UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

THE STATE OF GEORGIA, et al. Plaintiffs, v. CHIQUITA BROOKS-LASURE in her official capacity as Administrator of the Centers for Medicare & Medicaid Services; et al. Defendants.	)	Case No. 2:22-cv-00006-LGW-BWC

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, OF CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The Secretary of Health and Human Services (the Secretary), acting through the Administrator for the Centers for Medicare & Medicaid Services (the Administrator) (CMS) was well within his statutory and regulatory authority to withdraw authority for two components of Georgia's Medicaid demonstration project, entitled Georgia Pathways (Pathways), after the project had been initially approved but before it went into effect. As Defendants explained in their opening brief, the Administrator did so because she reasonably concluded that the project components—a premium requirement and a work- and community-engagement requirement—would not promote health coverage, the central objective of the Medicaid program. That is because new evidence published since the initial approval indicated that the COVID-19 pandemic was significantly depressing low-income employment in Georgia and because the agency concluded that the prior approval "did not adequately consider the likely difficulties in completing, and reporting compliance with," the work requirement, which would "only work to hinder the overall wellbeing of low-income Georgians." Withdrawal at 4–

5, AR 5–6. This amply supported decision meets all applicable standards under the Administrative Procedure Act (APA) and does not amount to unconstitutional "coercion" for Georgia to unconditionally expand Medicaid, as Georgia is free to walk away from the demonstration project in its current form.

In response, Georgia reiterates the arguments raised in its opening brief, but none are persuasive. Georgia's principal substantive contention is that the agency's withdrawal was unlawful because Georgia's project as a whole would expand Medicaid coverage in the state. But the applicable statutes do not require the agency to approve projects in full or continue projects that purport to expand coverage but that contain certain components that do not advance the objectives of Medicaid. 42 U.S.C. § 1315; 42 C.F.R. § 431.420(d)(2). Nor can a State hold the agency hostage by threatening to opt out of providing Medicaid coverage if its experimental projects are not fully approved. Such a position, taken to its logical conclusion, would deprive the agency of its discretion to approve or disapprove demonstration projects and would allow States to fashion projects that fail to advance the statutory objectives of Medicaid under the guise of preserving some form of Medicaid coverage in the State.

Plaintiffs' other contentions are equally meritless. They fail to explain why the Secretary is not entitled to significant deference in making predictive judgments about the effects of particular demonstration components. They also unsuccessfully seek to circumvent a regulation that squarely authorizes the agency to withdraw authority for a demonstration project at any time without notice and comment and ask the court to substitute its judgment for the agency's in determining whether withdrawal was appropriate. And they fail to establish that the agency was required to follow procedures it rescinded before issuing the withdrawal and cannot show the agency coerced the State into expanding Medicaid in violation of the Spending Clause. Summary judgment should be entered in Defendants' favor and Plaintiffs' Complaint should be dismissed.

ARGUMENT

I. The agency's withdrawal is committed to agency discretion by law.

The agency's decision to withdraw permission for Pathways is a judgment committed to agency discretion by law. *See* 5 U.S.C. § 701(a)(2). This limitation in the APA on judicial review "protect[s] agencies from undue judicial interference with their lawful discretion, and . . . avoid[s] judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66 (2004). An agency decision is not subject to judicial review when it "involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The withdrawal at issue here is just such a "complicated balancing" requiring the application of "expertise." The regulations require that, before the agency may withdraw a waiver, the Secretary must make a "finding that the demonstration project is not likely to achieve the statutory purposes." 42 C.F.R. § 431.420(d)(2). The record illustrates the expertise and fact-specific balancing that are required to support such a finding. *See, e.g.*, Withdrawal, AR 2–38. Accordingly, the withdrawal is committed to agency discretion by law, and this Court should dismiss the Complaint.

At a minimum, the agency's determination is entitled to utmost deference. The statute requires that the Secretary make a fact- and context-specific "judgment" about whether a demonstration project will "assist in promoting the objectives" of Medicaid. 42 U.S.C. § 1315(a). When agencies make such predictive judgments, judicial review under the "arbitrary and capricious" standard is "particularly deferential." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009). The reason agencies earn the utmost deference in this context is because of the "*expert experience, discretion, and judgment*" required—precisely the "kind of . . . function" where agencies have a comparative advantage over the courts. *Sunshine State Bank v. Fed. Deposit Ins. Corp.*, 783 F.2d 1580, 1582 (11th Cir. 1986) (quoting *Missouri-Kansas-Texas R.R. Co. v. United States*, 632 F.2d 392, 406 (5th Cir. 1980)).

The record is replete with the fact-specific work the Secretary undertook to examine whether Pathways would "assist in promoting the objectives" of Medicaid. *See, e.g.*, Withdrawal, AR 2, 35. This work plainly involves "predictive factual judgments," and deference to the agency should be at its apex. In similar cases, involving comparable "predictive factual judgments," courts routinely recognize the agency's expertise. For example, in *Rural Cellular*, the FCC was charged with, among other things, "developing specific, predictable and sufficient . . . mechanisms to preserve and advance universal service." *Rural Cellular Ass'n*, 588 F.3d at 1101 (citation omitted). The D.C. Circuit recognized that balancing "specific" and "predictable" and "sufficient" was a task best left to the agency. *Id.* at 1103. When an agency makes a predictive judgment, "certainty is impossible." *Id.* at 1105. As a result, the agency must "rel[y] on its expertise to evaluate the existing evidence." *Id. Accord. Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1513, 1514 (D.C. Cir 1989) (the statute permits the Secretary of the Air Force to correct a military record "*when he considers it necessary*") (quoting 10 U.S.C. § 1552(a)).

Plaintiffs' attempt to distinguish these cases fails in two ways. First, Plaintiffs wrongly assert that these cases turn on predictive factual judgments whereas the question here calls for the agency to make a legal determination. Defendants have illustrated the compelling similarities between agency reasoning in those cases and this one. *See, e.g.*, Defs.' Mot. to Dismiss or, in the Alternative, Cross-Mot. for Summ. J. & Mem. in Supp., at 10–12, ECF No. 23 (Defs.' Br.). And Plaintiffs do not explain why the distinction they attempt to make—between factual and legal determinations—should make a difference. The agency's decision to issue the withdrawal was a highly fact-specific, predictive determination. This analysis is evident in the withdrawal letter, where the agency explained, *inter alia*, how low-income Georgians were disproportionately affected by the COVID-19 pandemic, and detailed concerns about the administrative burdens associated with the work requirement. Withdrawal at 3-7, AR 4-8. These are not legal conclusions. These are predictive, factual judgments made based on the agency's expertise.

Second, even if Plaintiffs were correct that the agency's decision here was solely a legal determination, Plaintiffs do not explain why the agency should not be given deference on legal questions as well. When Congress has authorized an agency to exercise discretion, the agency's action may implicate both factual and legal questions. Judicial review of that action uses the arbitrary and capricious standard, which is exceedingly deferential. *See, e.g.*, *Gilbert Equip. Co. v. Higgins*, 709 F. Supp. 1071, 1075 (S.D. Ala. 1989) ("the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong" whether the agency's challenged determination is "deemed legal, factual or mixed questions of law…") *aff'd* 894 F.2d 412 (11th Cir. 1990). In short, if the Secretary's decision is subject to judicial review, it should earn the utmost deference and the withdrawal should be upheld.

II. The agency's withdrawal was not in excess of authority or contrary to law.

A. The agency's withdrawal is well within its regulatory authority.

As Defendants explained in their opening brief, a validly promulgated regulation, 42 C.F.R. § 431.420(d)(2), specifically authorizes the Administrator to "withdraw waivers or expenditure authorities based on a finding that the demonstration project is not likely to achieve the statutory purposes." Defs.' Br. at 12–15. Because Section 431.420(d)(2) plainly allows the agency to withdraw authorities for Georgia's project, and Plaintiffs do not challenge the regulation as invalidly promulgated, the regulation unequivocally disposes of Plaintiffs' claim in Count II that the agency acted *ultra vires* in withdrawing approval for components of Georgia's demonstration project. Moreover, nothing in 42 U.S.C. § 1315 forbids the agency from reconsidering its initial approval—indeed, the very nature of Medicaid demonstration projects as time-limited experiments authorized "to the extent and for the period" the agency finds necessary indicates that reconsideration and withdrawal of such projects is appropriate. *Id.*; *see Fresno Cmty. Hosp. & Med. Ctr. v. Azar*, 370 F. Supp. 3d 139, 155–56 (D.D.C. 2019), *aff'd sub nom. Fresno Cmty. Hosp. & Med. Ctr. v. Cochran*, 987 F.3d 158

(D.C. Cir. 2021) (agency action only *ultra vires* when the agency "patently misconstrued a statute, disregard[ed] a specific and unambiguous statutory directive, or violated a specific command of a statute." (internal citation omitted)).

Plaintiffs attempt to elide this squarely applicable regulation by arguing that Section 431.420(d)(2) somehow prevents the Administrator from withdrawing waiver authority before the project goes into effect because it provides only "authority to rescind an implemented waiver's failure to actually further the Act's purposes." Reply in Supp. of Pls.' Mot. for Summ. J., Opp'n to Defs.' Mot. to Dismiss, & Opp'n to Defs.' Mot. for Summ. J., at 4, ECF No. 43 (Pls.' Opp'n). In so doing, Plaintiffs seek to "add[] a timing requirement that does not exist in the regulation[]." *Pub. Emps. for Env't Resp. v. Hopper*, 827 F.3d 1077, 1085 (D.C. Cir. 2016). The plain text of the regulation imposes no deadline by which the agency must decide to withdraw waivers or expenditure authorities. What is more, the agency's withdrawal is to be based on a finding that a project component is not *likely* to achieve Medicaid's statutory purposes; it does not require a finding that the component fails to *actually* further the Act's purposes as Plaintiffs contend. 42 C.F.R. § 431.420(d)(2); Pls.' Opp'n at 4. That a separate portion of the regulation states that the agency may at any time prior to expiration rescind approval for a different reason, 42 C.F.R. § 431.420(d)(1), in no way requires the agency to withdraw authority for a project on the basis that the component no longer furthers the statutory objectives of Medicaid only *after* the project goes into effect. Indeed, it is eminently reasonable for the agency to come to a new conclusion based on newly available evidence and/or a re-weighing of previously available evidence prior to the project's effective date, just as the agency approved the initial project before its implementation. Pls.' Opp'n at 4.

Nor do the special terms and conditions (STCs) contain a timing requirement as Plaintiffs contend; in fact, the relevant STC states that "CMS reserves the right to withdraw expenditure authorities and end the demonstration *at any time* it determines that continuing the expenditure

authorities would no longer be in the public interest or promote the objectives of" the Medicaid program. AR 4177. Plaintiffs appear to conflate continuing expenditure *authorities* with the expenditures themselves, but the STCs do not limit the agency's withdrawal authority to circumstances where federal expenditures have already commenced. The STCs therefore do not prevent the agency from withdrawing authorities for portions of the project before the project takes effect.

Even if the agency lacked explicit regulatory authority to withdraw approval for certain components of Georgia's project—which it did not—it had inherent authority to do so. As Defendants explained, the agency's withdrawal satisfies the notice, timeliness, and reasonableness factors that other courts have required in evaluating an agency's inherent authority to reverse course. Defs.' Br. at 14–16 (citing *Dun & Bradstreet Corp. Found. v. U.S. Postal Serv.*, 946 F.2d 189, 193 (2d Cir. 1991); *Macktal v. Chao*, 286 F.3d 822, 825–26 (5th Cir. 2002)).

Plaintiffs reiterate their argument that the agency did not issue its withdrawal in time, Pls.' Opp'n at 5—which, incidentally, contradicts their prior argument that the agency acted too *early* in withdrawing its approval before the project went into effect, *id.* at 4. But as Defendants explained, the agency issued a preliminary determination less than four months after initial approval, provided an opportunity for Georgia to submit additional information, and issued a final decision before the project went into effect. Defs.' Br. at 15. The complexity of the initial decision and the depth of reasoning supporting the withdrawal, the fact that the agency "acted according to its general procedures for review," and the fact that the project was halted before it was implemented all show that the agency's reconsideration was timely. *Dun & Bradstreet*, 946 F.2d at 194. In response, Plaintiffs rely on various time periods by which a claimant has to move for reconsideration of Article III judicial decisions in 1965 as noted by the Court of Federal Claims, *see* Pls.' Opp'n at 5 (citing *Texas v. Brooks-LaSure*, No. 6:21-cv-00191, 2021 WL 5154219 at *8 (quoting *Dayley v. United States*, 169 Ct. Cl. 305, 309 (1965)); *see also* Pls.' Opp'n at 5. But none of the courts in question were required to render a

reconsideration *decision* within that time; rather, a claimant merely had to *file* for reconsideration by that time, a significantly different task. *Dayley*, 169 Ct. Cl. at 309.

Plaintiffs also continue to rely on the district court's preliminary injunction in *Texas*, 2021 WL 5154219 at *4–5, but they fail to overcome the multiple facts that materially distinguish that case from the facts at bar.[1] *See* Defs.' Br. at 15–16. Contrary to Plaintiffs' contention, the court in *Texas* found it significant that (in its view) the agency in that case failed to rely on any applicable authority or procedures in withdrawing its initial approval and based its withdrawal on a purely procedural error. Courts analyzing the timeliness of the agency's reconsideration look at whether regular agency processes were followed, the complexity of the decision, and the "probable impact of an erroneous agency decision absent reconsideration." *Texas*, 2021 WL 5154219 at *8. The *Texas* court concluded that those factors tipped against finding timeliness in that case because the agency did not appear to follow any regular process, and the procedural defect in the initial approval—failure to follow federal notice-and-comment procedures—was not a particularly complex point of reconsideration such that it "was unclear if such procedural error, if there was one, is significant enough" to warrant withdrawal at that stage of the implementation process. *Id.* at *8–9. Here, by contrast, the agency *did* follow its own procedures, and the substantive nature of its determination both rendered reconsideration appropriate and required substantial time to finalize. The *Texas* preliminary injunction is thus of no help to Plaintiffs here.

B. The agency's withdrawal accords with Section 1115.

As Defendants explained in their opening brief, the agency's decision to partially withdraw authority for Georgia's project does not conflict with 42 U.S.C. § 1315 or the Medicaid statute because

[1] Plaintiffs also continue to rely on a statement in *Forrest General Hospital v. Azar*, 926 F.3d 221, 233 (5th Cir. 2019), without acknowledging the fact that the decision in no way analyzed whether an agency could withdraw authority for a Medicaid demonstration project; rather, the opinion merely noted that the agency could not change its position *post-hoc* on the scope of the project it initially approved. *See* Defs.' Br. at 13 n.5.

the Administrator determined that the work- and community-engagement and premium components of Georgia's project did not, in the Administrator's judgment, advance the statutory objectives of Medicaid. Defs.' Br. at 17–18. The agency properly identified Medicaid's objectives as including whether a demonstration project component would promote the provision of health care coverage. *Id.* (citing Withdrawal at 11, 13, 16, AR 12, 14, 17).

As they did in their opening brief, Plaintiffs make no attempt to advance their claim under the rubric set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), which explains that courts are to evaluate a contrary-to-law claim by deciding whether Congress has "directly spoken to the precise question at issue" and, if not, whether the agency's interpretation "is based on a permissible construction of the statute," *id.* at 842–43; *see also Miami-Dade Cnty. v. U.S. EPA*, 529 F.3d 1049, 1062 (11th Cir. 2008). Instead, Plaintiffs identify the same statutory objectives the agency analyzed and attack the logic of, and factual "baseline" used by, the agency to question whether the project components would indeed promote access to health care coverage. Pls.' Opp'n at 7–8. But as Defendants explained, the agency's reasoning is to be evaluated under the deferential arbitrary-and-capricious standard, not under the *Chevron* standard. Defs.' Br. at 17–18; *see also Chamber of Com. of U.S. v. Fed. Election Comm'n*, 76 F.3d 1234, 1235–36 (D.C. Cir. 1996) ("[W]e think petitioners' alternative argument was mislabeled; it was actually a claim that the Commission unreasonably *applied* the authority which the Commission claims it had under the statute. That is, of course, a garden variety APA arbitrary and capricious claim, and we should treat it as such."). And the agency's thorough reasoning easily clears arbitrary-and-capricious review, as explained further below.

III. The agency's withdrawal was not arbitrary or capricious.

A. The Administrator reasonably explained her decision to partially withdraw authorities for Georgia's project.

The Administrator withdrew authority for the Georgia demonstration project's work- and community-engagement and premium components because she concluded that in light of (1) new

evidence regarding the economic and health-related toll of the COVID-19 pandemic on low-income Georgians and (2) evidence from other states' similar projects, "any potential benefits" from those components "outweigh their likely negative consequences." Withdrawal at 5, AR 6. Specifically, the COVID-19 pandemic had, as of December 2021, significantly depressed the employment rate for low-income Georgians, such that prolonged compliance with the project's work- and community-engagement requirements was, in the agency's view, "infeasible" for a significant portion of the targeted population. Withdrawal at 19, AR 20. Further, the agency concluded that many potential beneficiaries who were already working were likely to never secure, or were likely to gain and then lose, coverage given the onerous and confusing nature of the reporting requirements, which had been documented in similar projects implemented by other states, Withdrawal at 15–16, AR 16–17, and due to the fluctuating hours and instability inherent in many low-income jobs, Withdrawal at 17–18, AR 18–19.

The agency fully explained how it came to these conclusions, amply supporting its findings with applicable academic and empirical research about the pandemic's impact on health, childcare, and low-income employment in Georgia; detailed analysis of other states' projects; and demonstrated expertise in this complex, prediction-driven subject-matter. Withdrawal at 3–35, AR 4–36. The agency also thoroughly described how it came to change course from the initial approval in October 2020: new findings about COVID-19's impact had been published in the months since the initial approval, and the agency also reweighed the evidence from prior, similar projects proposed and implemented by other states. *Id.* Plaintiffs disagree with the agency's conclusions but fail to show that the withdrawal was not based on "a consideration of the relevant factors" or that it was based on a "a clear error of

judgment."[2] *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

In Plaintiffs' view, because *another* component of Georgia's project would make a new class of Georgians potentially eligible for temporary Medicaid coverage, the agency could not withdraw approval for *any* component of the project. *See* Pls.' Opp'n at 10. But that is plainly incorrect. The agency is not required to approve or continue any project component attached to another component that may expand coverage; rather, the agency is charged with using its judgment to consider whether the project advances the statutory objectives of Medicaid. 42 U.S.C. § 1315(a); 42 C.F.R. § 432.420(d)(2). Here, the agency reasonably concluded that the work- and community-engagement and premium components of Georgia's project would not promote Medicaid coverage among the intended beneficiaries of the project. Withdrawal at 11, 19, 27, AR 12, 20, 28. The statute and governing regulations require no more.

Plaintiffs also argue that because Georgia does not wish to continue with other components of the project unless it can implement the work- and community-engagement and premium components, the agency acted arbitrarily and capriciously by withdrawing approval for those components. Pls.' Opp'n at 13–14. Plaintiffs insist that they did not waive this argument by not raising it in the underlying administrative proceedings. *Id.* at 13. But Georgia was "given every opportunity to raise their arguments at each phase of the administrative proceeding, and the Agency was denied the

[2] Plaintiffs make much of Defendants' reference to the appropriate standard of review in evaluating an arbitrary-and-capricious claim. Pls.' Opp'n at 8. But it is unremarkable to note in the context of defending against this claim that "[a] party seeking to have a court declare an agency action to be arbitrary and capricious carries 'a heavy burden indeed.'" *Wisconsin Valley Improvement v. FERC*, 236 F.3d 738, 745 (D.C. Cir. 2001) (quoting *Transmission Access Policy Study Group v. FERC,* 225 F.3d 667, 714 (D.C. Cir. 2000)). Arbitrary-and-capricious review is "highly deferential and presumes the validity of agency action," *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1283 (D.C. Cir. 2019) (quoting *Nat'l Min. Ass'n v. Mine Safety & Health Admin.*, 116 F.3d 520, 536 (D.C. Cir. 1997)), particularly in the context of a statute that gives so much discretion to the Secretary, *see* Defs.' Br. at 11–12 (citing cases).

opportunity to exercise its discretion and expertise in considering the issue" because of Georgia's failure to do so. *Mahon v. U.S. Dep't of Agric.*, 485 F.3d 1247, 1256–57 (11th Cir. 2007). Georgia thus cannot argue that its recent announcement that it will not implement the rest of the project should be considered in evaluating whether the agency acted arbitrarily and capriciously in withdrawing partial authority for the project. As Defendants noted in their opening brief, the agency addressed the only bases for Georgia's declaration in its March 12, 2021 letter that implementation of the rest of the project was "impossible"—because Georgia could not enroll beneficiaries into the project without the work- and community-engagement requirements "under current Georgia law," AR 4150—by correctly pointing out that Georgia law did not in fact contain such restrictions,[3] Withdrawal at 35, AR 36. Further, Georgia had indicated that "it anticipated delaying implementation of the demonstration . . . as it assessed options to resolve the issues CMS identified" in its preliminary determination letter, "in order to find a mutually agreeable path forward to increase access to coverage in Georgia." Withdrawal at 1, AR 2; *see also* AR 4146, 4147 (Georgia's letters to the agency from the summer of 2021 indicating that the state intended "assess options . . . to find a mutually agreeable path forward" and "appreciate[d]" the continued discussions"). Therefore, the agency was not on notice that Georgia would decline to implement the rest of the project or refuse to at least work with the agency to come up with a mutually agreeable solution.

[3] The agency also noted that it was "willing and able to work with the state on making any necessary changes to the state's mechanism for enrolling beneficiaries in Medicaid," to address the state's logistical concerns about how to mechanically enroll potential beneficiaries in the project. Withdrawal at 35, AR 36; *see also* AR 4150 (possibly alluding to such concerns by stating that "[i]mplementing Pathways absent qualifying hours and activities would eliminate the mechanism for enrolling individuals in Medicaid . . . .").

In any event, a State may not force the Secretary to approve or continue any demonstration project simply by threatening to rescind Medicaid coverage if its request is denied. As another court put it,

> "[T]he *entire* Medicaid program is optional for states. The Court does not see why — if . . . threats to terminate the expansion program can supply the baseline for the Secretary's § 1115 review — that argument would not be equally good as applied to *traditional* Medicaid. Their argument must thus posit that any § 1115 program that maintains *any* coverage for *any* set of individuals promotes the objectives of the Medicaid Act as long as the state threatens to terminate all of Medicaid in the absence of waiver approval. Taken to its logical conclusion," such a position "makes little sense."

Stewart v. Azar, 366 F. Supp. 3d 125, 153–54 (D.D.C. 2019), *appeals dismissed*, No. 19-5095 (D.C. Cir. Jan. 8, 2020); *see also* Br. of Amici Curiae, ECF No. 31 at 9.

Plaintiffs' remaining arguments ask the court "to reweigh the evidence, an option that is simply not available . . . under [the court's] narrow standard of review."[4] *Nat'l Min. Ass'n v. Sec'y, U.S. Dep't of Lab.*, 812 F.3d 843, 876 (11th Cir. 2016). *First*, Plaintiffs seek to minimize the impact of the COVID-19 pandemic on the viability of the work- and community-engagement requirements. But Plaintiffs cannot escape the fact that the agency relied on robust new data published after the initial approval showing that "[i]n addition to health-related concerns and challenges around transportation and child-care availability . . . , low-wage earners" and other vulnerable groups "continue to experience

[4] Plaintiffs also continue to push their reliance interests in the *status quo*, Pls.' Opp'n at 9–10. But they cannot have it both ways by failing to note these interests when given an opportunity to respond to the agency's preliminary determination letter and then faulting the agency for not considering those interests, *see* Defs.' Br. at 24 n.14. This is particularly so since Georgia did not make clear in the administrative proceedings below that it does not wish to proceed with any part of the project or to work with the agency to find a mutually agreeable path. In any event, the fact that Georgia budgeted funds "through the first quarter of 2023" for the implementation of this experimental project, Pls.' Opp'n at 9, suggests that Georgia can mitigate any cognizable reliance interests by repurposing a large part of those future-allocated funds, since the project has not taken effect. And as Defendants noted in their opening brief, the very nature of Section 1115 demonstration projects—as time-limited projects contingent on the agency's continued determination that they are likely to advance the objectives of Medicaid—necessarily reduces the weight of a State's reliance interests in a project's continued implementation. *See* Defs.' Br. at 14 n.6.

disproportionately lower employment rates than other populations, while also experiencing overall higher rates of COVID cases and deaths." Withdrawal at 19–20, AR 20–21. As the agency explained, "[i]f economic opportunities are limited, beneficiaries and potential beneficiaries may continue to have difficulty meeting the work requirement in the aftermath of the COVID-19 pandemic." *Id.* at 20; *see also id.* at 19–27 (citing data published in 2021 about the latest COVID-19 economic and health indicators, particularly in Georgia).

Plaintiffs also quibble that the agency's concern with the lack of a specific exception for caregiving responsibilities in Georgia's project is arbitrary and capricious because the project contained a catch-all good-cause exception for failing to meet the work- and community-engagement requirement. Pls.' Opp'n at 11. A generic good-cause exception is no substitute for a specifically defined exception that potential beneficiaries can clearly understand would apply to them, especially for such a common circumstance. Withdrawal at 13, AR 14 (explaining that 30 percent of those not working in Georgia in 2019 were caring for a child or family member); Withdrawal at 21, AR 22 (noting that the COVID-19 pandemic has significantly increased caregiving burdens in Georgia). Meanwhile, Georgia's alternative suggestion that the agency could "seek to reach an accommodation with the State" instead of withdrawing authority for the component as a whole, Pls.' Opp'n at 11, merely restates the agency's own position. The agency decided to withdraw partial authority for the project because despite Georgia's earlier indication that it intended to work with CMS to reach a mutually agreeable solution about the concerns raised in the agency's preliminary determination letter—which included concerns about access to childcare, AR 4156–57—Georgia did not submit an alternative proposal before the project was scheduled to go into effect, Withdrawal at 1, AR 2. The agency therefore withdrew authority for the work- and community-engagement component but "stand[s] ready to work with the state to explore other options." *Id.* at 35, AR 36.

Second, Plaintiffs continue to suggest that the agency could not change its mind about the effect of Georgia's reporting requirements on the efficacy of its work- and community-engagement component. Pls.' Opp'n at 11. But the agency was entitled to reweigh the evidence culled from other states' experiences to determine that the requirements "are administratively complex, confusing and burdensome" and it reasonably noted that "[a]lthough Georgia's demonstration would not eliminate coverage for currently-enrolled Medicaid beneficiaries" as in other States, "the work requirement would prevent enrollment by potential demonstration beneficiaries" due to those administrative complexities and burdens. Withdrawal at 16, AR 17; *see also* Defs.' Br. at 27–28.

Third, Plaintiffs persist in portraying the agency's withdrawal as "contrived" and "pretextual," Pls.' Opp'n at 10, 17, but fail to support these drastic allegations with any evidence. Contrary to Plaintiffs' contentions, *id.* at 10–11, the agency did not contradict itself in finding both that Georgia's work- and community-engagement requirements would incentivize only a narrow pool of potential beneficiaries and that the requirement would make it difficult for those already working to receive Medicaid coverage through the project. "[R]esearch shows that most Medicaid beneficiaries are already working or are likely to be exempt from a potential community engagement requirement," which "indicated that the substantial majority of the population that would be targeted by the work requirement in Georgia's demonstration were already meeting the terms of this requirements," making it "challenging for such a requirement to produce any meaningful impact on employment outcomes by incentivizing behavioral changes." Withdrawal at 13, AR 14 (citing Garfield et al. (2021). Work Among Medicaid Adults; Huberfeld, N. (2018). Can Work be Required in the Medicaid Program? New England Journal of Medicine. 378:788-791. DOI: 10.1056/NEJMp1800549; Goldman, A.L., Woolhandler, S, Himmelstein, D.U., Bor, D.H. & McCormick, D. (2018). Analysis of work requirement exemptions and Medicaid spending. JAMA Intern Med, 178:1549-1552. DOI:10.1001/jamainternmed.2018.4194; Solomon, J. (2019). Medicaid Work Requirements Can't Be

Fixed: Unintended Consequences are Inevitable Result. Center on Budget and Policy Priorities. Retrieved from https://www.cbpp.org/research/health/medicaidwork-requirements-cant-be-fixed)). At the same time, those who are already working and, thus, substantively meeting the requirement, may be negatively impacted by either failing to qualify for coverage or quickly losing coverage because of a variety of factors, including the "lack of awareness of and administrative barriers associated" with the reporting requirements, Withdrawal at 15, AR 16; and the fact that "consistent and stable employment is often out of reach," even if a beneficiary is currently employed, Withdrawal at 17, AR 18. Far from being "contrived," this explanation is rational and finds ample support in the administrative record.

Similarly, Plaintiffs' renewed attack on the withdrawal as a "bait-and-switch" to force the State to expand Medicaid without conditions, Pls.' Opp'n at 15, rings hollow. As Defendants explained in their opening brief, the withdrawal forces Georgia to do no such thing; the State is free to walk away from the project entirely, to work with the agency to come up with an alternative project, or to implement the rest of the project as approved. *See* Defs.' Br. at 26. Moreover, certain "conditions" or restrictions on the new class of individuals potentially eligible for coverage under the project remain, such as the waiver of retroactive eligibility for coverage, hospital presumptive eligibility, and non-emergency medical transport—all of which, absent the agency's waiver, are otherwise provided to Medicaid beneficiaries. *See* AR 9384–85. Thus, Plaintiffs fail to establish that the agency's withdrawal was pretextual.

IV. The agency's withdrawal was not subject to notice-and-comment obligations.

CMS was not required to undertake notice-and-comment to withdraw the waiver for Pathways. It is a fundamental principle in administrative law that the agency is required only to undertake the procedures set forth in the relevant statute and regulations. *See, e.g.*, *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) ("Agencies are free to grant

additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them."). Here, the statute outlines procedures the agency must follow to *approve* a project, and the regulations provide procedures the agency must follow to *withdraw* permission for a project.

As Plaintiffs correctly note, 42 U.S.C. § 1315(d)(2) "requires notice and comment for demonstration *approvals*." Pls.' Opp'n at 18 (emphasis added). In fact, § 1315(d) is titled "Regulations relating to applications for or renewals of demonstration projects." By the plain text, the statute speaks only to the agency's approval and renewal process. Plaintiffs also correctly note that HHS did engage in notice-and-comment before approving Pathways. *See* Defs.' Br. at 5; AR 4177–78.

The procedure for a withdrawal is outlined in the regulations, *see* 42 C.F.R. § 431.420(d). Titled "Terminations and suspensions," this regulation provides that "The Secretary may also withdraw waivers or expenditure authorities based on a finding that the demonstration project is not likely to achieve the statutory purposes," *id.* § 431.420(d)(2), and that the "terms and conditions for the demonstration will detail any notice and appeal rights for the State for a termination, suspension or withdrawal of waivers or expenditure authorities." *Id.* § 431.420(d)(3).

Plaintiffs do not cite or discuss this regulation, nor do they explain why it does not directly control the agency's procedures to withdraw permission for Pathways. Plaintiffs also do not allege that the agency failed to follow these procedures. In fact, the Administrator made the findings required by § 431.420(d)(2), concluding Pathways was unlikely to achieve the statutory purposes, *see* Defs.' Br. at 7–8; AR 7, 13–20. Georgia was notified and given time to respond; the Administrator then responded to Georgia's objections. *See* Defs.' Br. at 7–8. Contrary to Plaintiffs' allegations, Defendants meticulously followed the procedures prescribed by statute and regulation.

Plaintiffs assert the agency must follow the same procedure to withdraw permission for Pathways as it followed to grant approval, but as discussed above, this argument is contrary to *Vermont*

Yankee and the plain text of the statute. Plaintiffs' arguments amount to an imposition of additional procedures for the agency to follow, but only Congress may do this.

As Defendants have earlier explained, Plaintiffs' reliance on *Perez v. Mort. Bankers Ass'n*, 575 U.S. 92 (2015) is also misplaced because there, the Supreme Court addressed specific procedural requirements for rulemaking; Pathways was approved through informal adjudication, not rulemaking. *See, e.g.*, *Neustar, Inc. v. FCC*, 857 F.3d 886, 893 (D.C. Cir. 2017) (distinguishing between rulemaking and informal adjudication). More fundamentally, the central holding of *Perez* is that the agency is not obligated to follow more than the procedures Congress set forth, and neither the parties nor the courts may add requirements for agencies. Requiring notice-and-comment "may be wise policy. Or it may not. Regardless, imposing such an obligation is the responsibility of Congress or the administrative agencies, not the courts." *Perez*, 575 U.S. at 102. Here, Congress required notice-and-comment to approve or renew a demonstration project, and the agency's regulations require other procedures for a withdrawal. It is certainly not for Plaintiffs to impose additional obligations on the agency.

For these reasons, the withdrawal was not subject to notice-and-comment, and this claim should be dismissed.

V. The agency's withdrawal did not violate any cognizable agreement with Georgia.

Plaintiffs have repeatedly asserted that the agency's withdrawal constituted a breach of contract. For the reasons Defendants argued previously, Plaintiffs still fail to carry their burden of pleading the elements of this claim. In reply, Plaintiffs still have not identified consideration exchanged. Plaintiffs do not argue that the federal government received any benefit from entering into an agreement with Georgia. Without consideration exchanged, there was no contract, and Plaintiffs' contract claim should be dismissed. *See* Defs.' Br. at 31–32.

In fact, the regulations and the STCs gave the Administrator the authority to withdraw permission for Pathways. 42 C.F.R. § 431.420(d)(2) provides that waivers, like the one granted to

Georgia here, may be withdrawn "based on a finding that the demonstration project is not likely to achieve the statutory purposes." And the STCs for Pathways clearly state that CMS "reserves the right to withdraw expenditure authorities and end the demonstration at any time it determines that continuing the expenditure authorities would no longer be in the public interest . . . ." *See* AR 4195. The agency made extensive findings, and these provisions give the agency ample authority to withdraw permission for Pathways based on these findings. *See* Withdrawal at 2, AR 3.

Perhaps recognizing the weakness in their contract claim, Plaintiffs' argument has shifted. Notwithstanding their earlier argument seeking a remedy for breach of contract, Plaintiffs suggest, without explanation, that case law applicable to government contracts is inapposite. Plaintiffs cannot have it both ways: they may not argue that the January 4 letter constituted a binding contract, while summarily dismissing Defendants' arguments as irrelevant for rebutting their contract claim. This constructive amendment of the Complaint should not be allowed; and this argument, made for the first time in reply, should be deemed waived. *See In re Egidi*, 571 F.3d 1156, 1163 (11th Cir. 2009) ("Arguments not properly presented in a party's initial brief or raised for the first time in the reply brief are deemed waived"). For the reasons Defendants argued previously, Plaintiffs cannot identify consideration exchanged and fail to plead breach of contract. The agency had ample authority to withdraw permission for Pathways. This claim should be dismissed.

VI. The agency's withdrawal does not violate the Spending Clause.

Plaintiffs have not challenged the constitutionality of any statute or regulation and therefore have not asserted a Spending Clause claim. *See, e.g., South Dakota v. Dole*, 483 U.S. 203, 207–08, 210 (1987). They have not identified a single case that permits the type of claim they assert here—a claim untethered to any legislation enacted with Congress's spending power. Plaintiffs cite *Bond*, without explanation, but *Bond* addressed the proper interpretation of a criminal statute, not the Spending Clause. *See Bond v. United States*, 572 U.S. 844, 848 (2014).

Plaintiffs also continue to insist that Georgia is being "coerced" into implementing Medicaid expansion. Not so. Georgia is free to walk away from its demonstration project in its current state or to work with the agency to provide low-income Georgians with Medicaid coverage in a manner that advances Medicaid's statutory objectives. Further, Georgia's *existing* Medicaid funds are not affected by the Administrator's decision at issue in this case. It was this distinction—between conditions on new spending and conditions on existing spending—that motivated the Supreme Court's reasoning in *NFIB*. *See Nat'l Fed'n of Indep. Bus. v. Sebelius ("NFIB")*, 567 U.S. 519, 576 581–85, 586 (2012).

Plaintiffs further suggest that Georgia did not "voluntarily and knowingly" accept the terms of the agreement with CMS. *See id.*, 567 U.S. at 577 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). But the demonstration project statute, 42 U.S.C. § 1315, and the applicable regulations, which authorize CMS to withdrawal approval for a demonstration project when the Secretary determines it is not likely to further the objectives of Medicaid, are neither new nor surprising. For these reasons, Plaintiffs' Spending Clause claim should be dismissed.[5]

CONCLUSION

For the foregoing reasons, and for the reasons set for in Defendants' opening brief, summary judgment should be granted in favor of Defendants and denied for Plaintiffs. Plaintiffs' Complaint should be dismissed.

Dated: June 16, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

[5] Plaintiffs again do not address their claim for estoppel. Accordingly, this Court should consider this claim abandoned. "When a party fails to respond to an argument or address a claim in a responsive brief, such argument or claim can be deemed abandoned." *Giuliani v. NCL (Bahamas) Ltd.*, 558 F. Supp. 3d 1230, 1244 (S.D. Fla. 2021) (quoting *GolTV, Inc. v. Fox Sports Latin Am. Ltd.*, 277 F. Supp. 3d 1301, 1311 n.7 (S.D. Fla. 2017)).

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CERTIFICATE OF SERVICE

Per Local Rule 5.1, Defendants certify that they effected service of this filing on all other parties to this action by filing it with the Court's electronic filing system.

/s/ Vinita B. Andrapalliyal
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