[NOT SCHEDULED FOR ORAL ARGUMENT]

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

CHARLES GRESHAM, et al. **PLAINTIFFS-APPELLEES**

v. **Nos. 19-5094 & 19-5096**

ALEX M AZAR, et al. **DEFENDANTS-APPELLANTS**

STATE OF ARKANSAS **INTERVENOR-DEFENDANT-APPELLANT**

REPLY BRIEF FOR THE STATE OF ARKANSAS

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GLOSSARY

ACA	Affordable Care Act

INTRODUCTION

Arkansas Works will help Medicaid expansion beneficiaries—those who qualify for Medicaid solely on the basis of their income—get jobs, engage in their communities, live better by working and volunteering, and ultimately rise from reliance on government assistance. It rests on the commonsense proposition that if a state offers health insurance to those who work or do community service, recipients will generally do so to continue receiving that insurance. The district court disagreed and declared that commonsense conclusion unreasonable.

Plaintiff-appellees' defense of that erroneous decision rests on two fallacies. *First*, plaintiff-appellees wrongly claim that Medicaid's *sole* purpose is maximizing Medicaid coverage and that the Secretary was foreclosed from considering any other objective in approving Arkansas's demonstration program. Indeed, they even argue that health is unambiguously *not* an objective of a government health program. Nor, in their opinion, are helping beneficiaries obtain financial independence, or ensuring that Medicaid remains financially sustainable, permissible objectives. That position rests exclusively on a misinterpretation of the purpose clause of a vague *appropriations* section, and it defies logic.

Second, recognizing the weakness of that argument, plaintiff-appellees resort to claiming that even if the Secretary could consider objectives other than maximizing coverage, the Secretary acted unlawfully because, they claim, he failed

to address selected commenters' coverage loss predictions. But the Secretary relied on the record before him to reasonably predict that any coverage loss would be small. Plaintiff-appellees' claim that he failed to consider comments is nothing more than a masked disagreement with his prediction. That is not a basis for vacating the Secretary's approval, and it cannot be a basis for affirming the district court.

Therefore, this Court should reverse the district court's order vacating the Secretary's approval of the Arkansas Works Amendment and allow Arkansas to return to putting people back to work and improving the lives of its citizens.

ARGUMENT

I. The Secretary's interpretation of Medicaid's "objectives" is reasonable.

Plaintiff-appellees wrongly claim that beneficiary health and independence are unambiguously not Medicaid objectives and that the Secretary could consider neither in approving Arkansas's demonstration program. They ground those claims entirely on the bare assertion that the Medicaid Act's appropriation section's vague statements of purpose unambiguously and exhaustively define the Medicaid Act's objectives. Res. Br. 25. But aside from that bare assertion, they do not explain why their preferred interpretation of Medicaid's undefined objectives is unambiguously right or why they think that the Secretary's interpretation is unambiguously wrong. Under *Chevron*—which plaintiff-

appellees do not dispute applies (*see* Res. Br. 25-37)—that is fatal to their claims. Indeed, whether the Secretary could have single-mindedly pursued coverage (to no other end, as plaintiff-appellees and the district court would have preferred), the Secretary's decision to pursue health and independence was unquestionably reasonable and entitled to deference. Reversal is required.

A. Medicaid's appropriations section is not an exhaustive statement of Medicaid's objectives.

As explained in Arkansas's opening brief and the Government's briefing, the Secretary's commonsense conclusion that beneficiary health and independence are proper Medicaid objectives was unquestionably reasonable. In response, plaintiff-appellees resort to implausibly claiming that "it is in the section of the [Medicaid] statute entitled 'appropriations' that Congress set out Medicaid's purpose." Res. Br. at 26. But they do not—and cannot—offer any reason why that section constitutes an exhaustive list of the Medicaid expansion's objectives or explain how that section conflicts with the Secretary's approval here. Rather, like the district court, they resort to artificially narrowing Medicaid's objectives.

First, Medicaid's appropriations section is just that—an appropriations section, not a purpose section. It merely identifies the ends to which funds are "hereby authorized to be appropriated," not the objectives of the program itself. 42 U.S.C. 1396-1. Parroting the district court, plaintiff-appellees cavil that there is no "better place [for] the purpose of a spending program [to] be found" than in its

appropriations section. Res. Br. at 26 (quoting *Gresham v. Azar*, 363 F. Supp. 3d 165, 180 (D.D.C. 2019)). Yet as explained in Arkansas's opening brief, Congress found a better place in at least *five* spending programs under the Social Security Act's umbrella: separate, explicit purpose sections stating "the purpose of this program," "part," "subpart," "subchapter," or "division," entirely apart from those programs' appropriations sections. *See* Arkansas Br. at 22-23; 42 U.S.C. 601(a), 603, 625, 629, 1397aa(a), 1397n. By contrast, Section 1901 does not expressly state Medicaid's purpose.

Plaintiff-appellees' argument simply ignores that inconvenient fact. But in light of that difference, it was certainly reasonable for the Secretary to conclude that Medicaid's appropriations section's stated *spending* purposes are not an exhaustive statement of the Medicaid program's objectives.

Second and equally fatally under *Chevron*, Medicaid's appropriations section does not say anything about the Medicaid *expansion*'s purposes—nor even the purposes of Medicaid expansion appropriations. It states the purposes of Medicaid appropriations with respect to "families with dependent children and . . . aged, blind, or disabled individuals," not the population of persons with income up to 133 percent of the poverty level covered by the Medicaid expansion. 42 U.S.C. 1396-1. Hence, even on plaintiff-appellees' own theory, the appropriations section would be an odd place to look for an unambiguous list of the things the Secretary

may consider in deciding whether to experimentally waive Medicaid expansion requirements.

Plaintiff-appellees' entire argument to the contrary amounts to little more than a self-serving declaration that "there is no doubt" that the Medicaid appropriations section's purposes apply equally to the Medicaid expansion. Res. Br. at 27. Yet while there is no doubt that the provision of medical assistance is *a* purpose of the Medicaid expansion, what is entirely unclear is whether the Medicaid expansion's purposes are *limited* to the purposes stated with respect to traditional Medicaid appropriations in Section 1901. Not one word of statutory text speaks to the issue.

Moreover, even if Section 1901 were a complete statement of *traditional* Medicaid's purposes, there is no reason to assume that "a new health care program," *NFIB v. Sebelius*, 567 U.S. 519, 584 (2012), designed to cover a less permanent population would share the same objectives as traditional Medicaid. Most obviously, Congress could very well have had a purpose of eventually transitioning Medicaid *expansion* beneficiaries from Medicaid coverage into the Affordable Care Act's (ACA's) Exchanges and employer-based coverage—a purpose that would have been less well-placed with respect to the "aged, blind, or disabled individuals" to whom Section 1901 speaks. Thus, the district court erred in concluding the contrary and reversal is warranted.

B. Health is an objective of Medicaid, a government health program.

Absent their false equation of the purposes of traditional Medicaid appropriations with the programmatic objectives of the Medicaid expansion, plaintiff-appellees haven't a leg to stand on. They remarkably claim that beneficiary health "is far afield of the basic purpose of Medicaid, and well outside the bounds of reasonableness." Res. Br. 29 (citation omitted) (internal quotation marks omitted). But the very comments on which plaintiff-appellees rely cited white papers documenting approvals of healthy behavior incentives by the last *three* administrations—incentives which, like those here, conditioned coverage on various healthy behaviors. *See id.* at 45 (citing AR 1265-66) (comment of American Heart Association (AHA)); AR 1268 (AHA comment, citing Hannah Katch & Judith Solomon, Ctr. on Budget & Pol'y Priorities, *Are Medicaid Incentives an Effective Way to Improve Health Outcomes?* (2017), https://tinyurl.com/yafs2nuf). Were the last three administrations "well outside the bounds of reasonableness"? Of course they weren't. Instead, it is plaintiff-appellees' astonishing insistence that *health* is not—even arguably—a Medicaid objective that is far outside the bounds of reasonableness.

To justify their extraordinary position that health is not an objective of a healthcare program, plaintiff-appellees claim that beneficiary health is merely a "desired outcome" of Medicaid and not one of "the specific mechanisms Congress

prescribed for achieving it. Res. Br. 28. According to plaintiff-appellees, "the Secretary lacks authority to isolate" the former from the latter. *Id.* Yet that "isolation" is precisely what the statute allows. It expressly authorizes the Secretary to "waive compliance with *any* of the requirements of section . . . 1396a"—the so-called specific mechanisms that plaintiff-appellees focus on—"[i]n the case of any . . . demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the o*bjectives* of" Medicaid. 42 U.S.C. 1315(a) (emphasis added).

Hence, contrary to plaintiff-appellees' claims, where the Secretary reviews a demonstration project application he not only *may* "isolate" Medicaid's objectives from the means Congress prescribed for achieving them, but must do so in order to decide whether to approve that application. Indeed, as the first court to review the relevant statute in any detail explained in rejecting plaintiff-appellees' approach: "[T]o translate a selected number of [section 1396a's] requirements into objectives, so that those requirements cannot be waived under [Section] 1115 does violence to the plain wording of that latter section. There is no ascertainable basis for distinguishing the waivable 'requirement' from the unwaivable 'objective.'" *Cal. Welfare Rights Org. v. Richardson*, 348 F. Supp. 491, 496 (N.D. Cal. 1972).

Recognizing the weakness of their statutory argument, plaintiff-appellees fall back on strangely suggesting that recognizing health as an objective of a

healthcare program would lead to absurd consequences. In particular, they bizarrely suggest that would mean that "the Secretary could approve *any* policy he concludes may improve health and wellness," including requiring beneficiaries to move to healthier neighborhoods. Res. Br. 29 (emphasis added). But that of course does not follow since whatever his decision, the Secretary's judgment must be reasonable.

Furthermore, insofar as plaintiff-appellees' parade of horribles has any superficial force it is not because the Secretary cannot consider beneficiary health, but because plaintiff-appellees' hypotheticals might flunk arbitrary-and-capricious review or potentially raise constitutional concerns. Indeed, any Medicaid objective, including plaintiff-appellees' preferred objective of maximizing Medicaid coverage, could be carried to impermissible extremes. That possibility does not render the underlying objective impermissible.

C. Beneficiary independence is a Medicaid objective.

Plaintiff-appellees wrongly deny that beneficiary independence is a Medicaid objective. *See* Res. Br. 30. On their telling, the Secretary cannot "facilitat[e] the transition of low-income adults from Medicaid to commercial coverage," because Congress, they say, "did not enact Medicaid to reduce beneficiary reliance on governmental assistance." *Id.* Instead, they claim that the

Secretary must always strive to keep as many statutorily eligible people on Medicaid for as long as possible.

Plaintiff-appellees' position refutes itself. The purpose of Medicaid—and in particular the Medicaid expansion—is not to maximize beneficiary dependence on government assistance. Instead, it is to help beneficiaries escape poverty traps by ensuring access to the healthcare they need to stay in the workforce and, ultimately, become independent of government assistance altogether. *Cf. Pharm. Research & Mfrs. Am. v. Thompson*, 362 F.3d 817, 825 (D.C. Cir. 2004) (holding that it furthers Medicaid objectives to provide drug price assistance to non-beneficiaries because doing so helps them "maintain or improve their health status and be less likely to become Medicaid eligible," thereby maximizing available resources for existing Medicaid beneficiaries).

Likewise, the very appropriation section on which plaintiff-appellees' entire argument rests plainly refutes their argument by declaring that Medicaid services are intended "to help [beneficiaries] attain . . . capability for independence or self-care[.]" 42 U.S.C 1396-1. Recognizing that, plaintiff-appellees resort to insisting that "[r]ead in context," that language refers to something they call "*functional* independence," not eventual independence from the program. Res. Br. 30-31. They do not even attempt to explain what that means. Insofar as Arkansas can discern, plaintiff-appellees seem to believe that "functional independence" is the

opposite of a state of "functional limitation[]" that makes a beneficiary eligible for institutionalization. *Id.* at 31 n.3 (quoting 42 C.F.R. 435.1010). But—if that is the case—plaintiff-appellees do not explain what about Section 1901's context causes the ordinary term "independence" to unambiguously carry that unusual meaning.

Rather than carry such an unusual meaning, as previously discussed in Arkansas's opening brief, that language should be interpreted in the same manner as two circuits interpreted the Aid to Families with Dependent Children program's formerly stated purpose of helping beneficiaries "attain . . . self-support and personal independence." *See C.K. v. N.J. Dep't of Health & Human Servs.*, 92 F.3d 171, 178, 184-85 (3d Cir. 1996); *Aguayo v. Richardson*, 473 F.2d 1090, 1104 (2d Cir. 1973 (Friendly, J.). Plaintiff-appellees do not distinguish those decisions or the language of AFDC's former purpose section. Nor do they point to anything suggesting that virtually identical language should—let alone *must*—be read differently here.

Moreover, as explained in the Secretary's and Kentucky's opening briefs, additional language in plaintiff-appellees' preferred statement of Medicaid's objectives counsels the same result. Section 1901 authorizes Medicaid appropriations for the purpose of "enabling each State" to furnish medical assistance "as far as practicable under the conditions in such State[.]" 42 U.S.C. 1396-1. As the Secretary explained, that language plainly underscores Congress'

desire that state Medicaid programs remain fiscally sustainable, and preserving limited resources by transitioning those who can work to commercial coverage plainly furthers that goal.[1] *See* Gov't Br. at 25.

Finally, ACA's amendment to the definition of medical assistance, discussed in Kentucky's brief, also indicates that transitioning beneficiaries from Medicaid to other sources of coverage is an objective of the program. As plaintiff-appellees heavily emphasize, Section 1901 states the purpose of "furnish[ing] medical assistance[.]" 42 U.S.C. 1396-1. That term *used* to be defined simply as government payment for healthcare. *See* Ky. Br. at 27. The ACA, however, broadened the definition of medical assistance to include healthcare itself, whether the government pays for it or not. *See id.* (citing 42 U.S.C. 1396d(a)). Thus, when

[1] Plaintiffs incorrectly claim that the Secretary did not approve Arkansas's program on this basis. *See* Res. Br. 49 n.10. Contrary to that claim, the Secretary explained Arkansas's program "attempts to facilitate transitions between and among Arkansas Works, ESI [employer-sponsored insurance], and the Marketplace for Arkansas Works enrollees [i.e., the state ACA exchange]." AR 2. Arkansas's proposal likewise stated that purpose. *See* AR 2057 ("[T]hese amendments to the demonstration seek to test innovative approaches to . . . encouraging movement up the economic ladder, and facilitating transitions from Arkansas Works to employer-sponsored insurance and Marketplace coverage."). The Secretary's approval of Kentucky HEALTH on remand undoubtedly further elaborated on how work incentives make state Medicaid expansion programs more sustainable. That amplification can be considered in Arkansas's case as well since it came "from the same official who" approved Arkansas's program and it merely "'illuminate[s] the reasons that are already implicit in the internal materials.'" *Rhea Lana, Inc. v. United States*, 925 F. 3d 521, 524 (D.C. Cir. 2019) (quoting *Olivares v. Transp. Sec. Admin.*, 819 F.3d 454, 464 (D.C. Cir. 2016) (alterations omitted)).

Medicaid beneficiaries begin to pay for their own healthcare, or receive coverage from an employer, they are receiving "medical assistance" as that term is now defined in the Act, and Section 1901's stated purpose is fulfilled.

II. The Secretary's conclusion that the Arkansas Works amendment is likely to assist in promoting the objectives of Medicaid was not arbitrary and capricious.

The Secretary reasonably concluded that the Arkansas Works Amendment "is likely to assist in promoting the objectives" of Medicaid. 42 U.S.C. 1315(a). In so doing, he necessarily made a predictive judgment in the face of uncertainty, the kind which receives "particularly deferential" arbitrary-and-capricious review. *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009). As the Supreme Court recently held in applying the arbitrary-and-capricious standard, "the choice between reasonable policy alternatives in the face of uncertainty was the Secretary's to make." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2570 (2019).

The Secretary "considered the relevant factors, weighed risks and benefits, and articulated a satisfactory explanation for his" approval of the Arkansas Works Amendment. *Id*. His approval of the Arkansas Works Amendment therefore easily survives arbitrary-and-capricious review. Indeed, "[i]n overriding that reasonable exercise of discretion, the [district] court improperly substituted its

judgment for that" of the Secretary. *Id*. Plaintiffs' arguments to the contrary do not save the district court's conclusion.

As explained above, plaintiff-appellees have failed to show that the Secretary's interpretation of the objectives of Medicaid as including beneficiary health, wellness, and independence was unambiguously foreclosed by the statutory text. *See supra* at § I. Because the district court erroneously concluded otherwise, it did not review the Secretary's decision that Arkansas's program would promote health, wellness, and independence. Nevertheless, the Secretary's conclusion that Arkansas Works would likely assist in promoting beneficiary health, wellness and independence was eminently reasonable.

A. Beneficiary health, wellness, and independence

Plaintiff-appellees first dispute the Secretary's finding that studies in the record show that work and volunteering are "positively correlated with improvements in individuals' health," which thus could at least "potential[ly] benefit[]" beneficiaries' health and wellness. AR 4; JA__. They variously argue that the Secretary "vastly overstated" the health benefits discussed in those studies and baldly assert that the Secretary "misconstrued the evidence." Res. Br. 43-44; *see also id.* at 45 (claiming the Secretary "inflated" the health benefits).

Plaintiff-appellees' quibble is not with the Secretary's approach. It is that they do not like the record evidence. They do not seriously dispute that the record

contains evidence of the health and wellness benefits of work. *See* AR 1759; JA__ (study detailing "strong association between worklessness and poor health," identifying "strong evidence that unemployment is generally harmful to health," and linking "unemployment and poorer physical and mental health and mortality"); *see also* AR 1780; JA__ (finding that "re-employment leads to improved health"); *id.* (reviewing studies and concluding that "the balance of the evidence is that health improvements are . . . a direct consequence of re-employment").

Nor do plaintiff-appellees seriously dispute the Secretary's conclusion that Arkansas Works would lead beneficiaries to attain "greater independence." AR 3; JA__; *see also* AR 6; JA__. Indeed, the Secretary's approval underscores Arkansas's goal of "test[ing] innovative approaches to promoting personal responsibility and work, encouraging movement up the economic ladder, and facilitating transitions" from the Medicaid expansion to private coverage through the state Exchange. AR 2057; JA__. The Secretary's conclusion that the Arkansas Works Amendment would help transition beneficiaries from government-assisted healthcare is in line with Arkansas's desire to "increase the sustainability of the Arkansas Works program." AR 2051; JA__. Plaintiffs do not seriously dispute that the Secretary had ample evidence before him to conclude that the Arkansas Works Amendment would further these goals.

Instead, plaintiff-appellees merely argue that the Secretary, when faced with potentially competing evidence, should have made their preferred judgment call instead of the one he made. But that is not the standard. "[T]he evidence before the Secretary hardly led ineluctably to" the plaintiffs' preferred "course of action." *Dep't of Commerce*, 139 S. Ct. at 2571. At the very least, the Secretary was faced with competing evidence regarding the potential health and independence benefits of work. In such a case, the "Secretary was required" only "to consider the evidence and give reasons for his chosen course of action." *Id.* "It is not for [this Court] to ask whether his decision was 'the best one possible' or even whether it was 'better than the alternatives.'" *Id.* (quoting *FERC v. Elec. Power Supply Assn.*, 136 S. Ct. 760, 782 (2016)).

The Secretary's conclusion that the Arkansas Works Amendment would further the objectives of beneficiary health, wellness, and independence was reasonable and supported by substantial evidence.

B. The Secretary considered and reasonably rejected commenters' concerns about coverage loss.

Plaintiffs next contend that, even assuming the Secretary reasonably found that the Arkansas Works Amendment was likely to promote beneficiary health and independence, the Secretary "failed to weigh those benefits" against potential loss of coverage. Res. Br. 45. Not so. The Secretary considered the prospect of coverage losses as a result of the community engagement requirement. Yet he

ultimately predicted that there would not be substantial coverage losses. Plaintiffs may dispute the Secretary's prediction. But that prediction was permissible and well "within the bounds of reasoned decisionmaking." *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983).

The Secretary considered the prospect of coverage loss as suggested by commenters, but he concluded that the community engagement requirement was a sufficient incentive for beneficiaries to comply and keep their coverage. The Secretary acknowledged the risk that some beneficiaries could lose coverage for failure to comply, given that "[a]ny system that requires individuals to fulfill certain requirements as a condition of receiving benefits necessarily places some degree of responsibility on these individuals." AR 7; JA__. Yet the Secretary reasonably concluded and explained at length that he believed that risk was outweighed by "the overall health benefits to the [a]ffected population through community engagement." AR 7; JA__. Indeed, as the Secretary rationally explained, those overall benefits readily "outweigh the health-risks with respect to those who fail to respond and who fail to seek exemption[s]" from the requirement. AR 7; JA__. Additionally, given the Secretary's prediction that substantial coverage losses would not occur, he was certainly entitled to conclude that Arkansas Works' beneficiary benefits likewise outweighed any negligible loss of coverage.

Moreover, as the Secretary explained, the risk that beneficiaries might not respond was also ameliorated by Arkansas's outreach strategy. For instance, as the Secretary explained, the approval "require[s] Arkansas to provide written notices to beneficiaries that include information [on] how to ensure that they are in compliance with the community engagement requirements," AR 6; JA__, and to "implement an outreach strategy to inform beneficiaries how to report compliance with the community engagement requirements." AR 7; JA__. Moreover, beneficiaries are provided "with three opportunities to rectify" noncompliance "or seek an exemption." *Id.* Weighing those safeguards against wholly speculative claims by commenters that coverage losses were bound to occur, it was reasonable for the Secretary to predict otherwise.

And while plaintiff-appellees argue that the "commenters made their estimates" with these safeguards in mind, Res. Br. 40, the Secretary—reviewing the entire record—could reasonably conclude those commentators overstated potential losses. The Secretary ultimately said he would not have approved the community-engagement requirements unless he thought they would "adequately incentivize beneficiary participation." AR 6; JA__. Plaintiff-appellees' favored commenters' speculations to the contrary do not, even remotely, give this Court a basis on which to gainsay that prediction.

Like the district court, plaintiff-appellees also simply ignore the Secretary's express consideration of this issue. *E.g., Gresham*, 363 F. Supp. 3d at 177 (erroneously concluding that the "Secretary's approval letter *did not consider* whether" the Arkansas Works Amendment "would reduce Medicaid coverage.") (emphasis altered). The Secretary did not, as plaintiff-appellees baldly claim, "simply dismiss[] commenters' concerns" about coverage losses, Res. Br. 39. Rather, the Secretary considered them, and as he is entitled to do, the Secretary made a different prediction. Indeed, given—as plaintiff-appellees acknowledge—that no commenter "quantified" the coverage loss they predicted, *id.*, the Secretary was required to draw a conclusion based on the entirety of the record before him. This is exactly the type of "weighing of incommensurables under conditions of uncertainty" that the Supreme Court has blessed. *Dep't of Commerce*, 139 S. Ct. at 2571.

The Secretary's approach was eminently reasonable given that one of the goals of the amendment was to "design and test incentives for beneficiary compliance" and ultimately gather the kind of information that plaintiff-appellees' preferred commenters failed to provide. AR 3; JA__.[2] And plaintiff-appellees'

[2] Ironically, plaintiff-appellees' improper attempt to bolster their argument by citing extra-record information regarding coverage losses post-approval, *see* Res. Br. 39, underscores their own recognition that no one provided such information *ex ante*. But of course, the post-decisionmaking, extra-record material that plaintiff-

argument to the contrary essentially boils down to a claim that the Secretary was required to *somehow* create the very data that the program was partially intended to gather before approval. That is simply nonsense, and the Secretary did not act unreasonably in not following that approach.

Plaintiff-appellees may disagree with the Secretary's conclusion. The Medicaid Act, however, vests the Secretary with the authority to "make policy choices within the range of reasonable options" in approving demonstration waivers like the Arkansas Works amendment. *Dep't of Commerce*, 139 S. Ct. at 2571. Perhaps a different Secretary would have reached a different conclusion based on the same evidence, perhaps even agreeing with plaintiff-appellees' view of the evidence. But it was at least reasonable for the Secretary to make the prediction he did—particularly in approving an experimental demonstration project.

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appellees cite says nothing about whether the Secretary acted reasonably based on the record evidence and cannot be the basis for a decision vacating the Secretary's approval of the Arkansas Works Amendment. *See Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1107 (D.C. Cir. 2009) ("[W]e judge the reasonableness of an agency's decision on the basis of the record before the agency at the time it made its decision."). But even if this Court is inclined to consider such evidence, it is by no means as clear cut as plaintiff-appellees make it out to be. *See, e.g.*, Nicholas Horton & Jonathan Bain, *The Truth About Arkansas' Medicaid Work Reporting Requirements*, Foundation for Government Accountability (2019), https://thefga.org/wp-content/uploads/2019/07/The-Truth-About-Arkansas-Medicaid-Work-Requirements-DRAFT5.pdf .

C. The Secretary did not need to consider other objectives.

Finally, Plaintiffs offer no serious rebuttal to Arkansas's observation that the Secretary, having concluded that the Arkansas Works Amendment would promote at least one objective of Medicaid—either beneficiary health and wellness or independence—did not need to consider whether the amendment would promote other objectives such as coverage. As explained in Arkansas's opening brief, where "an agency must balance a number of potentially conflicting objectives . . . judicial review is limited to determining whether the agency's decision reasonably advances at least one of those objectives and its decisionmaking was regular." *Fresno Mobile Radio v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999). Having reasonably concluded that the Arkansas Works amendment would promote beneficiary health and wellness and independence, the Secretary was not required to go any further.[3]

Plaintiffs have two unavailing responses. The first is to rehash their argument that health and wellness and independence are not objectives of Medicaid. Res. Br. 47. That argument fails for the reasons explained above. The

[3] For this reason, as previously explained, the Secretary was not required to independently consider whether the Arkansas Works amendment would assist in *promoting* coverage. *See* Arkansas Br. at 48. Tellingly, plaintiff-appellees do not respond to this point, choosing to simply parrot the district court's unfounded invention of this requirement. Res. Br. at 42 (citing *Gresham*, 363 F. Supp. 3d at 179).

second is to say that "nothing in logic or case law suggests that the Secretary could consider" health and wellness or independence "while entirely ignoring" the objective of coverage. *Id*. But that is exactly what case law holds. *See Fresno Mobile Radio*, 165 F.3d at 971. Even if it were not, the Secretary did not "entirely ignor[e]" the potential impact of the Arkansas Works amendment on coverage; he considered it, though he was not required to do so. And even assuming some consideration of the impact on coverage was required, it was for the Secretary "to decide the exact trade-off among" the potentially "conflicting goals" of health and coverage. *Cont'l Air Lines v. Dep't of Transp.*, 843 F.2d 1444, 1451 (D.C. Cir. 1988) (internal quotation marks omitted). He reasonably made that decision, and it was not for the district court to substitute its own judgment for the Secretary's judgment.

* * *

The Secretary's decision to approve the Arkansas Works Amendment was eminently reasonable in light of the record evidence before him. He correctly concluded that the Arkansas Works Amendment was likely to promote the objectives of Medicaid, and plaintiff-appellees' arguments to the contrary are based not on the arbitrary-and-capricious standard, but on their policy disagreements with the Secretary's decision. In agreeing with the plaintiff-

appellees, the district court likewise substituted its own judgment in place of the Secretary's, and this Court should reverse.

III. Remand without vacatur is the appropriate response to any shortcomings in the Secretary's approval.

As the Government correctly argues, if this Court identifies any shortcomings with the Secretary's approval of the Arkansas Works Amendment, the appropriate response is not vacatur of the program, as the district court decided, but a "remand so that the Secretary may determine how to proceed." Gov't Br. at 54. This is not a case where the Secretary could not "substantiate [his] decision on remand." *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 151 (D.C. Cir. 1993). As explained above, the Secretary's decision to approve the Arkansas Works Amendment was well within his statutory authority, and his ultimate conclusion was a reasonable exercise of such authority. There is more than a "serious possibility" that the Secretary can correct any deficiencies on remand." *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 756 (D.C. Cir. 2009) (quoting *Allied-Signal, Inc.*, 988 F.2d at 151). And although a remand without vacatur would not completely ameliorate the harms of the district court's decision to disrupt a program that had been up-and-running for *months*, it would ensure that state officials may restart the Arkansas Works amendment while its eventual approval is forthcoming. *See Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,863 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ Nicholas J. Bronni
Nicholas J. Bronni

CERTIFICATE OF SERVICE

I 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 District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Nicholas J. Bronni
Nicholas J. Bronni