IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES GRESHAM, et al., Plaintiffs, v. **ALEX M. AZAR II, et al.** Defendants.	Civil Action No. 1:18-cv-1900 (JEB)

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

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INTRODUCTION

The Secretary of Health & Human Services' (the "Secretary") approval of the amendments to Arkansas Works is amply justified by the reasoning in his November 20, 2018, approval of Kentucky's materially similar project. As the Secretary's Kentucky approval explained, demonstration projects that include features like community-engagement requirements and retroactive eligbility waivers improve the fiscal sustainability of Medicaid and thus help states that are concerned about the financial burden of coverage for the adult expansion population (like Arkansas and Kentucky) to continue providing that optional coverage. This permits such states to furnish as much medical assistance to their citizens as possible. The Arkansas Works amendments are also independently justified because the Secretary concluded the demonstration was likely to improve the health of coverage recipients.

Plaintiffs' contrary arguments fail. *First*, plaintiffs attempt to limit the Supreme Court's and D.C. Circuit's decisions recognizing that fiscal sustainability is an objective of Medicaid. But there is no meaningful basis for distinguishing those decisions, and their reasoning controls here. *Second*, Plaintiffs wrongly argue that, despite the Supreme Court's ruling in *NFIB* and the consistent position of the U.S. Department of Health and Human Services ("HHS") concerning the effect of that decision, a State does *not* have the option of terminating coverage for the Medicaid expansion population. That position is untenable. As HHS has consistently explained since 2012, *NFIB*'s holding invalidated the ACA-enacting Congress's attempt to mandate Medicaid expansion and empowered States to decide for themselves whether to expand Medicaid to cover the new adult group or, should they later change their minds, to end coverage for that group without jeopardizing the rest of their Medicaid funding. *Third*, plaintiffs proffer statistics about the number of individuals who had been disenrolled from Arkansas Works in 2018 due to failure to comply with the project's requirements, but the new calendar year moots those figures. Disenrolled individuals are all now free to re-apply for enrollment and their previous non-compliance will not be a factor in their Medicaid eligibility

determinations. *See* AR 31. *Finally*, plaintiffs previously attributed a significant portion of the effects on coverage to difficulties arising out of the online-only reporting system, *see* Pls.' Mem. 19–20, ECF No. 27-1, and those alleged difficulties have been addressed. Beneficiaries may now report their compliance through several methods, including online, by telephone, or in-person at Arkansas Department of Health Services county offices. *See* Am. Decl. of Franklin, M. ¶ 3, ECF No. 51.[1]

Plaintiffs' record-based arguments are equally meritless. The Secretary made a reasoned, predictive judgment that the amendments to Arkansas Works are likely to promote Medicaid objectives, and that determination was not arbitrary or capricious. In arguing to the contrary, plaintiffs ask this Court to substitute its judgment for that of the Secretary, to ignore the flexible and experimental nature of demonstration projects as set forth in 42 U.S.C. § 1315, and to prioritize plaintiffs' policy preferences. This Court should decline.

Finally, plaintiffs' challenge to a State Medicaid directors letter issued by the Secretary in January 2018 and their claim under the Constitution's Take Care Clause are both non-justiciable and meritless. Plaintiffs' arguments in support of those claims are far-fetched and merely retread the same ground covered in their opening brief.

ARGUMENT

I. THE SECRETARY REASONABLY DETERMINED THAT THE COMMUNITY-ENGAGEMENT REQUIREMENT AND WAIVER OF RETROACTIVE ELIGIBILITY ARE LIKELY TO ASSIST IN PROMOTING THE OBJECTIVES OF THE MEDICAID PROGRAM.

A. The Secretary's assessment is committed to agency discretion by law or, at a minimum, should be accorded great deference.

As explained in the federal defendants' opening brief, in Section 1115 Congress used language

[1] *See also* Letter from Andrea J. Casart, Dir., CMS Div. of Medicaid Expansion Demonstrations, to Cindy Gillespie, Dir., Ark. Dep't of Human Servs. (February 19, 2019), Attachment A at 5, 13, https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ar/Health-Care-Independence-Program-Private-Option/ar-works-apprvd-monitoring-plan-02192019.pdf.

that committed to agency discretion the Secretary's judgment about whether a particular demonstration project is likely to assist in promoting the objectives of Medicaid. *See* Defs.' Mem. 11–12, ECF No. 37-1. Even if that judgment were reviewable, however, the Secretary's discretionary determinations are at a minimum entitled to the utmost deference. Where a statute "draw[s] a … distinction between the objective existence of certain conditions and the Secretary's determination that such conditions are present," judicial deference is at its maximum. *Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1513 (D.C. Cir. 1989); *see also Stewart v. Azar*, 313 F. Supp. 3d 237, 243 (D.D.C. 2018) ("[T]he Secretary is afforded significant deference in his approval of pilot projects.").

Plaintiffs disagree and, indeed, argue that the Secretary's judgment is not even entitled to deference under *Chevron v. NRDC*, 467 U.S. 837 (1984), because it presents a question of "deep economic and political significance" and would "bring about an enormous and transformative expansion" in the agency's authority. Pls.' Reply 5, ECF No. 42 (citing *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) and *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014)). But this Court has already given the Secretary deference in interpreting the objectives of the Medicaid statute in accordance with the *Chevron* doctrine. *See Stewart*, 313 F. Supp. 3d at 260, 270. Moreover, this case is about a time-limited demonstration project testing new approaches to Medicaid; it is not a "transformative" expansion of the Secretary's authority and is certainly not the "extraordinary . . . case" where "there may be reason to hesitate before concluding that Congress has intended . . . an implicit delegation." *King*, 135 S. Ct. at 2488–89.

In *King*, the Supreme Court concluded that Congress did not *implicitly* delegate to the IRS the authority to determine whether tax credits created under the ACA were available for participants in the federally run health insurance exchange. 135 S. Ct. at 2489. The Court reasoned that Congress could not have intended to delegate that authority, given that the IRS had "no expertise in crafting health insurance policy of this sort" and that the issue had "deep economic and political significance."

Id. (citation and internal punctuation omitted). But here, by contrast, Congress *explicitly* delegated to "the Secretary broad power to authorize projects which do not fit within the permissible statutory guidelines of the standard public assistance programs." *Crane v. Mathews*, 417 F. Supp. 532, 539 (N.D. Ga. 1976). Congress conferred that authority to ensure federal requirements do not "stand in the way of experimental projects designed to test out new ideas and ways of dealing with the problems of public welfare recipients." S. Rep. No. 87-1589, at 19 (1962), *as reprinted in* 1962 U.S.C.C.A.N. 1943, 1961. Further, unlike the IRS in *King*, the Secretary *does* have expertise in health policy, including the specific expertise to determine whether community-engagement requirements are likely to help States furnish medical assistance to their citizens and to assist in promoting health and well-being.

Plaintiffs' reliance on *Utility Air* is even more misplaced. There, the challenged interpretation of the Clean Air Act would have "be[en] inconsistent with—in fact, would [have] overthrow[n]—the Act's structure and design." *Util. Air*, 134 S. Ct. at 2442. Here, the Social Security Act expressly *permits* the Secretary to allow States to experiment with projects that would otherwise violate the Act. In *Utility Air*, moreover, the claimed interpretation would have "severely undermine[d] what Congress sought to accomplish" by allowing the agency to exercise "an extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute unrecognizable to the Congress that designed it." *Id.* at 2443–2444. Nothing remotely like that occurred here. Plaintiffs' rhetoric notwithstanding, the Secretary's approval of the amendments to Arkansas Works does not "render the statute unrecognizable." On the contrary, it does precisely what the statute contemplates—authorize Arkansas to conduct an experimental demonstration that will test the hypothesis that the challenged requirements will both improve the health of Arkansas's residents and ensure the overall fiscal sustainability of its Medicaid program. Allowing that demonstration is well within the express grant of authority to the Secretary in Section 1115.

Plaintiffs' argument that the Secretary has impermissibly "transform[ed]" the Medicaid statute

ignores the statutory language. In plaintiffs' view, the Secretary may never waive the "eligibility criteria" in "Section 1396a(a)(10)(A)" as part of a demonstration project, because doing so improperly "restructure[s] Medicaid." Pls.' Reply 37. That position cannot be squared with the plain text of Section 1115, which allows the Secretary to "waive compliance with *any* of the requirements" in § 1396a. *See* 42 U.S.C. § 1315(a)(1) (emphasis added). Nor do plaintiffs explain why § 1396a(a)(10)(A) is more "fundamental" than any other provision of § 1396a, or how this Court is supposed to parse § 1396a in any principled way to determine which statutory requirements can be waived, versus which are so "fundamental" that they cannot be waived. *See Brogan v. United States*, 522 U.S. 398, 408 (1998) ("Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so."). Although plaintiffs prefer a different policy, Section 1115 plainly authorizes the Secretary to waive compliance with the eligibility requirements for a demonstration project that he has determined is likely to assist in promoting the objectives of Medicaid.

B. The community-engagement requirement furthers Medicaid's core objective of furnishing medical assistance because it is designed to help able-bodied adults transition to financial independence, which enhances the fiscal sustainability of the state Medicaid program.

Because Arkansas voluntarily chose to participate in the ACA's expansion of adult eligibility, it began providing Medicaid coverage to adults at or below 133% of the federal poverty line who were otherwise ineligible for Medicaid. Through an amendment to the preexisting demonstration project Arkansas Works, the State is now testing innovative ways of promoting the employment and employability of these adults and thus making it more likely that they might transition to other forms of health coverage. To that end, the demonstration project makes Medicaid eligibility contingent on performing and reporting 80 hours per month of community-engagement activities. This requirement is tailored to enable participants to succeed: it applies only to adults aged 19 to 49, and exempts categories of individuals who would be unlikely to be able to satisfy the requirement, including the medically frail. And while plaintiffs call it a "work requirement," that is not what it is. In reality, the

requirement covers a wide array of activities that include not only employment but also education, job-skills training, job-search activities, and community service. If successful, the community-engagement requirement will help able-bodied adults transition from Medicaid to financial independence and potentially to other forms of health coverage, including the subsidized coverage that is available through the Exchanges. The requirement thus will enhance the fiscal sustainability of Arkansas's Medicaid program and preserve scarce resources for others in need.

Plaintiffs disagree, but their challenge to the approval of the community-engagement requirement rests on multiple errors of law. The central premise of their argument is that no Medicaid purpose is ever served by a demonstration project designed to stretch limited state resources by helping able-bodied adults transition out of Medicaid. They flatly deny that "fiscal sustainability is an affirmative goal of the Medicaid Act." Pls.' Reply 17.

Plaintiffs are incorrect. Decisions of both the Supreme Court and the D.C. Circuit recognize that Medicaid eligibility is fluid, and that the long-term objectives of the program are served by reducing the need for borderline populations to receive Medicaid. The state Medicaid programs at issue in *PhRMA v. Thompson*, 362 F.3d 817 (D.C. Cir. 2004), and *PhRMA v. Walsh*, 538 U.S. 644 (2003), imposed burdens on Medicaid recipients (prior authorization for certain drugs) in order to induce drug manufacturers to provide benefits to persons who were not Medicaid-eligible (reduced drug prices). The plaintiffs there argued that those provisions were not "in the best interests of Medicaid recipients" because they burdened Medicaid recipients in order to benefit others. *Thompson*, 362 F.3d at 824 (quoting 42 U.S.C. § 1396a(a)(19)). The D.C. Circuit disagreed, accepting the Secretary's conclusion that such provisions "will further the goals and objectives of the Medicaid program." *Id.* at 825 (quoting a September 2002 HHS letter to State Medicaid Directors). "Specifically, the Secretary concluded that 'by making prescription drugs accessible to [borderline] populations,' it is 'reasonable to conclude that these populations . . . will maintain or improve their health status and be less likely

to become Medicaid eligible.'" *Id.* (quoting the approval letter). "Conversely, in the Secretary's view, the failure to implement" the provision for these populations could "lead to a decline in their health status and resources that will result in Medicaid eligibility or increased Medicaid expenses." *Id.* (quoting the approval letter). Such "[i]ncreased Medicaid enrollments and expenditures for newly qualified Medicaid recipients will strain already scarce Medicaid resources in a time of State budgetary shortfalls." *Id.* (quoting the approval letter).

The D.C. Circuit held that "[t]he Secretary's conclusion that a prior authorization program that serves Medicaid goals in this way can be consistent with Medicaid recipients' best interests, as required by section 1396a(a)(19), is reasonable on its face." *Id.* The court explained that "[i]f the prior authorization program prevents borderline populations in Non–Medicaid programs from being displaced into a state's Medicaid program, more resources will be available for existing Medicaid beneficiaries." *Id.* The court also noted that "[s]ix Justices in *Walsh* acknowledged that such an effect can be in the best interests of Medicaid beneficiaries." *Id.* (describing the plurality and concurring opinions in *Walsh*). More generally, *Walsh* reaffirmed the point that the Supreme Court had recognized decades earlier in *N.Y. State Dept. of Soc. Servs. v. Dublino*, 413 U.S. 405 (1973): the objectives of a welfare program are served by provisions that "attempt to promote self-reliance and civic responsibility, to assure that limited state welfare funds be spent on behalf of those genuinely incapacitated and most in need." *Walsh*, 538 U.S. at 666-67 (discussing *Dublino*). Unlike plaintiffs here, the Supreme Court saw nothing nefarious in provisions that "help individuals and families rise out of poverty and attain independence." Pls.' Reply 2 (quoting AR 74).

Plaintiffs never grapple with the reasoning of *Thompson* and *Walsh*, both of which foreclose their assertion that "fiscal sustainability" is not "an affirmative goal of the Medicaid Act." Pls.' Reply 17. Plaintiffs note that *Thompson* and *Walsh* did not involve Section 1115 projects, *see id.*, but ignore the reality that the reasoning of those decisions applies equally to the Section 1115 projects here. In

Thompson, for example, the D.C. Circuit upheld that Secretary's conclusion that the challenged provision would "further the goals and objectives of the Medicaid program" by preventing borderline populations from becoming Medicaid eligible, and thus avoiding a strain on scarce state Medicaid resources. 362 F.3d at 825. And the language *Thompson* quoted parallels the language of Section 1115, which authorizes the Secretary to approve a demonstration project that, "in the judgment of the Secretary, is likely to assist in promoting the objectives" of Medicaid. 42 U.S.C. § 1315(a). Plaintiffs' supposed distinction of *Thompson* and *Walsh*—that as a factual matter neither involved demonstration projects—is thus a distinction that makes no difference.[2] And their assertion that no deference is owed to the Secretary's understanding of the Medicaid statute's objectives, *see* Pls.' Reply 5–7, is foreclosed by *Thompson*'s contrary holding, *see* 362 F.3d at 822, 825.

The Secretary's consideration of fiscal sustainability as an objective of Medicaid is also properly viewed in the context of Arkansas's prerogative to end the adult eligibility expansion entirely. As of January 1, 2019, more than 234,000 adults received Medicaid coverage through Arkansas Works. Although Congress intended to make coverage of this adult expansion group mandatory when it enacted the ACA, the Supreme Court held in *NFIB* that Congress could not condition coverage of the adult expansion population on the State's preexisting Medicaid funding. The Supreme Court thus ruled that the Secretary "cannot . . . withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion." *NFIB v. Sebelius*, 567 U.S. 519, 585 (2012). In accordance with

[2] Indeed, the federal government's amicus brief in *Walsh* relied in part on HHS's prior approval of comparable demonstration projects in many States. *See, e.g.*, Brief for the United States, *PhRMA v. Concannon*, No. 01-188, 2002 WL 31156279, at *27 (Sept. 20, 2002) (explaining that HHS had approved a Massachusetts demonstration project that provided benefits to non-Medicaid populations, because "[t]he cost reductions [under Medicaid] would be realized from a decrease in premature reliance on the Medicaid program due to avoidable deterioration in health conditions, reductions in utilization of community or institutional longterm care services, and delays in individual spend-downs into the Medicaid program") (quoting Letter from Wendy E. Warring, Comm'r Mass. Exec. Office of Health & Human Servs., to Melissa Harris, CMS (May 1, 2002)).

that holding, CMS assured States in 2012 that they would have "flexibility to start *or stop* the expansion." Centers for Medicare & Medicaid Services (CMS), *Frequently Asked Questions on Exchanges, Market Reforms, and Medicaid* (2012 CMS Guidance) 11 (2012) (emphasis added);[3] *see also id.* at 12 ("A state may choose whether and when to expand, and, if a state covers the expansion group, it may later decide to drop the coverage."); Letter of Aug. 31, 2012 from CMS Administrator Cindy Mann to Arkansas Governor Mike Beebe, ECF No. 37-4 (same).

Plaintiffs' reply does not address the reasoning of *NFIB*, nor does it address (or even cite) the explicit assurances CMS gave to the States in 2012 to encourage them to expand their programs to cover the new adult population. Plaintiffs simply assert that "once a state, like Arkansas, extends Medicaid coverage to include the expansion population, that state can no more choose to eliminate coverage for that group of Medicaid recipients than it could for pregnant women, individuals with disabilities, or any other mandatory-coverage population." Pls.' Reply 19–20. But to support that remarkable assertion, they note only that "the expansion population remains listed in the statute as a mandatory-coverage population to this day." Pls.' Reply 19 (citing 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII)). The cited provision is, of course, the same adult eligibility expansion provision at issue in *NFIB*—*i.e.*, the very provision the Supreme Court held could *not* be a basis for terminating a State's preexisting Medicaid funding. It thus makes no difference whether Arkansas is "'actually at risk' of financial collapse," nor does Arkansas need to show that ending coverage of the adult expansion population "would be the best remedy for any budget woes." Pls.' Reply 18 (quoting *Stewart*, 313 F. Supp. 3d at 271). *NFIB* and the assurances CMS provided to Arkansas before the state expanded Medicaid make clear that Arkansas has the authority to eliminate coverage of the new adult group without putting the entirety of its Medicaid funding at risk.

[3] Available at https://www.cms.gov/CCIIO/Resources/Files/Downloads/exchanges-faqs-12-10-2012.pdf.

And because the new adult population is receiving coverage only because Arkansas has voluntarily chosen to provide it, that population is similar to the adult population receiving coverage under the pre-ACA Oregon demonstration project in *Spry v. Thompson*, 487 F.3d 1272 (9th Cir. 2007). There, the Ninth Circuit explained that people in a demonstration-only population were not "made worse off" by the challenged requirements because, "without the demonstration project, they would not be eligible for Medicaid at all." *Id.* at 1276. The circumstances here are similar, in the following sense. The adults receiving coverage under Arkansas Works are not "made worse off" by the challenged requirements because without Arkansas's voluntary expansion—an expansion it may discontinue if it cannot implement the challenged requirements—those adults "would not be eligible for Medicaid at all." *Id.*

C. The Secretary concluded that the amendments to Arkansas Works are likely to improve beneficiary health, another important goal of the Medicaid program.

As the Secretary explained in his approval of the Arkansas Works amendments, the project is also likely to improve the health of Arkansas Medicaid recipients. AR 3–5. The Secretary emphasized the validity of this goal in his November 20 approval of Kentucky HEALTH, sensibly noting that furnishing medical assistance under Medicaid to individuals who cannot afford necessary medical services has "little intrinsic value" if that assistance does not "advance[e] the health and wellness of the individual[s] receiving" it. ECF No. 37-3 at 2. Plaintiffs argue that "[n]othing in the Medicaid Act . . . suggests that the Secretary can approve a program that undermines the expressly stated goals identified in [42 U.S.C.] Section 1396-1 . . . so long as that program furthers the unstated objective of 'improving health outcomes,'" Pls.' Reply 9, but that is not what the Secretary did. Healthier people tend to need less medical care and may find employment that can lift them out of poverty and off of Medicaid altogether. ECF No. 37-3 at 2. By approving a demonstration that improves beneficiary health, the Secretary allowed Arkansas to implement changes that can ultimately improve the fiscal sustainability of a State's Medicaid program and enable Arkansas to concentrate on furnishing more

and higher-quality medical assistance to its most vulnerable residents. *See id.* Thus, by focusing on beneficiary health, Arkansas Works plainly *promotes* the goal of furnishing medical assistance in accordance with Section 1396-1.

D. The community-engagement requirement is neither a "simple benefits cut" nor a "work requirement."

Plaintiffs also mischaracterize the terms of the community-engagement requirement. Plaintiffs repeatedly liken the community-engagement requirement to the demonstration project that was at issue in *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994), but the two projects have nothing relevant in common. The California demonstration project in *Beno* imposed an across-the-board reduction in AFDC benefits, with the aim of giving recipients an incentive to look for work. *See Beno*, 30 F.3d at 1060–61. By its terms, the project was a benefits cut: California simply reduced AFDC spending to 11% below 1992 levels. *See id.* at 1062–63. In that context, the Ninth Circuit declared that a "simple benefits cut, which might save money, but has no research or experimental goal," does not satisfy the requirement that a demonstration project "test out new ideas and ways of dealing with the problems of public welfare recipients." *Id.* at 1069 (quoting S. Rep. No. 87-1589, at 1961).

That reasoning has no bearing on the community-engagement requirement here. First, while the demonstration project in *Beno* imposed an across-the-board reduction in state spending on AFDC, the community-engagement requirement does not, by its terms, cut benefits for anyone. Everyone who complies with the community-engagement requirement will continue to receive Medicaid benefits. Second, while the California demonstration project purported to establish a "work incentive" for people who were unable to work—such as persons with disabilities and children—the community-engagement requirement applies only to adults aged 18–49 who are not eligible for Medicaid on the basis of disability, and it exempts (among others) those who are medically frail. Furthermore, although plaintiffs label it a "work requirement," the adults who are subject to the requirement can fulfill it through a wide array of activities other than working. And third, there is no doubt that Arkansas'

community-engagement requirement has experimental value, which Arkansas will evaluate on a statewide basis. *Beno*'s holding is thus inapplicable to the community-engagement requirement here, which is, indeed, considerably more flexible than the state work requirements upheld by the Supreme Court in *Dublino* and the Second Circuit in *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973).

E. Early data on coverage effects are not a basis to override the Secretary's approval.

Plaintiffs emphasize that during a four-month period, approximately 16,900 non-exempt beneficiaries of Arkansas Works lost coverage as a result of their failure to comply with the community-engagement requirement for three consecutive months. *See* Pls.' Reply 16, 29. But as of January 1, 2019, every beneficiary who lost coverage due to the community-engagement requirement became eligible to re-apply for Arkansas Medicaid, and to be considered as having zero months of noncompliance with the community-engagement requirement. AR 31. What the Secretary recognized, but plaintiffs ignore, is that any loss of coverage stemming from noncompliance with the community-engagement requirement can be only temporary—lasting until the start of the next calendar year. AR 5. By limiting coverage effects to a temporary period, the Secretary carefully balanced the need to create an incentive for community-engagement against ensuring continued coverage.

Moreover, there are reasons to believe that the effects on coverage going forward will be significantly reduced. As beneficiaries become more familiar with their community-engagement obligations, they may well complete and timely report their hours in greater numbers. Indeed, plaintiffs attributed a significant portion of the coverage losses to difficulties that arose out of the online reporting system, *see* Pls.' Mem. 19–20, and those issues have been addressed. Even before this suit was filed, Arkansas began allowing beneficiaries to report compliance with, or exemptions from, the community-engagement requirement by phone to registered reporters[4] or in person at county offices

[4] Many of these registered reporters are employed by insurance carriers, which have strong incentives to assist their enrollees in reporting community engagement hours, because state premium payments

of the state Department of Human Services. *See* Decl. of Franklin, M. at ¶¶ 11–15, ECF No. 39-2. As of December 19, 2018, Arkansas expanded the reporting options to allow beneficiaries to report their hours by phone directly to a dedicated helpline between 7am and 9pm, seven days a week. *See* Am. Decl. of Franklin, M. ¶ 3, ECF No. 51.[5] And the state has now memorialized its expanded reporting options in its revised Eligibility and Enrollment Monitoring Plan, *see* Letter from Andrea J. Casart to Cindy Gillespie (February 19, 2019), Attachment A at 5, 13, with which the State must comply or else CMS is authorized to withhold federal funding in the amount of $5,000,000, *see* AR 36.

Thus, the concerns plaintiffs raised about online-only reporting, including that it exceeded the Secretary's authority, Pls.' Reply 39–40, and was a significant contributor to coverage losses, Pls.' Mem. 19–20, have been overtaken by events. Nor do plaintiffs' declarations claim they lack access to a telephone, so plaintiffs have no prospective injury from the reporting options and their challenge to that aspect of the project is moot. Plaintiffs' contention that the Secretary's approval would permit Arkansas to revert to online-only reporting, Pls.' Reply 4, disregards the revised Eligibility and Enrollment Monitoring Plan and the State's potential loss of funds for failing to comply with it, as well as the specific terms of the Secretary's approval, which require the State, to the extent practicable, to "ensure that the availability of Medicaid services will not be diminished under this demonstration for individuals who lack access to the Internet." AR 34. Moreover, any coverage losses should be considered in the broader context explained above: Arkansas retains the option to terminate coverage for the adult expansion population in light of the State's fiscal sustainability concerns. *See* AR 756. And, in all events, the Secretary's approval was lawful in the first instance because 42 U.S.C.

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to the carriers depend on the ongoing enrollment of Medicaid recipients. *See* Decl. of Franklin, M. at ¶ 13, ECF No. 39-2.

[5] *See also* https://humanservices.arkansas.gov/newsroom/details/dhs-expanding-phone-reporting-outreach-for-arkansas-works-enrollees.

§ 1315(a)(2) allows federal Medicaid expenditures notwithstanding a State's failure to meet requirements in 42 U.S.C. § 1396w-3(b).

Accordingly, even assuming the Secretary's determination is reviewable, early-stage data from Arkansas Works provide no basis to override the Secretary's judgment that the community-engagement requirement is, on balance, likely to assist Arkansas in providing medical assistance to its citizens. Plaintiffs may disagree with the Secretary's judgment, but it is *the Secretary's* judgment, not plaintiffs', that is relevant. *See* 42 U.S.C. § 1315(a). What is more, Section 1115 expressly contemplates that a demonstration project may "result in an impact on eligibility." *Id.* § 1315(d)(1). And as our opening brief explained, Arkansas tailored the community-engagement requirement to individuals with the capacity to comply, and incorporated protections that are specifically designed to minimize the risk of unnecessary coverage losses. *See* Defs.' Mem. 24–25. Plaintiffs object that commenters already had these guardrails "in mind" when expressing concerns, Pls.' Reply 27, but that is no reason to doubt that the guardrails could minimize effects on coverage.

II. PLAINTIFFS' STATUTORY AND RECORD-BASED ARGUMENTS FAIL.

A. The Secretary was not obligated to produce a "bottom-line" estimate of coverage losses.

Plaintiffs repeat their argument that to survive APA review, the Secretary was required to produce a "bottom-line" estimate of the number beneficiaries who would lose coverage. Pls.' Reply 26 (quoting *Stewart*, 313 F. Supp. 3d at 262–63). But as explained in the federal defendants' opening brief, it is neither necessary nor practical for the Secretary to determine *ex ante* the exact number of individuals who may gain or lose coverage as a result of a project's features. Defs.' Mem. 21–22. The entire purpose of a *demonstration project* is to test the effect of a temporary change in policy. *See Cal. Welfare Rights Org. v. Richardson*, 348 F. Supp. 491, 498 (N.D. Cal. 1972). It would make little sense to require the Secretary to determine the outcome of the experiment before it has begun. Indeed, several of the research articles considered by the Secretary expressly conclude that *more research is needed* to

establish the very findings that plaintiffs insist are a prerequisite to a Section 1115 determination.[6] Nor is a "quantitative estimate of coverage losses" necessary to determine that the project would likely *promote* coverage. Pls.' Reply 31. As explained, projects like Arkansas Works in fact promote coverage by ensuring the fiscal sustainability of the Medicaid program and enabling States to cover optional populations like the new adult group. *See* section I.B, *supra*. And contrary to plaintiffs' assertion, the fact that some "[n]on-governmental entities" were purportedly "able" to produce estimates does not mean those estimates are accurate or useful, much less required.[7] Pls.' Reply 29, 29 n.18.

Unsurprisingly, plaintiffs do not cite any authority suggesting that such a precise estimate of coverage losses is a necessary precondition to a Section 1115 approval. *Cf. C.K. v. N.J. Dep't of Health & Human Servs.*, 92 F.3d 171, 183 (3d Cir. 1996) ("[T]he Secretary was not required under the APA or section 1315(a) to make findings or to explain her decision to grant [the State's] waiver request."). At any rate, the demonstration here does not even lend itself to a "bottom-line" estimate of the number of people who would lose Medicaid coverage, because a beneficiary may choose not to comply and thus lose coverage for a short period of time, but then reapply for and regain coverage the next

[6] *See, e.g.*, AR 1370 ("To answer [] questions about the purpose, expected outcomes, and practical implementation, and associated costs of work requirements, *additional information is needed*." (emphasis added)); *id.* ("[I]nformation on the effectiveness of current work requirement policies is outdated or insufficient . . . . *More study is needed* to determine whether and how work requirements have the intended effects and produce any negative unintended consequences." (emphasis added)); AR 2044 ("Better understanding of how volunteer work fosters personal well-being would offer a positive theoretical complement to stress theory . . .").

[7] For example, the Urban Institute report plaintiffs cite, *see* Pls.' Reply 29 n.18, did not actually estimate coverage losses; rather, it merely described (at 7) that there were approximately 39,000 nonelderly nondisabled adult enrollees who would be potentially subject to community engagement requirements in 2018 and who were not working at the time of a 2016 survey. The figure does not reflect whether any of those individuals were volunteering, attending school, or engaging in other community engagement activities at the time of the 2016 survey. Nor does it reflect whether any of those individuals have begun community engagement activities, including work, since the implementation of Arkansas Works.

calendar year, or invoke administrative processes leading to reinstatement of coverage later in the same calendar year. Indeed, the only plaintiff who, at the time he signed his affidavit in support of plaintiffs' summary-judgment motion, asserted that he was disenrolled from Medicaid due to noncompliance with the community-engagement requirement, *see* Decl. of Adrian McGonigal ¶¶ 9–13, ECF No. 27-3, has now regained Medicaid coverage, *see* Decl. of Franklin, M. ¶ 28, ECF No. 39-2; Am. Decl. of Franklin, M. ¶ 4(d), ECF No. 51. An estimate of the number of people who will lose coverage—with the unfounded assumption that the loss is permanent—thus gives an inaccurate view of the effects of the demonstration on coverage. And even if it were both feasible and valuable for the Secretary to come up with a relevant figure, there is no suggestion that such a figure would come close to the size of the State's new adult group, which is the proper baseline against which to judge any predicted effects on coverage. *See* section I.B., *supra*.

B. Arkansas Works is an "experimental, pilot, or demonstration project."

In approving Arkansas Works, the Secretary explained that the project was designed to "test" the effects of coupling a community-engagement requirement with a meaningful incentive for compliance, AR 3, as well as "whether eliminating two of the three months of retroactive coverage will encourage beneficiaries to obtain and maintain health coverage, even when they are healthy," AR 5. To these ends, the project would be "assessed through an evaluation designed to measure how the demonstration affects eligibility, and health outcomes over time for persons subject to the demonstration's policies." AR 5. This language leaves no doubt the project has a research and experimental goal, and that the Secretary determined the demonstration was likely to yield useful information in furtherance of that goal. *See also id.* ("CMS will therefore allow Arkansas to test whether the stronger incentive model is more effective in encouraging participation.").

Although plaintiffs concede that the community-engagement requirement is novel in the context of Medicaid, Pls.' Reply 24, they object that the Secretary has previously waived retroactive

eligibility as part of demonstrations in other states. But plaintiffs fail to recognize that Arkansas Works is the first time a state has implemented a waiver of retroactive eligibility *alongside* a community-engagement requirement, so the data to be collected will be both original and useful. And in any event, Section 1115 nowhere states that a demonstration or the data it provides cannot be similar to that of prior experiments. Indeed, even if just confirming the results of a past experiment in another state, the data can still be useful to policymakers. What the statute requires is only that the project be "experimental," a "pilot," or a "demonstration"—not that it be unprecedented or even novel. Arkansas Works plainly satisfies this standard, and the Secretary reasonably determined it to do so.

C. Plaintiffs' other record-based arguments rest on incorrect premises.

Plaintiffs present a series of record-based arguments, none of which are persuasive. They contend that research shows that "similar work and administrative requirements in TANF and SNAP" are counterproductive, and argue that the community-engagement requirement will fail for the same reasons. Pls.' Reply 26 (arguing that "similar work requirements in SNAP and TANF have created significant barriers to accessing those benefits"). But Congress does not share plaintiffs' view of the work requirements in TANF and SNAP. Congress has not repealed those work requirements, which remain part of those programs. *See, e.g.*, 42 U.S.C. § 607 ("Mandatory work requirements"). In fact, Congress has even strengthened the work requirements in TANF by requiring the Secretary and States to improve the verification and oversight of recipients' work participation. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7102(c), 120 Stat. 4, 136 (2006).

Nor are plaintiffs correct that the Secretary insufficiently explained how the waiver of retroactive eligibility would furnish medical assistance. The Secretary approved the waiver to test whether it would "increase continuity of care" and therefore promote coverage "by reducing gaps in coverage when beneficiaries churn on and off Medicaid or sign up for Medicaid only when sick"—a

problem borne out by research.[8] AR 8; *contra* Pls.' Reply 32. The Secretary also is testing whether the waiver will "improve health outcomes" by encouraging beneficiaries to obtain coverage earlier and thus take advantage of primary and preventive health services, which promotes coverage because healthy people consume less health services, freeing up resources to cover additional populations and benefits. AR 8; *see id.* at 5 ("CMS believes it is important for beneficiaries to engage in their personal health care, particularly while they are healthy to prevent illness.").

Plaintiffs cannot dismiss this explanation as "conclusory." Pls.' Reply 30 (quoting *Stewart*, 313 F. Supp. 3d at 265). They may believe that lost retroactive coverage will outweigh coverage gains from earlier sign-ups, a more healthy population, and a more sustainable Medicaid program. But such weighing of costs and benefits is a decision for the Secretary, not plaintiffs, and approving a test to gather more information on the question is well within the Secretary's discretion and expertise. *See Sec. Indus. & Fin. Mkts. Ass'n v. CFTC*, 67 F. Supp. 3d 373, 430 (D.D.C. 2014) (weighing of costs and benefits "epitomize[s] the types of decisions that are most appropriately entrusted to the expertise of an agency").

In regard to community engagement, plaintiffs quibble with the details of the studies relied on by the Secretary, Pls.' Reply 31–34, but are unable to deny the correlation between community engagement and health. Indeed, the record is replete with evidence that employment and volunteering are associated with positive health outcomes:

- "Overall, the beneficial effects of work outweigh the risks of work, and are greater than the harmful effects of long-term unemployment or prolonged sickness absence." AR 1760.

- "A good-paying job makes it easier for workers to live in healthier neighborhoods, provide quality education for their children, secure child care services, and buy more nutritious

[8] *See, e.g.*, *Profile of the Medicaid Expansion Population* (Jan. 2018), at 3 https://www.antheminc.com/cs/groups/wellpoint/documents/wlp_assets/d19n/mzmw/~edisp/pw_g330411.pdf ("Across plans and states, the expansion population experienced high disenrollment rates, indicating that, as in other Medicaid eligibility groups, there is substantial churn in this population.").

food—all of which affect health … . Higher earning also translates to a longer lifespan . . . ." AR 1711.

- "[E]mployment significantly reduces the risk of depression … ." AR 1691; *see also* AR 1737 ("volunteering leads to lower rates of depression for individuals 65 and older").

- "Several studies have [] looked specifically at the effects of volunteering on those with chronic or serious illness. These studies have found that when these patients volunteer, they receive benefits beyond what can be achieved through medical care." AR 1741.

- Volunteering improves access to psychological and social resources, which are found to have a positive effect on health; increases physical and cognitive activity; and releases hormones that regulate stress and inflammation. AR 1464.

- "[V]olunteers had a 20 percent lower risk of death than their peers who did not volunteer. The study also found that volunteers had lower levels of depression, increased life satisfaction and enhanced well-being." AR 1684.

The Secretary reasonably relied on this and other evidence in the record supporting the conclusion that work and volunteering promote health, and the Court should uphold that determination. *See Mississippi v. EPA*, 744 F.3d 1334, 1348 (D.C. Cir. 2013). ("[I]t is not [this Court's] job to referee battles among experts; [it] is only to evaluate the rationality of [the agency's] decision.").

Plaintiffs' position, at bottom, is that Arkansas Works will fail, and therefore could not have been lawfully approved. But their arguments misunderstand both the nature of a demonstration project and the standard of review. The APA does not require unanimous support in the administrative record for an agency's decision to be upheld. It requires only a "rational connection between the facts found and the choice made," which, for the reasons explained, is plainly present here. *Kisser v. Cisneros*, 14 F.3d 615, 619 (D.C. Cir. 1994). And while it is true that if experiments like Arkansas Works prove successful, they may prompt Congress to enact similar requirements as part of the Medicaid statute—just as demonstration projects like the one at issue in *Aguayo* informed Congress's decision to make work requirements a permanent part of TANF—even if Arkansas Works does not accomplish its objectives, the findings still provide valuable data that can inform future action by Congress. Section 1115 "experiments are supposed to demonstrate the failings or success of such

programs." *C.K.*, 92 F.3d at 187; *see also Aguayo*, 473 F.2d at 1103 (explaining that the Administrator may set "lower threshold for persuasion" when evaluating experimental project of limited duration). Thus, the mere prospect that the project could fail cannot possibly mean its approval was deficient.

Plaintiffs attempt to avoid these points by urging the Court to take a different approach than the Second and Third Circuits in *Aguayo* and *C.K.*, arguing that those decisions "do not engage in the 'searching' assessment of the record demanded under Supreme Court and D.C. Circuit precedent." Pls.' Reply 25 n.13. But plaintiffs do not cite the "Supreme Court and D.C. Circuit precedent" that ostensibly demands this purported "searching" inquiry. *Id.* Nor do they explain how a "searching" assessment of the record could be appropriate in light of Congress's use of language that, even if it does not commit the issue to the Secretary's discretion entirely, indicates that the utmost deference is due to the Secretary's determination that a proposed demonstration meets the Section 1115 standard. *See* Defs.' Mem. 11–12, 12 n.4; *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 821 (D.C. Cir. 1983) ("[P]redictive judgments about areas that are within the agency's field of discretion and expertise" are entitled to "particularly deferential" treatment.).

D. Plaintiffs' remaining statutory arguments likewise fail.

Plaintiffs maintain their claim that Arkansas Works impermissibly seeks to "transform" Medicaid. Pls.' Reply 37. But in doing so they continue to conflate a statutory amendment with a temporary demonstration project. To be clear, Arkansas Works does not change the Medicaid statute; the statute remains as passed, and modified, by Congress. But Section 1115 of the Social Security Act, of which the Medicaid statute is a part, establishes that the Secretary may exercise his judgment to waive certain provisions of the Medicaid statute in order to ensure federal requirements do not "stand in the way of experimental projects designed to test out new ideas and ways of dealing with the problems of public welfare recipients." S. Rep. No. 87-1589, at 1961. That is precisely what the Secretary did here. Plaintiffs cannot explain how a temporary waiver of certain provisions with respect

to Arkansas's Medicaid program could possibly be the same as "chang[ing] the language of the Medicaid Act." Pls.' Reply 38.

The Court should likewise reject Plaintiffs' strained argument regarding the means by which the Secretary waived the retroactive eligibility requirement. Pls.' Reply 40–41. As an initial matter, plaintiffs state that both the federal defendants and Arkansas "do not challenge Plaintiffs' standing in the main." Pls.' Reply 3. But the federal defendants argued in their opening brief that no plaintiff asserted an injury stemming from the Secretary's approval of a limited waiver of retroactive eligibility. Defs.' Mem. 13 n.6. Plaintiffs have not refuted this argument and continue to lack standing to challenge that aspect of Arkansas Works. *See Bayala v. DHS*, 246 F. Supp. 3d 16, 25 (D.D.C. 2017).

Further, there is no disputing that the Secretary intended to waive two of the three months of retroactive eligibility; that much is plain from his waiver of Section 1396a(a)(34), and from his approval letter, *see* AR 3 ("CMS [] is authorizing authorities for additional features, including . . . the waiver of the requirement to provide new adult beneficiaries with retroactive eligibility."). Acknowledging this does not require the Court to "infer[]" anything. Pls.' Reply 41. Nor is there any dispute that the Secretary in fact waived the one subsection of 1396a that actually sets forth the retroactive eligibility requirement. *See* 1396a(a)(34). What remains is plaintiffs' meritless assertion that the Secretary also needed to waive a provision that *does not even mention retroactive eligibility*, because of a definitional section in another part of the statute. The Court should reject this overly technical interpretation as contrary to common sense and the Secretary's clearly stated intent. At a minimum, the Secretary's interpretation of the statute is reasonable, and thus entitled to *Chevron* deference.

III. ANY REMAND SHOULD BE WITHOUT VACATUR.

Even were this Court to conclude that the Secretary's approval requires additional action or explanation, the two factors set forth in *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993), counsel that any remand should be without vacatur. With regard to the

first factor, the "seriousness of the order's deficiencies," *id.*, the Secretary explained in the new approval of Kentucky HEALTH why the demonstration project there is likely to further the Medicaid program's objective of furnishing medical assistance to needy individuals. That same reasoning applies to the amendments to Arkansas Works. *See* section I.B, *supra*.

The second *Allied-Signal* factor, the "disruptive consequences of an interim change," 988 F.2d 150–51, weighs heavily in defendants' favor. Arkansas is more than eight months into a three-year experiment testing new requirements aimed at ensuring the sustainability of the Medicaid program and improving beneficiary health and financial independence. The state is currently collecting data from that project, and unwinding it at this stage would utterly frustrate the State's data collection efforts. Plaintiffs contend that "it is not clear what data collection Arkansas is conducting or even whether it already has begun." Pls.' Reply 43. But the letter from CMS on which they rely nowhere states that Arkansas is not collecting data, and instead merely recommends certain changes in how Arkansas collects and analyzes data—a routine request during the course of a demonstration.[9] In any event, plaintiffs' attempt to sow doubt about whether the State is collecting information is belied by the requirements of the STCs, AR 253–54, and plaintiffs' own reliance on the data Arkansas has gathered on coverage, *see* section I.E, *supra*.

Nor is it the case that Arkansas could easily abandon the project. The State has already assembled significant infrastructure to support the reporting of community-engagement hours, and insurance companies have likewise engaged registered reporters to assist with the process. *See* Decl. of Franklin, M. ¶¶ 11–16, ECF No. 39-2. Plaintiffs dismiss the effect of an interim change on

[9] *See* Letter from Andrea J. Casart, Dir., CMS Div. of Medicaid Expansion Demonstrations, to Dawn Stehle, Medicaid Dir., Ark. Dep't of Human Servs. (Nov. 1, 2018), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ar/Health-Care-Independence-Program-Private-Option/ar-works-feedback-eval-dsgn-20181101.pdf

beneficiaries, Pls.' Reply Mem. 42–43, but in light of the State's extensive education and outreach efforts, *see* Decl. of Franklin, M. ¶¶ 17–21, ECF No. 39-2; Am. Decl. of Franklin, M. ¶ 5, ECF No. 51, such a change would create significant confusion.

Plaintiffs are also wrong to suggest that any disruption would be outweighed by the effects on coverage from permitting the demonstration to proceed. Pls.' Reply 43–44. Indeed, plaintiffs' analysis of coverage has the issue precisely backwards. As already explained, every beneficiary that has lost coverage due to the program's requirements is currently able to reapply and regain coverage if eligible. The far greater threat to coverage would be if the program were vacated and as a result the State chose no longer to cover the ACA expansion population, a choice Arkansas is entitled to make. Especially considering plaintiffs' delay in bringing this lawsuit, vacatur is not an appropriate remedy.

In all events, at a minimum any relief should be limited to the plaintiffs before the Court. Although they may be willing to take the risk that Arkansas will end the optional adult expansion, other members of that population may be loath to take that risk. *See Gill v. Whitford*, 138 S. Ct. 1916, 1933, 1934 (2018) ("A plaintiff's remedy must be tailored to redress the plaintiff's particular injury.").

IV. PLAINTIFFS' CHALLENGE TO CMS'S LETTER TO STATE MEDICAID DIRECTORS IS NON-JUSTICIABLE AND MERITLESS.

As explained earlier, the State Medicaid letter challenged by plaintiffs had no legal effect; the Secretary's approval of Arkansas Works did not turn on the letter; and plaintiffs cannot show that the letter caused their asserted injuries. Thus, they cannot challenge the letter even in the context of a challenge to Arkansas Works.

The letter is also not final agency action. Far from creating a binding rule, the letter announces CMS's support for demonstration projects with community-engagement components, stating that "a spectrum of additional work incentives, including those discussed in this letter," could further the aims of Medicaid, that "applications will be reviewed on a case by case basis," and that CMS "will evaluate

each demonstration project application on its own merits." AR 76–77. This is a textbook example of non-final guidance in the form of "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666 (D.C. Cir. 1978) (internal citation omitted). Nor does the letter bind the agency. Nowhere does the letter state that certain projects will certainly be approved, and CMS remains free to approve or reject demonstration projects that propose work requirements on a case-by-case basis. *See* AR 74–83. *See also Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014) (no binding effect where "States and permit applicants may ignore the Final Guidance without suffering any legal penalties or disabilities, and permit applicants ultimately may be able to obtain permits even if they do not meet the recommendations" in the guidance).

Finally, even if the letter could be deemed final agency action, it easily satisfies review on the merits. As a general statement of policy exempt from notice-and-comment procedures, the letter merely (1) "announc[ed] a new policy" to "support state efforts to test incentives that make participating in … community engagement a requirement for continued Medicaid eligibility or coverage for certain adult Medicaid beneficiaries in demonstration projects" and (2) "describe[d] considerations for states that may be interested in pursuing demonstration projects" that seek for "Medicaid beneficiaries to participate in work and community engagement activities." AR 74. *See Nat'l Min. Ass'n*, 758 F.3d at 251. Moreover, the letter offered a "reasoned explanation" for the agency's policy shift towards supporting Medicaid demonstration projects with community-engagement components, thus plainly surviving arbitrary-and-capricious review. *See FCC v. Fox Television Stations*, 556 U.S. 502, 515–16 (2009). The letter describes the agency's policy view that it would be better to support demonstration projects that will help it determine whether community-engagement programs lead to better health outcomes, and provides reasoning to support this conclusion, including by relying on multiple studies that demonstrate a correlation between productive work and community

engagement and positive health outcomes. *See* AR 74; *N. Am.'s Bldg. Trades Unions v. OSHA*, 878 F.3d 271, 303 (D.C. Cir. 2017). The agency's "reevaluation" of its policy, as supported by these scientific studies, "is well within [its] discretion." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032,1038 (D.C. Cir. 2012).

V. THE TAKE CARE CLAUSE PROVIDES NO BASIS FOR RELIEF.

Nothing in the Take Care Clause authorizes a court to manage how federal officers implement the law or carry out Presidential directives, if those officers' actions are otherwise lawful, as they are here for all the reasons discussed above. The Clause applies to the President alone, and not to anyone else. Both *Printz v. United States*, 521 U.S. 898, 922 (1997), and *Util. Air*, 134 S. Ct. at 2446, stand for the unremarkable proposition that the President at times discharges his Take Care Clause duties by instructing his subordinates as to how they should perform their statutory responsibilities. Neither case, however, supports the notion that the Clause creates a cause of action against federal officers, or that such a cause of action would add anything to the remedies that plaintiffs already have against federal officers.

CONCLUSION

For the foregoing reasons, the Court should dismiss plaintiffs' Complaint, or, in the alternative, grant summary judgment to the federal defendants and deny plaintiffs' motion.

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