IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RONNIE MAURICE STEWART, et al.,

Plaintiffs,

vs.

ERIC HARGAN, et al.,

Defendants.

_____/

Civil Action
No. 1:18-cv-0152

Washington, DC
June 15, 2018

11:06 a.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JAMES E. BOASBERG
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by realtime stenographic shorthand; transcript produced by computer-aided transcription.

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P R O C E E D I N G S

DEPUTY CLERK: Good morning, we're on the record in civil case 18-152, Ronnie Stewart, et al., versus Eric Hargan, et al. If counsel from both sides will please approach the lecturn and identify yourselves for the record.

MR. GERSHENGORN: Good morning, your Honor. Ian Gershengorn on behalf of Ronnie Stewart. And with me at counsel table is Jane Perkins from the National Law Health Program and Catherine McKee also from the National Law Health Program. And then from Jenner & Block, Natacha Lam, Lauren Hartz, Sam Jacobson and Tom Perrelli.

THE COURT: Welcome to all of you.

MR. DAVIS: Good morning, your Honor. Ethan Davis for the United States. With me at counsel table is Eric McArthur, Deepthy Kishore, Vinita Andrapalliyal and Brian Stimson from HHS.

THE COURT: Good morning to you folks.

MR. KUHN: Good morning, your Honor. Matt Kuhn on behalf of the Commonwealth of Kentucky. With me at counsel table is Steve Pitt who is Governor Bevin's General Counsel, and Chad Meredith who is Deputy General Counsel to the Governor.

THE COURT: Good morning to you folks. So for the defendants, I was planning to have, Mr. Davis, you take the bulk of the time for the federal defendants and then a brief

period of time for Mr. Kuhn.

Is that all right with you folks?

MR. DAVIS: Yes, your Honor.

MR. KUHN: That's fine, your Honor.

THE COURT: So what we'll do is we'll start with Mr. Gershengorn, and then we'll go Mr. Davis, you and Mr. Kuhn. And then I'll give Mr. Gershengorn a brief period for rebuttal. So you may begin.

MR. GERSHENGORN: Good morning, your Honor, and may it please the Court. As part of a purported experiment to advance the purposes of Medicaid, the Secretary has for the first time in the history of the act approved a package of eligibility restrictions, penalty provisions and benefit cuts that will substantially limit access to care and coverage for tens of thousands of Medicaid recipients.

Before turning to the specifics of how the Secretary exceeded his statutory authority and why his reasoning is arbitrary and capricious, I'd like to start with one overarching point if I could. This is not in any way, shape or form a proper exercise of Section 1115 waiver authority to approve an experimental pilot or demonstration project that is likely to assist in promoting the objectives of Medicaid. It is expressly an effort to transform Medicaid, not to improve it.

It is not limited in scope as it has laid the

groundwork for cookie-cutter waivers across the nation to effectuate the wholesale transformation that was promised. It pursues goals such as promoting increased upward mobility and reducing reliance on public assistance that may animate programs such as TANF and SNAP, but are nowhere to be found in Medicaid. It imposes obstacles like high premiums and the elimination of retroactive coverage that simply aim to deter coverage.

It lacks any serious engagement with the lessons learned from prior failed or harmful waivers as one would expect in a true experiment. And perhaps most important, entirely absent from the analysis is any serious assessment of the impact on the tens or hundreds of thousands of people who will lose coverage or not receive care as a result of this project.

In short, both Kentucky and the federal government have told you exactly what they're trying to accomplish. Kentucky stated in its application that it sought to comprehensively transform Medicaid, and Administrator Verma called the Medicaid expansion a major fundamental flaw and vowed to, quote, use administrative actions to fundamentally transform Medicaid. But that kind of transformation is for Congress through legislation, not for the Secretary through administrative action.

So as I said at the start, your Honor, we were

talking about a package of eligibility restrictions, penalty provisions and benefit reductions. So what are we talking about? We're talking --

THE COURT: Let's start with some standing questions, all right?

MR. GERSHENGORN: Sure.

THE COURT: And then I will let you get to that. So the first -- and I'll refer to it either as a work requirement or as a CE requirement meaning community engagement requirement. I will likely not use the full term mainly because it's seven syllables instead of one. I'm not prejudging anything, it's just easier.

So on the work requirement, wouldn't it be enough if one of your named plaintiffs stated that he would refuse to comply with the requirement? In other words, you spend a lot of time in the brief saying you can't comply, but why wouldn't it be enough for someone to say I refuse to comply with this requirement?

MR. GERSHENGORN: Your Honor, I think that's exactly right. In fact, we think standing is actually quite straight forward here on a number of reasons. First of all, we think that -- the work requirements come with an onerous reporting requirement, monthly reporting requirements. We think for Article III injury purposes, that's sufficient to give standing. Your Honor's decision in the Florida Bankers

case recognized that reporting requirements can support Article III standing. We think actually that's sufficient.

But second, going directly to your Honor's suggestion, we don't think that people would have to say they would lose coverage in order to justify standing. If I have a -- if the bar association decided that I needed to do five hours a week of bar education in order to keep my license, the fact that I would actually do those -- I wouldn't risk my license and I would do the education, doesn't mean that I don't have standing. I don't have to risk, as the Government suggests, actually losing my coverage. It's enough to alter my behavior. And indeed, I think the plaintiffs have sufficiently alleged that.

THE COURT: And further, if I look at Kentucky HEALTH as a whole instead of waiver by waiver, isn't it enough to find one injury to one plaintiff from one provision?

MR. GERSHENGORN: So your Honor, I think that's right. And I guess I would say I don't read at least the federal government to have challenged our standing to attack the program as a whole. I understood them in their briefs -- perhaps wrongly, but I understood them to have challenged our standing to the extent we were challenging a particular count.

But I think your Honor is right, to challenge the

overall plan, I do think it would be enough to have standing for one. But to be clear, we do think we have standing to challenge the work requirements, because it will cause people to either have to look for work that they wouldn't have looked for or they have to seek an education course that they wouldn't have done.

That kind of change in behavior in direct response to a government choice to either do that or at the penalty of losing your health care certainly is enough to satisfy standing. So we do think that standing here is quite clear.

THE COURT: Let me ask you one other standing question which is regarding the State Medical Director letter or SMD letter. It seems you have a real redressability issue there though. In other words, if I say, you know, you're right, I'm going to strike down the letter but not the Secretary's approval of Kentucky HEALTH, how does that help you? In other words, it might help you in regard to other state programs, but those aren't the plaintiffs here. The plaintiffs are Kentucky plaintiffs.

So help me with the redressability issue which I'm having trouble with.

MR. GERSHENGORN: Your Honor, I guess I think the two of them are directly linked in a way that gives us standing to challenge the letter for similar reasons that we have standing to challenge the underlying approval. Our

position is that they were issued within a day of each other, that they clearly were tied from the administrative perspective. It was meant to be a letter coming out precisely to allow the Kentucky approval to go forward. And that without the letter -- the letter and the approval with respect to Kentucky are inextricably intertwined.

So I think if your Honor decided to eliminate the -- if your Honor were to hold hypothetically that the letter was invalid, that that itself would call into question also the underlying Kentucky approval because they were so linked. And so we would have standing through that mechanism.

THE COURT: But do you think -- are you really arguing there's independent injury from the letter beyond the approval to Kentuckians?

MR. GERSHENGORN: So I don't think we could satisfy standing on the ground that as actually has happened in practice, this has become a cookie-cutter template for other states.

THE COURT: Right.

MR. GERSHENGORN: So that it's not -- our standing is because it sets forth a framework that was indeed followed in Kentucky. If your Honor were to uphold -- I think absent the Kentucky approval, of course we could have challenged the letter. Because then we would say that this

is going to be the basis for the Kentucky approval and that would give us standing.

But here we have the Kentucky approval. And as I say, I think they are inextricably intertwined in a way that would give us standing to challenge the letter.

THE COURT: All right, let's move on now to the merits. Actually, if you'll permit me to ask you sort of another overarching question which then I think is going to help us tailor this discussion, and that's the standard, what's the lens I view this through.

It seems there are three alternatives here, and I want to make sure what you are arguing. The first is that the Secretary could never approve such a work or community engagement requirement, it's beyond his authority. The second is that he could theoretically do it, but the decision that the project serves the act's objectives here is not entitled to deference. And the third is that he may do it as long as he's not acting arbitrary and capricious.

Now, you may well think you win under each, but tell me why isn't the third the proper standard here.

MR. GERSHENGORN: So your Honor, the third, that it's only arbitrary and capricious. So obviously we do think it is arbitrary and capricious, but we also think that it is beyond his statutory authority to approve a work requirement as part of the waiver authority. And I can go

into that. But if your Honor's trying to stay at the standard level, we do think that it is both arbitrary and capricious because it's pursuing the wrong goals. But also it's beyond his statutory authority.

THE COURT: Tell me why you think it's beyond his statutory authority.

MR. GERSHENGORN: Sure. Obviously there's a fair bit of overlap. But if I could, your Honor, I'd like to just do one framing point before I go directly to the work requirements?

THE COURT: Sure.

MR. GERSHENGORN: We're talking about not just work requirements, but work requirements, premiums, retroactive coverage, a whole package of things. And in our view, the combined effect -- and we think the obvious intent of those provisions, is to undermine two fundamental pillars of Medicaid.

The first is that the populations identified by Congress should receive coverage and care. Second, that the most vulnerable of them should generally not have to pay for it. We think that the waiver here, both of work requirements and others as I'm going to explain, sort of tears down those pillars. So it seems to me the fundamental overarching question which is going to go to the work requirement is whether there is any meaningful constraint at

all on the Government's waiver authority in the statute.

The Government's position is the authority is unreviewable and it basically is unconstrained. We think that can't possibly be right; that the waiver authority, which is an ancillary authority, can't be used to reweigh the Congressional judgments in the act and strike a different balance. And because Congress doesn't hide elephants in mouse holes, it can't be used to strike at the core of the act. And because the act is designed to provide coverage and care to the most vulnerable, the waiver authority can't be used in a way to effect a massive reduction in coverage without a kind of serious analysis. And so our view is that the statute itself puts constraints on the Secretary's waiver authority.

So turning directly to the work requirement. We think it's unlawful and beyond statutory authority precisely because the work requirement gets at these very pillars. So the work requirement, it waives the eligibility restriction, the requirement that you cover mandatory populations, and puts in place different eligibility constraints. And it does so notwithstanding the fact that studies after studies have shown that the work requirements result principally in a reduction of benefits without getting people into stable jobs with insurance.

So why is that unlawful? Well, we start with the

foundation which is that the foundation of Medicaid has always been that Americans who meet eligibility requirements are guaranteed coverage. So this is imposing new eligibility requirements. Second, 50 years of agency practice. The agency has never thought it had authority to impose work requirements, and for the first 50 years of the act has not. And indeed there was -- the prior request to impose work requirements, CMS and HHS refused on the ground that it was contrary to the purposes of the act and that it would undermine access to care.

The next reason -- or building on that, your Honor, is the purposes that your Honor highlighted. So the purposes that are invoked are to increase upward mobility, reduce reliance on public assistance and familiarize beneficiaries with commercial coverage. Those are not the purposes of the act, all right. The purposes of the act are to provide care and coverage. And indeed, what's notable about that is that that is the purpose of TANF and SNAP, and it's in the statute there. So in 42 U.S.C. 601(a)(2), TANF has as one of its purposes to end the dependence of needy parents on government benefits by promoting job preparation, work and marriage. It is notably absent from the Medicaid statute, and it shows that Congress knew how to make this --

THE COURT: Right, but doesn't Congress give the Secretary the power to waive basically any Medicaid

requirement? And that's including the obligation that states cover low income individuals in 1396(a)(10).

So why to say this is just utterly beyond his authority, isn't that a stretch?

MR. GERSHENGORN: Your Honor, I think for the reasons you say, your Honor, I don't want to say this is the only argument. As your Honor suggested, we also think it's arbitrary and capricious. But I do want to just push a little bit, and it goes to the statutory waiver point. I do think that this principle that's articulated in Whitman that Congress doesn't hide elephants in mouse holes, and in MCI really at the core is that you can't use ancillary provisions to get at the heart of the act. And you can't use ancillary provisions to tear out the heart of the act. And that's exactly what the work requirements and indeed this package of things does.

By changing Medicaid fundamentally from a coverage program to a work promotion program, to move it to TANF, that is doing Congress' job. And that is not what the statute permits you to do. Now, you could look at it -- and again, I don't want to fight too hard, your Honor. There is a -- I'm happy to have those arguments filtered through the lens of arbitrary and capricious.

THE COURT: And you would agree that that's what other circuits have done, the Ninth Circuit in the Beno

case.

MR. GERSHENGORN: It was an arbitrary and capricious review. So the same arguments I'm making would filter through arbitrary and capricious, and we would be happy with that. But I do think, just to tie this off, your Honor, that in the wake of the rejection of the waiver request for work requirements, Congress considered bills that would have either made work requirements mandatory on Medicaid or made them permissive on Medicaid, and rejected those.

So we do think that package of things, the 50 years of not thinking that a statute was there, that they had the authority -- in a situation of course where in the context, as your Honor is well aware, where work requirements are being debated in the TANF and SNAP context, the subject of passionate policy debates, and yet the agency never approved a single waiver. Nobody ever sought even a waiver -- or I should say I don't know that. Certainly the agency never approved a waiver of work requirements suggesting that if they had had that authority, they certainly would have authorized it. So to me, that package suggests that they don't have the authority.

But as your Honor's question suggests, whatever your Honor thinks of that argument, the arbitrary and capricious arguments flowing from that same set of concerns,

the 50 years of practice, the complete changing of the purposes of Medicaid to purposes that are articulated in other statutes, but not in this statute. The fact that Congress -- reflecting the fact that this is really a judgment for Congress, has rejected bills over and over to allow this or impose this authority. The decisions from MCI and Whitman getting at the idea that you can't use something like a waiver authority to fundamentally restructure the act. And the fact that in fact, what happens on these things -- I don't want to lose sight in the arbitrary and capricious analysis of what actually happens in health outcomes. This is at page 22 of our brief and 36 of our reply brief. The experience which is not really confronted I don't think by the Secretary in the letter is that the result of this is that there's a loss in coverage, a loss in benefits and there isn't a flow to stable, high paying jobs that provide insurance; that that's just not the experience in the real world.

And so for those reasons, we do think it's arbitrary and capricious.

THE COURT: So let's spend a little more time assuming that is the standard I employ. First of all, would you agree that if you were to prevail on arbitrary and capricious, I wouldn't need to address the other two standards?

MR. GERSHENGORN: Absolutely, your Honor.

THE COURT: But in looking at arbitrary and capricious -- and another sort of general framing question. When I think about the objectives of the Medicaid act -- and I don't want to be too theoretical here, but is that a question of law? In other words, are you saying that I should find them ambiguous and then look to see if the Secretary acted unreasonably or is that a question of fact do you think?

MR. GERSHENGORN: Is it a question of fact, I don't think it's a question of fact, your Honor. I think that it's a question of law reflected in both the purposes section in Medicaid and reflected throughout the text and structure of the statute. And I think in this context, that the purposes of Medicaid are clear.

So some of them are reflected largely in 1396-1, to furnish medical assistance and furnish rehabilitation and other services. But I think broader from the text and structure of the act, you see that the purpose of the act is to provide coverage and care to the most vulnerable, and generally for that group not to require -- to provide care and coverage to the populations that Congress has identified as mandatory, and then to provide that care generally free of charge. And so those are the purposes that I think drive the act.

But I don't think your Honor has to decide exactly what those purposes are for all cases, because I think what's sufficient in this case is to decide what those purposes are not. And that really is from my perspective what drives the sort of arbitrary and capricious analysis and the purpose analysis.

So the purposes of Medicaid are definitely not upward mobility. The purposes of Medicaid are definitely not getting people off public assistance. The purposes of Medicaid are not replicating the harshest parts of commercial coverage. The purposes of Medicaid are not mere cost cutting as the Ninth Circuit recognized in Newton-Nations.

THE COURT: And how about --

MR. GERSHENGORN: And the purposes of Medicaid -- just the last point, your Honor.

THE COURT: Go ahead.

MR. GERSHENGORN: The purposes of Medicaid are not deciding that some of the populations that Congress decided were mandatory are more worthy than others. So I think those are the things that underlie the letter, and those are the things that are not the purposes of Medicaid.

THE COURT: And would you go so far as to say that the purpose of Medicaid is not improving health?

MR. GERSHENGORN: So your Honor, I don't think --

no is the answer, but I don't think I would say that that's not a purpose. I think that a Secretary could fairly decide that that is a purpose of Medicaid. But I want to put a huge but, so don't take that out of context, that concession out of context.

I think the answer is yes, of course health is what Congress was involved in. But two main things. What the act reflects is, first, Congress' judgment that it meant health as to be improved by coverage and care and access. So it's not health --

THE COURT: But isn't your argument that it's health assistance, not health? You can have two very healthy people and they remain healthy, but one is in much greater financial peril because of costs that she's expended than the other.

MR. GERSHENGORN: I think that's exactly right, your Honor. And so what I'm trying to distinguish is that if you say improve health, that just means anything goes, right. I mean, the idea that improve health means forced exercise, forced eating habits. I mean, you know, there's a whole range of things. That's not what Congress had decided.

What Congress had decided was for the most vulnerable people, they wanted improved health through improved access and coverage. So the Secretary has broad

demonstration authority to work through that framework to improve access to care and coverage. But he does not have the flexibility to say anything that I deem will make people healthier is consistent with the purposes of the Medicaid act. So I guess that's how I would answer your Honor's question.

THE COURT: And would you say that if he failed to consider the basic objective of furnishing medical assistance, is that enough to invalidate the whole plan or do I have to consider it on a waiver by waiver basis?

MR. GERSHENGORN: So we certainly have challenged on a waiver by waiver basis, but I think the best way to think about the arbitrary and capricious challenge is actually the plan as a whole. I think what the plan does -- and this is not a situation -- the plan is worse than some of its parts which is not to say this is a situation which each of the parts are okay but somehow together they're not. Each of the subparts is bad, but together it's worse.

So what you have really is this package -- and I know I've said it before, but it does seem to me a fundamental theme. You have a package of eligibility restrictions, penalty provisions and benefit reductions that together effect an unprecedented reduction in coverage in Medicaid kicking off 95,000 using Kentucky's own numbers -- although the amicus brief suggests it may be higher, 95,000

people from the rolls. And that kind of massive dislocation, you know, is unprecedented and it has to affect the arbitrary and capricious analysis.

So it has to affect it I think in a couple of ways. It has to affect it because when the Secretary is doing something unprecedented like that, he has to acknowledge it and he has to deal with it forthrightly. But second -- and I think this is where Newton-Nations comes in, the Ninth Circuit's decision. When you are dealing -- what makes this unusual is the complete dislocation and loss of coverage. What Newton-Nations says is the Secretary has a responsibility in that situation to account for the harms that the waiver is doing. It's not enough to say oh, we're going to kick these people off and see how it plays out in the end, it will be a nice experiment.

And that kind of attention to detail like what is the impact on this hundred thousand people or more from Kentucky of this approach; what are we really getting from things like retroactive coverage which just eliminates three months of coverage without serious benefits; what are we getting from premiums which the evidence is robust over decades that even small premiums deter care; that we're going to have all these people kicked off and for what benefit. And that kind of serious engagement -- you know, forget whether they could actually satisfy it, but that kind

of serious engagement with the standard and with the data just is entirely not there.

THE COURT: But if promoting medical assistance is the objective -- and I'm talking about medical assistance as medical coverage, okay, are you telling me there's no plan that could be provided in which some people lose coverage?

MR. GERSHENGORN: No, your Honor.

THE COURT: In other words, let's say there's a revamping of Medicaid to make it much more efficient, much more effective but some people lose some coverages. So that project wouldn't promote medical assistance, so why --

MR. GERSHENGORN: Your Honor, I think that -- I don't think your Honor has to go -- we're not asking your Honor to go that far. So there are two levels short of that that we're positing for the Court for a decision in this case.

First, when there's massive dislocation like there is here, the first thing we're saying is that it's arbitrary and capricious not really at all to have acknowledged and engaged with that at a serious level; that that is a failure to consider an important part of the problem. And that the Secretary can't just say -- the way he might on a waiver that expands care and coverage, to say well, we get a lot of deference to tinker around and see what happens. That's what Newton-Nations says, and I think it's exactly right.

That is a fundamental aspect of the problem that has to be taken into account.

Now, then we also would say -- going one step closer to your Honor's hypo, that in a case of this substantial a dislocation, I guess we're skeptical -- we don't think it could survive here because it doesn't have the kind of benefits. And that it really does get at the core of the act to say for that many people we're imposing new eligibility restrictions that we're then going to -- that are going to send away a hundred thousand people off the rolls. So we think that kind of magnitude restriction really can't survive.

Now, that is not to then go to the third step all the way to your Honor's hypo to say they could never cut coverage under any circumstances. It's to say I think that you would look at that with a much more skeptical eye. You know, we might take the position that a substantial cut is beyond, but it might depend on what else the Secretary was putting in place.

THE COURT: But certainly there have been premium increases in the past, right?

MR. GERSHENGORN: So there have been premium increases, and I'd like to at some point address the legality of that. Our view is that the premium increases are unlawful here and beyond the statute, and I'd like to at

least walk your Honor through our main argument there. But the one thing I would say is there have been a handful of prior premium increases, and they haven't been challenged or upheld in court.

But what makes this different -- and this is why I keep coming back to this theme. You know, sort of divide and conquer is not we think a fruitful way to really understand what's happening here. Not just because it doesn't help us legally, but actually because it doesn't reflect the reality of the program. What the reality of the program is is a comprehensive set of penalty provisions, benefit reductions and eligibility restrictions that together reinforce and operate to cut coverage over and over. They cut retroactive coverage. They have six-month lockouts. They cut -- they raised premiums -- they increased premiums the highest it's ever been for a mandatory population. They have the work requirements. This is not a series of isolated tests and experiments that all of which are not -- all of which are freestanding and not interrelated. This is a package, and it should be reviewed that way.

THE COURT: Let me go to one other area which is the economics and the Kentucky claim that this is a budget-busting situation.

So you agree that the Secretary can consider

whether a project is necessary to make Medicaid practical, I mean, that's in the statute, right?

MR. GERSHENGORN: Uh-huh.

THE COURT: And so let's say Kentucky had provided the Secretary with records saying we need these three waivers or the state's going to go bankrupt. In that case, couldn't the Secretary issue such waivers, because if the state was bankrupt it couldn't provide medical assistance to anybody?

MR. GERSHENGORN: So your Honor, I think the answer to that is no, and it's strongly suggested by Newton-Nations and here's why. I mean, what Newton-Nations says is that a mere effort to save money is not an experiment, a demonstration or a project. That is a worthy cause and there may be real reasons for it. But it's not an experiment, it's not a demonstration and it's not a pilot project. And that's the authority that the Secretary is invoking here.

And the reason for that is that Congress -- the reason why that makes some sense is Congress is -- Congress has put together a deal for the states, right. And the deal is we give you a whole lot of money to pay for health care, but you have to take the populations that we identify and you have to cover the services we identify. And so we get that that's costly, but we're paying a whole lot of money to

offset the bulk of those costs.

THE COURT: But I guess my hypothetical's different which is not that they say we would save money by this, because anybody can say we would save money by this. But the question is if they said that it would actually promote medical assistance, because absent this waiver we can't provide medical assistance to anybody or we're going to have to cut the medical assistance we provide so enormously that the population will get less, the population writ large will get less medical assistance.

Why wouldn't that promote medical assistance?

MR. GERSHENGORN: Your Honor, so I will say -- I'm going to answer directly with a hardline position, but I'm going to say you don't have to reach that here because that's not what's before you. But I guess I do think that Medicaid is not an a la carte project that way. It's not an a la carte menu where you can pick and choose and say it would be better and cheaper for us to not provide breast cancer screening; or it would be better and cheaper for us not to cover emergency room visits. I mean, that is not the way the program is designed.

And so I don't think that the idea is that if it would be better to cover some needy people but not others, and it would be cheaper to do so and would then not bust our budget, I think that's not the deal that Medicaid offers.

So I guess -- and I certainly don't think that that is -- the question as I understand it in the waiver is is it an experimental pilot or demonstration project which is likely to assist in promoting the objectives. And it is not a demonstration project. This is what Newton-Nations holds, what it says is that a mere desire to do a benefit cut is not an experiment. You're not testing anything.

What you're doing is precisely what your Honor said, you're getting a trade off. And it may improve the balance in the state. But I don't think it's fairly described as an experimental project or a pilot project or a demonstration project.

But I also -- you know, that's my answer, that's my view of the statute. But I don't think your Honor has to decide that here, because I don't think that that kind of sharp trade off I don't think is presented. But I don't think it's right.

THE COURT: Let me just ask you one last question which is can you tell me precisely the remedy you're seeking here? And let's take out the SMD letter.

MR. GERSHENGORN: Sure. The remedy we're seeking is a vacatur of the waiver decision -- well, it depends a little how your Honor approaches it in terms of statutory authority or arbitrary and capricious. But if we assume for the moment that your Honor decides it on the arbitrary and

capricious -- or I think on the statute, we would say vacate, remand and return to the agency the waiver. We do not think this is a situation where you could for example vacate -- you could remand without vacatur.

Your Honor addressed this in the National Venture Capital case. You said there, and I think correctly, that the presumption is that it comes with vacatur, and that that's an especially strong presumption when there's a disturbance -- when it would disturb the status quo to remand without vacatur. So we think that's exactly the right remedy here.

THE COURT: All right, thank you. I'll give you a few minutes of rebuttal after I speak to the Government. Thank you.

MR. GERSHENGORN: Thank you, your Honor.

THE COURT: Mr. Davis, you'll be begin.

MR. DAVIS: Good morning, your Honor. May it please the Court, I'd like to start with a broader overview of what's at stake in this case. Since NFIB made the Medicaid expansion optional, states have been struggling with whether to expand their Medicaid programs. Some states chose to expand right away. Other states were concerned that covering able-bodied adults without children under the same terms as the traditional Medicaid population could be impracticable under the conditions in those states.

In response to those concerns, the last administration assured the states that if they chose to expand, they would be free to reverse that decision later. The last administration also approved a series of demonstration projects in states that had expanded Medicaid. For example, the last administration approved demonstration projects in Indiana and Montana that allowed those states to impose premiums on the expansion population, and to enforce those premiums with lockout provisions.

The last administration also approved Arkansas' request to enroll the expansion population in commercial insurance on the exchanges. And the last administration approved a waiver of nonemergency medical transportation in Iowa. It's an open question whether those states would have agreed to expand Medicaid if CMS had rejected their demonstration projects.

Kentucky's project is based on the same principle, a state seeking to experiment with different ways of covering the expansion population in ways that are practicable under the conditions in Kentucky. If this Court were to advance the sweeping arguments that you just heard counsel for the other side advance, it would put all of these demonstration projects on the chopping block.

THE COURT: But this wouldn't just affect the expansion population, would it?

MR. DAVIS: It primarily affects the expansion population, your Honor, with a --

THE COURT: But the idea that if -- but the theory that if you expand you're permitted to unexpand and that's all Kentucky's doing, that's not quite true because 20 percent or so would be the traditional population, right?

MR. DAVIS: There's some, your Honor, in families with two parents and two children, only one of the parents would automatically be exempt from the community engagement requirement. But the bulk of the project applies to the expansion population here. And I think if your Honor were to hold, as the other side has asked, that the Secretary lacked authority to approve premium requirements, that puts the premium requirements approved under the last administration at risk. And the community -- if your Honor were to hold, as counsel requested, that the Secretary lacks authority to approve a community engagement requirement, that could have an effect on states that are deciding right now whether to expand.

As we've mentioned in our brief, Virginia has just passed a law opting in to the Medicaid expansion. But one of the conditions in that law is that the state must seek a waiver to impose a community engagement requirement like the one at issue in this case.

THE COURT: But one of your arguments which is

related to this is that the Secretary's decision isn't reviewable at all here, right, it's not a justiciable controversy; that's one of your points, right?

MR. DAVIS: That's correct, your Honor.

THE COURT: And so does that mean the Secretary could approve a project that says the blind are no longer covered by Medicaid?

MR. DAVIS: Your Honor, I think the answer to that is no.

THE COURT: Because?

MR. DAVIS: Because that would not be likely to assist in promoting the objectives of the Medicaid act. And it's hard to see how the Secretary could conclude --

THE COURT: But it's unchallengeable. In other words, when you say it would be hard to see how the Secretary would conclude it, the answer is because it would be arbitrary and capricious and not supported by law, right? But if the Secretary did that and they came in and said wait a minute, you can't cut the blind out of Medicaid, you wouldn't be sitting here I trust and saying hey, we do what we want.

MR. DAVIS: Your Honor, the reviewability question is different from the Secretary's own authority to approve it. The Secretary has an obligation, even if it's not judicially reviewable, to make a judgment that the project

is likely to assist in promoting the objectives of the Medicaid act.

THE COURT: But if the Secretary did something like that that you and I and everyone else agree wouldn't promote the objectives, are you saying that that could not be challenged in court?

MR. DAVIS: I think that's a problem that arises whenever you have a preclusion of review provision, your Honor. And you can always think of really extreme hypotheticals that arise in that circumstance, but I think you trust that in those circumstances Congress has made a judgment that it's the Secretary's decision whether to approve a project like that.

And the Secretary would certainly be under a legal obligation not to approve a project that is unlikely to assist in promoting the objectives of Medicaid. And the fact that it's not reviewable doesn't change the legal obligation that's on the Secretary.

But I would say, your Honor, you don't need to go so far as to hold that it's totally unreviewable here, because it really is -- if reviewable at all, the question here requires an unusually deferential application of the arbitrary and capricious standard as the Court --

THE COURT: Let me just ask you one other standing issue which is along the lines of what I asked

Mr. Gershengorn, and then we'll get to that.

So if I do look at the program as a whole, why wouldn't it be enough for a single plaintiff to establish an injury coming from Kentucky HEALTH as a whole? Do you agree that that's enough?

MR. DAVIS: No, we don't agree that's enough, your Honor. There's a difference between the merits and standing here. The merits question is whether the project as a whole is likely to assist in promoting the objectives of the Medicaid act. But if a plaintiff is only injured by one component of that act, that's the only component that the plaintiff has standing to challenge. And that's the only component that this Court would have jurisdiction to invalidate.

And I'd point your Honor to Printz versus United States which addressed -- while not directly on point, addressed an analogous situation where the Supreme Court held that it has no business answering questions about the inseverability of provisions that concern only the rights and obligations of parties not before the Court. I mean here, if they have standing to challenge anything -- and we don't think they have standing to challenge any part of the project, it's only the premiums. That's the closest that they get here.

THE COURT: Right, because you would agree they

would have standing to challenge a rise in premiums, that's a clear economic injury?

MR. DAVIS: Well, we're not sure that any of them will actually have to pay the premiums at this point, your Honor. It's not totally clear. There's still a process that they could go to to appeal the medically frail determinations.

THE COURT: And speaking of that, I couldn't find a definition for medically frail. Is there one that the Secretary's relying on?

MR. DAVIS: I believe that the -- there is one in the regulations, your Honor, that sets a floor to what a state must determine is medically frail. I'll get that cite for you, your Honor.

THE COURT: Okay, I would appreciate that.

MR. DAVIS: But I think Kentucky was developing its own definition of medically frail that used that one as a floor.

THE COURT: So let's go back then to the point you just made which is that you say that the standard -- the three-tiered question I asked Mr. Gershengorn, you agree that tier three is the proper standard, that it's an arbitrary and capricious standard, right?

MR. DAVIS: Assuming your Honor disagrees with our non-reviewability argument, we do agree this would be

reviewed under an unusually deferential application of the arbitrary and capricious standard.

THE COURT: And then the same question I asked him, do you think the objectives of the Medicaid act is a question of law?

MR. DAVIS: We think the objectives of the Medicaid act are a question of law, your Honor, but the means that the Secretary chose to advance those objectives would be committed to the Secretary's discretion. But we do think that the objectives are a legal question.

Our principal disagreement with the other side here is on the relevance and role of Section 1396-1. Section 1396-1 we think is certainly relevant here. It makes clear that a purpose of Medicaid is to provide medical assistance to certain specified populations as far as practicable under the conditions in those states.

But as the Supreme Court has told us, no statute pursues its purposes at all costs. And to figure out what the rest of the purposes of the Medicaid act are, you have to look to the entire Medicaid act.

THE COURT: Your brief seems to suggest that furnishing medical assistance may only refer to the traditional group. Is that what you mean or not?

MR. DAVIS: Not precisely, your Honor. The purpose -- those groups are the ones that are explicitly

mentioned in Section 1396-1. But the term medical assistance is defined elsewhere in the statute, and it includes providing medical assistance to the other groups that are mentioned in Section 1396(a)(10). But I think it's --

THE COURT: So you're not arguing there's a separate purpose under the ACA for the expansion group than for the traditional group?

MR. DAVIS: Well, we think that you have to look at the whole statute to ascertain that, your Honor. We think that the right way to think about it I think is that 1396(a) shows that the primary purpose of Medicaid is to provide medical assistance to the traditional Medicaid population.

But obviously it's also a purpose to provide medical assistance to the expansion population, because the act in fact provides medical assistance to the expansion population. That seems clear enough. But what we know from Section 1396(u) for example, which we cited in our brief, Section 1396(u)(1)(B)(3), is that a work requirement cannot be inconsistent with the purposes of the Medicaid program, because Congress specifically allowed states in that provision to terminate eligibility for Medicaid for failure to comply with the TANF work requirement.

Obviously by its terms, that 1396(u) would not

cover this situation here. But that's exactly the point. That's why a waiver was necessary to accomplish the demonstration project here. But when counsel says that it's not a purpose of the Medicaid act to impose a work requirement, that just -- if that were true, then 1396(u) simply could not exist. Same goes --

THE COURT: So how then fundamentally does the pilot program furnish medical assistance?

MR. DAVIS: Your Honor, the pilot program furnishes medical assistance by promoting the health of Medicaid beneficiaries. It sets certain conditions.

THE COURT: I'm going to stop you there for a second, because this was the issue that I got into a little bit with Mr. Gershengorn which is it seems to me, although if you think about it very cursorily and as a lay person, that promoting health and promoting medical assistance sounds like the same thing. But aren't they really different things?

Doesn't providing medical assistance means providing medical coverage, providing insurance, paying for medical treatment rather than improving people's health? Again, as I said, you could have two healthy outcomes, but one person spent a whole lot of money and now they've got a lot of other problems in their lives versus someone who is similarly healthy but hasn't had to pay.

MR. DAVIS: Well, your Honor, one clear way in which this demonstration project provides medical assistance is through the substance abuse component of it which expands the treatment for opioid addiction available in the state of Kentucky. And that's a major part of this demonstration project. It was the subject of another letter from CMS to the states. So the fact that it combats the opioid crisis by providing medical assistance to people suffering from substance abuse treatment, I don't want that feature of the demonstration project to get lost here.

THE COURT: What else?

MR. DAVIS: And as for the community engagement and premium requirements, your Honor, I think it's best to think of those as imposing conditions on the provision of medical assistance that are themselves likely to assist in promoting the objectives of the Medicaid act.

THE COURT: Which are what?

MR. DAVIS: Well, we know that imposing premiums can't be inconsistent with the objectives of the Medicaid act, because 1396(o) permits the imposition of premiums in certain circumstances. So I don't think that every demonstration project to be consistent with 1396-1 has to result in directly providing medical assistance. I mean, if that were true, then all of these other provisions that limit the provision of medical assistance throughout the act

simply couldn't exist.

I'd also point your Honor to the fact that there are very flexible on-ramps and exemptions.

THE COURT: But we're talking about demonstration projects. I mean, 1115 says, "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 the Medicaid statute."

Again, we're talking about providing medical assistance, right?

MR. DAVIS: That is one of the objectives of the Medicaid statute, your Honor.

THE COURT: So I guess what I'm trying to make clear here which I think is the plaintiffs' central argument is that it doesn't furnish medical assistance. And you've told me that it gives people opioid treatment. Now, that's for a limited time, right? I mean, they can't stay in treatment forever.

MR. DAVIS: I think that may be -- I'm not quite sure on that point, your Honor, but it's a dramatic expansion of opioid treatment available in Kentucky.

THE COURT: But what else is -- how else does it promote medical assistance or any other objective of the act?

MR. DAVIS: Well, your Honor, I think the

Secretary is entitled to deference in interpreting the purposes of the Medicaid act as a whole, not just Section 1396-1, but all the rest of the provisions to mean that the objective of the Medicaid act in the end is to promote the health of Medicaid beneficiaries.

And what this project does through the community engagement requirement is to promote their health. There's a variety of studies in the record that stand for the proposition that there's a strong correlation and a causal relationship between volunteering in your community, between working, between performing community service and the -- and healthy outcomes.

I think if there's some doubt about what the purposes of the Medicaid statute are, it's a question that is committed to the Secretary under Chevron. And that should be -- the Secretary should be entitled to deference there.

THE COURT: And didn't Kentucky suggest that 95,000 individuals would leave the Medicaid rolls if this project were approved?

MR. DAVIS: That's the estimate, your Honor. That doesn't mean that all of them are going to lose coverage and not have any coverage.

THE COURT: Do you agree with that number generally?

MR. DAVIS: We approved the project on the basis of that number, your Honor.

THE COURT: And did the Secretary consider that number in his analysis?

MR. DAVIS: Yes, your Honor. The idea is that Kentucky HEALTH will hopefully result in people graduating from Medicaid to commercial insurance, and that those 95,000 people will not all simply lose coverage. They'll find employer-sponsored insurance, they'll be able to graduate to insurance on the exchanges. The goal here is not a simple benefits cut as counsel and the other side has suggested.

THE COURT: You mentioned some of the tweaks, the on-ramp and a few others. Has there been any calculation of a new number based on those tweaks or not?

MR. DAVIS: I'm not aware of that, your Honor. I think it's part of the demonstration project. I think that will be evaluated as the project proceeds. But those on-ramps are quite flexible on-ramps, your Honor. The last administration approved a six-month lockout in Indiana for failure to pay premiums. There was no way to get back on in those six months.

By contrast, the lockout provision here is much more lenient. All you have to do is pay the back premiums and complete a financial or health literacy course to be re-admitted to the program. So it's not as if this is a

Draconian lockout period.

I'd like to return to the theme I started with at the beginning, your Honor. Ruling for the plaintiffs here could also cause other states that are unlikely -- that have not yet expanded to become reluctant to do so. There are quite a few states out there that are considering whether to expand. Many of them have suggested that a community engagement requirement would be relevant to that decision.

And so in our view, the Court should not interfere with this process and should let Section 1115 operate as a tool to allow the states to experiment with innovative ways to provide medical assistance to the expansion population.

THE COURT: Just a couple other questions, Mr. Davis, if that's all right. One, I talked to Mr. Gershengorn about cost savings and money and if Kentucky were in financial difficulty. But in the SMD letter itself, there's a statement -- and this is on page eight, that states will not be permitted to accrue savings from a reduction in enrollment that may occur as a result of using the Section 1115 authority.

So you're not arguing that cost savings to Kentucky would help promote medical assistance?

MR. DAVIS: Your Honor, we're not arguing that a cost saving rationale by itself would be enough here. But as a happy side effect, there's nothing wrong with that

being a happy side effect. And the best way you can -- the best historical analog for that is the transformation of Medicaid from fee-for-service to managed care that was done 20 or so years ago where the result was a lot of Medicaid savings.

It resulted in a lot more restrictions being placed on Medicaid beneficiaries. All of a sudden they couldn't choose their provider anymore. But it was justified on the grounds that it was a more efficient way to deliver health services. So we don't think the fact that a project saves money by itself is somehow a reason to give it -- to look down on it. There's nothing wrong with saving money. Obviously the goal of Medicaid is to provide medical assistance, so it's a financial motivation itself.

THE COURT: A couple unrelated ones. On the comments question, I understand the Secretary doesn't have to respond expressly to any comment through this. But do you think that Congress means for the Secretary to simply ignore the comments entirely in his analysis? Why would there be a comment process if it were permitted to be ignored entirely?

MR. DAVIS: A couple of responses to that, your Honor. No, the Secretary -- Congress clearly did not intend for the Secretary to ignore comments entirely. The agency passed the regulation that says CMS will review and consider

all comments received by the deadline, but will not provide written responses to public comments.

So here, the Secretary went beyond what was required and did provide a written response to the comments in the aggregate at the back of the approval letter. But even if the Secretary had not, I think it's enough to look at the administrative record to see that in substance, the Secretary considered the objections that the plaintiffs were raising.

And if you look through the special terms and conditions of the project, your Honor, you'll see that there are many guardrails built in. There are many on-ramps built in. There are many safeguards throughout. Special term and condition 33 builds in a lot of safeguards to the premium requirement.

You know, because there's no obligation to respond to comments, there's no obligation to address them all individually. But you can see from the record that the Secretary did not entirely fail to consider an important aspect of the problem here.

THE COURT: And I'll just ask you the last question that I asked Mr. Gershengorn which is remedy. If I rule for the plaintiffs, do you really believe that there could be a remand without vacatur of the -- not of the SMD letter, but of the approval of Kentucky HEALTH?

MR. DAVIS: Your Honor, we think that any remedy here should be limited to the provision that the plaintiffs have standing to challenge, and the only one they've come close to showing standing to challenge is the premium. So we don't think there's jurisdiction to vacate any part of the project other than the premiums.

If your Honor disagrees and is deciding whether to vacate the entire project, we would argue that the remand should be without vacatur because of the disruptive consequences under Allied-Signal that would occur. The best way to look at that is the substance abuse component of the waiver which would also go down in that case. That component is critically important to ensuring treatment to the people of Kentucky who are suffering from substance abuse. That would be a strong reason to remand without vacatur.

For example, if your Honor thought that the agency did not sufficiently respond to comments, it would make far more sense to remand without vacatur to allow the agency an opportunity to respond to the comments and put those in the record rather than take down the whole project in the meantime.

THE COURT: How about if it was more fundamentally not considering the objectives of Medicaid?

MR. DAVIS: I still think, your Honor, it would

make sense to send it back to the agency without vacatur to see if the agency could articulate an explanation that's more consistent with the objectives of the Medicaid act. I think the balance of harms here would weigh strongly in favor of keeping the project in place while anything proceeded.

THE COURT: Okay. Thank you very much, Mr. Davis. I appreciate your time.

Mr. Kuhn.

MR. KUHN: May it please the Court. Your Honor, Kentucky HEALTH is the culmination of a 16-month effort between Kentucky and the federal government to address some of Kentucky's most pressing problems while on the other hand making sure that Medicaid in Kentucky remains sustainable.

Before I get into some of the back and forth, I would like to describe on the record the reality on the ground in Kentucky, the problems that we're addressing here. Almost 20 percent of our residents live in poverty. We're 47th in the nation for median household income. Our workforce participation rate is among the worst in the nation. Something that's particularly relevant here, we have the third highest rate of drug-related deaths in the country. We rank 45th and 47th in the nation on the occurrence of diabetes and heart problems respectively. And these are all problems that we have even though we've had

expanded Medicaid for four years.

When we sat down to talk about a demonstration project, we came to the conclusion that expanded Medicaid was not solving these deep underlying problems that we have in Kentucky. The best example that I can give to the Court of that is that in 2015, the year after Kentucky expanded, less than one in 10 of our new enrollees actually got preventative care, went and got an annual health exam. It's lower for dental care, and it's lower for vision care. That is a key predictor of how healthy your population is. So we have serious health problems that we're confronting in Kentucky.

We also have equally serious budget constraints. Your Honor has asked two questions about that. I want to be clear about that. It's undisputed in this record that if we continue expanded Medicaid in Kentucky without Kentucky HEALTH, it is going to be $2.1 billion in new spending for the Commonwealth.

THE COURT: I saw that figure. That's before or after federal government reimbursement?

MR. KUHN: That is after. So we are going to have -- through 2021, we are going to have $2.1 billion in new health care spending.

THE COURT: So it's really more than $20 billion, because the feds reimburse sliding scale down, but no less

than 90 percent, right?

MR. KUHN: I think we're at 5 or 6 percent that we're paying now up to 10 percent in or around 2021 is my understanding.

THE COURT: So then it's more like 30 or $40 billion?

MR. KUHN: For the cost of expanded Medicaid in Kentucky?

THE COURT: Before reimbursement.

MR. KUHN: Before reimbursement. If it's $2.1 billion in new spending through 2021 -- and I'm not doing the math --

THE COURT: Because 95, that would be 5 percent. $2 billion would be 5 percent of $40 billion.

MR. KUHN: And to be clear, that's money that the Commonwealth does not have unless we sacrifice other essential services. We're talking here about pension obligations. We're talking about health and safety. We're even talking about our traditional Medicaid program.

I want to be clear, I think the Governor's executive order has made this clear: Without Kentucky HEALTH, Kentucky will be forced to withdraw from expanded Medicaid.

THE COURT: But isn't the reimbursement for expanded -- for the expansion population greater than for

the traditional population? In other words, the expansion population as you say is around 95 percent.

MR. KUHN: Currently.

THE COURT: Right, sliding to 90 I believe.

MR. KUHN: Sure.

THE COURT: But traditional's not that high, is it?

MR. KUHN: It's a matching program. I don't know what the actual number is. My suspicion is it's not that high, no.

THE COURT: So then why attack the expansion population? Why not have more targeted -- have a more targeted program that would result in a greater cost savings?

MR. KUHN: A more targeted program?

THE COURT: In other words, with the expansion population you're getting 95 percent back, but with some of the traditional you're getting less.

MR. KUHN: The traditional Medicaid population is core, that's something that we do not want to take away. We consider it sacred. That's why we are working on the expanded Medicaid. The Governor made clear when we submitted our application in August that this was the only way we could afford expanded Medicaid. CMS recognized that in their approval letter. And the Governor's executive

order came out on the same day as the approval letter.

THE COURT: And on the Governor's executive order, one of your arguments is that there's no standing because there's no injury from this because the Governor's executive order -- if I struck down the Secretary's approval, the Governor's executive order would go into effect and these people would be out of luck anyway, right?

MR. KUHN: Correct.

THE COURT: But that's not temporally precisely accurate, because the executive order talks about up to six months after all appeals are exhausted, right?

MR. KUHN: Sure.

THE COURT: And as wonderful as our Court of Appeals is and as timely as they are on ruling on all matters, we're talking about a fair bit of time then. And so aren't the plaintiffs -- wouldn't the plaintiffs in that instance be suffering concrete injury for a not insignificant period of time which would be enough to give them standing?

MR. KUHN: I don't think so, no. First off, I don't think they've made that argument, the six-month delay. We don't know it's going to be a six-month delay, that's what we've put in there. My understanding is we'd have to do a Medicaid waiver or amendment to our state plan to accomplish withdrawal. The point is they've not sued to get

Medicaid for an eight-month period of time or whatever it is. They've sued to keep their Medicaid going forward. And I think their standing has to match the relief that they're requesting. I think that's why they haven't made that six-month argument.

THE COURT: Well, the six months is after appeals are exhausted. So you've got the period from a decision through an appellate decision plus up to six months, right?

MR. KUHN: Up to six months, I think that's correct, yes.

THE COURT: But if somebody says they're being injured in a certain way and the Court says well, you actually have been injured half of that way or a quarter of that way, that's still an injury for standing purposes.

MR. KUHN: I think that the rule your Honor is proposing, it would make it -- I mean, if there's any delay based on a court action, you can have standing based on a court action. They've not sued to get Medicaid coverage during the pendency of a court case. They've sued to keep their Medicaid coverage.

The Governor's executive order is the law of the Kentucky, it's self-executing. If your Honor were to strike down any aspect of Kentucky HEALTH and that were to be affirmed, it's self-executing. We've got our cabinet for Health and Family Services Secretary, it would be his job --

the law of Kentucky then would be for him to unexpand.

THE COURT: But you would -- and I think you may have just said this, but wouldn't you agree that you would have to go to the Secretary to get -- under 1115 to unexpand?

MR. KUHN: So we expanded in October -- we sent a state plan amendment in October of 2013 to expand. I think we would have to go back to a state plan amendment. One thing I want to put in the record is in December of 2012 -- so after the NFIB decision, a lot of states were considering whether or not to expand. One of the questions that was asked of CMS during the prior administration was whether if a state expands, can they unexpand. The plans say we can't. I'd point the Court to the FAQs of CMS in December 2012 that said unequivocally that a state can in fact unexpand.

THE COURT: Unilaterally without Secretary approval?

MR. KUHN: It would have to be through a state plan amendment is our understanding, and we would submit that very promptly. I do want to point the Court, we think the third party redressability rule from the Klamath Water Users Association from the U.S. Ecology decision, that when the discretion to give the plaintiffs their ultimate relief rests in the hand of a third party, the plaintiffs just don't have redressability.

One point that I want to make clear about is in the U.S. Ecology decision, we had a situation where one governor of California wanted to do one thing, the next governor wanted to do something different. The Court said -- the D.C. Circuit said because we had a change in governors, they exercised their discretion differently, there's no redressability. We think that's a pretty clear application.

The most that the plaintiffs have cited on this issue is the Village of Arlington case from 1977. They say it's an absolute barrier, that Kentucky HEALTH is an absolute barrier to their receipt of expanded Medicaid. Plaintiffs can still get it if they follow the system requirements. Moreover, even if it's an absolute barrier, there's also another absolute barrier right after it, and that's the Governor's self-executing executive order. So we feel the third party redressability doctrine is dispositive of standing here.

This is not a case where the Governor stood up and made a speech. He didn't Tweet out anything about expanding. This is an executive order, it's the law of Kentucky and it's self-executing. There's nothing left for the Governor to do on this.

THE COURT: I just want to give you a couple more minutes. So it would probably be most helpful for me if

there's any other factual issue related to Kentucky specifically that you believe that either of the previous advocates got wrong or that you want to add, that would be helpful.

MR. KUHN: Sure, a couple of things. Your Honor asked Mr. Davis a number of questions about medical assistance as opposed to health outcomes. Let me add a little bit to that if that's all right. Obviously the primary one is substance use disorder treatment. This is a big deal. We've got residential treatment in there. Methadone treatment is covered. Again, we're in the grips of an opioid crisis. This is big for us on medical assistance. Three or four other states have gotten something like this. This is a critical component of this for us. It goes to the disastrous consequences that we would have if there were a vacatur of everything.

Other things about medical assistance that are in this plan, we've got dental and vision are covered. You can use money in your My Rewards account. Kentucky's not required to cover that. If your Honor strikes down the premiums, coverage for medical and dental will go away in Kentucky for the expansion population completely.

The biggest point I have though on medical assistance is that the expanded population gets to keep coverage. That is medical assistance. If this is struck

down, they're going to lose coverage. They're going to keep their medical assistance if we have Kentucky HEALTH.

THE COURT: Okay, thank you very much. I appreciate your being here and responding to those questions.

MR. KUHN: Thank you, your Honor.

THE COURT: All right, Mr. Gershengorn, I'll give you five minutes to rebut anything you wish.

MR. GERSHENGORN: I'll be very brief, your Honor, I just want to tick off a few points. So on the medical assistance point, you know, this is -- counsel for the federal government, this is where I think -- as we said in our brief and I'll say here, this is Orwellian. The program furnishes medical assistance by cutting from the rolls 95,000 people. That is not furnishing medical assistance, and it's not imposing conditions on medical assistance. That is reducing, cutting in a giant package medical assistance.

Second, cost cutting. Mr. Davis described it as a happy side effect analogous to the change in payment methods. The vast majority of the savings here it is undisputed comes from enrollment cuts and benefits. It's from kicking people off Medicaid. That kind of cost saving is not making something more efficient or doing something like that, that is cutting benefits to people. That is not

the kind of cost cutting that's permissible.

With respect to standing in Kentucky, so the rights -- we have a current complaint against the federal government. The possibility that the Governor might take unlawful action that he has discretion whether or not to take might later subject our plaintiffs to a loss in coverage is not a reason to deprive standing, even with respect to the expansion population. And I will say your Honor is absolutely record, and it's the record 5421 and 5422, that 20 percent of the population is not the expansion population. And so for that population, even the Governor's hypothetical is not implicated.

But as your Honor pointed out, if the Governor withdraws -- which he may, we think that would be, A, unlawful but, B, they still have the exact same health problems and they're giving up the 95 percent of the funding that comes from the federal government. So he may choose to do that. But the possibility that he will take that unlawful discretionary action is not enough to deprive our plaintiffs of standing.

With respect to the expansion population, there was a lot of back and forth about that. So the Virginia case is a good example, and Kentucky is the cleanest example. Kentucky did not condition its acceptance of the Medicaid expansion population on work requirements, it

excepted it. It is now seeking to impose work requirements and premiums and everything else on a whole range of people including 20 percent not in the expansion population, but also on the expansion population. We don't think they have authority to do that. This is not an a la carte program. The fact that once that population came in, it is within the statute in the exact same provision treated as all of the other mandatory populations. This is not kind of a pick and choose. And while this may impact what other states do or don't do, I don't think candidly that that's for this Court to worry about. We have a challenge to the Kentucky waiver, and it's presented here.

And then the final thing I'd like to say which is kind of a combination of medical assistance and remedy which is this opioid treatment, this combination of the opioid treatment and the Allied-Signal point. The opioid treatment has come in as a way to show that there's medical assistance. I just want to be clear as a technical -- not as a technical matter. What we have done is challenged something called Kentucky HEALTH, spelled out. That is a program within KY HEALTH. And so even if you could -- which we don't think you can, even if you could say well, we're throwing a hundred thousand people off Medicaid but we're giving substance abuse treatment -- which is important, but we're giving substance abuse treatment to other people and

say net-net, things are good, even if you could do that in theory I don't think you can do that here. We have challenged -- and the complaint and the waiver's made clear that these are separate, that Kentucky HEALTH is a subset of KY HEALTH and the substance abuse in KY HEALTH. It's like a parallel program. So we don't think that you can balance them in general, and we certainly don't think you can balance the particular substance abuse treatment.

So that leads me then to the vacatur point which is that I guess I would like, just to be clear, perhaps to slightly modify my Allied -- the response to your question of exactly what you would do. I still think you would vacate and remand, but we would like to vacate the Kentucky HEALTH set of waivers which is what we have challenged. Those are the ones that have the premiums, the work conditions, the lockouts, the retroactive coverage and everything else.

And then so I guess I'd just like to conclude -- and your Honor has been very generous with your time this morning. So I just will conclude very quickly by going back to where I started. This is not an experiment. This is an effort to transform through a nationwide process by adding work requirements, premiums and other things which fundamentally change the purposes of Medicaid to the detriment of Congress' goal of providing medical assistance

through insurance and coverage.

So we ask the Court to vacate and remand.

THE COURT: Thank you very much. Thank you to all advocates for your fine work on the briefing. I found the briefing very helpful and well done. Thank you for your arguments. I will do my best to have a decision issued by the end of the month, because again I know this goes into effect July 1. I will do everything I can to have an opinion issued therefore by June 30th.

So thank you for our audience's lack of rustling around despite the fact that this is not always the easiest area of the law. So I appreciate it. Have a good weekend to all.

(Proceedings adjourned at 12:19 p.m.)

C E R T I F I C A T E

I, **Jeff M. Hook, CSR, RPR,** certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

June 15, 2018

DATE

Jeff M. Hook, CSR, RPR