No. 20-38

# In the Supreme Court of the United States

STATE OF ARKANSAS,
*Petitioner,*
v.
CHARLES GRESHAM, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## REPLY BRIEF FOR PETITIONER


OFFICE OF THE ARKANSAS ATTORNEY GENERAL
323 Center St., Ste. 200
Little Rock, AR 72201
(501) 682-6302
nicholas.bronni@arkansasag.gov

LESLIE RUTLEDGE
Arkansas Attorney General
NICHOLAS J. BRONNI
Solicitor General
*Counsel of Record*
VINCENT M. WAGNER
Deputy Solicitor General
ASHER STEINBERG
DYLAN L. JACOBS
Assistant Solicitors General

*Counsel for Petitioner*


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## REPLY BRIEF

Having successfully invalidated two States' community-engagement requirements on astonishingly broad grounds, Respondents attempt to recast their wins as exceptionally narrow victories. In fact, on Respondents' telling, the court of appeals merely "remanded two waiver approvals to the Secretary for a fuller discussion." BIO 2.

Respondents are far too modest. No community-engagement requirement could survive the analysis demanded by the court of appeals, and absent this Court's review, none ever will. The court of appeals rejected as "not consistent with Medicaid" every conceivable objective a community-engagement requirement might further. Pet. App. 16a. Indeed, it categorically rejected any suggestion that promoting beneficiary independence, helping transition beneficiaries to private coverage and thereby protecting the program's sustainability, or even improving beneficiary health are valid Medicaid objectives. Pet. App. 16a. Instead, the court of appeals held Medicaid's sole objective is coverage and that, to survive review, a community-engagement requirement must increase the ranks of those on Medicaid. No "fuller discussion" will ever meet that standard, and that underscores the importance of this dispute and why this Court's review is warranted.

Ultimately, Respondents don't dispute the breadth of the court of appeals' holdings. Instead, they merely argue that those holdings were correct. But arguing that Medicaid bars the Secretary from testing community-engagement requirements doesn't make the question of whether it does any less worthy of this Court's review. And Respondents' arguments on the merits are singularly unpersuasive.

Their argument that Medicaid's overriding objective is coverage rests entirely on treating a 1965 authorization of Medicaid appropriations—that says nothing about the Medicaid expansion—as an exhaustive statement of Medicaid's purposes. But if that were true, the Medicaid expansion itself would exceed Medicaid's purposes. Respondents have no answer to that conundrum. Nor does Respondents' arbitrary-and-capricious argument fare any better. For if the Medicaid expansion has purposes beyond coverage—such as health—the Secretary could reasonably choose to prioritize those purposes over coverage.

Respondents' arguments against review therefore fall flat, and this Court should grant the Petitions.

## ARGUMENT

### I. The question presented is exceptionally important.

Respondents spill a great deal of ink attempting to minimize the consequences of their victory below. They insist that the court of appeals "did not outlaw work requirements." BIO 25. Instead, they argue, it merely held that the Secretary "must comply with the most basic constraints on administrative action" and "left open the possibility that the Secretary could cure the deficiencies" it identified on remand. BIO 25-26.

That is an untenably minimalist account of what the court of appeals held. Indeed, even if the court of appeals did not expressly declare that work- or community-engagement requirements are unlawful, its crabbed reading of Medicaid's objectives makes it unlawful for the Secretary to approve such requirements. And whether the Secretary may—when he has already approved them in eleven States and nine more States have sought approval of similar programs—is

an undeniably important question that merits this Court's review.

To approve a Medicaid demonstration project, the Secretary must find it is "likely to assist in promoting the objectives" of Medicaid. 42 U.S.C. 1315(a). In approving Arkansas's demonstration project, and specifically its community-engagement requirement, the Secretary predicted it would likely promote beneficiary health, independence, and, by transitioning less needy beneficiaries to private coverage, the sustainability of the State's Medicaid program. See Pet. 7-8; Gov't Pet. 10.

Rather than rejecting the Secretary's empirical predictions, the court of appeals simply held that all of the objectives the Secretary identified were "not consistent with Medicaid." Pet. App. 16a. As Respondents concede, the court of appeals held "better health outcomes" are not an objective of Medicaid. BIO 17 (quoting Pet. App. 13a). It next held that beneficiary independence is not a Medicaid objective. Pet. App. 14a-16a. And though Respondents claim the court of appeals simply refused to address the Secretary's arguments on *Chenery* grounds, BIO 22 & n.4, it alternatively held the Secretary could not "have rested his decision on the objective of transitioning beneficiaries away from government benefits through . . . commercial coverage." Pet. App. 14a. To the exclusion of all these objectives, the court of appeals held Medicaid had just "one primary purpose." Pet. App. 16a. That, it declared, "is providing health care coverage without any restriction geared to healthy outcomes, financial independence or transition to commercial coverage." *Id.* Thus, to approve a demonstration project under the court of appeals' decision, the

Secretary must find it would likely increase the number of people on the Medicaid rolls.

Against that backdrop, Respondents claim the door is still open to approving community-engagement requirements. BIO 26. Yet giving the game away, they simultaneously forecast that performing the analysis required by the court of appeals would likely "demonstrate . . . fatal shortcomings." *Id.* That's unsurprising, because the analysis the court of appeals required is fatal to community-engagement requirements. The court of appeals barred reliance on every rationale the Secretary has offered for approving a community-engagement requirement. In their place, it required the Secretary to find community-engagement requirements would likely promote coverage.

As the court of appeals defined that objective, that is an impossible task. The Secretary could predict—indeed, he did in this case—that community-engagement requirements are unlikely to substantially reduce coverage. But that would not satisfy the court of appeals' test. The Secretary could predict that community-engagement requirements will, in the long run, promote Medicaid coverage by conserving scarce Medicaid funds. But the court of appeals rejected that rationale, holding the Secretary must pursue the aim of coverage "without any restriction geared to . . . transition[ing] [beneficiaries] to commercial coverage." Pet. App. 16a. What the Secretary cannot rationally predict is that conditioning coverage on community-engagement will, in the immediate term, increase the ranks of those on Medicaid coverage.

Experience has also demonstrated that the decision below is fatal to community-engagement requirements. Respondents claim it merely casts a shadow on other States' approvals. BIO 2. Yet Respondents'

own counsel have already successfully leveraged it to invalidate two, New Hampshire's and Michigan's, and challenged a third, Indiana's, that the government has conceded must fall under the decision below. Pet. 26-28. Respondents don't even acknowledge these decisions, let alone offer any means of distinguishing the community-engagement requirements, approved and pending approval, in fifteen other States.

But the impacts of the court of appeals' decision don't stop there. Respondents' counsel has persuasively argued it bars conditioning coverage on healthy behaviors—a staple of Section 1115 waivers over the last three administrations. *See Young v. Azar*, No. 1:19-cv-3526, D. Ct. Doc. 27, at 2-3 (D.D.C. Mar. 24, 2020). As they explained, healthy behavior incentives pursue an objective the court of appeals held inconsistent with Medicaid—health—at the expense, however slight, of what the court of appeals deemed Medicaid's "one primary purpose"—coverage. And unsurprisingly health policy experts fear that even health-promoting demonstration projects with neutral impacts on coverage would fall under the court of appeals' test. *See* Kristen Underhill, *Purchasing Health? The Promise and Limits of Public Health Insurance*, 119 Colum. L. Rev. F. 302, 325-26 (2019) (discussing a hypothetical project that used Medicaid funds to prevent lead poisoning). For under that test, only projects that expand coverage are "likely to assist in promoting the objectives" of Medicaid. 42 U.S.C. 1315(a). That stifling limit on Medicaid experimentation demands this Court's immediate review.

## II. The court of appeals' decision is wrong.

Respondents devote the bulk of their opposition to defending the court of appeals' decision on the merits. BIO 27-37. That defense is not a reason to deny

review, and if anything, it underscores just how indefensible the court of appeals' decision is.

### A. Health and independence are Medicaid objectives.

Respondents' defense of the court of appeals' statutory holding rests entirely on a selective misreading of Medicaid's original authorization of appropriations. They claim it "expressly provides that [Medicaid] funds are '[f]or the purpose of enabling each State, as far as practicable under the conditions in such State, *to furnish (1) medical assistance* ….'" BIO 27 (quoting 42 U.S.C. 1396-1). That omits a lot of text. Besides omitting the section's second stated purpose of helping beneficiaries attain "capability for independence or self-care," it omits that "medical assistance" was to be furnished only "on behalf of families with dependent children and of aged, blind, or disabled individuals." 42 U.S.C. 1396-1. That is, the section only states a purpose of covering Medicaid's original beneficiaries. It says nothing about covering expansion beneficiaries, and nothing at all about the Medicaid expansion's purposes. Yet this is a Medicaid-expansion case. And Respondents do not explain—because they can't—how what's at most a statement of original Medicaid's purposes can unambiguously limit the Secretary's understanding of "a new health care program." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 584 (2012) (holding that the expansion was not "a mere alteration of [the] existing" Medicaid program).

Nor do Respondents explain why a mere authorization of appropriations should be mistaken for a statement of Medicaid's original purposes. Respondents' only gesture at addressing the problem is to rhetorically ask what "better place could the purpose of a spending program be found than in the provision that

sets up the '*purpose*' of the appropriations." BIO 28 (quoting Pet. App. 46a). That retort might make some sense if the provision appropriated funds and told the agency how to spend them. But it doesn't. It merely authorized future Congresses to appropriate funds. And as explained in Arkansas's Petition—to no dispute from Respondents—such provisions are only directives to Congress, not to agencies. Pet. 15-16.

Besides mistaking an outdated spending authorization for a comprehensive statement of Medicaid's purposes, Respondents offer little reason to conclude health and independence are not Medicaid objectives.[1] They concede, as they must, that health is one of Medicaid's "ultimate purposes," but they claim the Secretary may only pursue health through "the means" Congress chose—i.e., coverage. BIO 29. But while agencies are generally bound by both Congress's means and ends, Section 1115 authorizes the Secretary to "waive compliance" with Medicaid's requirements to promote its "objectives." 42 U.S.C. 1315(a), (a)(1). Thus, Respondents' argument falls flat.

Respondents next argue that if health is a Medicaid objective, the Secretary could condition coverage on healthy behavior—a result, they claim, is absurd. BIO 29. But far from an absurd approach, the last

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[1] Respondents do claim several other circuits have held Medicaid's overriding purpose is simply coverage. BIO 20. The decisions they cite do not support their position. Critically, none addresses the purposes of the Medicaid expansion, and none addresses the purposes of Medicaid in the context of reviewing a Section 1115 approval. Indeed, two do not address Medicaid's purposes at all, *see Virginia ex rel. Hunter Labs., L.L.C. v. Virginia*, 828 F.3d 281 (4th Cir. 2016), *Univ. of Wash. Med. Ctr. v. Sebelius*, 634 F.3d 1029 (9th Cir. 2011), and the others merely contain stray, unreasoned dicta.

*three* administrations read Section 1115 exactly that way. Pet. 4. Indeed, Congress itself has authorized Medicaid cash incentives for healthy behaviors. In response, Respondents offer the non sequitur that they are not Section 1115 projects and don't "affect Medicaid eligibility."[2] BIO 30. But the lesson of these projects isn't that Congress has specifically authorized conditioning coverage on healthy behaviors under Section 1115. It's that health in itself, not just coverage, is an objective of Medicaid.

Respondents' arguments that independence is not a Medicaid objective are of a piece. Even the provision they tout as a comprehensive statement of Medicaid's objectives states a purpose of helping beneficiaries "attain . . . independence." 42 U.S.C. 1396-1. Addressing that awkward fact, Respondents merely declare—without explanation—that "in context, [independence] refers to *functional* independence." BIO 30. In a case they acknowledge is governed by *Chevron*, BIO 19, such ipse dixit does not suffice to displace the Secretary's contrary interpretation.

Finally, Respondents make much of the fact that Congress did not included work requirements in Medicaid. BIO 30-31. But the whole point of Section 1115 is to allow States to test Medicaid reforms that *aren't* part of the program.

### B. The Secretary's approval was not arbitrary and capricious.

Respondents do not dispute that the Secretary reasonably predicted Arkansas's demonstration pro-

[2] Even that much cannot be said of an earlier authorization of healthy-behavior-incentive demonstration projects. *See* Pet. 21 (citing 42 U.S.C. 1396u-8(a)(3)).

ject would likely promote beneficiary health and independence. BIO 36. Rather, they only claim his approval was arbitrary and capricious because he supposedly failed to assess the risk of coverage loss. BIO 34-36. That argument suffers from both a legal and a factual problem: the Secretary did not have to consider the risk of coverage loss, and he did consider it.

Respondents' argument that the Secretary was required to address coverage loss rests on the false legal premise that coverage is "the stated and primary objective" of the Medicaid expansion. BIO 36. Absent that premise, the argument falls apart. For as Arkansas's Petition explained (Pet. 23-24) and the court of appeals acknowledged, when a program has "several objectives," it's "enough for the agency to assess at least one" and deprioritize others. Pet. App. 18a. If Respondents disagree with that aspect of the court of appeals' opinion, they don't say so. That means their argument rises and falls on Medicaid's having a single purpose. If health and independence are also Medicaid purposes, the Secretary could choose to prioritize them over maximizing coverage.

In any event, the Secretary did consider coverage loss. On the one hand, Respondents concede the Secretary could not be expected "to pinpoint the amount of coverage loss." BIO 35. On the other, they concede the Secretary "acknowledge[d] the concern" and responded by addressing a series of protections that he believed would "minimize coverage loss." *Id.* How, then, can they conclude the Secretary fell short? Ultimately, Respondents' real dispute with the Secretary is not that he failed to consider coverage loss, but that he disagreed with commenters who predicted it.

Respondents give the real nature of their argument away when they explain why the Secretary could not rely on the various safeguards against coverage loss in Arkansas's proposal. They reason that certain commenters considered those safeguards as well, yet still predicted substantial coverage loss. *Id.* But all that shows is that the Secretary disagreed with the commenters' prediction, not that he failed to consider it.

## III. There are no vehicle problems.

Respondents raise two supposed vehicle problems. Neither is an obstacle to review.

First, Respondents claim the Secretary's Petition rests on an argument that wasn't made in his approval or passed on by the court of appeals. BIO 21-23. That is wrong. But even if the Secretary's Petition suffered from that defect, Arkansas's does not. The rationales Arkansas has offered for sustaining the Secretary's approval—health and independence—were contained in the Secretary's approval letter and passed on below, and Respondents do not claim otherwise. Given the importance of the question presented, Arkansas's defense of the approval suffices to grant review even if the Court could not entertain the Secretary's arguments. *See Alaska v. Se. Alaska Conservation Council*, 554 U.S. 931 (2008) (granting State's petition to review vacatur of agency mining permit where the government opposed certiorari); *Morgan Stanley Cap. Grp. v. Pub. Util. Dist. No. 1*, 551 U.S. 1189 (2007) (granting intervenor's petition to review vacatur of FERC order despite FERC's cert-stage defense of the vacatur).

In any event, the Secretary's Petition does not suffer from a vehicle problem either. Contrary to Respondents' suggestions, the Secretary has not abandoned

reliance on health and independence. Indeed, the Secretary continues to argue that health is "an overarching purpose" of Medicaid. Gov't Pet. 28. Rather, at most the Secretary has elaborated on why his reliance on health and independence was appropriate, by explaining that beneficiary health, and helping expansion beneficiaries transition to commercial coverage, reduces Medicaid costs, thus making core Medicaid coverage more sustainable. Gov't Pet. 26-27 (independence); Gov't Pet. 28-29 (health). That kind of elaboration on the legal support for an agency's rationale is not what *Chenery* guards against. *See Mass Trs. of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 246-48 (1964) (holding it irrelevant that an agency failed to correctly identify "the statutory basis" for an authority it correctly determined it had).

Respondents' last stab at avoiding review feints at justiciability. Noting that under the Families First Coronavirus Response Act (FFCRA) States cannot disenroll Medicaid beneficiaries during the COVID-19 emergency, Respondents conclude "Petitioners are effectively asking this Court for an advisory opinion." BIO 24. The word "effectively" is used advisedly, because any opinion the Court would write in this case would not be advisory in any ordinary sense of the word.

FFCRA does not undo Section 1115 waivers; it merely holds their implementation in temporary abeyance for the duration of the pandemic. When the pandemic ends, FFCRA will—but for the judgment below—permit Arkansas to implement its demonstration project. If the Court grants certiorari and reverses, the project will be implemented when the pandemic ends. If the Court does not grant certiorari, the judgment below will bar implementation even after FFCRA's bar is lifted, and there will be no

opportunity for this Court, the courts below, or the Secretary to reconsider the permissibility of Arkansas's project. Thus, Respondents' vehicle arguments fall flat and this Court's review is warranted for the reasons explained here and in the Petition.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General
NICHOLAS J. BRONNI
Solicitor General
*Counsel of Record*
VINCENT M. WAGNER
Deputy Solicitor General
ASHER STEINBERG
DYLAN L. JACOBS
Assistant Solicitors General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center St., Ste. 200
Little Rock, AR 72201
(501) 682-6302
nicholas.bronni@
arkansasag.gov

*Counsel for Petitioner*

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