UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANDREA YOUNG, et al.,	)	
	)	
Plaintiffs,	)	
	)	No. 1:19-cv-03526-JEB
v.	)	
	)	
ALEX M. AZAR II, et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' BRIEFS IN RESPONSE TO THE COURT'S JANUARY 14, 2020 AND MARCH 4, 2020 MINUTE ORDERS

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INTRODUCTION

This case involves another cookie-cutter approval by the Secretary of the Department of Health and Human Services of a Section 1115 waiver project targeting Medicaid coverage of adults made eligible through the Affordable Care Act. As approved by the Secretary, the 2018 Healthy Michigan Plan ("HMP") extension allows Michigan to impose additional eligibility conditions on this targeted group: work requirements, premiums, and healthy behavior requirements. Commenters warned the Secretary that tens of thousands of individuals would lose coverage due to the work requirements, and tens of thousands more would lose coverage as a result of the premium and healthy behavior requirements.

The rationale used by the Secretary to approve the 2018 HMP extension project mirrors the rationale he used to approve the Arkansas, Kentucky, and New Hampshire projects. Not only has this Court repeatedly rejected that rationale, but the D.C. Circuit soundly rejected it when affirming this Court's decision to vacate the Arkansas Works Amendment in *Gresham v. Azar*, 950 F.3d 93 (D.C. Cir 2020). These opinions control the outcome here. The approval of the 2018 HMP extension project is unlawful under the Administrative Procedure Act ("APA"). Under controlling precedents, the appropriate remedy is vacatur of the project as a whole. That ordinary course applies here because, as this Court has noted, the legal errors committed by the Secretary go "to the heart" of the approval, *Gresham v. Azar*, 363 F. Supp. 3d 165, 182 (D.D.C. 2019).

ARGUMENT

I. The Secretary's Approval of the 2018 HMP Extension Project Suffers from the Exact Same Deficiencies as His Approvals of the Arkansas, Kentucky, and New Hampshire Projects.

The Federal Defendants and State Intervenor acknowledge that "the Secretary's approval of the work and community engagement component of the 2018 HMP extension is not materially

different from the approval of the work and community engagement components challenged in *Stewart* and *Gresham*." Fed. Defs' Br. in Resp. to the Court's January 14, 2020 Minute Order, 1 ("Fed. Br."), ECF No. 24. *See also* Mem. of Intervenor Mich. Dep't of Health & Human Servs., 1 ("Mich. Br."), ECF No. 23.

This statement does not go far enough. The D.C. Circuit and this Court invalidated the Secretary's approvals of the challenged projects *as a whole*. *See Gresham*, 950 F.3d at 96, *aff'g.*, 363 F. Supp. 3d at 181; *Stewart v. Azar*, 366 F Supp. 3d 125, 156 (D.D.C. 2019) (*Stewart II*); *Stewart v. Azar*, 313 F. Supp. 3d 237, 246-47, 250 (D.D.C. 2018) (*Stewart I*); *see also Philbrick v. Azar*, 397 F. Supp. 3d 11, 32 (D.D.C. 2019). Under the reasoning of these cases, the Secretary's approval of the 2018 HMP extension project as a whole—not just his approval of the work requirements—is unlawful.

As with the Arkansas, Kentucky, and New Hampshire approvals, the Secretary justified approval of the Michigan project as a whole on the grounds that it would improve health outcomes, encourage "responsible decisions" about health care, and "promote beneficiary financial independence." AR 6, *see also* AR 7-8 (citing increased "engagement" with health care and improved health outcomes to condition coverage on healthy behavior requirements for individuals with incomes above 100% of the federal poverty level ("FPL") with 48 months of HMP enrollment and to extend healthy behavior incentives for other HMP enrollees); AR 8 (extending existing 2% premium and cost sharing provisions to "prepare people for the commercial health insurance market"), AR 9 (establishing heightened 5% premiums as a condition of eligibility for individuals above 100% of FPL with 48 months of HMP enrollment to "provide beneficiaries with the tools to successfully utilize commercial market health insurance . . . [and] remov[e] incentives for remaining on Medicaid"); AR 14 ("[C]onditioning eligibility for Medicaid coverage on

compliance with certain measures is an important element of the state's efforts, through experimentation, to improve beneficiaries' health and independence and enhance programmatic sustainability.").

These "alternative objectives of better health outcomes and beneficiary independence are not consistent with Medicaid. The text of the statute includes one primary purpose, which is providing health care coverage without any restriction geared to healthy outcomes, financial independence or transition to commercial coverage." *Gresham*, 950 F.3d at 102. As to the Medicaid Act's *actual* core objective of providing health care coverage, the Secretary failed to adequately consider whether the Michigan project was likely to advance this cause. *See Stewart v. Azar II*, 366 F. Supp. 3d at 140-43; *Philbrick*, 397 F. Supp. 3d at 23-25. Indeed, he largely ignored comments "repeatedly detail[ing] the potential for substantial coverage loss supported by research evidence." *Gresham*, 950 F.3d at 103 (finding Secretary's analysis arbitrary and capricious).

According to the record, 400,000 enrollees would be subject to the new eligibility restrictions. *See, e.g.*, AR 4411, 4322, 4953, 4981, 6352, 6982. With respect to the work requirements alone, Michigan initially acknowledged that 54,000 individuals could lose coverage for failing to work enough hours. *See* AR 4331, 5814, 4960. Commenters warned losses could be substantially higher; Michigan ultimately agreed. *See e.g.*, AR 6383-84, 6390, 7370; Ltr. from Gov. Gretchen Whitmer to Seema Verma, Adm'r, Ctrs. for Medicare & Medicaid Servs. (Feb. 8, 2019), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/mi/Healthy-Michigan/mi-healthy-michigan-state-acceptance-ltr-20190608.pdf (noting 61,000-183,000 people could lose coverage).

As for the premiums, commenters pointed to almost two decades of research concluding, without exception, that premiums create insurmountable barriers to coverage for low-income

people.[1] *See* AR 3688-89, 4323, 4413, 5222, 6386-87, 6498-6502, 7368. Commenters warned that premiums, including the 2% premiums (imposed on individuals with less than 48 months of HMP enrollment) would stop individuals from accessing Medicaid coverage in the first place. *See* AR 3689, 5222-234323, 5727, 6449, 6514, 6987. They also described how the new mandatory 5% premiums (imposed on individuals with more than 48 months of HMP enrollment) would cause additional coverage loss. *See* AR 4952-53, 5107, 5119, 6375, 6449. Commenters estimated that 35,000 individuals would be subject to these premiums, and many of them would be unable to pay. AR 5422, 5877, 6375, 6005-06. They referred to Michigan's own evaluation of the lower 2% premiums finding that 78% of individuals were unable to pay. *See* AR 4425, 4346.

Commenters further warned of additional harm from the premiums, as well as the cost sharing. They cited decades of research proving that cost sharing reduces access to medically necessary care. AR 4323, 5106-07, 5730-31, 6513. What is more, when enrollees fail to pay the 2% premiums or the cost sharing, they are subject to debt collection and garnishment of their tax returns for the unpaid amounts. AR 5119, 6515. *See also* STCs ¶ 26. Commenters highlighted evidence from Michigan itself, showing that in November 2016, alone, nearly 32,000 HMP enrollees had debts sent to the Michigan treasury for garnishment. AR 7384-85, 5119.

[1] Among the evidence commenters cited was recent data from Indiana's Section 1115 project. *See* AR 5808, 5105, 5119-20, 6005-06, 6386-87, 6500-01, 6825-26. During just one 22-month period in 2015 and 2016, more than 46,000 individuals who were eligible for Medicaid in Indiana did not receive that coverage because they did not pay the initial monthly premium. *See* Lewin Group, *Healthy Indiana Plan 2.0: POWER Account Contribution Assessment* ii, 12 (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. An additional 13,550 individuals enrolled in Medicaid later lost coverage for failing to pay. *Id*. Overall, 55% of people found eligible for the project did not pay at least once. *Id*. at 8-11.

Finally, the evidence in the record questioned the efficacy and experimental value of the healthy behavior incentives. Commenters noted that, according to Michigan's own evaluation, more than 85% of Medicaid enrollees failed to complete healthy behaviors, in part because "[m]ost beneficiaries did not know" about the incentives. AR 6504. A scant 0.1% reported that they completed a health risk assessment so they could reduce their cost sharing burden. AR 6504. *See id.* (describing similar findings from Iowa and Indiana).

In the face of the significant record evidence showing that the 2018 HMP extension project and its component parts would result in a serious loss of Medicaid coverage, the approval contains a "rather stunning lack of evidence" that the Secretary gave that evidence any serious consideration. *Beno v. Shalala*, 30 F.3d 1057, 1074 (9th Cir. 1994). The Secretary did not address the various estimates of coverage loss, *see* AR 1-19, just as he did not address projected coverage losses in the other waiver approvals. *See, e.g.*, *Gresham*, 950 F.3d at 100. He did acknowledge that "comments expressed general concerns that the demonstration will result in many poor citizens losing Medicaid," and that up to "400,000 beneficiaries could be subject to the proposed demonstration amendments (including those related to healthy behaviors, premiums, and community engagement requirements)."AR 11, 14. But instead of grappling with the coverage loss those requirements would cause, he simply asserted that "[i]t is not possible to predict the percentage of this group of beneficiaries who will not comply with the demonstration amendments affecting eligibility," and that the various "incentives . . . are not designed to encourage" coverage loss. AR 14; *see also* AR 19 (acknowledging commenters' concerns that the healthy behavior requirement would result in coverage loss, but stating that the Secretary "believe[s] it is appropriate to test inclusion of various activities that may increase health engagement and improve health as a

condition of eligibility.").[2] As the D.C. Circuit pointed out, "Nodding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking." *Gresham*, 950 F.3d at 103; *see also Stewart I*, 313 F. Supp. 3d at 264 (refusing to credit Secretary's speculation where he approved project "with no idea of how many people might lose Medicaid coverage" due to either the project as a whole or its individual components).

What is more, the record evidence showed that the existing 2% premiums and cost sharing reduce access to coverage and care and leave low-income people with debt, with no demonstrated benefit. The Secretary neither acknowledged commenters' concerns regarding the extension of these provisions nor explained how maintaining these components would serve any experimental or demonstration value. He simply approved their five-year extension without comment. AR 6. *Cf. Newton-Nations v. Betlach*, 660 F.3d 370, 381 (9th Cir. 2011) (questioning whether the Secretary could find cost sharing has any experimental value given the 35-year history of research on the effects of cost sharing on the poor).

By failing to adequately consider "an important aspect of the problem," the Secretary violated the APA. *Stewart II*, 366 F. Supp. 3d at 155; *Stewart I*, 313 F. Supp. at 261 (ignoring Medicaid's purpose of providing coverage to the expansion population was a "fundamental failure"). That failure invalidates the project as a whole, not just the work requirements.

II. The Court Should Vacate the 2018 HMP Extension Project as a Whole.

Just as nothing about the 2018 HMP approval warrants a different result on the merits, so too, nothing about this case requires a different remedy. As in the other cases, vacatur is the

[2] In response to commenters' concerns regarding premiums, the Secretary stated that Michigan "designed the premium requirement in a way that minimizes potential impacts on beneficiaries" and recited the various exemptions and exceptions from the premiums. AR 18. That amounts to no response at all. Commenters took these exemptions into account, so they were already "baked in" to their concerns about coverage loss. *Stewart I*, 313 F. Supp. 3d at 263.

appropriate remedy. *See Gresham*, 363 F. Supp. 3d at 182-85, *aff'd*, 950 F.3d at 104; *Philbrick*, 397 F. Supp. 3d at 33; *Stewart II*, 366 F. Supp. 3d at 155; *Stewart I*, 313 F. Supp. 3d at 273.

When, as here, an agency action violates the APA, the "practice of the court is ordinarily to vacate" the action and remand it to the agency. *Ill. Pub. Telecomms. Ass'n v. FCC*, 123 F.3d 693, 693 (D.C. Cir. 1997). As this Court has noted, under Supreme Court and D.C. Circuit precedents, "vacatur[] is the presumptively appropriate remedy for a violation of the APA." *Gresham*, 363 F. Supp. 3d at 182 (quotation marks omitted). To determine if remand without vacatur is warranted, the Court must consider "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (internal quotation marks omitted). As discussed below, Defendants have not provided justification to overcome the presumption of vacatur.

Seriousness of Deficiencies. "Failure to consider an important aspect of the problem is a 'major shortcoming[]' generally warranting vacatur." *Stewart II*, 366 F. Supp. 3d at 155 (citation omitted). Here, the Secretary failed to adequately consider whether the 2018 HMP extension project was likely to advance Medicaid's core objective of furnishing medical assistance to low-income people in need. Instead of considering the effect of the project on coverage, the Secretary focused on his alternative objectives. As this Court found with respect to the Secretary's other approvals, this failure goes "to the heart" of his decision. *Stewart I*, 313 F. Supp. 3d at 273 (quotation marks omitted); *Gresham*, 363 F. Supp. 3d at 182 (citing *Stewart I*). And to be sure, this failure was not isolated to the work requirements. Rather, as with the previous approvals, it

infected his rationale for approving the Michigan project as a whole.[3] *See Stewart I*, 313 F. Supp. 3d at 272; *Gresham*, 363 F. Supp. 3d at 181. *See also Gresham*, 950 F.3d at 104 (noting that the Secretary's decision "to prioritize non-statutory objectives to the exclusion of the statutory purpose," undermined each component of the Arkansas waiver project).

Extent of Disruption. The disruptive consequences of vacatur are "weighty only insofar as the agency may be able to rehabilitate its rationale for the regulation." *Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009). For reasons described above, the approval cannot be rehabilitated. *See Stewart II*, 366 F. Supp. 3d at 156 (noting that on remand, "the Secretary doubled down on his consideration of other aims of the Medicaid Act," leaving the court with "some question" about his "ability to cure the defects in the approval"); *accord Gresham*, 950 F.3d at 99 (finding the district court's analysis "indisputably correct"). But even if the Court were to consider this factor, it supports vacatur.

Here, the Court has already vacated the work requirements, *see* Minute Order (Mar. 4, 2020), and there will be minimal disruption to the State from vacating the heightened 5% premium and behavior eligibility requirements, as those provisions have not been implemented. Contrary to Defendants' suggestions, *see* Fed. Br. at 9-10, the State's decision to delay implementation of these components weighs in favor of vacatur because disruption will be minimal. As this Court noted in *Stewart*, the fact that various, harmful waiver components had not yet taken effect weighed in

[3] Plaintiffs allege that the Secretary does not have the authority to allow Michigan to impose premiums on individuals below 150% of FPL and that he violated Medicaid's cost sharing waiver provision, 42 U.S.C. § 1396o(f). *See* Compl. ¶¶ 47-52, 231-36, ECF No. 1. If they succeed on those claims, the Court would have no "doubt whether the agency chose correctly" in approving the premium and cost sharing waivers. *Allied-Signal, Inc.*, 988 F.2d at 150; *see Conservation Law Found. v. Pritzker*, 37 F. Supp. 3d 254, 271 (D.D.C. 2014) ("[W]here there is no question that the agency has violated the law and absolutely no possibility of the rule's survival on remand—the D.C. Circuit has suggested that the rule ought to be vacated." (citing *Nat'l Res. Def. Coun. v. EPA*, 489 F.3d 1250, 1261) (D.C. Cir. 2007)).

favor of vacatur. *Stewart I*, 313 F. Supp. 3d at 273. Moreover, those provisions, if implemented, threaten the coverage of tens of thousands of individuals. Meanwhile, individuals remain subject to the 2% premiums and the copayments, which deter access to coverage and care and are difficult for most beneficiaries to pay. In fact, Michigan's most recent annual report revealed that over 266,000 enrollees had unpaid premiums and copayments.[4] These policies have left tens of thousands of individuals with debts to be collected by Michigan's Treasury. While the Secretary argues that the active components will not directly result in any beneficiary losing Medicaid coverage, Fed. Br. at 1, the evidentiary record shows otherwise as do activities from other states. Recognizing that premiums create barriers to health coverage, states such as Indiana and Iowa have waived them in light of the COVID-19 pandemic. *See* Gov. Eric Holcomb, Exec. Order 20-05 (Mar. 19, 2020), https://www.in.gov/gov/files/EO_20-05.pdf; Iowa Dep't of Hum. Servs., "DHS waives all co-pays, premiums, and contributions during emergency declaration," (Mar. 13, 2020), https://dhs.iowa.gov/sites/default/files/470-5609.pdf?032320202026.

Finally, vacatur does not require Michigan to eliminate its managed care program, as the State suggests. Mich. Br. at 15-17. Managed care affects *how* covered services are delivered to Medicaid enrollees, not *whether* an individual is eligible for Medicaid. Use of managed care delivery systems in Medicaid was tested in the 1980s and 1990s by a group of states through Section 1115 managed care waivers. *See* Amicus Br. of Mich. Ass'n of Health Plans, 4 ECF No. 26 (noting that Michigan first implemented managed care in 1996). Thereafter, Congress amended the Medicaid Act to allow states to implement the kind of managed care program Michigan

[4] *See* Maximus, MI Health Account, Healthy Michigan Plan, Executive Summary Report, 17 (Dec. 2018), available at PDF p. 119 of https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/mi/Healthy-Michigan/mi-healthy-michigan-Q4-annl-rpt-2018.pdf.

describes through a state plan amendment. *See* 42 U.S.C. § 1396u-2. CMS must act on a state plan amendment within 90 days, or it is deemed approved. 42 C.F.R. § 430.16. Thus, as was the case in Arkansas, although vacatur will cause Michigan to make changes to its Medicaid program and those changes could take a few months, it "will have little lasting impact on HHS's or [Michigan's] interests." *Gresham*, 363 F. Supp. 3d at 183-84. On balance, any temporary administrative burden suffered by the State cannot outweigh the harm that individuals will experience if the approval remains in effect. *See id*. at 185.

CONCLUSION

For these reasons, the Plaintiffs respectfully ask the Court to vacate the Secretary's approval of the 2018 HMP extension project as a whole. If, however, the Court is inclined to remand the Secretary's approval without vacatur, Plaintiffs request an opportunity to file a brief on the remaining claims in their complaint. See Compl. ¶¶ 208-215, 229-61 (Counts I, IV-VI).

Dated: March 24, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2020, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send an electronic notice to the Defendants' and State Intervenor's attorneys of record.

By: /s/ Jane Perkins
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