Nos. 20-37 & 20-38

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.*,
Respondents.

STATE OF ARKANSAS,
Petitioner,
v.
CHARLES GRESHAM, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF OF INDIANA AND 16 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Social Security Act authorizes the Secretary of Health and Human Services to approve "any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives" of a host of state-administered welfare programs including Medicaid. Here, Arkansas sought approval to test the hypothesis that conditioning Medicaid expansion benefits on work, education, or volunteering would lead to healthier outcomes for its beneficiaries. The Secretary agreed, predicting that Arkansas's proposal would likely improve beneficiary health and promote independence from governmental support.

On review, the United States Court of Appeals for the D.C. Circuit held that approval unlawful. It did not hold that the Secretary's prediction of health benefits was unreasonable, or even that the Secretary failed to weigh those benefits against the project's potential costs. Rather, it held the Secretary could not even consider them because, in its view, the objective of Medicaid is expanding the ranks of those on Medicaid and beneficiary health is beyond the Secretary's remit.

The question presented is:

Whether the Secretary's approval of the Arkansas Works Amendment was lawful.

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INTEREST OF *AMICI* STATES

The States of Indiana, Alabama, Alaska, Arizona, Florida, Georgia, Kansas, Louisiana, Mississippi, Missouri, Montana, Ohio, Oklahoma, South Carolina, Texas, Utah, and West Virginia respectfully submit this brief as *amici curiae* in support of Petitioners.

Amici States submit this brief to explain why the Court should reject the exceedingly narrow interpretation given by the court below to the waiver authority vested by Section 1115 of the Social Security Act in the Secretary of Health and Human Services. The limits placed by the decision below on the Secretary's Section 1115 waiver authority conflict with both statutory text and decades of waiver practice. If allowed to stand, those limits threaten the validity of numerous 1115 waiver programs on which millions of Americans rely. While the decision below pertains specifically to Medicaid waivers relating to community-engagement requirements—that is, requirements that beneficiaries demonstrate participation in education or work (whether volunteer or compensated) to maintain enrollment—the results of the decision affect not only the numerous waiver programs that include such requirements but also many waiver programs that are entirely unrelated to community-engagement requirements. It should be reversed.

INTRODUCTION

1. With the Social Security Act of 1935, now codified as Chapter 7 of Title 42 of the U.S. Code, Congress created several programs that provide federal financial support for state services to the needy. *See* Pub. L. 74-271, 49 Stat. 620, at Title I (state old-age-assistance programs), Title IV (state programs for needy dependent children), and Title X (state programs for the blind). These funds are conditioned on States' receipt of federal approval for their plans to conduct such programs, and these plans are in turn subject to numerous statutory and regulatory requirements. *See id.*; *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 610–11 (2012) (explaining plan-approval process States must follow to qualify for federal Medicaid funds). In order to participate in Medicaid and receive federal funding, for example, a State must submit a plan for medical assistance that meets statutory requirements and must obtain approval of the plan from the Secretary of Health and Human Services. *See* 42 U.S.C. § 1396(a)–(b).

Twenty-seven years later, recognizing that the many requirements federal law imposes on state programs "often stand in the way of experimental projects designed to test out new ideas and ways of dealing with the problems of public welfare recipients," Congress adopted the waiver provision at issue in this case—Section 1115 of the Social Security Act. S. Rep. No. 1589, 87th Cong., 2d Sess. 19, reprinted in 1962 U.S.C.C.A.N. 1943, 1961–62.

Section 1115 authorizes the Secretary to approve state-run "experimental, pilot, or demonstration project[s]" and empowers the Secretary to "waive compliance" with otherwise-applicable federal requirements "to the extent and for the period he finds necessary to enable such State . . . to carry out such project." Pub. L. 87-543, 76 Stat. 172 (codified at 42 U.S.C. § 1315).

Section 1115 is not limited to any specific welfare program. It was adopted two years *before* Congress created Medicaid: The statute creating Medicaid amended Section 1115 to add Medicaid as a program to which 1115 applies. *See* Pub. L. 89-97, 79 Stat. 286, 352. Rather, it authorizes the Secretary to grant waivers in a variety of welfare programs, and today "the Secretary may waive compliance with any of the requirements of section 302 [old-age assistance], 602 [Temporary Assistance to Needy Families (TANF)], 654 [child and spousal support], 1202 [aid to the blind], 1352 [aid to the permanently and totally disabled], 1382 [Supplemental Security Income (SSI)], or 1396a [Medicaid]" of Title 42. 42 U.S.C. § 1315(a)(1).

Section 1115 provides only a single condition for the Secretary's exercise of this waiver authority. It is limited to "any . . . project which, in the judgment of the Secretary, is likely to assist in promoting the objectives" of these various programs—in particular, "subchapter I [old-age assistance], X [aid to the blind], XIV [aid to the permanently and totally disabled], XVI [SSI], or XIX [Medicaid], or part A [TANF] or D [child and spousal support] of subchapter IV." *Id.* And neither Section 1115 nor any other provision of the Social Security Act specifically defines the "objectives" a waiver should "assist in promoting." *Id.* This

case turns on what it means for a waiver program to "assist in promoting the objectives" of the Social Security Act, and the degree of discretion the Secretary holds to make that determination. *Id.*

2. The Section 1115 waivers at issue here authorize Medicaid demonstration projects. Over the last few decades such projects have become an integral part of America's Medicaid system: Millions of Americans now receive healthcare coverage via state Medicaid programs authorized by Section 1115 waivers. *See infra* Part I.B. In particular, this case arises from waivers Kentucky, Arkansas, and New Hampshire obtained authorizing them to adopt community-engagement requirements for specified Medicaid beneficiaries. The Secretary determined that those requirements were "likely to assist in promoting the objectives" of the Social Security Act, but the courts below deemed that determination arbitrary and capricious based on their view of the "objective" of the Medicaid statute. *See* Pet. App. 19a, 51a.

The Kentucky community-engagement waiver program, dubbed Kentucky HEALTH, is especially instructive for understanding this case, even though the challenge to that waiver program is not before the Court. Kentucky HEALTH included several experimental provisions: a community-engagement requirement, a monthly-premium requirement, an eligibility-reporting requirement, lockouts for failing to meet these requirements, limits on non-emergency medical transportation, limits on retroactive eligibility, and penalties for non-emergency use of the emergency room. *See Stewart v. Azar*, 313 F. Supp. 3d 237, 246 (D.D.C. 2018). In attempting to identify the relevant

"objectives," this waiver should "assist in promoting," 42 U.S.C. § 1315(a), the district court looked to Medicaid's appropriations provision, which authorizes payments to States "[f]or the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance . . . and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care," *id.* § 1396-1. The district court inferred from this provision that "one objective of Medicaid" is "'furnishing . . . medical assistance'" to eligible beneficiaries. 313 F. Supp. at 261 (quoting 42 U.S.C. § 1396-1; ellipsis in original).

From that premise, the district court reasoned that the Secretary must, before issuing a Medicaid waiver under Section 1115, consider "whether the project would cause recipients to lose coverage" and "whether the project would help promote coverage." *Id.* at 262. It concluded that the Secretary's waiver approval "neglected both," including by failing to "provide[] a bottom-line estimate of how many people would lose Medicaid with Kentucky HEALTH in place." *Id.* As a remedy, the district court vacated the *entire* Kentucky HEALTH waiver—not merely the community-engagement requirements—and remanded the matter back to the agency. *Id.* at 274.

On remand, the Secretary estimated the likely coverage loss owing to the community-engagement requirements and explained how any such loss was outweighed by the likelihood the program would "promote beneficiary health and financial independence and improve the sustainability of the safety net." *Stewart v. Azar*, 366 F. Supp. 3d 125, 134 (D.D.C.

2019). Yet that explanation proved insufficient, as the district court concluded that neither "health" nor "financial independence" are valid statutory objectives. *Id.* at 145. It also concluded that, while the Secretary may "take into account fiscal sustainability in determining under § 1115 whether a demonstration project promotes the objectives of the Act," *id.* at 149, the Secretary's analysis of fiscal sustainability was unlawful "because he did not compare the benefit of savings to the consequences for coverage," *id.* at 150. The district court did not hold that approval of the community-engagement requirements would *necessarily* be unlawful, however, and it once more vacated the waiver—again, in its entirety—and remanded to the agency. *Id.* at 156.

The same day it vacated Kentucky's waiver for the second time, the district court vacated a similar Section 1115 waiver authorizing Arkansas to adopt community-engagement requirements and limitations on retroactive coverage (but not the other facets of the Kentucky waiver). Pet. App. 30a–31a. As in the Kentucky case, the district court vacated the entire waiver and remanded the matter to the agency, concluding that because "one of Medicaid's central objectives is to furnish medical assistance to persons who cannot afford it," the Secretary acted unlawfully in failing to consider whether the Arkansas waiver "would advance or impede that objective." *Id.* at 39a–40a (internal quotation marks and citation omitted).

Finally, a few months later, the district court vacated a Section 1115 waiver that permitted New Hampshire, like Arkansas, to adopt community-en-

gagement requirements and limits on retroactive coverage. *Id.* at 70a–71a. The district court again vacated the entire waiver, refusing to limit its relief to "the aspects of the program that [the plaintiffs] have successfully challenged." *Id.* at 101a–102a.

3. The States appealed in each case, but the D.C. Circuit ultimately considered only the Arkansas and New Hampshire decisions.[1] The D.C. Circuit affirmed, and in doing so construed Section 1115 even more narrowly than the district court. Like the district court, it looked to Medicaid's appropriations provision, 42 U.S.C. § 1396-1, to identify the program's purpose. Pet. App. at 10a. Unlike the district court, however, the D.C. Circuit concluded that 1396-1 states the *sole* objective of Medicaid: "The text of the statute includes *one* primary purpose, which is providing health care coverage." *Id.* at 16a (emphasis added). Accordingly, the D.C. Circuit concluded, "the alternative objectives" identified by the Secretary, "better health outcomes and beneficiary independence[,] are not consistent with Medicaid." *Id.*

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[1] After filing its appeal, Kentucky terminated its program, and the D.C. Circuit dismissed the case as moot without issuing a written opinion. *See Stewart v. Azar*, No. 19-5095, Motion to Dismiss Case as Moot (Dec. 16, 2019). For this reason, the D.C. Circuit never addressed the scope of the district court's remedy in the Kentucky case—which, again, vacated the entire waiver based on a purportedly flawed analysis of the community-engagement requirements. And it affirmed the orders in the Arkansas and New Hampshire's cases without any discussion of the scope of the district court's remedies in those cases as well. *See* Pet. App. 19a–21a.

Having thus sharply limited the "objectives" a Medicaid waiver program must promote, the D.C. Circuit easily concluded that the Secretary's approvals were *necessarily* arbitrary and capricious. It observed that the approvals "contain the Secretary's articulation of how he thought the demonstrations would assist in promoting an entirely different set of objectives than the one we hold is the principal objective of Medicaid." *Id.* at 18a. And it held that Section 1115 does not permit the Secretary "to prioritize non-statutory objectives" over the single "statutory purpose"—namely, providing healthcare coverage. *Id.* at 19a.

SUMMARY OF ARGUMENT

1. The Court should reject the D.C. Circuit's exceedingly narrow interpretation of Section 1115. Under the D.C. Circuit's test, the Secretary cannot use Section 1115 to authorize *any* rule limiting healthcare coverage, for such a rule necessarily prioritizes some other objective over the single-minded provision of coverage. That conclusion departs from the longtime understanding of courts, States, and federal officials that Section 1115 permits experimental policies that limit coverage in a variety of ways. Indeed, the D.C. Circuit's decision threatens numerous *current* Section 1115 waiver programs, including many entirely unrelated to community-engagement requirements. Worse, the decision below will disrupt even more settled expectations when combined with the district court's one-bad-apple remedy where any waiver containing even a single coverage limitation is vulnerable to invalidation. The result could mean the wholesale invalidation of waiver programs on which millions of Americans rely.

2. The Court need not endorse such a cataclysmic disruption of state Medicaid programs, for nothing in the statutory text requires construing Section 1115 so narrowly. The provision speaks in terms of "promoting the objectives" of the Social Security Act generally: Neither it nor any of the cross-referenced subchapters specifically define the "objectives" a waiver program must "assist in promoting." 42 U.S.C. § 1315(a). And the statute vests with the politically accountable Secretary the authority to determine whether a particular program will promote these undefined "objectives." *Id.* There is simply no text that suggests, much less requires, a sharp, no-coverage-limitations restriction on the Secretary's authority. Indeed, such a restriction would be inconsistent with the Secretary's authority to "waive compliance with *any* of the requirements of section . . . 1396a." *Id.* (emphasis added). The Court should therefore reject the D.C. Circuit's rule.

ARGUMENT

I. The Decision Below Is Flatly Inconsistent with Historical and Current Practice Under Section 1115

The potentially disastrous consequences of the D.C. Circuit's decision arise from its remarkably narrow view of the "objectives" the Secretary may consider in determining whether to approve a waiver program under Section 1115. The D.C. Circuit of course rejected the objectives the Secretary advanced below: It held that the Secretary can *never* rest his decision to approve a waiver program on the program's potential to produce "better health outcomes," Pet. App.

12a, and added for good measure that the Secretary also cannot "rest[] his decision on the objective of transitioning beneficiaries away from government benefits through either financial independence or commercial coverage," *id.* at 14a.

Categorically rejecting such commonsense objectives would be bad enough, but the decision below went further and held that there is only *one* purpose the Secretary may consider when deciding whether to approve a Medicaid waiver program: "The text of the [Medicaid] 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." *Id.* at 16a (emphasis added); *see also id.* at 12a (contending that "the intent of Congress is clear that Medicaid's objective is to provide health care coverage" (internal quotation marks and citation omitted).

Applying this single-purpose view of Medicaid waivers, the D.C. Circuit noted that the Arkansas waiver's community-engagement requirements could cause some individuals to lose Medicaid coverage and held that Section 1115 did not permit the Secretary to balance this potential coverage loss against other objectives, because, in its view, there is only one legitimate objective of Medicaid waiver programs—providing coverage. *Id.* at 18a (explaining that while "[i]n some circumstances it may be enough for the agency to assess at least one of several possible objectives," here "the Medicaid statute identifies its primary purpose rather than a laundry list"). It was thus necessarily unlawful, the D.C. Circuit concluded, for the

Secretary "to prioritize non-statutory objectives" over this singular purpose. *Id.* at 19a.

Notably, the practical effect of such reasoning is to bar *all* Section 1115 Medicaid waivers that will result in even small decreases in Medicaid coverage. After all, any waiver that decreases or limits coverage necessarily prioritizes some *other* goal over a single-minded pursuit of healthcare coverage. And if the only relevant objective is providing coverage—and if Section 1115 categorically prohibits "prioritiz[ing] non-statutory objectives" over this solitary objective—then all such waivers will inevitably run afoul of the D.C. Circuit's rule. *Id.*

Such a narrow construction of the Secretary's waiver authority is inconsistent with decades of practice and threatens to invalidate dozens of Medicaid waiver programs on which millions of Americans have come to rely. Section 1115 waivers often authorize rules that may limit coverage, but—until the D.C. Circuit's decision—courts have not held that such limitations on coverage automatically render waivers unlawful. Over half a century has passed since Congress adopted Section 1115, and in that time state and federal Medicaid officials have consistently understood Section 1115 to confer broad authority on the Secretary to authorize a wide variety of experimental programs. The drastic limitation on this authority imposed by the decision below would disrupt the settled expectations of States, the federal government, and millions of Medicaid beneficiaries. This Court should correct the D.C. Circuit's novel misinterpretation of Section 1115.

A. Section 1115 waivers have long authorized States to adopt measures that limit coverage in some respects

First, the D.C. Circuit's rule is inconsistent with the longstanding interpretation of Section 1115. For decades, courts and policymakers have understood Section 1115—as applied to Medicaid and other welfare programs—to authorize waivers that permit States to adopt rules that reduce or limit the coverage of their welfare programs.

1. For example, *Aguayo v. Richardson*, 473 F.2d 1090, 1103 (2d Cir. 1973), upheld a Section 1115 waiver that authorized New York to adopt work requirements for the State's Aid to Families with Dependent Children (AFDC) program. Like the plaintiffs here, the plaintiffs there contended "that there was no basis on which the projects could be deemed 'likely to assist in promoting the objectives' of the specified parts of the Social Security Act." *Id.* at 1103 (quoting 42 U.S.C. § 1315). And as here, the plaintiffs argued that the AFDC's appropriations provision dictated a purpose to "encourage 'the care of dependent children in their own homes or in the homes of relatives'–not to force their parents or relatives, or themselves, to work." *Id.* (quoting 42 U.S.C. § 601). Judge Henry Friendly, writing for the panel, rejected this argument: He observed that that Section 1115 explicitly "permits waiver of the basic requirement that aid be furnished 'to all eligible individuals' within the state, 42 U.S.C. § 602(a)(10)," which is inconsistent with the notion—advanced by the *Aguayo* plaintiffs and adopted by the decision below—that Section 1115 prohibits any waiver that limits coverage. *Id.* at 1105.

Notably, the AFDC work-requirement waiver upheld in *Aguayo* was not unusual. Many States adopted such AFDC waivers under Section 1115, and those programs provided some of "the key elements" of the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. 104-193, 110 Stat. 2105, which transformed AFDC into TANF and "required participation in job search or employment activities within two years of entering the welfare rolls." Carol Harvey, Michael J. Camasso, and Radha Jagannathan, *Evaluating Welfare Reform Waivers Under Section 1115*, 14 J. Econ. Persps. 165, 179, https://pubs.aeaweb.org/doi/pdf/10.1257/jep.14.4.165.

2. Courts and policymakers have long taken the same approach to Section 1115 waivers in the Medicaid context. Nearly fifty years ago, for example, the Secretary issued a Section 1115 waiver authorizing California to adopt a co-payment requirement for its state Medicaid program. *California Welfare Rights Org. v. Richardson*, 348 F. Supp. 491, 494–95 (N.D. Cal. 1972). As here, that waiver was challenged on the ground that "the provisions of § 1115 do not authorize the Secretary to approve any project which results in a lowering of benefits," and that the "approval of the California project" was therefore "in excess of the authority vested in the Secretary because the project conflicts with an objective of title XIX." *Id.* at 495–96. And, as with the Second Circuit in *Aguayo,* the district court squarely rejected that argument, observing that the "purposes of the California experiment might be expressed as an attempt to see how imposition of some cost-sharing will decrease utilization of the program benefits, and, consequently, costs." *Id.* at 496.

The Secretary, it said, may approve "a project which was directed to promoting one of several objectives, even if another objective would suffer by reason of the project's operation, so long as the Secretary concluded that *on balance* the objectives considered together were likely to be advanced." *Id.* at 497 (emphasis in original).

Like the AFDC waiver upheld in *Aguayo*, the Medicaid waiver upheld in *Richardson* was not unusual. For example, a few years later, in *Crane v. Mathews*, another federal district court upheld a similar waiver authorizing Georgia to adopt a co-payment requirement for its state Medicaid program, which "represented an alleged state experiment designed to devise a mechanism which would curtail over utilization in Georgia of 'marginally needed' health care." 417 F. Supp. 532, 537 (N.D. Ga. 1976). There, too, the plaintiffs challenged the waiver as failing to promote the objectives of Medicaid, and the district court rejected the argument, concluding that the "plaintiffs have failed to show that [the Secretary] abused his discretion in approving the section 1115 waiver." *Id.* at 543.

These decisions underscore that for decades courts and state and federal Medicaid officials have understood Section 1115 to afford the Secretary broad discretion in evaluating the "objectives" of the Social Security Act and determining whether a waiver program "is likely to assist in promoting" those objectives. 42 U.S.C. § 1315. Indeed, these decisions make clear that Section 1115 has long been understood to *permit* precisely the sort of waivers the D.C. Circuit deemed absolutely *prohibited*—that is, waivers that result in some reduction or limitation of coverage.

B. The decision below threatens to invalidate numerous Section 1115 programs which currently cover millions of Americans

Beyond contradicting decades of practice under Section 1115, the D.C. Circuit's decision threatens numerous Medicaid waiver programs in effect *today*—programs that authorize States to limit Medicaid coverage in some ways while still providing important healthcare coverage to millions of Americans.

1. First, many States have followed Arkansas, Kentucky, and New Hampshire in adopting community-engagement requirements as part of their waiver programs. The Secretary has already approved similar community-engagement requirements for Arizona, Georgia, Indiana, Michigan, Ohio, South Carolina, and Wisconsin. And five more states—Alabama, Idaho, Oklahoma, South Dakota, and Tennessee—have applied to the Secretary to implement such requirements.[2]

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[2] Ariz. Health Care Cost Containment System Approval (Jan. 18, 2019), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/az/Health-Care-Cost-Containment-System/az-hccc-appvd-demo-01182019.pdf; Ga. Pathways to Coverage Approval (Oct. 15, 2020), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ga/ga-pathways-to-coverage-ca.pdf; Healthy Ind. Plan Approval (Oct. 26, 2020), https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/in-healthy-indiana-plan-support-20-ca-01012021.pdf; Healthy Mich. Plan Approval (Dec. 21, 2018), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/mi/mi-healthy-

The D.C. Circuit's rule would, of course, prohibit all these community-engagement requirements, notwithstanding the important purposes they serve: States have adopted them to test social-science research suggesting that enrollees who pursue either education or work (whether compensated or volunteer) are more likely to attain positive health out-

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michigan-ca.pdf; Ohio Group VIII Work Requirement and Community Engagement Section 1115 Demonstration Approval (Mar. 15 2019), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/oh/work-requirement-and-community-engagement/oh-work-requirement-community-engagement-demo-appvl-20190315.pdf; S.C. Healthy Connections Works Demonstration Approval (Dec. 12, 2019), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/sc/sc-healthy-connections-works-ca.pdf; Wis. BadgerCare Reform Approval (Oct. 31, 2018), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/wi/wi-badgercare-reform-ca.pdf; Ala. Medicaid Workforce Initiative Application for a Section 1115 Demonstration (Sept. 10, 2018), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/al/al-workforce-initiative-pa.pdf; Idaho Section 1115 Medicaid Waiver Demonstration Project Application (Sept. 27, 2019), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/id/id-medicaid-reform-pa.pdf; SoonerCare Community Engagement Amendment Request (Dec. 7, 2018), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ok/ok-soonercare-pa6.pdf; S.D. Career Connector 1115 Waiver Application (Aug. 10, 2018), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/sd/sd-career-connector-pa.pdf; TennCare II Demonstration Community Engagement Amendment 38 (Dec. 28, 2018), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/tn/tn-tenncare-ii-pa6.pdf.

comes and transition to private insurance—transitions that help make the costs of Medicaid programs sustainable in the long run. *See* Pet. App. 133a-134a, 155a.

2. Second, the decision below threatens to invalidate many other waiver-authorized Medicaid rules as well.

Many States, for example, require Medicaid beneficiaries to pay modest premiums. The Georgia Pathways to Coverage program is one such waiver program: Georgia expects the program to eventually extend Medicaid coverage to more than 52,000 otherwise-ineligible people, and to help do so the program will require beneficiaries to pay premiums or else face disenrollment. Ga. "Pathways to Coverage" Section 1115 Demonstration Waiver Application (Dec. 23, 2019), https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/ga-pathways-to-coverage-pa1.pdf. The Secretary has authorized similar premium-requirement waivers for Arizona, Indiana, Iowa, Michigan, Oklahoma, and Wisconsin, and is considering a similar application from Utah.[3]

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[3] Ariz. Health Care Cost Containment System Approval (Jan. 18, 2019), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/az/Health-Care-Cost-Containment-System/az-hccc-appvd-demo-01182019.pdf; Healthy Ind. Plan Approval (Oct. 26, 2020), https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/in-healthy-indiana-plan-support-20-ca-01012021.pdf; Iowa Wellness Plan Approval, (Nov. 15, 2019), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ia/ia-wellness-plan-ca.pdf; Healthy Mich.

As the district court noted in *California Welfare Rights Organization*, the purpose of such contribution requirements is to encourage Medicaid beneficiaries to take ownership over their healthcare and to help control costs. 348 F. Supp. at 494–95. As the Georgia waiver illustrates, such cost control allows States to extend their Medicaid programs to individuals who may not receive coverage otherwise.

The rule announced by the decision below, however, would seriously threaten the validity of these requirements, which are ultimately enforced by the sanction of coverage loss. The decision below suggests that—because Medicaid has "one primary purpose, which is providing health care coverage," Pet. App. 16a—the Secretary cannot balance the possibility of coverage loss for some against other objectives, such as cost control or beneficiary independence, *see id.* at 19a (deeming it unlawful under Section 1115 "to prioritize non-statutory objectives to the exclusion of the statutory purpose"). If—as the D.C. Circuit held—States cannot obtain Section 1115 waivers authorizing them to experiment with rules backed by the

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Plan Approval (Dec. 21, 2018), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/mi/mi-healthy-michigan-ca.pdf; SoonerCare Demonstration Approval (Nov. 1, 2019), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ok/ok-soonercare-ca.pdf; Utah 1115 Demonstration Waiver Amendment (Nov. 1, 2019), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ut/ut-primary-care-network-pa9.pdf; Wisconsin BadgerCare Reform Approval (Oct. 31, 2018), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/wi/wi-badgercare-reform-ca.pdf.

threat of coverage loss, States will be unable to develop ways to maintain the fiscal sustainability of their Medicaid programs. And such an outcome will, in the long term, produce far more coverage loss and far worse health outcomes.

Further, in yet another important waiver category, many States have obtained Section 1115 waivers that—like the Arkansas and New Hampshire waivers at issue here—allow them to waive or limit retroactive coverage that would otherwise be required by the Medicaid statute. Such waivers typically allow coverage beginning the first day of the month an individual enrolls in Medicaid, often with an exception for pregnant women. Under such rules, an individual who incurs medical costs *before* enrolling in Medicaid generally does not receive Medicaid coverage for those costs unless the costs were incurred in the month of enrollment. Limits on retroactive coverage encourage beneficiaries to enroll in Medicaid even while healthy and receive preventive care, thereby reducing Medicaid costs in the long run. *See* Pet. App. 149a.

Retroactive coverage limits are an integral part of many States' Medicaid programs. In addition to Arkansas and New Hampshire, the States of Arizona, Delaware, Florida, Georgia, Indiana, Iowa, Massachusetts, Minnesota, Missouri, Oregon, and Rhode Island all have an approved or pending waiver of retroactive coverage.[4]

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[4] Ariz. Health Care Cost Containment System Approval (Jan. 18, 2019), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/az/Health-Care-

Indeed, Arizona's *entire* Medicaid program—which serves more than two million people—has operated under a Section 1115 waiver since the program's inception. Ariz. Health Care Cost Containment System Renewal Application (Dec. 21, 2020),

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Cost-Containment-System/az-hccc-appvd-demo-01182019.pdf; Fla. Managed Medical Assistance Demonstration Approval (Jan. 15, 2021), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/fl/fl-mma-ca.pdf; Del. Diamond State Health Plan 1115 Demonstration Approval (Jan. 19, 2021), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/de/de-dshp-ca.pdf; Ga. Pathways to Coverage Approval (Oct. 15, 2020), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ga/ga-pathways-to-coverage-ca.pdf; Healthy Ind. Plan Approval (Oct. 26, 2020), https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/in-healthy-indiana-plan-support-20-ca-01012021.pdf; Iowa Wellness Plan Approval (Nov. 15, 2019), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ia/ia-wellness-plan-ca.pdf; MassHealth 1115 Demonstration Approval (June 26, 2019), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ma/ma-masshealth-ca.pdf; Minn. Reform 2020 Demonstration Approval (Sept. 18, 2020), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/mn/mn-reform-2020-ca.pdf; Mo. Gateway to Better Health Demonstration Approval (Nov. 2, 2020), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/mo/mo-gateway-to-better-health-ca.pdf; Or. Health Plan Demonstration Approval (Jan. 12, 2017), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/or/or-health-plan2-ca.pdf; R.I. Comprehensive Demonstration Approval (Jul. 28, 2020), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ri/ri-global-consumer-choice-compact-ca.pdf.

https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/az-hccc-pa8.pdf. Because Arizona's waiver includes a limitation on retroactive coverage that would seem to run afoul of the D.C. Circuit's rule against any reductions in Medicaid coverage, the decision below threatens to invalidate that rule—and thereby, under the district court's remedial theory—Arizona's entire Medicaid program. The resulting disruption in coverage and uncertainty surrounding program succession would be cataclysmic.

3. In sum, if the decision below stands, millions of individuals are at risk of disruption or even loss of their Medicaid coverage due to judicial invalidation of entire waiver programs—a figure that far exceeds the number of individuals who might suffer coverage disruption or loss for failing to comply with a waiver-authorized requirement. States and millions of Medicaid beneficiaries have relied on the longstanding interpretation of Section 1115—affirmed by multiple courts—that reads that statute to permit the Secretary to issue waivers authorizing States to adopt rules that result in some coverage loss in some circumstances for some individuals.

Although the D.C. Circuit's rule threatens other waiver-authorized provisions as well, the community-engagement, premium-payment, and retroactive-coverage provisions discussed above aptly illustrate the scale of the problem. These provisions feature in at

least 16 state Medicaid waiver programs, which collectively provide coverage to more than 12.5 million people.[5]

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[5] Arizona's Medicaid waiver program has 2,147,310 members, (https://www.azahcccs.gov/Resources/Downloads/PopulationStatistics/2021/Jan/AHCCCSPopulationHighlights.pdf); Delaware's 214,497 (https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/de/Diamond-State-Health-Plan/de-dshp-qtrly-rpt-apr-jun-2019.pdf); Florida's 3,719,999 (https://ahca.myflorida.com/medicaid/Policy_and_Quality/Policy/federal_authorities/federal_waivers/docs/MMA_DY14_Annual_Report_CMS20201030.pdf); Georgia's 52,509 (https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/ga-pathways-to-coverage-pa1.pdf); Indiana's 569,971 (https://www.in.gov/fssa/hip/files/IN_HIP_Interim_Evaluation_Report_Final.pdf); Iowa's 189,421 (https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/ia-wellness-plan-qtrly-rpt-apr-jun-2020.pdf); Massachusetts's 1,469,829 (https://www.mass.gov/doc/section-1115-demonstration-waiver-annual-report-fy18/download); Michigan's approximately 680,000 (https://deepblue.lib.umich.edu/bitstream/handle/2027.42/154761/HMP_Eval_Final_Evaluation_Report_3.12.20_684780_7.pdf); Minnesota's 2,683 (https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/mn-reform-2020-qtrly-rpt-jan-mar-2020.pdf); Missouri's 66,827 (https://stlgbh.com/programoverview); Ohio's 709,923 (https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/oh/oh-work-requirement-community-engagement-pa.pdf); Oklahoma's approximately 550,000 (https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/oksoonercare-annl-rpt-2019.pdf); Oregon's 1,261,823 (https://www.oregon.gov/oha/HSD/OHP/DataReportsDocs/snapshot012521.pdf); Rhode Island's more than 116,000

The decision below ignored the tremendous reliance interests at stake in the continued operation of these Medicaid waiver programs—interests that Congress itself has expressly protected by deeming State applications to extend existing waiver programs to be approved if the Secretary takes too long to consider them. 42 U.S.C. § 1315(e), (f). Such safeguards underscore a commonsense point: Long-running Medicaid waiver programs induce considerable reliance interests that courts should be careful to avoid disrupting. Yet by categorically rejecting any waivers that produce coverage losses (and commanding vacatur of an entire waiver program as a remedy), the decisions below have threatened the waiver programs on which millions of Americans rely. This Court should reverse.

II. The Decision Below Contravenes the Plain Text of Section 1115

1. No statutory text requires (or even permits) the Court to accept the disastrous consequences that attend the D.C. Circuit's interpretation of Section 1115. Indeed, the plain statutory text makes clear that the discretion to approve a waiver lies with the Secretary, not the courts.

To revisit the relevant text, the Medicaid statute requires that a "State plan for medical assistance"

(https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/ri-global-consumer-choice-compact-qtrly-rpt-jan-mar-2020.pdf); South Carolina's 11,511 (https://innovation.cms.gov/files/reports/fai-sc-firstevalrpt.pdf); and Wisconsin's 958,469 (https://www.dhs.wisconsin.gov/badgercareplus/bcpstate-dec.pdf).

comply with scores of minimum-coverage requirements in order to qualify for federal financial support. 42 U.S.C. § 1396(a). But Section 1115 provides that "the Secretary may waive compliance with any of the requirements of . . . 1396a . . . to enable such State . . . to carry out" an "experimental, pilot, or demonstration project." 42 U.S.C. § 1315(a). The sole condition on the Secretary's exercise of this authority is that the project "*in the judgment of the Secretary*, is likely to assist in promoting the objectives" of the various specified subchapters of the Social Security Act. *Id.* (emphasis added).

The statutory text thus commits to the Secretary's "judgment" whether a given project will "assist in promoting the objectives" of the Social Security Act—objectives that the statutory text nowhere expressly defines. *Id.* The Secretary therefore has discretion to identify the relevant objectives and to determine whether a particular waiver program will promote those objectives. As the district court below recognized, such flexibility allows a State to "'test out new ideas' for providing medical coverage to the needy, thereby influencing the trajectory of the federal-state Medicaid partnership down the line." Pet. App. 53a.

Indeed, the statute's text authorizes the Secretary to approve a waiver if the Secretary determines that it "is likely to assist in promoting the objectives of" *any* of several Social Security Act programs administered cooperatively by States —in particular, old-age assistance (subchapter I), aid to the blind (subchapter X), aid to the permanently disabled (subchapter XIV), supplemental security income for the aged, blind, and disabled (subchapter XVI), Medicaid (subchapter

XIX), or TANF block grants (part A of subchapter IV), or TANF grants to States to enforce child-support obligations (part D of subchapter IV). *See* 42 U.S.C. § 1315(a).

For example, Section 1115 can easily be read to authorize the Secretary to issue a waiver permitting a State to adopt a community-engagement requirement on the ground that such a requirement "is likely to assist in promoting the objectives of" TANF (i.e., "Part A . . . of subchapter IV"). *Id.* Notably, unlike Medicaid, TANF has an express purpose provision, which provides that the program's "purpose . . . is to increase the flexibility of States in operating a program designed to," among other things, "end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage." 42 U.S.C. § 601. And community-engagement requirements clearly help "end the dependence of needy parents on government benefits by promoting job preparation [and] work." *Id.* Accordingly, a plain-text interpretation of Section 1115 would justify the community-engagement waivers at issue here regardless of how one identifies the "objectives" of the Medicaid statutes.

This case does not require the Court to go even this far, however. Recognizing that Section 1115 gives the Secretary significant discretion to decide what programs to approve is sufficient to decide this case. Congress has given the Secretary, not the courts, authority to determine which state waiver programs to permit.

2. Finally, even apart from the expansive discretion Section 1115 confers on the Secretary, the statutory text doubtless forecloses the D.C. Circuit's categorical prohibition on waivers that reduce Medicaid coverage. As Judge Friendly observed long ago, Section 1115 explicitly "permits waiver of the basic requirement that aid be furnished 'to all eligible individuals' within the state, 42 U.S.C. § 602(a)(10)," which alone disproves the theory that no waiver may reduce coverage. *Aguayo*, 473 F.2d 1090, 1104.

Furthermore, subsection 1115(d) imposes special procedural rules on waivers "that would result in *an impact on eligibility, enrollment*, benefits, cost-sharing, or financing with respect to a State program under subchapter XIX" (*i.e.*, a state Medicaid program). 42 U.S.C. § 1315(d) (emphasis added). Section 1115 thus expressly contemplates that some waivers will "result in an impact on"—that is, an expansion *or limitation* of—Medicaid eligibility or enrollment. *Id.* Accordingly, Section 1115 itself contradicts the D.C. Circuit's rule, which *forecloses* any waiver that limits Medicaid eligibility or enrollment.

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The D.C. Circuit's narrow interpretation of Section 1115 casts serious doubt on the validity of numerous Medicaid waiver programs on which millions of Americans rely. It would be one thing to impose such an enormous disruption on state Medicaid systems if it were clearly demanded by the statutory text. Section 1115, however, requires no such result. Indeed, the provision's plain meaning squarely contradicts the

D.C. Circuit's rule: Section 1115 vests authority to determine whether a waiver program "is likely to assist in promoting the objectives of" the Social Security Act in "the judgment of the Secretary"—not the federal courts. 42 U.S.C. § 1315. The Court should reject the D.C. Circuit's categorical no-coverage-losses-ever rule and recognize the flexibility Section 1115 gives the Secretary to authorize creative state experimentation in social welfare programs.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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