VIA ELECTRONIC SUBMISSION
Centers for Medicare & Medicaid Services
Department of Health and Human Services
P.O. Box 8016
Baltimore, MD 21244-8016

Re: Arizona Section 1115 Waiver Amendment Request: Proposal to Waiver Prior Quarter Coverage

Dear Sir/Madam:

The National Health Law Program (NHeLP) is a public interest law firm working to advance access to quality health care and protect the legal rights of low-income and under-served people. We appreciate the opportunity to provide these comments on the Arizona Section 1115 Waiver Amendment Request: Proposal to Waive Prior Quarter Coverage ("Retroactive Waiver Amendment"). We ask the Secretary not to approve the Retroactive Waiver Amendment.

We incorporate by reference the comments opposing the Retroactive Waiver Amendment submitted by the Center on Budget and Policy Priorities, Center for Children and Families, et al. In addition:

1. The Secretary has previously used the Section 1115 authority to allow Arizona to implement an experimental waiver of the retroactive coverage requirement. We are not aware of the results of the evaluation of that experiment and do not think they were ever shared with the public. We ask that you publish those results before awarding the State a waiver to do something that it has already done before.

2. The Government Accountability Office has repeatedly warned about the lack of transparency in the Section 1115 arena. The problem needs to be addressed before additional waivers are approved, in particular when, as here, the waivers

are terminating coverage to thousands of low-income individuals. *E.g.*, GAO, *Medicaid Demonstrations: Federal Action Needed to Improve Oversight of Spending* (Apr. 2017), https://www.gao.gov/assets/690/683888.pdf; *Medicaid Demonstrations: More Transparency and Accountability for Approved Spending are Needed* (June 2015), https://www.gao.gov/assets/680/670938.pdf; *Approval Process Raises Cost Concerns and Lacks Transparency* (June 2013), https://www.gao.gov/assets/660/655484.pdf.

2. The Medicaid Act's purpose is to enable states to furnish medical assistance to low-income people. *See* 42 U.S.C. § 1396-1. The Act requires states to extend three-months' retroactive coverage to eligible individuals. The purpose of this coverage is to "protect[ ] persons who are eligible for Medicaid but do not apply for assistance until after they have received care, either because they did not know about the Medicaid eligibility requirements, or because the sudden nature of their illness prevented their applying." *Cohen by Cohen v. Quern*, 608 F. Supp. 1324, 1332 (N.D. Ill. 1984) (quoting H. Rep. No. 92-231, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4989, 5099). Congress also wanted to encourage providers to "furnish necessary medical assistance and ensure financial protection to otherwise eligible persons during the retroactive period." *Amends. to the Soc. Sec. Act 1969-1972: Hrg. on H.R. 17550 Before the S. Comm. on Fin.,* 91st Cong. 1262 (1970) (stmt. of Elliot L. Richardson, Sec'y, Dep't of Health, Educ., & Welfare).

Arizona says the Retroactive Waiver Amendment is consistent with Medicaid's purposes because it will encourage individuals to obtain coverage and contain Medicaid costs. Individuals do not know they are eligible for Medicaid, much less understand that Medicaid has a retroactive coverage policy and what that means. Moreover, elimination of retroactive coverage will limit coverage, introduce coverage gaps and churning, and increase medical debt. In addition to the data below, public comments submitted to Arizona in response to this Retroactive Waiver Amendment repeatedly make these points. We ask you to review these comments, particularly those submitted by health care providers, because they provide consistent and redundant evidence showing the harmful consequences of this Amendment.

3. The Retroactive Waiver Amendment does not account for the harm that will result to low-income people in Arizona. And harm is certain. Iowa estimates that its waiver of retroactive coverage will reduce enrollment by 3,344 people per month, amounting to over 40,000 fewer people with coverage per year.[1] CMS previously denied Indiana's request to end a retroactive coverage program after determining "that 13.9% of beneficiaries were

[1] See Jane Perkins, National Health Law Program, Comments Re: Amendment to the Iowa Wellness Plan 1115 Demonstration 2 (Sept. 7, 2017) (citing STATE OF IOWA DEP'T HUMAN SERVS., Section 1115 Amendment: Iowa Wellness Plan, 11 (Aug 2, 2017), http://www.healthlaw.org/issues/medicaid/waivers/nhelp-comments-iowa-amended-section-1115-waiver-project#.WmI0YqinGUk,

eligible for the program and had incurred costs averaging $1,561 per person."[2] This data suggests that the Retroactive Waiver Amendment will result in reductions in enrollment and in increased financial burdens for people with low incomes.

The waiver of retroactive coverage is also likely to result in increased unmet costs for hospitals. Because retroactive coverage provides a mechanism for paying hospitals and other providers for care that would otherwise be uncompensated, it has an important function in helping hospitals cover costs and maintain quality of care.[3] In Ohio, where the state considered eliminating retroactive coverage from its Medicaid program, one report estimated that eliminating retroactive coverage would result in roughly $2.5 billion more in uncompensated costs for Ohio hospitals over the five-year course of that waiver, with annual totals of "350,000 to 380,000 [uncompensated] medical claims, adding up to $470 million to $510 million a year in lost revenue for providers."[4] Iowa's waiver was opposed on similar grounds, including by the Iowa Hospital Association, which stated that the waiver will "place a significant financial burden on hospitals and safety-net providers and reduce their ability to serve Medicaid patients[,] will likely translate into increased bad debt and charity care for Iowa's hospitals and will affect the financial stability of Iowa's hospitals, especially in rural communities."[5]

Waiving retroactive coverage will harm low-income people and care providers. Without this protection, individuals are likely to incur significant medical costs if they need medical care and are not yet enrolled in coverage. Hospitals, particularly rural hospitals that serve as the first and last option for many, are likely to experience increases in rates of uncompensated care, which is likely to result in increased budget strains and more difficulty in providing quality care to those who need it most.

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[2] MaryBeth Musumeci & Robin Rudowitz, Kaiser Family Found., *Medicaid Retroactive Coverage Waivers: Implications for Beneficiaries, Providers, and States* 4 (Nov. 2017) (citing Letter from Vikki Wachino, Director, Center for Medicaid and CHIP Services, to Tyler Ann McGuffee, Insurance & Healthcare Policy Director, Office of Governor Michael R. Pence (July 29, 2016)), https://www.medicaid.gov/Medicaid-CHIP-ProgramInformation/By-Topics/Waivers/1115/downloads/in/Healthy-Indiana-Plan-2/in-healthy-indiana-plan-support-20-lockoutsredetermination-07292016.pdf.

[3] Jessica Schubel, Center on Budget & Policy Priorities, *Ending Medicaid's Retroactive Coverage Harms Iowa's Medicaid Beneficiaries and Providers* (Nov. 9, 2017), https://www.cbpp.org/blog/ending-medicaids-retroactive-coverage-harms-iowas-medicaid-beneficiaries-and-providers.

[4] Virgil Dickson, Modern Healthcare, *Ohio Medicaid Waiver could cost hospitals $2.5 billion*, April 22, 2016, http://www.modernhealthcare.com/article/20160422/NEWS/160429965.

[5] Virgil Dickson, Modern Healthcare, *Hospitals balk at Iowa's proposed $37 million Medicaid cut*, August 8, 2017, http://www.modernhealthcare.com/article/20170808/NEWS/170809906.

4. The Retroactive Waiver Amendment will introduce serious barriers to care for individuals due to no fault of their own. Individuals may have a sudden onset of a health care crisis. The impact and recovery may make it practically impossible for the individuals to apply for Medicaid until months after the health crisis. To give but one example, an individual who suffers a stroke may be incapacitated in a number of ways for days, weeks, months, or more. Studies find that one in four older survivors of strokes were dependent in their activities of daily living at six months post stroke.[6] Strokes commonly lead to paralysis or other motor control problems, aphasia, and/or problems with thinking and memory, among other disabilities.[7] It is often impossible for such an individual to submit an application in the same month as the stroke happens. If the stroke happens at the end of the month, it is almost never possible. If the individual does not recover, then it is up to their family to collect the paperwork necessary to apply for Medicaid on behalf of the individual– and that too takes months. Health providers will also struggle to submit an application. In situations like these, there may simply be no practical way to apply in the same month or even the following month.

5. The real purpose of the Retroactive Waiver Amendment is clear–to cut costs. The Secretary is bound by the Ninth Circuit's precedent for any waiver requests under Section 1115. And in *Beno v. Shalala,* 30 F.3d 1057, 1069 (9th Cir. 1994), the Ninth Circuit held:

> The [1115] statute was not enacted to enable states to save money or to evade federal requirements but to 'test out new ideas and ways of dealing with the problems of public welfare recipients'. A simple benefits cut, which might save money, but has no research or experimental goal, would not satisfy this requirement.

In summary, the Retroactive Waiver Amendment is not proposing an experiment and is not consistent with Medicaid's objectives. It is proposing a simple benefit cut. The Amendment should be denied. Please consider information contained in the linked documents cited in this letter, and please consider these linked documents, along with this letter, to be part of the record for this review. Thank you for the opportunity to comment. If

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[6] VY Ma et al., *Incidence, Prevalence, Costs, and Impact on Disability of Common Conditions Requiring Rehabilitation in the United States: Stroke, Spinal Cord Injury, Traumatic Brain Injury, Multiple Sclerosis, Osteoarthritis, Rheumatoid Arthritis, Limb Loss, and Back Pain*. *Archivers of Physical Medicine and Rehabilitation* (2014), at https://www.archives-pmr.org/article/S0003-9993(14)00031-8/fulltext#sec2.1.

[7] National Institutes of Health, *Neurological Disorders and Stroke. Post-Stroke Rehabilitation Fact Sheet* (2018), https://www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Fact-Sheets/Post-Stroke-Rehabilitation-Fact-Sheet#disabilities.

you have any questions, please contact me at (919) 968-6308 (x101) or at perkins@healthlaw.org.

Sincerely,

Jane Perkins
Legal Director