[ORAL ARGUMENT HEARD ON OCTOBER 11, 2019]

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

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| CHARLES GRESHAM, et al., | ) | |
| | ) | |
| Plaintiffs-Appellees, | ) | |
| | ) | |
| v. | ) | Nos. 19-5094 & 19-5096 |
| | ) | |
| ALEX M. AZAR II, et al., | ) | |
| | ) | |
| Defendants-Appellants, | ) | |
| _____ | ) | |
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| RONNIE MAURICE STEWART, et al., | ) | |
| | ) | |
| Plaintiffs-Appellees, | ) | |
| | ) | |
| v. | ) | Nos. 19-5095 & 19-5097 |
| | ) | |
| ALEX M. AZAR II, et al., | ) | |
| | ) | |
| Defendants-Appellants. | ) | |

**APPELLEES' RESPONSE TO KENTUCKY'S MOTION TO DISMISS THE *STEWART* APPEALS**

Appellees do not oppose dismissal of the *Stewart* appeals. Appellees *do*, however, oppose the Federal Appellants' request that this Court decide whether HHS's approval of the Arkansas Works Amendment was arbitrary and capricious based on reasoning the Secretary provided in his later November 2018 approval of the Kentucky Health project. Appellees also oppose the government's request that this Court vacate the district court judgment in *Stewart*.

The question presented by each of the consolidated cases currently pending before this Court is whether the district court correctly held that the Secretary's approvals of each waiver application—by Kentucky and, separately, by Arkansas—were arbitrary and capricious. If the Kentucky (*Stewart*) appeals are dismissed, the question in the remaining Arkansas (*Gresham*) appeals is whether the Secretary's approval of *Arkansas's* waiver project was arbitrary and capricious. The deficiencies in the Secretary's reasoning on that front simply cannot be cured by pointing to rationale he later provided when evaluating a different state's waiver application. Indeed, as the district court correctly held when facing an identical plea, that request "runs headlong into the 'fundamental rule of administrative law' that a reviewing court 'must judge the propriety of such action solely by the grounds invoked by the agency.'" *Gresham v. Azar*, 363 F. Supp. 3d 165, 180 (D.D.C. 2019) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)), *appeals docketed*, Nos. 19-5094 & 19-5096 (D.C. Cir. Apr. 11, 2019). "[T]he Court 'may not accept counsel's *post hoc* rationalizations for agency action.'" *Id.* at 181 (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (alteration in original)).

The case Federal Appellants cite, *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), actually undermines their argument rather than supports it. In that case the Supreme Court *refused* to consider action by

the agency that "had no bearing on the final agency action that respondents challenge"—just as the Court should do here. *Id.* at 659-60. At any rate, even if this Court *were* to consider the Secretary's rationale for approving Kentucky's application—and it should not—it does not help Appellants here. As Judge Boasberg held, because the Secretary's "explanation [with regard to Kentucky] does not even justify affirmance of Kentucky's project, it cannot support upholding a different administrative decision approving a different state's project." *Gresham*, 363 F. Supp. 3d at 181.

As to the Federal Appellants' request that this Court vacate the district court's judgment in *Stewart*, the Court should decline to do so, for three reasons. *First*, vacatur is improper because "[t]his controversy did not become moot due to circumstances unattributable to any of the parties" or the "unilateral action of the party who prevailed below." *Karcher v. May*, 484 U.S. 72, 83 (1987); *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). In *Karcher v. May*, the Supreme Court declined to vacate the appellate court decision where state legislators acting in their official capacities appealed a federal judgment but subsequently lost their posts, and their successors declined to pursue the appeal. Because the appellant declined to pursue its appeal, that decision was not "unattributable to any of the parties." 484 U.S. at 83. Here, Kentucky, represented by the Governor in his official capacity, was a vociferous party to this suit and appealed from the judgment below,

but the Governor lost his position; his successor voluntarily withdrew the state's Section 1115 application and sought dismissal of this appeal—a decision certainly attributable to Kentucky.

*Second*, granting vacatur would produce an inequitable result. "It is petitioner's burden . . . to demonstrate . . . equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp Mortg. Co.*, 513 U.S. at 26. That demonstration requires "exceptional circumstances," *id.* at 29, yet Federal Appellants do not list a single equitable consideration that counsels in favor of vacatur. In fact, allowing vacatur here would "allow a party . . . to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment," thereby "disturb[ing] the orderly operation of the federal judicial system." *Id.* at 27. Federal Appellants have failed to show any exceptional circumstances justifying vacatur, and in fact none exist.

*Third*, HHS's approach would facilitate manipulation and abuse. For example, were this Court to affirm Judge Boasberg's opinion in Arkansas, HHS could seek further review and Arkansas could then withdraw its application, allowing HHS then to seek vacatur of *this* Court's decision. A doctrine designed at core to prevent the *prevailing* party from preserving a precedent while evading review should not be extended to the vastly different circumstances here.

## CONCLUSION

If this Court dismisses the *Stewart* appeals, it should not address the November 2018 HHS approval of the Kentucky project in its consideration of the merits in the *Gresham* appeals, and this Court should not vacate the judgment below.

Dated: December 20, 2019

Respectfully submitted,

Thomas J. Perrelli
Ian Heath Gershengorn
Devi M. Rao
Natacha Y. Lam
Claire M. Lally
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
CLally@Jenner.com

*Counsel to National Health Law Program*

Samuel Brooke
Emily C.R. Early
Neil K. Sawhney
Ellen Degnan
Southern Poverty Law Center
400 Washington Avenue
Montgomery, Alabama 36104
Phone: 334-956-8200
samuel.brooke@splcenter.org
emily.early@splcenter.org
neil.sawhney@splcenter.org
ellen.degnan@splcenter.org

By: /s/ Jane Perkins
Jane Perkins
Catherine McKee
Elizabeth Edwards
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
edwards@healthlaw.org

Ben Carter
Betsy Davis Stone
Kentucky Equal Justice Center
222 South First Street, Suite 305
Louisville, KY 40202
502-468-9403
859-582-2285
ben@kyequaljustice.org
betsy@kyequaljustice.org

Kevin De Liban
Trevor Hawkins
Legal Aid of Arkansas
310 Mid-Continent Plaza, Suite 420
West Memphis, AR 72301
Phone: 870-732-6370 (x2206)
kdeliban@arlegalaid.org
thawkins@arlegalaid.org

*Counsel for Appellees*

## CERTIFICATE OF COMPLIANCE

I certify that this response complies with the type-volume limitation established by Federal Rule of Appellate Procedure 27(d)(2)(A). The response contains 826 words, excluding the parts of the response exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

This response complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), which apply to motions under Federal Rule of Appellate Procedure 27(d)(1)(E). The response has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14 point font.

December 20, 2019 */s/ Jane Perkins*

**CERTIFICATE OF SERVICE**

I certify that, on December 20, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the appellate CM/ECF system, and the document is being served on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

December 20, 2019 */s/ Jane Perkins*