggests that despite extensive work effort . . . job instability and limited upward mobility (i.e. transitions to good jobs) characterized the employment experiences of most respondents." *Id.* (quotation marks omitted). Similarly, amici assert that a "large body of evidence" shows "the catastrophic impact of work requirements seen in programs such as cash assistance of TANF." Deans, Chairs, and Scholars Br. 25.

[5] *See also* https://go.usa.gov/xyETb (listing optional services covered by the Arkansas Medicaid program); https://ardhs.sharepointsite.net/DHSPolicy/DCOPublishedPolicy/Section%20O-100%20Medically%20Needy%20Program.pdf (describing optional coverage of the medically needy population in Arkansas).

The literature on which plaintiffs rely has not persuaded Congress to repeal the work and work-related requirements in TANF and SNAP, which have been a part of those programs for more than two decades. *See* 42 U.S.C. § 607 (TANF) ("Mandatory work requirements"); 7 U.S.C. § 2015(o)(2) (SNAP) ("Work requirement"). On the contrary, Congress strengthened the requirements in TANF by effectively increasing the work participation rate that States had to achieve and requiring the Secretary and States to improve the verification and oversight of recipients' work participation. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7102(c), 120 Stat. 4, 136 (2006). Moreover, even critics of the policies acknowledge that the evidence is mixed. *See, e.g.*, Urban Institute, *Work Requirements in Social Safety Net Programs: A Status Report of Work Requirements in TANF, SNAP, Housing Assistance, and Medicaid* (Dec. 2017) (KY AR 4709) (stating that "despite mixed evidence, work requirements are rationalized as a means to alleviate poverty through income from work"); Pl. Br. 49 (acknowledging that there is "disagreement about the extent to which the enactment of TANF, as opposed to 'general economic trends,' led to an increase in work post-1996").

Plaintiffs' only response is to declare that "the purposes of SNAP and TANF are fundamentally different from the purposes of Medicaid," and to assert that "[a]ny judgment Congress made about work requirements in TANF and SNAP is simply irrelevant for Medicaid." Pl. Br. 48. But plaintiffs themselves have made the critique

of the TANF and SNAP work requirements the centerpiece of their argument. They argue that those statutory requirements have been counterproductive, and they predict that the similar requirements of the demonstrations will not help able-bodied adults transition to financial independence and commercial coverage. Congress, however, has not accepted their empirical assessment. For more than twenty years, Congress has left the TANF and SNAP requirements in place and, indeed, strengthened them. HHS's evaluation of similar requirements in Medicaid demonstrations thus accords with Congress's judgment. And the very purpose of the demonstrations is to test a hypothesis, which does not have to be proven before the experiments can be approved.

Plaintiffs cannot plausibly contend that work requirements are antithetical to Medicaid, or that the Medicaid statute impliedly precludes the Secretary from testing such requirements through a Section 1115 demonstration project. As our opening brief explained, the Medicaid statute itself incorporates the TANF work requirements, by allowing States to terminate the Medicaid benefits of certain adults who fail to comply with the TANF work requirements. *See* 42 U.S.C. § 1396u-1(b)(3). Contrary to plaintiffs' assertion, section 1396u-1 was not necessary "to ensure that the two programs do not conflict." Pl. Br. 32. The two programs could readily have operated in parallel. Nonetheless, as part of the 1996 welfare reform legislation, Congress allowed States to make compliance with the TANF work requirements a condition of

Medicaid benefits, and that provision has been in place ever since. And even if plaintiffs were correct that the demonstrations at issue here, "for the first time, require individuals to meet a work requirement to maintain eligibility for medical assistance," Br. 1, that would not preclude the agency from testing such requirements as part of a Section 1115 demonstration. On the contrary, the point of Section 1115 is to encourage innovation in public-welfare programs.

3. Like the requirements of TANF and SNAP, the demonstrations are tailored to allow those adults who are subject to them to fulfill them.

Plaintiffs declare that section 1396u-1 "does not give the Secretary carte blanche to import the TANF objectives into the Medicaid program." Br. 32. The Secretary has not done so. The demonstrations are time-limited state experiments, not federal regulations. The experiments do not apply to the "65 million low-income individuals" who receive Medicaid, Pl. Br. 1, but to a particular subset.

Plaintiffs do not argue that the characteristics of the adults who are subject to the demonstrations make them less suited to perform work or work-related activities than the adults subject to the similar requirements of TANF and SNAP. The adults who are subject to the demonstrations are overwhelmingly members of the ACA's adult-expansion population, which means they are not receiving Medicaid on the basis of disability, advanced age, blindness, pregnancy, or as parents of dependent children. Moreover, the demonstrations provide additional exemptions for (among others)

persons who are medically frail, experiencing an acute medical condition, or full-time students. Although amici suggest that the term "medically frail" is "troublingly vague," American Academy of Pediatrics Br. 10, "medically frail" is a defined term that is used in other Medicaid exemptions, *see* 42 C.F.R. § 440.315(f), and in prior demonstrations.[6] That term includes individuals with disabling mental conditions, chronic substance-use disorders, serious medical conditions, or a disability that significantly impairs their ability to perform one or more activities of daily living, *see id.*, so the exemption addresses the concerns raised by amici.

Moreover, although plaintiffs describe the demonstrations as imposing "work requirements," Pl. Br. 2, their requirements can be met through activities that include education, job-skills training, and volunteering. Insofar as Medicaid beneficiaries are "disproportionately unskilled and less-educated," American Academy of Pediatrics Br. 10, one purpose of the demonstrations is to address that concern.

With notable understatement, plaintiffs concede that "volunteer experience makes it easier to find a job and having a high school diploma leads to higher earnings," Pl. Br. 48—both points the district court overlooked. In fact, one study found that "volunteering increased the chances of employment by 51% among individuals without a high school diploma, and by 55% among individuals living in

[6] *See, e.g.*, https://go.usa.gov/xmNDx (2016 approval of Arizona demonstration)

rural areas." KY AR 25513. And it is "well understood that increased education is directly associated with higher wages." KY AR 25519. In Kentucky, for example, there is a 33% difference in median annual earnings between individuals with and without high school diplomas. *Id.* To encourage adults in the demonstration to improve their education, participation in Kentucky's free General Educational Development certification exam prep classes available in every county will count as a credit towards the work and work-related requirements. *Id.*

Plaintiffs express doubt that such investments in education, community service, and job-skills training can help lift able-bodied, working-age adults out of poverty and into coverage on the Exchanges. Pl. Br. 49. But even critics of the demonstrations acknowledged that "additional information is needed" to evaluate the impact of such policies. KY AR 4731 (Urban Institute).

Obtaining such additional information is, of course, the purpose of the Section 1115 experiments. For example, Kentucky's application identified as a "Hypothesis" the proposition that the demonstration's policies "will encourage members to earn employment and ultimately transition to commercial health insurance coverage," and indicated that the demonstration will "[t]rack [the] number of individuals successfully transitioning to commercial health insurance coverage." KY AR 25598. Similarly, Arkansas indicated that its previous voluntary-work referral program had proven ineffective: only 4.7% of Medicaid beneficiaries followed

through with the referral and took advantage of the programs that the Arkansas Department of Workforce Services provides to assist individuals in gaining employment, even though 23% of those who took advantage of the referral became employed. Ark. AR 4. Arkansas thus amended its demonstration "to test whether the stronger incentive model is more effective in encouraging participation." Ark. AR 5. Even if the results of these experiments ultimately prove disappointing, that would not undermine HHS's judgment that their features are worth testing.

4. HHS properly weighed the benefits of the demonstrations against the risk of coverage loss due to noncompliance.

HHS's approval letters leave no doubt that the agency weighed the anticipated benefits of the demonstrations against the risk that coverage would be lost due to noncompliance. Plaintiffs' assertion that HHS engaged in a "stunted decision-making process" and an "ostrich-like adjudication," Br. 3, is colorful but inaccurate.

After multiple rounds of public comment, HHS recognized that "some individuals may choose not to comply with the conditions of eligibility imposed by the demonstration, and therefore may lose coverage." KY AR 6729. HHS emphasized, however, that "the goal of these policies is to incentivize compliance, not reduce coverage," and that the demonstrations are "designed to make compliance" with their "requirements achievable." KY AR 6727; Ark. AR 5, 6-7. Like the TANF and SNAP requirements on which the demonstrations are modeled, the Kentucky and Arkansas requirements apply only to those working-age, nondisabled adults who reasonably can

be expected to fulfill them. No "massive coverage loss" was "obvious from the face of the proposals." Pl. Br. 4.

Nor did "Kentucky's own application concede[]" that there would be a massive coverage loss due to noncompliance. Pl. Br. 4. As HHS explained, the reductions in coverage projected in Kentucky's budget-neutrality worksheet—a 5% decrease in the total member months covered over the five-year duration of the demonstration—reflected a number of factors "including beneficiaries transitioning to commercial coverage." KY AR 6731. Moreover, those projections "were made prior to the inclusion of changes made to the demonstration at approval, including additional beneficiary guardrails expected to help beneficiaries maintain enrollment." *Id.* As Kentucky explains (Br. 47-49), those additional protections were significant. For example, noncompliance with the work and work-related requirements is excused if the beneficiary submits a statement from a physician indicating the beneficiary has an acute medical condition that would prevent compliance. Kentucky Br. 47. In addition, Medicaid beneficiaries who are exempt from the work and work-related requirements of SNAP or TANF are automatically deemed to satisfy the requirements of the demonstration. *See id.* at 48. As Kentucky notes (Br. 49 n.9), it informally projected that this SNAP/TANF exemption would exclude an additional 60,000 beneficiaries from the demonstration's work and work-related requirements.

In considering the effects that the demonstrations may have on coverage, HHS properly took into account the fact that the coverage at issue here is optional. Plaintiffs implicitly concede that all of the individuals before this Court are members of the ACA's adult-expansion population. Like the adults who received coverage under the pre-ACA demonstration at issue in *Spry v. Thompson*, 487 F.3d 1272, 1276 (9th Cir. 2007), members of the ACA's adult-expansion population are not "made worse off" by the requirements of the Kentucky and Arkansas demonstrations, because the States are not required to provide this coverage at all.

Plaintiffs incorrectly contend that their coverage is not optional. They argue that States that elect to opt into the ACA expansion thereby forfeit the prerogative to opt out. Br. 35-36. In *NFIB*, however, the Supreme Court held that HHS cannot "withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion." 567 U.S. at 585. That is what it means for Medicaid coverage to be optional.[7] Accordingly, in 2012, when many States were deciding whether to expand their Medicaid programs, HHS assured the States that they would "have flexibility to start *or stop* the expansion." 2012 HHS Guidance 11 (emphasis added); *see also id.* at 12 ("A state may choose whether and when to expand, and, if a state covers the expansion group, *it may decide later to drop the coverage*.") (emphasis added);

[7] *See NFIB*, 567 U.S. at 690 (Scalia, J., dissenting) (noting that the Court adopted the government's proposed remedy by "mak[ing] the Medicaid Expansion optional").

Letter from CMS Administrator Cindy Mann to Arkansas Governor Mike Beebe (Aug. 31, 2012) (JA __) [ECF 107-1] (same).

It is eminently reasonable for HHS to consider the optional nature of the affected population in determining whether a demonstration is likely to assist in promoting coverage. Whereas the Supreme Court concluded as a factual matter that States are not likely to eliminate mandatory coverage and thus end their participation in Medicaid entirely, it is entirely plausible that States may reduce or eliminate optional coverage. Accordingly, if HHS were to disregard the optional nature of the population affected by a demonstration, it would risk making the beneficiaries worse off. Nothing in Section 1115 prohibits the Secretary from taking that risk into account.

Plaintiffs are equally wide of the mark in urging that the difficulties encountered during the rollout of the Arkansas demonstration should have counseled against approval of the Kentucky demonstration. Pl. Br. 4, 22. By plaintiffs' own account, Arkansas' online-only reporting system was "difficult, and for some impossible, due to lack of internet access, trouble using computers, and problems working with the online portal." JA __ ¶ 135 (*Gresham* complaint). As the district court emphasized, only 12.3% of non-exempted persons in Arkansas reported *any* qualifying activity. *Gresham v. Azar*, 363 F. Supp. 3d 165, 172 (D.D.C. 2019). That very low reporting rate suggested a problem with the reporting system rather than

with the underlying requirements. Indeed, one of the comments on which plaintiffs rely (Br. 22) urged that few Arkansas enrollees "were able to navigate the complex reporting system and satisfy the reporting requirement" and urged HHS to consider "lack of access to the internet" in evaluating the Kentucky application. KY AR 13558 (American Cancer Society Cancer Action Network).

Kentucky did not propose online-only reporting and, by the time the district court issued its decision in *Gresham*, Arkansas had already expanded its reporting policy to allow telephone and in-person reporting as well as reporting online. *See Gresham*, 363 F. Supp. 3d at 174; *see also* JA __ [ECF 45-1]. Our opening brief explained that the experience with the rollout of the Arkansas project underscores the value of testing experiments at the local level—where changes can be made quickly—before policies are established nationwide. Without apparent irony, plaintiffs suggest (Br. 39 n.6) that additional data are needed on why so few individuals reported any qualifying activities during the initial phase of the Arkansas demonstration. As the district court understood, its vacatur order brought Arkansas' data-collection and outreach efforts to a halt, *see Gresham*, 363 F. Supp. 3d at 183-184, undermining the value of that ongoing experiment.

C. HHS Reasonably Determined That The Demonstrations' Requirements May Improve The Health Of Medicaid Beneficiaries, Which Would Reduce Program Expenses.

It was also eminently rational for HHS to determine that the demonstrations may improve the health of Medicaid beneficiaries, which in turn would reduce program expenses. An array of studies found that increased engagement in the community through work or volunteering correlates with better physical and mental health. *See, e.g.*, KY AR 4824, 4840, 5047, 5054, 5061, 5074, 5112, 6733 n.10.

Plaintiffs acknowledge that "improving health outcomes is clearly a desirable *result* of furnishing medical assistance." Pl. Br. 28. Although they state that "promoting beneficiary health" is "unrelated to the provision of medical assistance," *id.*, healthier beneficiaries tend to consume fewer medical services and are generally less costly to cover. KY AR 6719. The ACA itself authorized grants for States that give Medicaid beneficiaries incentives for various "healthy behaviors," including "[c]easing use of tobacco products," "[c]ontrolling or reducing their weight," "[l]owering their cholesterol," or "[a]voiding the onset of diabetes, or, in the case of a diabetic, improving the management of that condition." ACA § 4108 (codified at 42 U.S.C. § 1396a note). HHS previously encouraged States to develop demonstrations "aimed at promoting healthy behaviors" and "accountability tied to improvement in health outcomes." KY AR 6724 (quoting 2012 HHS Guidance at 15). And a

coalition of public-health organizations urged that improving "health outcomes" is a proper objective of a Medicaid demonstration. KY AR 3833.

Moreover, HHS previously approved demonstrations with features similar to those vacated by the district court here. In 2015, for example, HHS approved an Indiana demonstration that allowed the State to charge premiums, limit retroactive eligibility, and limit non-emergency medical transportation. *See, e.g.*, JA __, __-__ [ECF 51-8 at 2, 7-8]. And in 2016, HHS approved an Arizona demonstration that tested the use of premiums and other incentives "to build health literacy, achieve identified health targets and encourage appropriate care."[8]

As HHS explained in approving the Kentucky demonstration, premium requirements test whether beneficiaries who pay premiums are more invested in their health-care decisions and thus "more likely to obtain primary care and preventive care, have better drug adherence, and rely less on the emergency room for treatment compared to those who do not." KY AR 6734-35. Waivers of retroactive eligibility are designed to encourage eligible individuals to obtain coverage when healthy, which in turn increases the use of preventive services. KY AR 6736. And the various aspects of the Kentucky demonstration work in tandem to help prepare Medicaid beneficiaries to transition to commercial coverage, where premiums are required and there is typically no retroactive eligibility or coverage of non-emergency medical

[8] https://go.usa.gov/xmNDx

transportation. KY AR 6725 (explaining that "[c]overage for most individuals enrolled in Kentucky HEALTH is designed to work more like insurance products sold on the commercial market"); *see also* Kentucky Br. 9-14 (describing these and other features of the Kentucky demonstration).

Plaintiffs do not dispute that increasing preventive care is important, nor do they defend the district court's suggestion that HHS must "quantify" the "uptick in preventive care" before a demonstration can be approved. *Stewart II*, 366 F. Supp. 3d at 143. Again, although plaintiffs express doubt that the demonstrations will meet their objectives, the hypotheses of a demonstration do not have to be supported by "record evidence" before they can be tested. Pl. Br. 25. The purpose of a demonstration is to gather data that can be used to validate or refute a hypothesis and thus inform national policy. Plaintiffs' assertion that HHS failed to weigh the anticipated benefits of the Kentucky and Arkansas demonstrations against potential coverage losses due to noncompliance disregards the explicit reasoning of the agency's approval letters, as described above and in our opening brief.[9]

[9] Amici offer arguments that plaintiffs did not make and that rest on mistaken premises. For example, amici mistakenly suggest that HHS regulations require States to submit detailed evaluation designs before a demonstration is approved. *See* Deans, Chairs, and Scholars Br. 14-15. In reality, as the 2016 approval of a New Hampshire demonstration illustrates, it is typical for a State to develop its detailed evaluation design after HHS informs the State of the special terms and conditions that HHS sets upon approval. *See* https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/nh/health-protection-

II. Any Relief Should Have Been Limited To The Parties And The Provisions That Caused Them Injury.

Assuming *arguendo* that there was a basis to grant any relief, the district court should have limited the relief to the plaintiffs before it and the provisions that caused them injury.

As we emphasized below, these suits are not class actions, and there is no sound reason for invalidating aspects of the demonstrations as applied to nonparties. Although the individuals before the Court—all members of the ACA's adult-eligibility expansion—may be willing to put their optional coverage at risk, there is no justification for imposing that risk on hundreds of thousands of Medicaid beneficiaries who did not join these suits. That concern was not present in the case on which plaintiffs rely, *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). There, in stating that "the ordinary result" of a successful APA challenge is that "rules are vacated—not that their application to the individual petitioners is proscribed," *id.* at 1409, this Court noted that persons adversely affected by an agency rule often may seek review in the district court for the District of Columbia, and that this Court's "refusal to sustain a broad injunction"

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program/nh-health-protection-program-premium-assistance-cms-appvl-amend-req-01062017.pdf (Special Term and Condition #66). Amici are likewise mistaken in suggesting (Br. 17-18) that the amendments to Arkansas' demonstration were "an extension or renewal" to which the requirements of 42 C.F.R. § 431.412(c) applied. In fact, Arkansas amended a preexisting demonstration without extending its term.

would be "likely merely to generate a flood of duplicative litigation," *id.* Here, by contrast, there is no basis to assume that the individuals before the Court represent the views of absent members of the adult-expansion group. Indeed, although plaintiffs styled the *Stewart* complaint as a class action, *see* JA __ [ECF 88 at 4], they never moved to certify a class, presumably because they understood that the requirements for class certification could not be met.

Nor is there any sound basis to invalidate the approval of provisions that do not cause any plaintiff injury. As an initial matter, plaintiffs incorrectly state (Br. 53) that the government waived this argument below. The government urged below that neither Article III nor principles of equity permit relief more burdensome to the defendant than necessary to provide complete relief to the plaintiffs. *See* JA __-__ [ECF 107 at 22-23]. Moreover, when the government indicated that the district court "should remand the whole demonstration" to HHS if it found a particular provision invalid, the government specified that "any such remand should be without vacatur" of the demonstration, JA __ [ECF 108-1 at 42 n.11], which would allow the Secretary to decide whether the remaining elements of the demonstration should proceed.

In addressing the scope of the district court's authority, plaintiffs confuse the role of the Secretary with the role of a court. There is no doubt that the Secretary considers a demonstration as a whole. Indeed, it is longstanding HHS policy that a demonstration must be budget neutral. *See, e.g.*, 76 Fed. Reg. 78,265 (Dec. 16, 2011).

It does not follow, however, that a court may invalidate aspects of a demonstration that do not injure any plaintiff. If components of a demonstration that cause particular plaintiffs injury are ruled invalid, the appropriate course is to so declare and remand so that the Secretary may determine how to proceed.

CONCLUSION

The judgments of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief uses a proportionately spaced, 14-point font and contains 6,447 words according to the count of this office's word processing system, and thus complies with Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure.

/s/ Alisa B. Klein
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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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