

12-6-2019

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Recommended Citation

Jane Perkins, *The Administration's Medicaid Waivers: Exploding in the Guise of Experimenting*, 13 St. Louis U. J. Health L. & Pol'y (2019).

Available at: <https://scholarship.law.slu.edu/jhlp/vol13/iss1/7>

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THE ADMINISTRATION'S MEDICAID WAIVERS: EXPLODING IN THE GUISE OF EXPERIMENTING

JANE PERKINS*

ABSTRACT

Congress enacted the Medicaid Act with the stated purpose of furnishing medical assistance to low-income people. Medicaid participation is not required of a state, but if a state does choose to participate—which they all do—the federal government will contribute the lion's share of the cost of providing care. In return, the state agrees to pay the remaining costs of care. The state must also adhere to the detailed regulatory scheme Congress placed in the Medicaid Act, including requirements for determining eligibility for the program and the scope and affordability of coverage. Section 1115 of the Social Security Act authorizes the Secretary of the U.S. Department of Health and Human Services to allow states to waive (or ignore) certain requirements to undertake time-limited, experimental projects that are likely to promote the objectives of the Medicaid Act.

Unlike previous administrations, President Trump is using Section 1115 to implement restrictive policies, including mandatory work requirements, that will result in dramatic coverage losses. Such policies will, in the President's words, "explode" the Affordable Care Act and its Medicaid expansion. This article will provide an overview of the nature and scope of the Section 1115 experimental waiver authority and describe how administrations have exercised that authority over time. The final sections of this article discuss cases filed by Medicaid beneficiaries to challenge the current administration's actions and explore two table-setting legal questions these cases raise: (1) does the Secretary have plenary, unreviewable authority to decide whether to approve a Section 1115 waiver and, (2) if not, what level of deference, if any, should the courts give the Secretary's decision?

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I. INTRODUCTION

Congress enacted the Medicaid program to provide medical assistance to certain categories of low-income people: the disabled, the blind, the elderly, and families with dependent children.¹ But as the Supreme Court noted in *National Federation of Independent Business v. Sebelius*, as part of the Affordable Care Act's (ACA's) "comprehensive national plan to provide universal health insurance coverage," Congress "transformed [Medicaid] into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level."² As of June 2019, the Medicaid program provides health insurance coverage to more than sixty-five million people in the United States.³

With Medicaid, Congress has offered a "deal for states." If a state chooses to participate in the program—which they all do—the federal government will contribute the lion's share of the cost of providing care. In return, the state agrees to pay the remaining portion of the costs of care.⁴ The state must also adhere to the detailed regulatory scheme Congress placed in the Medicaid Act, including requirements for determining eligibility for the program and the scope and affordability of coverage.⁵ With respect to determining eligibility, a state cannot impose eligibility criteria other than those set forth in the Medicaid Act,⁶ and it cannot pick and choose among individuals within a covered group.⁷ Each state must operate its program through a state Medicaid plan that has been approved by the Secretary of the U.S. Department of Health and Human Services (the Secretary of DHHS).⁸

The Social Security Act, in which Medicaid is included as Title XIX, does include provisions that allow states to ignore some Medicaid requirements.⁹

1. See Social Security Act, 42 U.S.C. § 1396a(a)(10) (2018).

2. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 583 (2012) (citing 42 U.S.C. §§ 1396a(a)(10)(A)(i)(VIII)) (2006 ed. and Supp. IV)).

3. See CTRS. FOR MEDICARE & MEDICAID SERVS., *June 2019 Medicaid & CHIP Enrollment Data Highlights*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/report-highlights/index.html> (last updated Sept. 24, 2019).

4. Complaint at 3, *Philbrick v. Azar*, No. 19-773, 2019 U.S. Dist. LEXIS 125675 (D.D.C. Mar. 20, 2019); Julia Paradise et al., *Medicaid at 50*, KAISER FAM. FOUND. 19–20 (May 6, 2015), <http://files.kff.org/attachment/report-medicaid-at-50>.

5. See 42 U.S.C. § 1396w-5(a) (2018).

6. *Id.* § 1396a(a)(10)(A). See, e.g., *Jones v. T.H.*, 425 U.S. 986, 986 (1976) (affirming a three-judge district court's holding that a Utah regulation was inconsistent with Title XIX because it added a requirement for obtaining medical assistance); Complaint, *supra* note 4, at 3.

7. See 42 U.S.C. § 1396a(a)(10)(B); Complaint, *supra* note 4, at 3.

8. Medicaid & CHIP Payment & Access Comm'n, *State Plan*, MACPAC, <https://www.macpac.gov/subtopic/state-plan> (last visited Sept. 21, 2019).

9. Elizabeth Hinton et al., *Section 1115 Medicaid Demonstration Waivers: The Current Landscape of Approved and Pending Waivers*, KAISER FAM. FOUND. 1 (Feb. 12, 2019), <http://files>

Section 1115 of the Social Security Act authorizes the Secretary to allow states to waive (or ignore) certain requirements to undertake time-limited, experimental projects that are likely to promote the objectives of the Medicaid Act.¹⁰

This article focuses on the nature and scope of this experimental waiver authority. It will provide an overview of the statute and its legislative history and describe how administrations have exercised the waiver authority over time. Unlike previous administrations, President Trump is using these waivers to implement restrictive policies, including mandatory work requirements, that will result in dramatic coverage losses. Such policies will, in the President's words, "explode" the ACA and its Medicaid expansion.¹¹ The final sections of this article discuss cases filed by Medicaid beneficiaries to challenge the administration's actions and explore two table-setting legal questions these cases raise: (1) does the Secretary have plenary, unreviewable authority to decide whether to approve a Section 1115 waiver and, (2) if not, what level of deference, if any, should the courts give the Secretary's decision?

II. OVERVIEW OF SECTION 1115

A. *The Statute and its Primary Requirements*

Section 1115 of the Social Security Act states:

In the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of subchapter . . . XIX . . . in a State or States—

(1) the Secretary may waive compliance with any of the requirements of section . . . 1396a of this title, . . . to the extent and for the period he finds necessary to enable such State or States to carry out such project, and

(2)(A) costs of such project which would not otherwise be included as expenditures under section . . . 1396b of this title, . . . shall, to the extent and for the period prescribed by the Secretary be regarded as expenditures under the State plan or plans approved under such subchapter . . .¹²

Thus, Section 1115 gives the Secretary of DHHS limited authority. First, the Secretary can only approve proposals that seek to undertake an "experimental, pilot, or demonstration project."¹³ As stated in the legislative history, Section

.kff.org/attachment/Issue-Brief-Section-1115-Medicaid-Demonstration-Waivers-The-Current-Landscape-of-Approved-and-Pending-Waivers.

10. 42 U.S.C. § 1315(a).

11. Frank J. Thompson et al., *Trump and the Affordable Care Act: Congressional Repeal Efforts, Executive Federalism, and Program Durability*, 48 PUBLIUS 396, 396, 413–15 (2018).

12. 42 U.S.C. § 1315(a). This article refers to the provision as it appears in the Social Security Act, as Section 1115.

13. *Id.*

1115 was intended to allow for “experimental projects designed to test out new ideas and ways of dealing with the problems of public welfare recipients. . . . Projects . . . are expected to be selectively approved by [DHHS] and to be those which are designed to improve the techniques of administering assistance and the related rehabilitative services under the assistance titles.”¹⁴ Citing this history, the Ninth Circuit Court of Appeals has noted that

[t]he statute was not enacted to enable states to save money or to evade federal requirements but to “test out new ideas and ways of dealing with the problems of public welfare recipients.” . . . A simple benefit cut, which might save money, but has no research or experimental goal, would not satisfy this requirement. Rather, the “experimental or demonstration project” language strongly implies that the Secretary must make at least some inquiry into the merits of the experiment—she must determine that the project is likely to yield useful information or demonstrate a novel approach to program administration.¹⁵

Second, the Secretary can only approve projects that are “likely to assist in promoting the objectives” of the Medicaid Act.¹⁶ The Medicaid Act, 42 U.S.C. § 1396-1, states that Medicaid’s purpose is to

enable[e] each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of . . . individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care.¹⁷

While cases have discussed Medicaid’s purpose as furnishing medical assistance to people in need,¹⁸ this part of Section 1115 has been a central focus of the

14. S. REP. NO. 87-1589 (1962), as reprinted in 1962 U.S.C.C.A.N. 1943, 1961–62. See also H. R. REP. NO. 3982, pt. 2, at 307 (1981) (“States can apply to HHS for a waiver of existing law in order to test a unique approach to the delivery and financing of services to Medicaid beneficiaries.”).

15. *Beno v. Shalala*, 30 F.3d 1057, 1069 (9th Cir. 1994); *accord Pharm. Res. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 664–65 (2003) (plurality) (“The fact that the [Program] . . . provid[es] benefits to needy persons and . . . curtail[s] the State’s Medicaid costs . . . would not provide a sufficient basis for upholding the program if it severely curtailed Medicaid recipients’ access to prescription drugs.”).

16. 42 U.S.C. § 1315(a).

17. *Id.* § 1396–1.

18. *Accord Schweiker v. Hogan*, 457 U.S. 569, 571 (1982) (finding Congress established Medicaid “for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons”). See, e.g., *Pharm. Res. & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 75 (1st Cir. 2001) (citing § 1396 [now, § 1396-1] as setting Medicaid’s “primary purpose”); *W. Va. Univ. Hosps., Inc. v. Casey*, 885 F.2d 11, 20 (3d Cir. 1989) (“[T]he primary purpose of [M]edicaid is to achieve the praiseworthy social objective of granting health care coverage to those who cannot afford it.”); *Stewart v. Azar (Stewart I)*, 313 F. Supp. 3d 237, 266 (D.D.C. 2018) (citing § 1396-1 as establishing the central objective of the Medicaid Act).

litigation challenging the Trump administration's restrictive waivers. It is discussed more fully in Section III, below.

Third, Section 1115 only authorizes the Secretary to waive a state's compliance with requirements of Section 1396a of the Medicaid Act.¹⁹ Section 1396a describes the mandatory and optional components of the state Medicaid plan and, as such, is a pivotal provision.²⁰ That said, the Medicaid Act is a complex and lengthy statute that begins with Section 1396 (addressing Medicaid and CHIP payment and access commission) and goes through Section 1396w-5 (addressing health disparities). All told, there are fifty-two provisions outside of Section 1396a. Many of them set limits on federal authority, for example, the federal government must provide federal funding to participating states (Section 1396b).²¹ Others establish protections for program beneficiaries, including affordability protections that prohibit states from imposing premiums on very low-income people and charging cost-sharing above certain limits (Sections 1396o and 1396o-1).²² Courts have acknowledged the Section 1396a boundary. In *Pharmaceutical Research & Manufacturers of America v. Thompson*, the District of Columbia Circuit Court of Appeals, without extensive discussion, held, "Although the Act [Section 1115] authorizes the Secretary to waive certain Medicaid requirements for such demonstration projects, it does not authorize him to waive any requirements of section 1396r-8's [outpatient drug] rebate provision or the [§ 1396o] requirement that Medicaid beneficiaries contribute no more than a 'nominal' amount to the cost of medical benefits they receive."²³

Finally, Section 1115 requires the project to be time-limited. The Secretary can only grant waivers "to the extent and for the period . . . necessary to enable [the] state to carry out" the experiment.²⁴ The costs of such an approved Section 1115 project are then regarded as Medicaid expenditures under the state Medicaid plan.²⁵

In the ACA, Congress amended Section 1115 to require the Secretary of DHHS to implement regulations that ensure a transparent application and approval process.²⁶ Among other things, the process must allow for state and

19. 42 U.S.C. § 1315(a)(1).

20. *Id.* § 1396a.

21. *Id.* § 1396b.

22. *See generally id.* §§ 1396o–1396o-1.

23. *Pharm. Research & Mfrs. of Am. v. Thompson*, 251 F.3d 219, 222 (D.C. Cir. 2001).

24. 42 U.S.C. § 1315(a)(1). *See Cal. Welfare Rights Org. v. Richardson*, 348 F. Supp. 491, 498 (N.D. Cal. 1972) ("As a matter of principle, it is clear that the Secretary would abuse his discretion if he were to approve a project which . . . subject[ed] an unreasonably large population to the experiment or continu[ed] it for an unreasonably long period.")

25. *See* 42 U.S.C. § 1315(a)(2).

26. *Id.* § 1315(d).

federal public comment periods prior to the Secretary making a decision on a state's Section 1115 waiver application.²⁷

B. Section 1115 Medicaid Waivers Over Time

Over the last fifty years, Section 1115 Medicaid waivers have been used to experiment with a wide array of program design features. Early waivers gave states the ability to conduct short-term experiments designed to test the use of copayments. After two courts upheld these experiments,²⁸ Congress amended the Medicaid Act to define the circumstances under which states may impose premiums and cost sharing and stated its expectation that further demonstration waivers concerning cost sharing would not be necessary.²⁹

Section 1115 has also been used to experiment with delivery system reform. During the 1990s, for example, the Clinton administration approved a number of states' requests to implement Section 1115 waivers to expand Medicaid coverage to childless adults who were not at that point described in the Medicaid Act. At the same time, these waivers allowed states to contract with managed care plans to deliver services to Medicaid beneficiaries.³⁰ Congress subsequently amended the Medicaid Act to describe, in detail, the states' options for using managed care for the provision of medical assistance.³¹ The Obama administration approved waivers designed to improve quality of care in managed care settings, establish health homes for individuals with chronic conditions, and introduce new delivery and payment models for individuals eligible for both Medicaid and Medicare.³² Past administrations have also used

27. See 42 C.F.R. § 431.408(a)(1)–(3) (2018).

28. See *Crane v. Mathews*, 417 F. Supp. 532, 538–40, 543 (N.D. Ga. 1976). See also *Cal. Welfare Rights Org.*, 348 F. Supp. at 497–98.

29. See Tax Equity and Fiscal Responsibility Act of 1982, H.R. 4961, 97th Cong. § 131(a) (1982) (enacting 42 U.S.C. § 1396o to specify states' options for premiums and cost sharing, including the use of waiver authority); H.R. REP. NO. 97-757, pt. 1, at 6 (1982) (“The Committee notes that a large number of States have sought waivers of current law relating to the imposition of cost-sharing under the demonstration authority at section 1115 of the Act. The Committee believes that this bill gives the States sufficient flexibility in this regard to make further exercise of the Secretary’s demonstration authority unnecessary.”).

30. Laura D. Hermer, *On the Expansion of “Welfare” and “Health” Under Medicaid*, 9 ST. LOUIS U. J. HEALTH L. & POL’Y 235, 238–40 (2016).

31. See generally Balanced Budget Act of 1997, H.R. 2015, 97th Cong. § 4701 (1997) (amending 42 U.S.C. § 1396v and enacting § 1396u–2).

32. Alexandra Gates et al., *An Overview of Delivery System Reform Incentive Payment (DSRIP) Waivers*, KAISER FAM. FOUND. 1 (2014), <http://files.kff.org/attachment/an-overview-of-dsrip>.

Section 1115 waivers to ensure that low-income people can maintain coverage during disasters, such as Hurricane Katrina and September 11.³³

In contrast to this history, the Trump administration is using Section 1115 to fundamentally transform the Medicaid program.³⁴ In 2017, President Trump stated his intent to “explode” the ACA, including the Medicaid expansion.³⁵ An Executive Order issued just after his inauguration called on federal agencies to unravel the ACA.³⁶ Shortly thereafter, DHHS sent a letter to all governors stating that the ACA Medicaid expansion “was a clear departure from the core, historical mission of the program,” encouraging them to apply for “waiver[s]” of coverage requirements—particularly for the expansion population, and promising to “fast track” the approvals.³⁷ In a November 2017 speech, the Administrator of the Centers for Medicare & Medicaid Services (CMS), the agency within DHHS directly responsible for implementing the Medicaid Act, identified approval of state waivers that condition Medicaid coverage on work requirements as part of the Trump administration’s response to the ACA’s Medicaid expansion.³⁸ In addition, in November 2017, and despite Section

33. See *Medicaid’s Role in Disasters and Public Health Emergencies*, MEDICAID & CHIP PAYMENT & ACCESS COMM’N, 4 (2018), <https://www.macpac.gov/wp-content/uploads/2018/03/Medicoids-Role-in-Disasters-and-Public-Health-Emergencies.pdf>.

34. See, e.g., *About Section 1115 Demonstrations*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.medicaid.gov/medicaid/section-1115-demo/about-1115/index.html> (last visited Sept. 22, 2019) (establishing Trump administration criteria for Section 1115 applications, including potential to “promote upward mobility, greater independence, and improved quality of life among individuals” and “[e]nhance alignment between Medicaid policies and commercial health insurance products”).

35. Amy Goldstein & Juliet Eilperin, *Affordable Care Act Remains ‘Law of the Land,’ but Trump Vows to Explode It*, WASH. POST (Mar. 24, 2017), https://www.washingtonpost.com/national/health-science/affordable-care-act-remains-law-of-the-land-but-trump-vows-to-explode-it/2017/03/24/4b7a2530-10c3-11e7-ab07-07d9f521f6b5_story.html.

36. See Exec. Order No. 13,765, *Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal*, 82 Fed. Reg. 8351 (Jan. 20, 2017).

37. Letter from Thomas E. Price & Seema Verma, U.S. Dep’t of Health & Human Servs., to Governor 1–2 (Mar. 14, 2017) (available at <https://www.hhs.gov/sites/default/files/sec-price-admin-verma-ltr.pdf>).

38. See Seema Verma, Adm’r, Ctrs. for Medicare & Medicaid Servs., *Speech: Remarks by Administrator Seema Verma at the National Association of Medicaid Directors (NAMD) 2017 Fall Conference* (Nov. 7, 2017) (transcript available at <https://www.cms.gov/newsroom/fact-sheets/speech-remarks-administrator-seema-verma-national-association-medicoid-directors-namd-2017-fall>) (stating that the ACA’s decision to “move[] millions of working-age, non-disabled adults into” Medicaid “does not make sense” and announcing that CMS would resist that change through approving work requirement waivers). See also, e.g., Alex M. Azar II, Sec’y, U.S. Dep’t of Health & Hum. Servs., *Remarks on State Healthcare Innovation* (Aug. 9, 2018) (transcript available at <https://www.hhs.gov/about/leadership/secretary/speeches/2018-speeches/remarks-on-state-health-care-innovation.html>) (stating that DHHS “is now overseeing the next great generation of transformation in Medicaid, through our efforts to encourage work and other forms of community engagement”).

1115's focus on time-limited experimental projects, CMS announced that it would extend "routine, successful, non-complex" Section 1115 waivers for up to ten years.³⁹

Then, on January 11, 2018, CMS issued a letter to state Medicaid directors announcing a "new policy" to "Promote Work and Community Engagement Among Medicaid Beneficiaries."⁴⁰ The policy established guidelines for states wanting to "make participation in work or other community engagement a requirement for continued Medicaid eligibility."⁴¹ This action by CMS reversed the previous Agency position that work requirements could not be approved under Section 1115 because they do not further the objectives of the Medicaid Act.⁴²

A day later, the administration approved Kentucky HEALTH, a Section 1115 project that, among other things, conditioned medical assistance on compliance with work requirements.⁴³ To date, the administration has approved work requirements in ten states (AZ, AR, IN, KY, ME, MI, NH, OH, UT, WI), and additional requests are pending.⁴⁴ Notably, the administration has not waited to learn the results of these demonstrations but rather included work requirements in the Medicaid program, nationwide, in its 2020 budget, with projected savings of \$130 billion over ten years.⁴⁵

39. BRIAN NEAL, CTRS. FOR MEDICARE & MEDICAID SERVS., SECTION 1115 DEMONSTRATION PROCESS IMPROVEMENTS (2017).

40. See Letter from Brian Neale, Dir., Ctrs. for Medicare & Medicaid Servs., to State Medicaid Directors 1 (Jan. 11, 2018) (available at <https://www.medicaid.gov/federal-policy-guidance/downloads/smd18002.pdf>).

41. *Id.*

42. See, e.g., Letter from Andrew M. Slavitt, Acting Adm'r, Ctrs. for Medicare & Medicaid Servs., to Thomas Betlach, Dir., Ariz. Health Care Cost Containment Sys. 2-3 (Sept. 30, 2016) (available at <https://www.azahcccs.gov/Resources/Downloads/1115Waiver/LetterToState09302016.pdf>) (stating that work requirements "do not support the objectives of the [Medicaid] program" and "could undermine access to care"); *Secretary Burwell's Hearing on "The President's Fiscal Year 2017 Budget:" Before the Energy & Commerce Health Subcomm.*, 114th Cong. 13 (2016) (responses to additional questions for the record by Hon. Joseph R. Pitts).

43. MaryBeth Musumeci et al., *Re-approval of Kentucky Medicaid Demonstration Waiver*, KAISER FAM. FOUND. 1 (2018), <http://files.kff.org/attachment/Issue-Brief-Re-approval-of-Kentucky-Medicaid-Demonstration-Waiver>.

44. See *State Waivers List*, MEDICAID, <https://bit.ly/2BYzfms>. *Medicaid Waiver Tracker: Approved and Pending Section 1115 Waivers by State*, KAISER FAM. FOUND. (Sept. 18, 2019), <https://www.kff.org/medicaid/issue-brief/medicaid-waiver-tracker-approved-and-pending-section-1115-waivers-by-state/>. Some waivers that were approved have since been set aside by courts in Arkansas, Kentucky, and New Hampshire. See *id.*

45. See DEP'T OF HEALTH & HUM. SERVS., EXEC. OFFICE OF THE PRESIDENT, BUDGET IN BRIEF, FISCAL YEAR 2020 (2019), <https://www.hhs.gov/sites/default/files/fy-2020-budget-in-brief.pdf>.

The administration's use of Section 1115 to restrict Medicaid coverage is in sharp contrast to that of previous administrations.⁴⁶ Researchers at the George Washington University Milken Institute School of Public Health reviewed Section 1115 approvals across administrations, finding no approved project prior to January 2017 that was designed to limit medical assistance. They concluded that

[T]he Trump administration's ... experiments, which are designed to introduce benefit rollbacks coupled with multiple eligibility restrictions (the principle ones being work as a condition of eligibility, premiums, expanding reporting rules, and lengthy lock-out periods for non-compliance) represent a clear departure from historical 1115 practice under Republican and Democratic administration[s] alike. . . . Looking at approved experiments over the 25 years leading up to the Trump administration, it is evident that its use of 1115 has no operational precedent.⁴⁷

III. LITIGATION CHALLENGING THE ADMINISTRATION'S WAIVER APPROVALS

As the Milken Institute report notes, the Trump administration's approved Section 1115 projects include numerous components that reduce coverage (e.g., premiums, lock-outs);⁴⁸ however, it is the work requirements that have received particular attention. Ample research finds work requirements to be a dubious policy choice. The majority of non-disabled adults who are on Medicaid are already working, and the vast majority of those who are not working cannot work due to a chronic health condition or caretaking duties.⁴⁹ According to the Kaiser Family Foundation, when those who are working or who cannot work are removed from the equation, this leaves only about six percent of the adult population at whom work requirements can be directed.⁵⁰ As a further

46. Alexander Somodevilla et al., *How Far Do Section 1115 Medicaid Experiments Designed to Restrict Eligibility and Enrollment Veer from the Norm? A 25-Year Perspective*, GEO. WASH. U. MILKEN INST. SCH. PUB. HEALTH (June 13, 2019), <http://gwhpmmatters.com/blog-how-far-do-section-1115-medicaid-experiments-designed-restrict-eligibility-and-enrollment-veer>.

47. *Id.*

48. *Id.*

49. Rachel Garfield et al., *Implications of Work Requirements in Medicaid: What Does the Data Say?*, KAISER FAM. FOUND. 2, 5–6 (2018), <http://files.kff.org/attachment/Issue-Brief-Implications-of-Work-Requirements-in-Medicaid-What-Does-the-Data-Say> (finding that almost eighty percent of adults who are enrolled in Medicaid, but do not receive supplemental security income, live in families with at least one worker, and almost sixty percent are working themselves).

50. Rachel Garfield et al., *Implications of a Medicaid Work Requirement: National Estimates of Potential Coverage Losses*, KAISER FAM. FOUND. 2 (2018), <http://files.kff.org/attachment/Issue-Brief-Implications-of-a-Medicaid-Work-Requirement-National-Estimates-of-Potential-Coverage-Losses>. Cf. Rachel Garfield et al., *Understanding the Intersection of Medicaid and Work: What Does the Data Say?*, KAISER FAM. FOUND. 2 (2019), <http://files.kff.org/attachment/Issue-Brief-Understanding-the-Intersection-of-Medicaid-and-Work-What-Does-the-Data-Say> (placing this figure at about seven percent).

complication, implementation of work requirements is extremely expensive, with cost estimates ranging from \$15 to \$30 million annually (Michigan)⁵¹ to \$121 million and \$163 million in just two years (2020, 2021) for local governments (Minnesota).⁵² A report from Kentucky found that as the state began to implement its work requirement waiver, Medicaid administrative costs increased more than forty percent, even prior to the work requirements going into effect.⁵³ New Hampshire spent \$130,000 on outreach alone—*prior to* deciding to delay implementation of its work requirements because so many people were facing loss of coverage.⁵⁴ To further complicate matters, ample research establishes that work requirements do not achieve the stated goal of moving low-income people into employment with health insurance coverage.⁵⁵ Hospitals and community health centers face increased uncompensated care costs when individuals lose coverage as a result of a work requirement.⁵⁶

Policy arguments aside, the administration's efforts are legally suspect. The administration is relying on Section 1115 to achieve Medicaid transformation through the imposition of work requirements.⁵⁷ As previously noted, however, Section 1115 limits waiver projects to those likely to further the Medicaid Act's objectives. In contrast to other public benefit programs such as Temporary Assistance to Needy Families and the Supplemental Nutritional Assistance

51. Jennifer Wagner & Judith Solomon, *States' Complex Medicaid Waivers Will Create Costly Bureaucracy and Harm Eligible Beneficiaries*, CTR. ON BUDGET & POL. PRIORITIES 15 (May 23, 2018), <https://www.cbpp.org/sites/default/files/atoms/files/5-23-18health2.pdf>.

52. *Id.* See also Mattie Quinn, *Implementing States' Medicaid Wishes Won't be Cheap*, GOVERNING (Feb. 19, 2018), <https://www.governing.com/topics/health-human-services/gov-medicaid-work-requirements-states-cost-implement.html>.

53. Bruce Japsen, *Trump's Medicaid Work Rules Hit States with Costs and Bureaucracy*, FORBES (July 22, 2018), <https://www.forbes.com/sites/brucejapsen/2018/07/22/trumps-medicaid-work-rules-hit-states-with-costs-and-bureaucracy/#36553b3866f5>.

54. See Holly Ramer, *N.H. Delays Work Requirement Compliance Deadline*, CONCORD MONITOR (July 8, 2019), <https://www.concordmonitor.com/New-Hampshire-delays-work-requirement-compliance-deadline-26844999>.

55. See, e.g., Benjamin D. Sommers, et al., *Medicaid Work Requirements—Results from the First Year in Arkansas*, 381 NEW ENG. J. MED. 1073, 1079 (Sept. 12, 2019) (finding “significant losses in health insurance coverage in the initial 6 months of the policy but no significant change in employment”); Hannah Katch, *Medicaid Work Requirements Would Limit Health Care Access Without Significantly Boosting Employment*, CTR. ON BUDGET & POL. PRIORITIES (Jul. 13, 2016), <https://www.cbpp.org/research/health/medicaid-work-requirement-would-limit-health-care-access-without-significantly>.

56. See, e.g., Jessica Sharac et al., *How Would Medicaid Losses in Approved Section 1115 Medicaid Work Experiment States Affect Community Health Centers?*, GEIGER GIBSON / RCHN COMMUNITY HEALTH FOUND. RES. COLLABORATIVE 7 (June 2019), <https://www.rchnfoundation.org/wp-content/uploads/2019/06/Draft-GG-IB-59-6.19-FINAL.pdf>; Randy Haught et al., *How Will Medicaid Work Requirements Affect Hospitals' Finances?*, COMMONWEALTH FUND (Mar. 14, 2019), <https://www.commonwealthfund.org/publications/issue-briefs/2019/mar/how-will-medic-aid-work-requirements-affect-hospitals-finances>.

57. Letter from Thomas E. Price & Seema Verma, *supra* note 37, at 1–3.

Program, the Medicaid Act does not authorize work requirements or refer to employment or work as a program objective.⁵⁸ The Federal Agency previously took the position that work requirements are not likely to promote Medicaid's objectives because they will reduce, rather than promote, coverage.⁵⁹ As discussed below, Medicaid beneficiaries are bringing court challenges, arguing that the administration has exceeded its authority when approving the Section 1115 waivers and that the approvals are arbitrary and capricious.

A. Summary of the Cases

Medicaid beneficiaries in Kentucky, Arkansas, and New Hampshire have challenged the Secretary of DHHS's approvals of Section 1115 Medicaid projects in their states. The beneficiaries filed their complaints in the U.S. District Court for the District of Columbia, and in each case, District Court Judge James E. Boasberg vacated the Secretary's approval. The Secretary has appealed the Kentucky and Arkansas decisions.⁶⁰

1. The Kentucky Case: *Stewart v. Azar*⁶¹

Approved on January 12, 2018, Kentucky HEALTH was intended to "comprehensively transform" the State's Medicaid program.⁶² While the project targeted the ACA Medicaid expansion population, about twenty percent of affected enrollees were caretaker parents and relatives.⁶³ Among other things, the approved project authorized Kentucky to impose work requirements (eighty hours a month) and impose premiums on very low-income people. Enrollees who failed to pay the premiums or meet administrative reporting requirements would be terminated from coverage and locked out.⁶⁴ The approval also

58. See Social Security Act, 42 U.S.C. § 601(a)(2) (2018) (declaring purpose of TANF is to "end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage"); *Id.* § 607 (requiring states to ensure that most TANF recipients engage in "work activities" and requiring TANF payments to be reduced or terminated if an individual does not engage in the work activities.); 7 U.S.C. § 2029(a)(1) (2018) (providing that "[t]he Secretary shall permit any political subdivision, in any State . . . to operate a [SNAP] workfare program").

59. Somodevilla et al., *supra* note 46.

60. *Stewart I*, 313 F. Supp. 3d 237, 274 (D.D.C. 2018); *Philbrick v. Azar*, No. 19-773, 2019 U.S. Dist. LEXIS 125675, at *15 (D.D.C. July 29, 2019). See generally *Stewart v. Azar (Stewart II)*, 366 F. Supp. 3d 125 (D.D.C. 2019); *Gresham v. Azar*, 363 F. Supp. 3d 165, 185 (D.D.C. 2019), *appeal docketed*, No 19-5094 (D.C. Cir. Apr. 11, 2019).

61. *Stewart I*, 313 F. Supp. 3d 237, *opin. on re-approval*; *Stewart II*, 366 F. Supp. 3d 125 (D.D.C. 2019), *appeal filed*, Nos. 19-5095 & 19-5097. *The plaintiffs are represented by the National Health Law Program, Kentucky Equal Justice Center, Southern Poverty Law Center, and Jenner & Block LLP.*

62. *Stewart II*, 366 F. Supp. 3d at 130 (referring to the Commonwealth's description).

63. See *Stewart I*, 313 F. Supp. 3d at 268.

64. *Id.* at 246-47. See also Complaint at 22, 23, 37, *Stewart v. Hargan*, No. 1:18-cv-00152 (D.D.C. Jan. 24, 2018).

eliminated both three-month retroactive coverage once a beneficiary enrolls and non-emergency medical transportation.⁶⁵ The Secretary approved the project on the grounds that it would promote beneficiary health and wellness, encourage their financial independence and transition them to commercial insurance, and enhance the fiscal sustainability of the Medicaid program.⁶⁶

Medicaid beneficiaries in Kentucky filed suit against the Secretary of DHHS and other federal officials in the U.S. District Court for the District of Columbia, alleging that the approval was arbitrary and capricious under the Administrative Procedure Act (APA), that the Secretary's issuance of the January 12, 2018 new policy advancing work requirements was an invalid rule under the APA, and that the approval was an unconstitutional executive action under the Take Care Clause of the Constitution.⁶⁷

Before the case could be heard, Kentucky Governor Matthew Bevin tried to stop it. He issued an executive order directing the state Medicaid agency to end the Medicaid expansion if a court prohibited any part of the Kentucky HEALTH project from being implemented.⁶⁸ He filed a lawsuit in Kentucky against the Kentuckians who had filed *Stewart v. Azar* in the District of Columbia—a case that was ultimately dismissed by the Kentucky court.⁶⁹ He also intervened in *Stewart v. Azar* and, with the Trump administration, unsuccessfully sought to have the case transferred from the District of Columbia to his chosen federal court in Kentucky.⁷⁰ Thus, the case proceeded in the District of Columbia.

Among other things, the plaintiffs claimed the Secretary violated the APA because he failed to adequately consider whether the Kentucky HEALTH project was likely to assist in promoting Medicaid's objectives as required by Section 1115.⁷¹ Judge Boasberg agreed and vacated the Secretary's approval. Following remand, the Secretary re-approved Kentucky HEALTH. There were no major changes to the project; rather, as explained below, the Secretary

65. See, e.g., Letter from Paul Mango, Chief Principal Deputy Adm'r & Chief of Staff, Dep't of Health & Human Servs., to Carol H. Steckel, Comm'r, Ky. Dep't of Medicaid Servs. (Nov. 20, 2018) (available at <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ky/ky-health-ca.pdf>).

66. *Id.* at 7–9.

67. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that under the APA, an agency action is arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”).

68. Ky. Exec. Order No. 2018-040 (Jan. 12, 2018), <http://apps.sos.ky.gov/Executive/Journal/execjournalimages/2018-MISC-2018-0040-253682.pdf>.

69. See Complaint at 1–2, *Bevin v. Stewart*, No. 03-008, 2018 WL 3973409 (E.D. Ky. Feb. 19, 2018). For the opinion dismissing the case, see *Bevin v. Stewart*, No. 03-008, 2018 WL 3973409, at *1 (E.D. Ky. Aug. 20, 2018).

70. *Stewart v. Azar (Stewart III)*, 308 F. Supp. 3d 239, 242 (D.D.C. 2018).

71. *Stewart II*, 366 F. Supp. 3d 125, 136 (D.D.C. 2019).

“doubled down” on his original justification. Low-income Kentuckians challenged the re-approval on the same grounds raised in *Stewart I*, and the court again found an APA violation.⁷²

The court’s opinions in the Kentucky cases are quite similar to one another. To determine whether the project was likely to promote the objectives of the Medicaid Act, Judge Boasberg looked to the Medicaid Act itself—specifically 42 U.S.C. § 1396-1’s command that states furnish medical assistance as far as practicable.⁷³ He then separated the coverage assessment into two sub-issues: the risk of coverage losses and the possibility of promoting coverage.⁷⁴ Reviewing the Secretary’s approval letters and the administrative records underlying the approvals, the court found that the Secretary “never adequately considered whether Kentucky HEALTH would in fact help the state furnish medical assistance to its citizens, a central objective of Medicaid.”⁷⁵ In particular, the court expressed deep concern that the Secretary entirely failed to grapple with Kentucky’s estimate that the project would cause coverage loss equivalent to 95,000 people going without Medicaid for a full year.⁷⁶ The court rejected the Secretary’s argument that he had no obligation to estimate coverage loss because predictive calculations are murky. As the court pointed out, no matter how the number is parsed, “it indisputably reflects that a substantial number of people will lose coverage.”⁷⁷ The court also disagreed with the Secretary’s argument that the demonstration would promote coverage because it would help transition some individuals to commercial insurance coverage. The Secretary had cited no evidence or research to support that statement; nor did the Agency explain how those engaging in the community engagement activities (e.g., volunteering, job searching) could expect to get commercial insurance.⁷⁸

The court overruled the alternative Medicaid Act objectives used by the Secretary of DHHS to justify approving and re-approving Kentucky HEALTH, namely to promote health and financial independence or commercial insurance coverage, and to enhance fiscal sustainability. To begin with, the court found

72. *Id.* at 156.

73. *Id.* at 131, 136, 156.

74. *Id.* at 140; *Stewart I*, 313 F. Supp. 3d 237, 262 (D.D.C 2018). *Accord* Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 664–65 (2003) (noting that providing cheaper drugs to individuals not enrolled in Medicaid and cutting Medicaid costs “would not provide a sufficient basis for upholding the [supplemental drug rebate] program if it severely curtailed recipients’ access to” Medicaid services).

75. *Stewart II*, 366 F. Supp. 3d at 133–34. *See also Stewart I*, 313 F. Supp. 3d at 261 (“The fundamental failure here . . . is that [the Secretary] *ignored* that objective in evaluating Kentucky HEALTH.”).

76. *See Stewart II*, 366 F. Supp. 3d at 140. *See also Stewart I*, 313 F. Supp. 3d at 263.

77. *Stewart II*, 366 F. Supp. 3d at 141.

78. *Id.* at 142. *See also Stewart I*, 313 F. Supp. 3d at 264. *See generally* Letter from Byry Kennedy, Gen. Counsel, N.H. Dep’t of Health & Human Servs., to Kay Drought, Litig. Dir., N.H. Legal Assistance (Aug. 22, 2019) (on file with author).

that the objective of promoting health was not an independent objective of the Medicaid Act.⁷⁹ According to the court, “[t]reating health—rather than the furnishing of medical services—as the Act’s ultimate goal is nothing ‘more than a sleight of hand,’” because it impermissibly “extrapolate[s] the objectives of the statute to a higher level of generality.”⁸⁰ While promoting health might be a desirable *result* of the Medicaid program, the court reasoned that the Secretary had no authority to “choose his own means to that end.”⁸¹ Rather, the text and the structure of the Medicaid Act show that Congress “designed a scheme to address not health generally but the provision of care to needy populations.”⁸² As Judge Boasberg pointed out, the Secretary’s construct would allow him to approve *any* policy he subjectively concluded might improve health outcomes, no matter how far afield from Medicaid’s basic purpose of reimbursing the costs of medical care. He wrote: “Nothing could stop him from conditioning Medicaid coverage on consuming more broccoli . . . [o]r . . . forc[ing] all recipients to enroll in pilates classes or take certain nutritional supplements.”⁸³

Next, the court found that the Secretary’s goals of promoting individuals’ self-sufficiency and transitioning them from Medicaid to commercial coverage are also not independent objectives of the Medicaid Act.⁸⁴ Even accepting the argument, the court found that the Secretary acted arbitrarily because he never balanced the trade-offs between this objective and the Medicaid Act’s core objective of furnishing health insurance coverage to needy people.⁸⁵

Thereafter, the court addressed the Secretary’s final justifications that the project would enhance cost savings and fiscal sustainability. In *Stewart I*, the government labeled cost savings a “happy side effect” of the project,⁸⁶ but on re-approval, cost became the Secretary’s primary rationale for approving the project. The court agreed that cost can be considered when discerning whether or not a project passes muster under Section 1115.⁸⁷ However, as the court noted, under the APA “[t]he Secretary must also give an adequate explanation for why Kentucky HEALTH advances that objective, and why, if it is adverse to other Medicaid objectives [i.e., furnishing medical assistance], he could reasonably

79. *Stewart II*, 366 F. Supp. 3d at 138.

80. *Id.* at 144 (quoting *Stewart I*, 313 F. Supp. 3d at 266); *id.*

81. *Stewart I*, 313 F. Supp. 3d at 266–67 (quoting *Waterkeeper All. v. EPA*, 853 F.3d 527, 535 (D.C. Cir. 2017)) (“Agencies are . . . bound not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.”).

82. *Stewart II*, 366 F. Supp. 3d at 144. *See also Stewart I*, 313 F. Supp. 3d at 267.

83. *Stewart I*, 313 F. Supp. 3d at 267–68.

84. *Stewart II*, 366 F. Supp. 3d at 145. *See also Stewart I*, 313 F. Supp. 3d at 271.

85. *See Stewart I*, 313 F. Supp. 3d at 271–72.

86. *Id.* at 270 (quoting Transcript of Motion Hearing at 42–43, *Stewart I*, 313 F. Supp. 3d 237 (D.D.C. 2018) (No. 18-152)).

87. *Stewart II*, 366 F. Supp. 3d at 149 (reasoning that 42 U.S.C. § 1396-1 (2017) aims to furnish medical assistance “as far as practicable under the conditions” in the state).

conclude that, on balance, it promotes the objectives of the Act as required by § 1115.”⁸⁸ The court found that the Secretary had not made a reasoned decision because he made no findings that Kentucky HEALTH would save Kentucky any money or otherwise make the Medicaid program more sustainable.⁸⁹ Notably, this reasoning is in line with that used by previous courts, which have noted that if the “purpose of [a Section 1115] waiver application [i]s to save money,” the application does not satisfy Section 1115.⁹⁰ Section 1115 “was not enacted to enable states to save money or to evade federal requirements but to test out new ideas.”⁹¹

In addition, Judge Boasberg refused to accept the idea advanced by the Secretary of DHHS that dramatic coverage losses for adults eligible through the ACA’s Medicaid expansion could be justified by the need to preserve funding for “traditional” Medicaid populations.⁹² Instead, the court assessed the words and structure of the Medicaid Act and found that the Act does not prioritize some mandatory populations over others.⁹³

Finally, the court rejected the government’s argument that Kentucky HEALTH would promote coverage because, without it, the state might de-expand Medicaid in response to fiscal strain. Judge Boasberg found this reasoning impermissible under the statute. He pointed out that the argument does not depend on fiscal sustainability at all; “[r]ather, all that matters is that a state, like Kentucky, has threatened to de-expand Medicaid if its proposed demonstration is not approved. The underlying reason for the threat—whether budgetary priorities, fiscal crisis, or their policy goals—is of no moment.”⁹⁴ As a result, he found that the argument “is not subject to any kind of limiting principle.”⁹⁵ It would allow a state to treat Medicaid “as an *a la carte* exercise, picking and choosing which of Congress’s mandates it wanted to implement.”⁹⁶ Judge Boasberg reasoned that, taken to its logical conclusion, the Secretary’s argument would mean that when states threaten to de-expand, “or indeed do away with all of Medicaid—for fiscal reasons or no reason at all—if the Secretary does not approve whatever waiver of whatever Medicaid requirements

88. *Id.* at 149. *See also id.* at 152 (explaining that “a project that enhances financial sustainability may not advance the objectives of Medicaid if it significantly impedes or curtails Medicaid services or coverage.”).

89. *Id.* at 149. *See also Stewart I*, 313 F. Supp. 3d at 270–71.

90. *Newton-Nations v. Betlach*, 660 F.3d 370, 381 (9th Cir. 2011).

91. *Beno v. Shalala*, 30 F.3d 1057, 1069 (9th Cir. 1994).

92. *Stewart I*, 313 F. Supp. 3d at 268–70.

93. *Id.* at 269. *See also Stewart II*, 366 F. Supp. 3d at 153.

94. *Stewart II*, 366 F. Supp. 3d at 153. Judge Boasberg later pointed out that the New Hampshire approval proved this point because the State threatened to de-expand without a justification. *Philbrick v. Azar*, No. 19-773, 2019 U.S. Dist. LEXIS 125675, at *10 (D.D.C. July 29, 2019).

95. *Stewart II*, 366 F. Supp. 3d at 154.

96. *Id.* at 153.

they wish to obtain,” the Secretary could approve those requests “no matter how few people remain on Medicaid thereafter because any waiver would be coverage promoting compared to a world in which the state offers no coverage at all” (emphasis in original).⁹⁷ He concluded that Congress did not, and could not, grant the Secretary such unbridled authority.⁹⁸ Rather, the text of Section 1115 makes it clear that the baseline against which a proposed project must be evaluated is not “a hypothetical future universe” with no Medicaid coverage at all, but Medicaid coverage provided in compliance with the Medicaid Act.⁹⁹

2. The Arkansas Case: *Gresham v. Azar*¹⁰⁰

On March 5, 2018, the Secretary of DHHS approved Arkansas’s request to condition Medicaid coverage on work requirements (eighty hours per month) and to limit retroactive coverage.¹⁰¹ The work requirements went into effect on June 1, 2018.¹⁰² There were immediate repercussions. Nearly one in five enrollees subject to the work requirement lost coverage in the first two months after the penalties kicked in. More than 18,000 enrollees were terminated by the end of 2018.¹⁰³ A study by Harvard researchers found “significant losses in health insurance coverage in the initial 6 months of the policy but no significant change in employment.”¹⁰⁴

Medicaid beneficiaries in Arkansas challenged the Secretary’s approval of the project on similar grounds as those raised in the *Stewart* cases.¹⁰⁵ The Secretary’s approval letter was largely a repeat of the initial Kentucky HEALTH approval letter, leading the court to find, “It’s déjà vu all over again.”¹⁰⁶ Thus,

97. *Id.* at 154.

98. *Id.* See also, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 538–39 (1935) (finding delegation unconstitutional where President had authority to “impose his own conditions, adding to or taking from what is proposed, as ‘in his discretion’ he thinks necessary ‘to effectuate the policy’ declared by the act.”).

99. *Stewart II*, 366 F. Supp. 3d at 154 (explaining that Section 1115 only authorizes the Secretary to waive compliance with certain Medicaid Act provisions “to the extent and for the period . . . necessary” to carry out the project).

100. See generally *Gresham v. Azar*, 363 F. Supp. 3d 165 (D.D.C. 2019), *appeal filed*, Nos. 19-5094 & 19-5095. *The plaintiffs are represented by the National Health Law Program, Legal Aid of Arkansas, Southern Poverty Law Center, and Jenner & Block LLP.*

101. Letter from Seema Verma, Adm’r, Ctrs. for Medicare & Medicaid Servs., to Cindy Gillespie, Dir., Ark. Dep’t of Human Servs. (Mar. 5, 2018) (available at <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ar/ar-works-ca.pdf>).

102. *Id.*

103. Robin Rudowitz et al., *February State Data for Medicaid Work Requirements in Arkansas*, KAISER FAM. FOUND. 1 (2019), <https://www.kff.org/medicaid/issue-brief/state-data-for-medicaid-work-requirements-in-arkansas/> (collecting Ark. Dep’t of Human Servs. reports).

104. Benjamin D. Sommers et al., *Medicaid Work Requirements—Results from the First Year in Arkansas*, 381 NEW ENG. J. MED. 1073, 1079 (2019).

105. *Gresham*, 363 F. Supp. 3d at 168–69. Arkansas intervened as a defendant. *Id.* at 173.

106. *Id.* at 175.

in *Gresham v. Azar*, Judge Boasberg held the Secretary's approval was arbitrary and capricious because it failed to address whether and how the project would impact Medicaid's "core" objective of furnishing medical coverage to the needy.¹⁰⁷ And once again, the court found that the Secretary could not ignore this core objective in favor of his other objectives—promoting health and financial independence.¹⁰⁸

Unlike Kentucky, Arkansas did not include in its application an assessment of the extent to which the project would affect Medicaid coverage.¹⁰⁹ The court found this of little moment, stating:

Whether a state gives the Secretary excellent data or no data at all about coverage, his duty remains the same: to determine whether the proposed project will promote the objectives of the Act, including whether it advances or hinders the provision of health coverage to the needy. If it were otherwise, HHS could approve a project that would decimate Medicaid coverage without so much as addressing the issue where the state did not submit its own estimate of coverage loss. Even putting to one side the agency's affirmative obligation to address coverage loss, however, the Secretary unquestionably has a duty to consider that issue where multiple commenters provide credible forecasts that it will occur. . . . Here, as has been said, the agency had and neglected that duty.¹¹⁰

3. The New Hampshire Case: *Philbrick v. Azar*¹¹¹

On November 30, 2018, the Secretary of DHHS approved New Hampshire's project to impose work requirements (100 hours each month) and waive retroactive coverage on the grounds that the project would improve the "health and wellness" of beneficiaries and enhance the "fiscal sustainability of the Medicaid program."¹¹² New Hampshire Medicaid beneficiaries challenged the approval, citing similar claims as were raised in the Kentucky and Arkansas cases.¹¹³

With a record in the New Hampshire case "indistinguishable" from the previous cases and an approval letter "mirror[ing] the one in *Stewart II*, with numerous key paragraphs matching it word for word," the court again faulted the Agency for not contending with the possibility that the project would cause

107. *Id.* at 176, 181 (noting that the Secretary of DHHS referred to the provision of medical assistance as "Medicaid's core objective").

108. *Id.* at 179–80. Unlike in Kentucky, the fiscal sustainability objective did not figure prominently in the Arkansas approval.

109. *Gresham*, 363 F. Supp. 3d at 178.

110. *Id.* (citations to administrative record omitted).

111. *See generally* *Philbrick v. Azar*, No. 19-773, 2019 U.S. Dist. LEXIS 125675, at *1 (D.D.C. July 29, 2019). *The plaintiffs are represented by the National Health Law Program, New Hampshire Legal Assistance, and National Center for Law and Economic Justice.*

112. *Id.* at *3–4.

113. *Id.* at *5.

substantial losses in Medicaid coverage.¹¹⁴ Judge Boasberg found this omission “particularly startling” in light of information before the Secretary of DHHS about the dramatic coverage losses from Arkansas’s “markedly similar project.”¹¹⁵ The court was also aware that the state had postponed the date for beginning to terminate people from coverage (originally August 1, 2019), when data showed that approximately 17,000 beneficiaries (out of about 25,000 total) were at risk of losing coverage.¹¹⁶ Stating that “we have all seen this movie before,” Judge Boasberg concluded, for the fourth time, that DHHS failed to engage in “reasoned decisionmaking” as required by the APA because the Secretary did not adequately consider the impact of the proposed project on Medicaid coverage.¹¹⁷

As in *Stewart II*, the Agency’s main argument was that the Secretary reasonably concluded that the project would allow New Hampshire to stretch limited Medicaid resources. The court concluded, as it did in *Stewart II*, that DHHS’s explanation did not “clear the bar.”¹¹⁸ To begin with, DHHS made no finding that the project would save the state “any amount of money or otherwise make the program more sustainable in some way.”¹¹⁹ Meanwhile, New Hampshire said it did not intend or expect the project to reduce costs, thus causing the court to observe, “The glaring disconnect between the Secretary’s position and New Hampshire’s raises substantial questions about how the agency came to believe the program would improve the State’s fiscal circumstances, underscoring the need for reasoned analysis of this issue.”¹²⁰ Second, the court found that evidence in the record raised “substantial reasons to doubt” whether the project would save any money given administrative costs and the possible rise in uncompensated care that would accrue to the state.¹²¹ Also problematic, the Secretary never explained why he found the project might transition beneficiaries to commercial coverage, “given the consistent evidence before him that nearly all Medicaid recipients are already working, unable to work, or able to find only low-paying jobs that do not offer or lead to commercial [insurance] coverage.”¹²²

114. *Id.* at *7.

115. *See id.* at *1.

116. *Philbrick*, 2019 U.S. Dist. LEXIS 125675, at *4.

117. *See id.* at *2 (quoting *Judulang v. Holder*, 565 U.S. 42, 53 (2011)). *See also* *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015).

118. *Philbrick*, 2019 U.S. Dist. LEXIS 125675, at *12.

119. *Id.* (quoting *Stewart II*, 366 F. Supp. 3d 125, 149 (D.D.C. 2019)).

120. *Id.*

121. *Id.* at *13 (citing administrative record and also pointing out that the Medicaid expansion is almost entirely federally funded). *See* 42 U.S.C. § 1396d(y)(1) (2018) (establishing federal payments at between 90 and 100 percent of the costs).

122. *Philbrick*, 2019 U.S. Dist. LEXIS 125675, at *13.

Finally, the court rejected DHHS's suggestion that the project advanced the objectives of Medicaid regardless of its effect on health and coverage because it would help the state and federal governments collect useful data for future policy making purposes.¹²³ Observing that "no one is suggesting with a straight face that a purpose of the Medicaid Act is to collect data," the court also found the practical consequences of the government's suggestion to be alarming. "If experimentation alone could justify a project, then demonstrations with dire consequences for Medicaid beneficiaries could be approved just for the Government to gather information."¹²⁴

B. Pivotal Questions Regarding Judicial Review of the Secretary's Section 1115 Authority

1. Does the Secretary have plenary, unreviewable authority to decide whether to approve a Section 1115 waiver?

When sued, the Secretary of DHHS has argued that courts cannot review the Agency's decision because, under the APA, it is committed by law to the Agency's discretion.¹²⁵ The Secretary points out that Section 1115 authorizes approval of projects "in the judgment of the Secretary."¹²⁶

This argument most likely fails because there is a "strong presumption that Congress intends judicial review of administrative action."¹²⁷ The Supreme Court's 2019 decision in *Department of Commerce v. New York*, illustrates this point.¹²⁸ There, the Court rejected the government's argument that the Commerce Secretary's decision to include a citizenship question on the 2020 census was unreviewable.¹²⁹ The Supreme Court reiterated that it reads the APA's exception for action committed to agency discretion "quite narrowly."¹³⁰ Reviewing provisions of the Census Act, the Court concluded that the Act did not reflect one of those "rare circumstances" where a court "would have no meaningful standard against which to judge the agency's exercise of discretion."¹³¹

123. *Id.* at *14.

124. *Id.*

125. *See* 5 U.S.C. § 701(a)(2) (2018).

126. 42 U.S.C. § 1315(a) (2018).

127. *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). *See also* *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (explaining that the APA "embodies the basic presumption of judicial review" of agency action).

128. *Dep't of Commerce v. New York*, No. 18-966, 139 S. Ct. 2551, 2568 (2019).

129. *Id.* at 2568.

130. *Id.*

131. *Id.* (noting that Census Act did not leave the Secretary with unbounded authority because, among other things, it "instructs [the Secretary] to take 'a decennial census of population' in 'such form and content as he may determine'" and authorizes him or her to "obtain such other census information as necessary.").

Indeed, all federal courts that have faced the question to date have found that the Secretary's decision to grant a Section 1115 waiver is judicially reviewable.¹³² In *Beno v. Shalala*, for example, the Ninth Circuit pointed out that Congress has established "an all encompassing series of statutory requirements" in the Medicaid Act, and "the granting of an exemption from statutory requirements is not an area of agency discretion traditionally unreviewable."¹³³ That court found that in granting waiver authority, Section 1115 "provides a meaningful standard by which to judge the Secretary's waiver," allowing waivers only for the extent and time period necessary to implement an experimental project that is likely to promote the objectives of the Act.¹³⁴ Putting it another way, the court stated that "the mere fact that a statute contains discretionary language does not make agency action unreviewable."¹³⁵ The Ninth Circuit concluded by stating: "[W]e doubt that Congress would enact such comprehensive regulations, frame them in mandatory language, require the Secretary to enforce them, and then enact a statute allowing states to evade these requirements with little or no federal agency review."¹³⁶

2. Assuming the Secretary does not have plenary authority, what level of deference, if any, should courts give the Secretary's Section 1115 approval decision?

This brings us to *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, which lower courts have used for over thirty-five years to decide deference questions.¹³⁷ Under *Chevron*, if the underlying statute is clear, then that is the end of the matter and an agency's interpretation of the statute gets no deference. However, if there is an ambiguity in the statute, then the court should defer to the agency's reasonable interpretation of the statute provided that the agency is authorized by Congress to interpret the statute.¹³⁸ Members of the Supreme Court have questioned the ongoing application of *Chevron*.¹³⁹

132. See, e.g., *Newton-Nations v. Betlach*, 660 F.3d 370, 378, 380 (9th Cir. 2011); *Beno v. Shalala*, 30 F.3d 1057, 1067 (9th Cir. 1994); *C.K. v. N.J. Dep't of Health & Human Servs.*, 92 F.3d 171, 183 (3d Cir. 1996); *Aguayo v. Richardson*, 473 F.2d 1090, 1105 (2d Cir. 1973); *Stewart I*, 313 F. Supp. 3d 237, 256 (D.D.C. 2018).

133. See *Beno*, 30 F.3d at 1067 (quoting *Beno v. Shalala*, 853 F. Supp. 1195, 1205 (E.D. Cal. 1993)). *Beno* also noted that "federalism arguments have less weight in the context of a waiver of a congressional requirement." *Id.* at 1068.

134. *Id.* at 1067.

135. *Id.* at 1066.

136. *Id.* at 1068–69 (internal quotations and citations omitted).

137. See generally *Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

138. *Id.* at 842–43.

139. See, e.g., *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (noting the "impressive body" of pre-*Chevron* law recognizing that "the meaning of a statutory term is properly a matter for judicial [rather than] administrative judgement."); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (finding, even under *Chevron*, no deference was due to the agency because the Court

Even with that standard in place, the plaintiffs in the pending Medicaid Section 1115 waiver cases have argued that the *Chevron* framework does not apply. They note that the Supreme Court has repeatedly held that deference is not appropriate when an agency decision touches on issues “of deep ‘economic and political significance’ that [are] central to [a] statutory scheme.”¹⁴⁰ That is especially true when the “agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy” and asserts that power in a way that would “bring about an enormous and transformative expansion” in the agency’s authority “without clear congressional authorization.”¹⁴¹ The plaintiffs have argued that is precisely what is occurring with the administration’s expressly stated intent to use Section 1115 work requirement waivers to explode the ACA and its Medicaid expansion.¹⁴²

Not surprisingly, the Secretary of DHHS does not agree. Rather, he has argued that, even if he lacks plenary authority over Section 1115, courts must afford his decisions “utmost deference” because they involve “predictive judgments” about areas that are within his “policy and scientific expertise.”¹⁴³ This argument probably goes too far because courts recognize that “new agency policies often will involve some element of prediction about the future effects of those policies,” but this does not cause them to “treat the predictive nature of the judgment as though it were a talisman under which any agency decision is by definition unimpeachable.”¹⁴⁴ To do otherwise would leave “the arbitrary and capricious standard of judicial review . . . effectively nullified.”¹⁴⁵ In short, a “[p]redictive judgment must be based on reasoned predictions,” as supported by the administrative record in the case.¹⁴⁶

was “more than up to the job” of solving the interpretive puzzle); *Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring) (cautioning lower courts against “reflexive deference” to agency interpretation, particularly where that interpretation concerns the agency’s own authority, and finding it “necessary and appropriate” to reconsider *Chevron* and how courts have implemented it); *Id.* at 2121 (Alito, J., dissenting) (describing *Chevron* as an “important, frequently invoked, once celebrated, and now increasingly maligned precedent.”). *Cf.* 5 U.S.C. § 706 (2018) (Provision of the APA requiring courts to “decide all relevant questions of law.”).

140. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

141. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444.

142. *See Stewart III*, 308 F. Supp. 3d 239, 249 (D.D.C. 2018). *See also* First Amended Class Action Complaint for Declaratory & Injunctive Relief at 19–20, *Stewart III*, 308 F. Supp. 3d 239 (No. 18-152).

143. Memorandum in Support of Fed. Defendants’ Motion to Dismiss or, in the Alternative, for Summary Judgment & in Opposition to Plaintiffs’ Motion for Partial Summary Judgment at 3, 12, *Philbrick v. Azar*, No. 19-773, 2019 U.S. Dist. LEXIS 125675 (D.D.C. June 6, 2019).

144. *Int’l Ladies’ Garment Workers’ Union v. Donovan*, 722 F.2d 795, 821–23 (D.D.C. 1983) (vacating agency action where the agency did not give “sufficient consideration to factors that may be highly relevant to” its predictive judgment).

145. *Id.* at 822.

146. *Metlife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d 219, 237 (D.D.C. 2016).

Notably, in his decisions, Judge Boasberg has side-stepped the plaintiffs' argument of no deference and has not applied the Secretary's "utmost deference" standard. Applying the traditional *Chevron* standard, the court concluded that DHHS's interpretation of Medicaid's objectives fell "outside the bounds of reasonableness."¹⁴⁷ As discussed above, the court reasoned that an interpretation of Medicaid's objectives that "do not include 'furnish[ing] . . . medical assistance' to the expansion group . . . would be 'utterly unreasonable' in light of Medicaid's text, structure, and legislative history."¹⁴⁸ Of course, the District of Columbia Circuit Court of Appeals will have to grapple with these questions of reviewability and deference as it decides whether to affirm or reject Judge Boasberg's reasoning.

IV. CONCLUSION

Congress included Section 1115 in the Social Security Act to allow the state and federal governments to improve the techniques of administering public assistance.¹⁴⁹ While broadly written to encourage innovation, Section 1115 contains notable limitations on the Secretary of DHHS's authority. The Secretary may only approve an experimental, pilot or demonstration project that is likely to promote the objectives of the Medicaid Act.¹⁵⁰ When those features are present, the Secretary can only waive certain Medicaid Act provisions and only to the extent and for the period necessary for the state to carry out the experiment.¹⁵¹

The Trump administration is making unprecedented use of Section 1115 as part of its campaign to "explode" the ACA, including its Medicaid expansion, and to rollback Medicaid coverage.¹⁵² The Secretary has approved Section 1115 waiver applications that contain work requirements and other restrictions that will cause tens of thousands of Medicaid enrollees—the vast majority of whom are working or unable to work—to be jettisoned from coverage.¹⁵³ So far, these efforts have been blocked in court. Applying the *Chevron* standard of review, a federal district court has found the Secretary has violated the APA by taking arbitrary and capricious actions and, as a result, vacated the approvals. In these

147. See *Stewart I*, 313 F. Supp. 3d 237, 268 (D.D.C. 2018) (citation omitted); *Stewart II*, 366 F. Supp. 3d 125, 144 (D.D.C. 2019) (citation omitted); *Gresham v. Azar*, 363 F. Supp. 3d 165, 176 (D.D.C. 2019) (finding deference of little practical significance because the Secretary agreed with the court's understanding that furnishing health coverage is a "core objective" of the Medicaid Act); *Philbrick v. Azar*, No. 19-773, 2019 U.S. Dist. LEXIS 125675, at *11 (D.D.C. Mar. 20, 2019) (citation omitted).

148. *Stewart I*, 313 F. Supp. 3d at 270.

149. S. REP. NO. 87-1589, at 31 (1962), reprinted in 1962 U.S.C.C.A.N. 1943, 1973.

150. Social Security Act, 42 U.S.C. § 1315(d)(1) (2017).

151. *Beno v. Shalala*, 30 F.3d 1057, 1062 (9th Cir. 1994).

152. Goldstein & Eilperin, *supra* note 35.

153. *E.g.*, Rudowitz et al., *supra* note 103, at 1.

cases involving cookie-cutter waiver approvals for Kentucky, Arkansas, and New Hampshire, the court has concluded that the Secretary acted unreasonably because his justifications for approval (e.g., transitioning individuals off Medicaid and saving money) have ignored the Medicaid Act's core, essential objective of furnishing affordable health coverage to low-income people who cannot afford it.¹⁵⁴ The district court's reasoning will be scrutinized by the court of appeals and perhaps even the Supreme Court. Stay tuned.

154. See discussion *supra* Section III.A.

