No. 20-37

In the Supreme Court of the United States

ALEX M. AZAR II, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

CHARLES GRESHAM, ET AL.

ALEX M. AZAR II, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

SAMUEL PHILBRICK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Congress has expressly authorized the Secretary of Health and Human Services (HHS) to approve experiments in States' Medicaid programs that he adjudges "likely to assist in promoting the objectives" of Medicaid by testing whether variations on the default requirements for state Medicaid plans would advance those objectives. 42 U.S.C. 1315(a). The Secretary acted well within his authority in approving the Arkansas and New Hampshire demonstration projects at issue here, which are designed to test whether certain measures may help States provide health-care coverage by stretching their

limited Medicaid resources. The court of appeals' decisions invalidating those approvals rest on a fundamental misunderstanding of the statute and threaten to curtail sharply the Secretary's authority going forward.

Respondents identify no sound reason to forgo or defer review. Their defense of the decisions below on the merits largely echoes the court of appeals' legal errors. Respondents contend that the provision of health-care coverage is the only permissible objective of a demonstration project and that such experiments cannot pursue other aims at the expense of that goal. But like the court of appeals, respondents fail to show that the statute precludes projects designed to test whether a particular measure may be a *means* of promoting the provision of coverage. And they offer no basis for second-guessing the Secretary's determination that the experiments he approved to test work and skill-building requirements are likely to assist in promoting that aim.

Respondents also fail to refute the practical significance of the question presented, which may bear on more than a dozen other similar experiments that have been approved by or are pending before the agency. Their suggestion of deferring review until a circuit conflict develops disregards the fact that the court of appeals' decision in *Gresham* is now controlling precedent in a circuit where any future plaintiff challenging other experimental projects may also bring suit. And their reliance on the temporary impediment that the COVID-19 pandemic poses to implementing work and skill-building requirements fails to confront the permanent limitations the court of appeals' reasoning would place on the agency.

Respondents seek to shield the D.C. Circuit's erroneous rulings from review by belatedly asserting that

the court did not pass upon the Secretary's resource-stretching rationale for determining that work and skill-building requirements promote the Medicaid Act's objectives. Both the language of the court's opinion in *Gresham* and its summary affirmance in *Philbrick* based on that opinion refute that contention. And respondents' assertion that the court in *Gresham* could not properly have considered that rationale is both wrong and ultimately irrelevant. The court of appeals reached and incorrectly resolved that important legal issue. The petition for a writ of certiorari should be granted.

I. THE DECISIONS BELOW ARE INCORRECT

A. Respondents embrace (Br. in Opp. 27) the court of appeals' premise that Medicaid's "principal objective" is providing health-care coverage, to the exclusion of improving beneficiaries' health and financial independence. See *id.* at 27-31. But even assuming arguendo that the premise is correct, respondents—like the court of appeals—identify no sound reason why the Secretary may not approve experiments designed to test whether certain variations from the default Medicaid model may be means of furthering that very end.

Respondents contend (Br. in Opp. 33) that HHS "cannot place saving money on par with the Medicaid Act's primary objective of furnishing medical assistance." But the New Hampshire and Arkansas projects at issue here do not seek to make maximal use of scarce resources "at the expense" of providing coverage. *Ibid.* Rather, the projects seek to conserve scarce Medicaid dollars as a way of preserving and enhancing States' ability to provide coverage. As our petition explained, most Medicaid spending concerns optional populations and benefits, Pet. 3-4—including the coverage of the

adult expansion population under the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119, which became optional as a result of *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519 (2012). If successful, the requirements of the projects at issue here will help adults in that expansion population to develop the job skills needed to transition out of Medicaid and into commercial coverage, including the federally subsidized coverage that is available through the ACA's Exchanges. In addition, these requirements are expected to improve the health of Medicaid recipients and thus make them less costly for state programs to cover. The projects thus have the potential to enable States with scarce Medicaid dollars to preserve or extend optional coverage. Pet. 24-29.

Respondents similarly miss the point in contending (Br. in Opp. 33) that *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405 (1973), and *Pharmaceutical Research & Manufacturers of America* v. *Walsh*, 538 U.S. 644 (2003), preclude HHS from elevating fiscal sustainability over "program objectives established by Congress." Both decisions recognized that enabling a State to focus its limited resources on those in the greatest need can itself promote the aims of a public-welfare program. Pet. 22. The purpose of the experiments at issue here is to evaluate whether and how the particular measures Arkansas and New Hampshire proposed can accomplish that aim.

B. Respondents offer no sound basis for second-guessing the Secretary's predictive judgment that testing the work and skill-building requirements at issue here is likely to assist in promoting the provision of coverage. They note (Br. in Opp. 32) the district court's skepticism that those requirements will in fact enable

New Hampshire to stretch limited resources. See *id.* at 15 (citing Pet. App. 94a-95a). But reliance on the district court's doubts on that score is doubly misplaced. First, the point of a demonstration project is to test a hypothesis. Nothing in Section 1315 requires HHS or a State to demonstrate in advance that the project is certain to yield the anticipated outcome; an experiment to test a measure that the Secretary determines may further the statutory objectives can add value by disproving a hypothesis as well as by proving it. Pet. 20. Second, Section 1315 authorizes the Secretary, not a reviewing court, to make the predictive judgment that testing a particular variation on the default requirements will promote Medicaid's objectives. Pet. 19-20. In approving the New Hampshire and Arkansas projects, the Secretary determined that the particular measures they include are "likely to assist in promoting the objectives of the Medicaid program." Pet. App. 150a; see *id.* at 133a.

Respondents err in asserting (Br. in Opp. 32) that New Hampshire "disclaimed" any resource-stretching benefit from its demonstration project. See *id.* at 15; Pet. App. 94a. At the district-court hearing in question, the State explained that the "purpose" of its project "was not to reduce coverage" and thereby yield short-term "budget savings." *Philbrick* 7/23/19 Tr. 27. Instead, the project is focused on the long term, by testing whether New Hampshire can sustainably extend Medicaid coverage to the ACA's adult expansion population.

As New Hampshire has explained in this Court (Br. 2), that experiment was part of "a public policy balance" that "expand[ed] Medicaid coverage to low-income, able-bodied adults in New Hampshire, while trying to ensure the fiscal sustainability of the State's

Medicaid program." The project includes evaluating whether New Hampshire's "community engagement requirement" can prevent "able-bodied adult[s] capable of performing regular work and obtaining commercial insurance[] from diverting scarce Medicaid resources away from those who need them." *Ibid.*; see *Philbrick* 7/23/19 Tr. 27 ("We're just trying to test the hypothesis, which is, if we can get people into programs so they're working, then maybe they can transition off of the program."). The Secretary properly determined that testing that long-term strategy for providing coverage "as far as practicable under the conditions in [the] State," 42 U.S.C. 1396-1, is likely to promote the objectives of Medicaid.

Contrary to respondents' conjecture, the government's interpretation of Section 1315 would not "require * * * the Secretary to approve any project if a State threatened to cut any population or 'do away with all of Medicaid,'" or "to approve a waiver" whenever a State seeks to test "anything that might theoretically advance fiscal sustainability." Br. in Opp. 32 (citation omitted). Section 1315 vests the discretion to approve a demonstration project in the Secretary, not the States. The Secretary may exercise his discretion to approve a demonstration project and waiver only if he makes a "judgment" that the project "is likely to assist in promoting the objectives of" Medicaid. 42 U.S.C. 1315(a). In making that determination, however, it is entirely reasonable for the Secretary to take into account the fact that particular coverage a State provides is optional rather than mandatory.

C. Respondents briefly defend (Br. in Opp. 34) the court of appeals' conclusion in *Gresham* that the ap-

proval of Arkansas's project violated the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.* But that conclusion cannot independently support the court's judgment because it was premised on the court's misinterpretation of Section 1315. See Pet. 31-33. The court held that "the Secretary disregarded th[e] statutory purpose" of providing coverage, Pet. App. 19a, because the court failed to account for the Secretary's determination that stretching scarce resources is a potential means of achieving that purpose.

Respondents relatedly contend (Br. in Opp. 34) that the Secretary "failed to address coverage loss" that could result from work and skill-building requirements. But the record makes clear that HHS did consider and respond to public comments addressing that risk. The approval letters explained that the projects are tailored to minimize such coverage loss, including because the work and skill-building requirements apply only to those able-bodied adults who can reasonably be expected to fulfill them, and the requirements include protections designed to guard against coverage loss. See Pet. App. 164a-168a (New Hampshire); *id.* at 137a-142a (Arkansas). At bottom, respondents simply disagree with the Secretary's determination that the benefits of the demonstration projects outweigh the risks. But Congress entrusted that "judgment" to "the Secretary," 42 U.S.C. 1315(a), not to Medicaid beneficiaries like respondents or the courts.

II. THE QUESTION PRESENTED WARRANTS REVIEW

Respondents make little effort to contest the importance of the question presented. They do not dispute that, in addition to the two projects the decisions below directly invalidated, the court of appeals' precedential ruling in *Gresham* will jeopardize as many as 17 other

similar projects in other States that have been approved by or are pending before HHS. Pet. 8, 33-35. And respondents do not deny that, if HHS cannot approve experiments to test work and skill-building requirements even as means to promote the fiscal sustainability of a State's Medicaid program—including its coverage of optional benefits or populations—States may be discouraged from providing optional coverage.

Respondents instead contend (Br. in Opp. 19-21) that this Court's review is not yet necessary in the absence of a lower-court conflict. But they do not dispute that the governing venue statute permits any plaintiff challenging the approval of a demonstration project to sue in the D.C. Circuit. See Pet. 34. Future plaintiffs thus have both the ability and a powerful incentive to bring suit where *Gresham* is controlling. There is no reason to await decisions in other circuits because *Gresham* in effect already establishes a de facto nationwide rule.

Respondents also err in contending (Br. in Opp. 23-25) that this Court's review is not necessary in light of the COVID-19 pandemic. Although the pandemic may make immediate, complete implementation of the projects impracticable until public-health conditions allow, that impediment is not a permanent bar. Likewise, the recent statute respondents cite, which conditions a State's receipt of an increase in federal Medicaid funding during the pandemic on the State's maintenance of its existing Medicaid parameters, is temporary and will apply only until shortly after the COVID-19 public-health emergency ends. *Id.* at 23-24 (citing Families First Coronavirus Response Act, Pub. L. No. 116-127, Div. F, § 6008(a) and (b), 134 Stat. 208). In contrast, the court of appeals' decision in *Gresham*, if left standing, threatens permanently to prevent implementation of

New Hampshire's and Arkansas's projects and will cast a cloud over the Secretary's authority to approve similar projects going forward. And in the meantime, the decision may deter other States from developing proposals for demonstration projects to be implemented after the pandemic subsides.

III. RESPONDENTS' VEHICLE CONCERNS LACK MERIT

Respondents further contend (Br. in Opp. 21-23) that these cases are unsuitable vehicles to decide the question presented because the court of appeals "did not consider" HHS's resource-stretching explanation and could not have done so in *Gresham*. *Id.* at 22. That contention lacks merit.

A. Although the court of appeals in *Gresham* stated that HHS had not adequately articulated the resource-stretching rationale in the Arkansas approval letter, see Pet. App. 13a-14a, the court nevertheless explicitly addressed that rationale on its merits, *id.* at 14a-16a. The court stated that the Secretary could not "have rested his decision" approving Arkansas's project on "the objective of transitioning beneficiaries away from government benefits through either financial independence or commercial coverage." *Id.* at 14a. To be sure, the court appears to have rejected the Secretary's determination based on a misconception of his reasoning. See Pet. 29-31. But the fact that the court's analysis was marred by a misunderstanding of the agency's position is only further reason why its ruling warrants review.

The court of appeals' decision in *Philbrick* confirms that the *Gresham* panel passed upon HHS's resource-stretching rationale. The same day that it decided *Gresham*, the court directed the parties in *Philbrick* to file motions to govern further proceedings. *Philbrick*

C.A. Order (Feb. 14, 2020). In response, the government acknowledged that *Gresham* foreclosed HHS's resource-stretching rationale and moved for summary affirmance on that basis. *Philbrick* Gov't C.A. Mot. for Summ. Affirmance 4 (Mar. 12, 2020). Respondents neither opposed the government's summary-affirmance motion nor disputed that *Gresham* controlled the outcome of *Philbrick*. The *Philbrick* panel (which included the author of *Gresham*) granted the government's motion and summarily affirmed the district court's decision invalidating the Secretary's approval of New Hampshire's project. Pet. App. 20a; Pet. 32-33. Respondents' belated assertion (Br. in Opp. 21-22) that the D.C. Circuit never passed upon the resource-stretching explanation cannot be squared with the record.

B. Respondents additionally suggest (Br. in Opp. 22) that, under *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), the court of appeals in *Gresham* could not properly consider HHS's resource-stretching reasoning because the Arkansas letter inadequately articulated that reasoning. Even if that suggestion were well taken, it would provide no basis for denying review in *Philbrick*. As respondents acknowledge (Br. in Opp. 22), HHS's letter approving New Hampshire's project expressly set forth the resource-stretching rationale.

In any event, respondents' reliance on *Chenery* to oppose review in *Gresham* is misplaced. The principle respondents invoke (Br. in Opp. 22) that courts generally must review an agency's action based on "the grounds invoked by the agency," *Chenery*, 332 U.S. at 196, does not require remanding a matter to an agency where doing so "would be an idle and useless formality," *Morgan Stanley Capital Grp. Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 545 (2008) (quoting *NLRB* v.

Wyman-Gordon Co., 394 U.S. 759, 766 n.6 (1969) (plurality opinion)). That follows from the "harmless error rule," *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 660 (2007) (citation omitted), which Congress codified in the APA, *id.* at 659 ("[D]ue account shall be taken of the rule of prejudicial error." (quoting 5 U.S.C. 706)). A remand is unnecessary where, for example, an agency's subsequent explication of its reasoning eliminates any uncertainty about its position. See *id.* at 659-660 & n.5 (holding that harmless-error rule rendered remand unnecessary where "the agencies involved ha[d] resolved any ambiguity in their positions going forward"); *Wyman-Gordon*, 394 U.S. at 767 n.6 (plurality opinion) (concluding that "[i]t would be meaningless to remand" under *Chenery* because "the substance of the [agency's] command [wa]s not seriously contestable" and "[t]here [wa]s not the slightest uncertainty as to the outcome of a proceeding before the [agency]").

"*Chenery*" thus "does not require that [courts] convert judicial review of agency action into a ping-pong game." *Morgan Stanley*, 554 U.S. at 545 (citation omitted). That is especially true of demonstration-project approvals, which are not required to set forth the agency's reasoning for allowing an experiment in the same manner as if it were promulgating a rule. See *Aguayo* v. *Richardson*, 473 F.2d 1090, 1103-1108 (2d Cir. 1973) (Friendly, J.) (upholding Section 1315 demonstration project including work requirement where there was "no statement of the grounds for the Secretary's action"), cert. denied, 414 U.S. 1146 (1974).

Here, HHS's letter approving Arkansas's project explained that the project sought to improve beneficiaries' health and financial independence and to "facilitate

transitions" to non-Medicaid coverage. Pet. App. 130a; see *id.* at 133a-136a; A.R. 2057. And long before the court of appeals rendered its decision in *Gresham*, the Secretary had elaborated in the New Hampshire and revised Kentucky letters his reasoning linking such transitions to the statutory objectives. Both letters set forth in detail the Secretary's position that testing whether work and skill-building requirements can improve the fiscal sustainability of States' Medicaid programs promotes the provision of health-care coverage. Pet. 11-13. And the court not only was aware of the agency's position but had the benefit of briefing and argument on that issue, because *Gresham* was briefed and argued together with the appeals concerning Kentucky's project. Pet. 14 n.7.

The court of appeals thus faced no uncertainty about the agency's position on how work and skill-building requirements may enhance fiscal sustainability and in turn promote the provision of coverage. Remanding for HHS to reiterate again, in the specific context of Arkansas's project, an explanation that it had already articulated in other letters would have been an "idle and useless formality." *Morgan Stanley*, 554 U.S. at 545 (citation omitted). Respondents' effort to insulate the court's erroneous rulings from review lacks merit and should be rejected.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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Acting Solicitor General

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