UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MONTE A. ROSE, JR., et al.,	)	
	)	
Plaintiffs,	)	
	)	No. 1:19-cv-02848-JEB
v.	)	
	)	
ALEX M. AZAR II, et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR BRIEFING SCHEDULE AND OPPOSITION TO DEFENDANTS' MOTION FOR A STAY PENDING RESOLUTION OF D.C. CIRCUIT APPEALS

On October 31, 2019, Defendants opposed Plaintiffs' motion proposing a briefing schedule, *see* ECF No. 16, and filed a motion to stay this case pending the issuance of the mandates in *Stewart v. Azar*, No. 19-5096 (D.C. Cir.) and *Gresham v. Azar*, No. 19-5094 (D.C. Cir.). ECF Nos. 18, 19. Plaintiffs ask that the Court deny Defendants' motion to stay and grant their motion.[1]

1. The Balance of Hardships Weighs Heavily Against a Stay.

As Defendants note, the federal government's approval of the Indiana project at issue here is substantially similar to the approvals this Court vacated in *Stewart* and *Gresham*. *See* Defs.' Mem. at 9, ECF No. 18-1. Thus, Plaintiffs do not dispute that a stay *could*, theoretically, promote judicial economy, depending on how and when the D.C. Circuit issues the mandate. But that is not where the inquiry ends. When reviewing a motion to stay, courts must "weigh competing interests and maintain an even balance between the court's interests in judicial economy and any possible hardship to the parties." *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 732-33 (D.C. Cir.

[1] The Court would need to amend the proposed schedule given that Plaintiffs' proposed deadline for production of the administrative record has passed.

2012) (citations and internal quotations omitted). "[I]f there is even a fair possibility that" a stay "will work damage to some one else," the party requesting it "must make out a clear case of hardship or inequity in being required to go forward." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). Defendants have not met this burden. *See Clinton v. Jones*, 520 U.S. 681, 708 (1997) (party seeking stay bears burden of establishing need).

Harm to Plaintiffs. There is more than "a fair possibility" that a stay will cause harm to Plaintiffs. Plaintiffs have challenged the federal Defendants' 2018 approval of the HIP project, Compl. ¶¶ 235-40, 274-91, ECF No. 1, as well as individual components of the approval, *id*. ¶¶ 241-73. Indiana has decided to pause implementation of two features of the approved project (work requirements and the redetermination lockout penalty) until this case is resolved but is moving forward with the other challenged components (mandatory premiums, elimination of retroactive coverage, and elimination of non-emergency medical transportation (NEMT)). Continued implementation of these components is harming Plaintiffs.[2]

To illustrate, Plaintiffs must pay monthly premiums ranging from $1 to $20. For low-income individuals struggling to make ends meet, having to pay another bill is a serious harm. *See* Compl. ¶¶ 177-78, 190, 206, 219. If Plaintiffs are unable to pay their premiums or if their payment is processed incorrectly, there are significant consequences, including loss of Medicaid coverage for six months. In 2018, Plaintiff Rhonda Cree lost her Medicaid coverage for failing to pay the

[2] Defendants suggest that the work requirements were *the* focus of this Court's decisions in *Stewart* and *Gresham* and of this lawsuit. But in *Stewart*, *Gresham*, and *Philbrick*, the Court evaluated the approval of the project as a whole. *Stewart v. Azar I*, 313 F. Supp. 3d 237, 257 (D.D.C. 2018); *Stewart v. Azar II*, 366 F. Supp. 3d 125, 136 (D.D.C. 2019); *Gresham v. Azar*, 363 F. Supp. 3d 165, 174 (D.D.C. 2019); *Philbrick v. Azar*, __F. Supp. 3d __, 2019 WL 3414376, at *7 (D.D.C. 2019). Moreover, if "the real object" of this lawsuit were the work requirements, Defs.' Mem. at 11-12, Plaintiffs would have agreed to a stay (assuming Indiana would have stopped implementation of the requirements entirely).

monthly premiums. *Id*. ¶ 196. During the lockout penalty period, she experienced significant vision loss because she could not access needed care. *Id*. ¶ 197-98. Ms. Cree also incurred out-of-pocket medical expenses that Indiana will not cover due to the elimination of retroactive coverage. *Id*. ¶ 197. Plaintiff Monte A. Rose does not currently have any income and does not know where he will get the money to pay his premiums. If he is unable to pay the premiums, he will have to pay cost-sharing for any health care he needs, and he will lose Medicaid coverage for vision, dental, and chiropractic services altogether. This could be a serious problem for him, as he has needed Medicaid coverage to access vision care in the past. *Id*. ¶¶ 182-83.

Defendants acknowledge that Plaintiffs will continue to suffer harm from the premium requirement, elimination of retroactive coverage, and elimination of NEMT during the course of the lawsuit. *See* Defs.' Mem. at 8 (claiming that "no beneficiary will suffer harm from the *new* requirements") (emphasis added). They downplay this harm by arguing that these restrictions have been "in place in various forms for many years." *Id*; *see also id*. at 11. That Indiana has been purporting to "test" these restrictions on low-income individuals for more than a decade does not somehow render the consequences of these restrictions irrelevant to the Court's analysis. *Cf. Mendoza v. Perez*, 754 F.3d 1002, 1015 (D.C. Cir. 2014) (holding "Department of Labor's previous failure to comply with the notice and comment requirements of the APA cannot excuse its later violation of those requirements"). The 2018 approval that Plaintiffs have challenged is what allows Indiana to charge premiums, refuse to provide retroactive coverage, and refuse to furnish NEMT. Without that approval, the previous HIP 2.0 project would have expired on January 31, 2018 leaving the State without any authority to implement these restrictions and returning Indiana to the Medicaid program as Congress established it.

In addition, even though Indiana announced it will not "consider" coverage suspensions for failure to meet the work requirements until this case is decided, ECF No. 19-1, it continues to take steps to implement the requirements. Among other things, Indiana will continue to inform individuals of their status ("exempt," "reporting met," or "reporting") and to "encourage HIP members to report their activities to the state or their health plan." *Id*. Such activities, coupled with how coverage suspensions would function in Indiana – the State is to assess compliance over the course of the calendar year – could cause confusion among Medicaid enrollees. Plaintiffs and thousands of other individuals could reasonably believe they need to meet the work requirements now to avoid the possibility of losing their Medicaid coverage when and if the State starts coverage suspensions. Indiana's assertion that "participating members would receive substantial advance notice regarding the timeline," ECF No. 19-1, does not assuage that concern, particularly given the recently reported estimates that at least 50,000 enrollees in Indiana are set to be jettisoned from coverage due to the work requirements. *See* Leighton Ku and Erin Brantley, *Indiana's Medicaid Work-Requirement Program is Expected to Cause Tens of Thousands to Lose Coverage*, The Commonwealth Fund, To The Point (Oct. 28, 2019), https://www.commonwealthfund.org/blog/2019/indianas-medicaid-work-requirement-program-expected-cause-tens-thousands-lose-coverage.

Finally, while Defendants suggest the stay of this case will be short-lived, there is no way to know how long it would remain in place. The federal Defendants pursued an expedited appeal in *Stewart* and *Gresham* "so that . . . the losing party would be afforded an opportunity to decide whether to ask the Supreme Court to consider the cases before the end of the next Term." *See, e.g.*, Mot. to Expedite Related Appeals at 2, *Gresham v. Azar*, No. 19-5094 (D.C. Cir. argued Oct. 11, 2019). Many months could pass before the *Stewart* and *Gresham* cases are finally resolved.

Cf. Nat'l Indus. for Blind v. Dep't of Veterans Affairs, 296 F. Supp. 3d 131, 140 ("What [Defendants] *cannot* do, consistent with equity principles, is to *both* opt to implement the policy that is allegedly harmful to Plaintiffs *and* simultaneously seek an indefinite delay of the proceedings that Plaintiffs have brought to challenge the policy – at least without good reason").[3]

Harm to Defendants. The federal Defendants do not argue that proceeding with this case will harm them. That is not surprising, given that "being required to defend a suit, without more, does not constitute a clear case of hardship or inequity," and "[t]his is particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before [the Court]." *Ctr. For Biological Diversity v. Ross*, No. 18-112, 2019 WL 5653458, *3 (D.D.C. Oct. 31, 2019) (internal citations and quotations omitted).

Defendants offer a two-sentence argument that Indiana will be harmed. Defs.' Mem. at 12. However, the concerns they identify are not enough to warrant a stay. First, Defendants complain that vacatur would interrupt data collection efforts. Collecting data is not the same thing as conducting a valid experiment. Compl. ¶ 105. Even assuming that Indiana does have a valid interest in collecting data, it has interrupted those efforts with respect to the work requirements and redetermination lockout penalty. It is not clear why it would be more problematic to interrupt data collection with respect to the three features of the HIP project that the State has had the chance to study for more than a decade. *Cf. Gresham*, 363 F. Supp. 3d at 185 (holding interruption in data collection is not significant enough harm to warrant a remand without vacatur).

[3] Defendants' citations to cases finding no harm to Plaintiffs from a stay are inapposite. Defs.' Mem. at 9-10 (citing *Washington v. Trump*, No. C17-0141, 2017 WL 1050354, at *4 (W.D. Wash. Mar. 17, 2017) (issuing stay, *sua sponte*, where another court had already issued a nationwide injunction prohibiting enforcement of the challenged policy); *Owner-operator Indep. Drivers Ass'n, Inc. v. Lahood*, No. 12-1158, 2013 WL 12330195, at *2 (D.D.C. Sept. 25, 2013) (granting stay where "the prejudice to the plaintiffs is *de minimis* because their case is being heard in its entirety in another court").

Second, Defendants claim that if the approval is vacated and then later reinstated, beneficiaries could be confused. However, as Plaintiffs illustrate, beneficiaries are *already* confused, including with regard to those aspects of the HIP project that the State continues to implement. *See* Compl. ¶¶ 195, 199-200 (Ms. Cree describing confusion with premiums); ¶¶ 210, 213-14 (Ms. Holbrock describing confusion with the medically frail determination process and with premiums); *see also* The Lewin Group, *Healthy Indiana Plan 2.0: POWER Account Contribution Assessment* 19-20 (2017), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/in/Healthy-Indiana-Plan-2/in-healthy-indiana-plan-support-20-POWER-acct-cont-assesmnt-03312017.pdf (finding confusion with premiums). Moreover, as described above, the State's recent communication regarding the work requirements could generate significant additional confusion. *Cf.* Compl. ¶¶ 185-86 (Mr. Rose expressing confusion with work requirements). Finally, the identified injuries would only occur if the Court denies the stay and vacates the 2018 HIP approval before the D.C. Circuit issues its opinion in the related cases, and the D.C. Circuit opinion "demand[s] a different result." Defs.' Mem. at 12. These harms are highly speculative. By comparison, if the Court grants a stay, Plaintiffs face certain injury – financial loss in the form of monthly premiums – as well as a "fair possibility" of even greater injury, including loss of coverage entirely. *See Landis*, 299 U.S. at 255.

Defendants have not made a clear showing that interests of judicial economy or any hardship to them from proceeding with this case outweigh the harm that a stay will inflict on Plaintiffs. *See id*. As such, Plaintiffs respectfully ask the Court to deny Defendants' motion to stay and enter a briefing schedule in this case.

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Respectfully submitted,

Thomas J. Perrelli
(D.C. Bar No. 438929)
Ian Heath Gershengorn
(D.C. Bar. No. 448475)
Devi M. Rao
(D.C. Bar No. 1004146)
Natacha Y. Lam
(D.C. Bar. No. 1030168)
Zachary M. Blau
(D.C. Bar No. 1600714)
Jenner & Block LLP
1099 New York Avenue, N.W.
Suite 900, Washington, DC 20001
Phone: 202-639-6004
TPerrelli@jenner.com
IGershengorn@jenner.com
DRao@jenner.com
NLam@jenner.com
ZBlau@Jenner.com

Counsel to National Health Law Program

By: /s/ Jane Perkins
Jane Perkins
Catherine McKee
National Health Law Program
200 N. Greensboro Street, Suite D-13
Carrboro, NC 27510
Phone: 919-968-6308 (x101)
perkins@healthlaw.org
mckee@healthlaw.org

/s/ Adam Mueller
Adam Mueller
Amanda Hall
Indiana Legal Services, Inc.
151 N. Delaware St. #1850
Indianapolis, IN 46204
Phone: 317-829-3174
adam.mueller@ilsi.net
amanda.hall@ilsi.net

Counsel for Plaintiffs