

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

APPEARANCES

For the Plaintiffs:

IAN H. GERSHENGORN
NATACHA Y. LAM
LAUREN J. HARTZ
SAMUEL JACOBSON
THOMAS J. PERRELLI

Jenner & Block LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001

JANE PERKINS

CATHERINE A. MCKEE

National Health Law Program
200 N. Greensboro Street, Suite D13
Carrboro, NC 27510

For the Defendants:

ETHAN P. DAVIS
ERIC McARTHUR

U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

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

APPEARANCES CONTINUED

For the Defendants:

**VINITA B. ANDRAPALLIYAL
DEEPTHY KISHORE**

U.S. Department of Justice
Civil Division, Federal Programs
20 Massachusetts Avenue, NW
Washington, DC 20530

BRIAN R. STIMSON

U.S. Department of Health & Human
Services
Office of the General Counsel
200 Independence Avenue, SW
Room 713-F
Washington, DC 20201

**For the Commonwealth
of Kentucky:**

**MATTHEW F. KUHN
MARK STEPHEN PITT
STEPHEN CHAD MEREDITH**

Office of the Governor of Kentucky
700 Capital Avenue, Suite 101
Frankfort, KY 40601

Court Reporter:

JEFF M. HOOK, CSR, RPR

Official Court Reporter
U.S. District & Bankruptcy Courts
333 Constitution Avenue, NW
Room 4700-C
Washington, DC 20001

P R O C E E D I N G S

1
2 **DEPUTY CLERK:** Good morning, we're on the record
3 in civil case 18-152, Ronnie Stewart, et al., versus Eric
4 Hargan, et al. If counsel from both sides will please
5 approach the lecturn and identify yourselves for the record.

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

12 **THE COURT:** Welcome to all of you.

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

17 **THE COURT:** Good morning to you folks.

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

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

1 period of time for Mr. Kuhn.

2 Is that all right with you folks?

3 **MR. DAVIS:** Yes, your Honor.

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

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

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

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

25 It is not limited in scope as it has laid the

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

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

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

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

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

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

6 **MR. GERSHENGORN:** Sure.

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

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

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

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

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

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

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

25 But I think your Honor is right, to challenge the

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

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

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

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

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

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

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

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

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

20 **THE COURT:** Right.

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

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

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

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

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

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

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

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

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

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

11 **THE COURT:** Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 case.

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

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

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

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

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

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

1 **MR. GERSHENGORN:** Absolutely, your Honor.

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

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

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

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

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

14 **THE COURT:** And how about --

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

17 **THE COURT:** Go ahead.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 **MR. GERSHENGORN:** No, your Honor.

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

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

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

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

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

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

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

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

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

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

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

25 So you agree that the Secretary can consider

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

3 **MR. GERSHENGORN:** Uh-huh.

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

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

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

1 offset the bulk of those costs.

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

11 Why wouldn't that promote medical assistance?

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

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

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

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

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

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

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

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

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

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

15 **MR. GERSHENGORN:** Thank you, your Honor.

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

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

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

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

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

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

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

3 **THE COURT:** But the idea that if -- but the theory
4 that if you expand you're permitted to unexpand and that's
5 all Kentucky's doing, that's not quite true because
6 20 percent or so would be the traditional population, right?

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

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

25 **THE COURT:** But one of your arguments which is

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

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

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

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

10 **THE COURT:** Because?

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

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

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

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

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

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

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

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

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

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

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

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

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

25 **THE COURT:** Right, because you would agree they

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

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

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

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

15 **THE COURT:** Okay, I would appreciate that.

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

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

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

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

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

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

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

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

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

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

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

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

9 **MR. DAVIS:** Well, we think that you have to look
10 at the whole statute to ascertain that, your Honor. We
11 think that the right way to think about it I think is that
12 1396(a) shows that the primary purpose of Medicaid is to
13 provide medical assistance to the traditional Medicaid
14 population.

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

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

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

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

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

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

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

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

11 **THE COURT:** What else?

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

17 **THE COURT:** Which are what?

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

1 simply couldn't exist.

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

4 **THE COURT:** But we're talking about demonstration
5 projects. I mean, 1115 says, "In the case of any
6 experimental pilot or demonstration project which in the
7 judgment of the Secretary is likely to assist in promoting
8 the objectives of the Medicaid statute."

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

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

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

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

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

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

1 Secretary is entitled to deference in interpreting the
2 purposes of the Medicaid act as a whole, not just Section
3 1396-1, but all the rest of the provisions to mean that the
4 objective of the Medicaid act in the end is to promote the
5 health of Medicaid beneficiaries.

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

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

18 **THE COURT:** And didn't Kentucky suggest that
19 95,000 individuals would leave the Medicaid rolls if this
20 project were approved?

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

24 **THE COURT:** Do you agree with that number
25 generally?

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

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

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

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

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

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

1 Draconian lockout period.

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

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

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

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

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

1 being a happy side effect. And the best way you can -- the
2 best historical analog for that is the transformation of
3 Medicaid from fee-for-service to managed care that was done
4 20 or so years ago where the result was a lot of Medicaid
5 savings.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 Mr. Kuhn.

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

15 Before I get into some of the back and forth, I
16 would like to describe on the record the reality on the
17 ground in Kentucky, the problems that we're addressing here.
18 Almost 20 percent of our residents live in poverty. We're
19 47th in the nation for median household income. Our
20 workforce participation rate is among the worst in the
21 nation. Something that's particularly relevant here, we
22 have the third highest rate of drug-related deaths in the
23 country. We rank 45th and 47th in the nation on the
24 occurrence of diabetes and heart problems respectively. And
25 these are all problems that we have even though we've had

1 expanded Medicaid for four years.

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

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

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

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

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

1 than 90 percent, right?

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

5 **THE COURT:** So then it's more like 30 or
6 \$40 billion?

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

9 **THE COURT:** Before reimbursement.

10 **MR. KUHN:** Before reimbursement. If it's
11 \$2.1 billion in new spending through 2021 -- and I'm not
12 doing the math --

13 **THE COURT:** Because 95, that would be 5 percent.
14 \$2 billion would be 5 percent of \$40 billion.

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

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

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

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

3 **MR. KUHN:** Currently.

4 **THE COURT:** Right, sliding to 90 I believe.

5 **MR. KUHN:** Sure.

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

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

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

15 **MR. KUHN:** A more targeted program?

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

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

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

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

8 **MR. KUHN:** Correct.

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

12 **MR. KUHN:** Sure.

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

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

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

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

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

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

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

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

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

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

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

16 **THE COURT:** Unilaterally without Secretary
17 approval?

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

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

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

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

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

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

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

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

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

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

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

6 **MR. KUHN:** Thank you, your Honor.

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

9 **MR. GERSHENGORN:** I'll be very brief, your Honor,
10 I just want to tick off a few points. So on the medical
11 assistance point, you know, this is -- counsel for the
12 federal government, this is where I think -- as we said in
13 our brief and I'll say here, this is Orwellian. The program
14 furnishes medical assistance by cutting from the rolls
15 95,000 people. That is not furnishing medical assistance,
16 and it's not imposing conditions on medical assistance.
17 That is reducing, cutting in a giant package medical
18 assistance.

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

1 the kind of cost cutting that's permissible.

2 With respect to standing in Kentucky, so the
3 rights -- we have a current complaint against the federal
4 government. The possibility that the Governor might take
5 unlawful action that he has discretion whether or not to
6 take might later subject our plaintiffs to a loss in
7 coverage is not a reason to deprive standing, even with
8 respect to the expansion population. And I will say your
9 Honor is absolutely record, and it's the record 5421 and
10 5422, that 20 percent of the population is not the expansion
11 population. And so for that population, even the Governor's
12 hypothetical is not implicated.

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

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

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

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

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

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

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

1 through insurance and coverage.

2 So we ask the Court to vacate and remand.

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

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

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

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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

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