[NOT SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES GRESHAM, et al. **PLAINTIFFS-APPELLEES**

v. **Nos. 19-5094 & 19-5096**

ALEX M AZAR, et al. **DEFENDANTS-APPELLANTS**

STATE OF ARKANSAS **INTERVENOR-DEFENDANT-APPELLANT**

BRIEF FOR THE STATE OF ARKANSAS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The plaintiffs-appellees in *Gresham* are Charles Gresham, Cesar Ardon, Marisol Ardon, Adrian McGonigal, Veronica Watson, Treda Robinson, Anna Book, Russell Cook, and Jamie Deyo. The plaintiffs-appellees in *Stewart* are Ronnie Maurice Stewart, Shawna Nicole McComas, David Roode, Sheila Marlene Penney, Hunter Malone, Sarah Martin, Althea Humber, Melissa Spears-Lojek, Linda Keith, Kimberly Kobersmith, Debra Wittig, Randall Yates, Rodney Lee, Teri Blanton, Robin Ritter, and Diika Nehi Segovia.

The federal defendants-appellants are Alex M. Azar II, in his official capacity as Secretary of Health and Human Services; Seema Verma, in her official capacity as Administrator of the Centers for Medicare & Medicaid Services; the United States Department of Health and Human Services; and the Centers for Medicare & Medicaid Services.

The State of Arkansas is intervenor-defendant-appellant.

The following organizations participated as amici: Deans, Chairs and Scholars; and National Alliance on Mental Illness.

B. Rulings Under Review

The rulings under review are the opinion and order entered on March 27, 2019 (Dkt. Nos. 57, 58); the order entering judgment pursuant to Rule 54(b) on

April 4, 2019 (Dkt. No. 60); and all prior orders and decisions that merge into those. The rulings were issued by the Honorable James E. Boasberg in Case No. 1:18-cv-1900 (D.D.C.). The opinion is reported at 363 F. Supp. 3d 165 (D.D.C. 2019).

C. Related Cases

These cases were not previously before this Court. Substantially the same issues are presented in *Stewart v. Azar*, 19-5095 & 19-5097, and *Philbrick v. Azar*, No. 1:19-cv-773 (D.D.C.) (Boasberg, J.).

/s/ Nicholas J. Bronni
Nicholas J. Bronni

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GLOSSARY

AFDC	Aid to Families with Dependent Children
TANF	Temporary Assistance for Needy Families

INTRODUCTION

These consolidated cases are ultimately about whether Medicaid exists to promote healthy outcomes or merely to provide coverage. Correctly recognizing that health was "the ultimate objective" of a government healthcare program, AR 2; JA__, the Secretary of Health and Human Services approved the demonstration programs at issue here. Arkansas's program expands coverage beyond traditional Medicaid beneficiaries and, in exchange for that coverage, requires new able-bodies beneficiaries to work or participate in volunteer activities. Those activities, as the Secretary correctly recognized, would promote healthier outcomes and encourage financial independence.

The district court disagreed and vacated the Secretary's approval of the demonstration programs at issue. In particular, the district court rejected the Secretary's reasoned conclusion that health was Medicaid's ultimate objective and instead declared that "ensuring Medicaid coverage for the needy is" itself Medicaid's "key objective." *Gresham*, 363 F. Supp. 3d at 180; *see also Stewart II*, 366 F. Supp. 3d at 145 ("health is not a freestanding objective of the statute"). Thus, put differently, in the district court's view, maximizing enrollment—not health—is Medicaid's real aim.

That conclusion defies commonsense, statutory text, and precedent interpreting similar provisions of the Social Security Act. Indeed, contrary to the

district court's assertions, the record unambiguously establishes that the Secretary properly considered the objectives underlying the Medicaid program and the administrative record before approving the demonstration programs at issue. Therefore, reversal is required.

STATEMENT OF JURISDICTION

Plaintiffs-Appellees invoked the district court's jurisdiction under 28 U.S.C. 1331. The district court entered final judgment on Count VIII of the Plaintiffs'-Appellees' Amended Complaint under Federal Rule of Civil Procedure 54(b) on April 4, 2019. Defendants-Appellants filed notices of appeal on April 10 and 11, 2019. This Court has appellate jurisdiction under 28 U.S.C. 1291.

ISSUES PRESENTED[1]

1. Whether the Secretary reasonably interpreted the "objectives" of Medicaid under Section 1115 of the Social Security Act, 42 U.S.C. 1315.

2. Whether the Secretary acted arbitrarily and capriciously in predicting that the Arkansas Works amendment would likely assist in promoting the objectives of Medicaid.

PERTINENT STATUTES AND REGULATIONS

Pertinent provisions have been reproduced in the federal government's addendum.

[1] Arkansas incorporates by reference the federal government's argument about the overbreadth of the district court's relief.

STATEMENT OF THE CASE

A. Statutory Background

In 1965, Congress enacted Medicaid as a new subchapter of the Social Security Act. *See* Pub L. No. 89-97, 79 Stat. 286 (1965). A cooperative federalism program, Medicaid originally afforded federal funding to states to assist "families with dependent children and . . . aged, blind, or disabled individuals, whose income and resources [we]re insufficient to meet the costs of necessary medical services," in obtaining medical care. 42 U.S.C. 1396-1. Every state in the country participates in Medicaid. *See NFIB v. Sebelius*, 567 U.S. 519, 542 (2012).

Medicaid expanded over the subsequent decades, *see Stewart I.*, 313 F. Supp. 3d at 270, but never so dramatically as in 2010, when Congress, as part of the Affordable Care Act, enacted the Medicaid expansion. The Medicaid expansion "require[d] state [Medicaid] programs to provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level" and denied states Medicaid funds if they did not amend their programs to cover that new population. *NFIB*, 567 U.S. at 542. The Supreme Court, declaring the expansion "a new health care program," *id.* at 584, rather than a "mere[] . . . modification of the existing" one, *id.* at 582-83, held that that condition on participation in traditional Medicaid was unconstitutionally coercive and rendered participation in the expansion voluntary. *See id.* at 585-86.

Where a state chooses to participate in the Medicaid expansion—or indeed in Medicaid itself—it generally must submit a plan for the Secretary of Health and Human Services' approval, which the Secretary may only approve if it satisfies a vast array of substantive requirements for state Medicaid plans codified in 42 U.S.C. 1396a(a). *See* 42 U.S.C. 1396a(b).

With respect to the expansion, many states have sought to experiment with methods of providing coverage to the expansion population that depart, in one or another respect, from the detailed requirements applicable to permanent plan approvals. Congress gave the Secretary authority to permit such experimentation in Section 1115 of the Social Security Act. *See* 42 U.S.C. 1315. That provision applies to a variety of Social Security Act programs, including Medicaid. It provides that when a state proposes an "experimental, pilot, or demonstration project . . . the Secretary may waive compliance with any of the requirements of . . . [42 U.S.C.] 1396a," or the central provisions of the other programs to which Section 1115 applies, so long as the project, "in the judgment of the Secretary, is likely to assist in promoting the objectives" of the relevant program. 42 U.S.C. 1315(a), (a)(1).

B. Arkansas Works

In September 2013, Arkansas became the first state in the country to receive approval for a Section 1115 demonstration waiver to provide coverage to the

Medicaid expansion population through a private-option plan. Instead of providing benefits on a traditional fee-for-service model, enrollees are, with few exceptions, enrolled into private insurance plans, with the state paying the premiums on behalf of enrollees. This public-private partnership has been a great success.

Continuing Arkansas's track record of innovation, in 2016 the Arkansas proposed and the Secretary approved the first Arkansas Works Medicaid demonstration project in 2016. The program sought to increase community engagement among Medicaid expansion enrollees, particularly by incentivizing enrollees to seek employment. Dkt. No. 39-2 ¶ 4; JA__. In January 2017, Arkansas implemented a program to refer all individuals enrolled in Arkansas Works to the Arkansas Department of Workforce Services, allowing enrollees to voluntarily seek assistance with job training and job placement. Of enrollees who utilized the services, 23 percent became employed. *Id*. ¶ 5; JA__. But far fewer enrollees made use of the program than Arkansas had hoped. By October 2017, only 4.7 percent of enrollees acted upon the referral and used the offered services. *Id*. Thus, it became clear that a stronger incentive model was required.

In 2017, Arkansas thus submitted another demonstration waiver proposal to "increase the sustainability of the Arkansas Works program," "test innovative approaches to promoting personal responsibility and work," "encourag[e] movement up the economic ladder, and facilitat[e] transitions from Arkansas

Works to employer-sponsored insurance and Marketplace coverage." AR 2057; JA__. In order to incentivize participation in work and community-engagement activities, Arkansas submitted an amendment to the Arkansas Works demonstration project requiring certain able-bodied adults—without dependents—to engage in, and report, 80 hours of qualifying activities each month.

Qualifying activities include work, job seeking, skills training, education, and volunteering and community service. If enrollees have income that is consistent with working 80 hours per month at minimum wage, they are deemed to satisfy the requirement even if they actually work fewer than 80 hours per month. AR 20 n.2 and accompanying text; JA__. Thus, for example, a beneficiary who works only forty hours a month and is paid twice the hourly minimum wage satisfies the requirement through her work activities alone. This requirement applies only to able-bodied adults without dependents, and specifically excludes individuals for whom it would be difficult to comply, including medically frail individuals, women who are pregnant or recently pregnant, and full-time students, to name but a few categories. AR 28; JA__.

The Secretary approved Arkansas's proposal, concluding it was likely to assist in promoting the objectives of Medicaid. Specifically, he noted that the community-engagement requirement "is designed to encourage beneficiaries to obtain and maintain employment or undertake other . . . activities that research has

shown to be correlated with improved health and wellness." AR 4; JA__. Those benefits are, of course, contingent on beneficiaries complying with the requirement.

The Secretary acknowledged Arkansas's experience that "referrals alone, without any further incentive, may not be sufficient to encourage the Arkansas Works population to participate in community engagement activities." AR 4-5; JA__-__. He believed it important that "state Medicaid programs . . . be able to design and test incentives for beneficiary compliance." AR 4; JA__. In this spirit, the Secretary approved Arkansas's plan to "encourage compliance by making it a condition of continued coverage." *Id.* This would "allow Arkansas to test whether the stronger incentive model is more effective in encouraging participation." AR 5; JA__. The Secretary believed it would be a success and predicted that "the community engagement requirements [would] create appropriate incentives for beneficiaries to gain employment." AR 6; JA__.

The Secretary therefore approved Arkansas's plan to "require all Arkansas Works beneficiaries ages 19 through 49, with certain exceptions, to participate in and timely document and report 80 hours per month of community engagement activities, such as employment, education, job skills training, or community service, as a condition of continued Medicaid eligibility." AR 2; JA__. The

Arkansas Works amendment, including its community-engagement requirement, fully went into effect in June 2018 and was approved through December 31, 2021.

C. Procedural History

The lawsuit challenging Arkansas's demonstration waiver came on the heels of the district court's vacatur of a similar Kentucky program approved by the Secretary. *Stewart v. Azar*, 313 F. Supp. 3d 237 (D.D.C. 2018) (*Stewart I*). The approval of that demonstration project was challenged before it went into effect, and the district court vacated the Secretary's approval of Kentucky's program on the ground that the Secretary did not adequately consider whether the program "would in fact help the state furnish medical assistance to its citizens, a central objective of Medicaid." *Id*. at 243. Further, the district court expressed skepticism that promoting beneficiary health and wellness is even an objective of Medicaid at all. *See id.* at 267. The district court remanded the matter to the agency for further consideration.

The district court's decision in *Stewart I* prompted the challenge to Arkansas's program, which had rolled out months earlier. *Gresham v. Azar*, 363 F. Supp. 3d 165 (D.D.C. 2019). The plaintiffs' challenge generally relied on the district court's *Stewart I* reasoning and sought vacatur on the same grounds.

Despite the fact that Arkansas's program had been up and running for ten months, on March 27, 2019, the district court vacated and remanded both

Arkansas's and Kentucky's demonstration waiver approval and re-approval, respectively. *See Stewart v. Azar*, 366 F. Supp. 3d 125 (D.D.C. 2019) (*Stewart II*). The district court viewed the challenge to Arkansas's program to be a mere formality given its previous consideration of Kentucky's program, concluding its "job" was "easy" on the reasoning of its prior opinion. *Gresham*, 363 F. Supp. 3d at 169.

Under Section 1115 of the Medicaid Act, the Secretary is tasked with determining whether a proposed demonstration project "is likely to assist in promoting the objectives" of Medicaid. 42 U.S.C. 1315(a). The district court reiterated its view from *Stewart I* that the "objectives" of Medicaid are located in Section 1901 of the Act and that one of the "central objectives" of Medicaid is "to furnish medical assistance," which the district court viewed as paying for medical coverage. *Gresham*, 363 F. Supp. 3d at 169. In rejecting Kentucky's earlier approval, the district court had previously concluded that Secretary had "entirely failed to consider" this objective, and given what the district court viewed to be key similarities with the approval of Arkansas's program, the district court reached the same conclusion here. Because the Secretary, in the district court's view, did not "consider whether" Arkansas Works "would be likely to cause recipients to lose coverage and whether it would cause others to gain coverage[,]" *id.* at 177, it believed that Arkansas's approval suffered the same defect.

In hastily reaching this conclusion, the district court ignored key differences between the approvals. Most importantly, the district court concluded that the Kentucky approval was insufficient because it did not adequately address Kentucky's estimate that its program would, as the district court understood that estimate, result in the loss of coverage for 95,000 recipients. *Id.* at 178. Arkansas pointed out that neither it—nor any commenters—provided the Secretary with any numerical estimate regarding the program's potential impact on coverage. But despite referencing Kentucky's estimate no less than a dozen times in its opinion in *Stewart I*, the district court found the lack of numerical estimate here made no difference.

Instead, the district court faulted the Secretary for failing to adequately address various comments, suggesting coverage losses would occur as a result of the community-engagement requirement. In so doing, the district court ignored the Secretary's prediction, in response to those very comments that "the community engagement requirements [would] create appropriate incentives for beneficiaries to gain employment." AR 6; JA__. It also ignored the Secretary's acknowledgement of the risk of coverage losses and his prediction "that the overall health benefits to the [a]ffected population through community engagement" incentivized by the community-engagement requirement "outweigh the health-risks with respect to

those who fail to respond and who fail to seek exemption[s]" from the requirement. AR 7; JA__.

Despite the disruptive effects of halting a program that had been up-and-running for almost a year, the district court declined the defendants' invitation to remand without vacatur. *Gresham*, 363 F. Supp. 3d at184-85. Rather, the district court simply vacated the Secretary's approval of the amendment and remanded to the agency for further consideration.

This appeal followed, and this Court subsequently granted expedited briefing. Given the errors below, this Court should reverse.

SUMMARY OF ARGUMENT

The Secretary reasonably concluded that Medicaid is ultimately about making beneficiaries healthy. Based on evidence that work and volunteering activities have health and wellness benefits, the Secretary approved the Arkansas Works amendment and its community-engagement requirement, predicting it would promote beneficiary health and wellness.

The district court disagreed and instead believed that the objective of Medicaid is merely to provide medical coverage, irrespective of any impact on beneficiary health. It thus held that the Secretary was unambiguously foreclosed from approving Medicaid demonstration projects to promote the health and independence of Medicaid beneficiaries. But the Secretary's reasonable interpretation of the objectives of Medicaid is entitled to deference, and the district court's fundamental misinterpretation of the statute should be reversed.

Compounding its error, the district court vacated the Secretary's approval of the Arkansas Works amendment because it believed that the Secretary had failed to consider the amendment's impact on providing medical coverage, largely reiterating its similar vacatur of the Secretary's Kentucky approval. But the district court imposed a higher standard of review than provided by the Medicaid Act, failing to afford the Secretary the significant deference he is due. Further, the district court overlooked key differences in the two approvals that render the

Secretary's approval of the Arkansas Works amendment reasonable even under the district court's approach. The Secretary did consider the amendment's effects on medical coverage and predicted that any coverage loss would be outweighed by the amendment's health benefits. The district court did not find this prediction unreasonable; it simply hand-waved away its existence. The Secretary's approval gave thorough consideration to all aspects of the Arkansas Works amendment, and the district court's decision vacating it should be reversed.

STANDARD OF REVIEW

The district court's summary-judgment orders are reviewed de novo by this Court. *Chenari v. George Washington Univ.*, 847 F.3d 740, 744 (D.C. Cir. 2017).

ARGUMENT

I. The Secretary's interpretation of Medicaid's "objectives" is reasonable.

Section 1115 of the Social Security Act authorizes the Secretary to "waive compliance with any of the requirements of [42 U.S.C. 1396a]," "[i]n the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of [Medicaid]." 42 U.S.C. 1315(a). Applying that provision, the Secretary found that Arkansas's proposed amendment to its existing Section 1115 demonstration project was "likely to promote" multiple "Medicaid objectives," including "improving health and well-being for Medicaid beneficiaries," "strengthen[ing] beneficiary engagement in their personal health care," and "promot[ing] beneficiary independence." AR 2-6; JA_-_, The Secretary therefore waived the relevant requirements of Section 1396a and approved the Arkansas Works amendment.

That conclusion was entirely reasonable and consistent with the Medicaid Act's statutory text. The district court only concluded otherwise because—as it stated in simultaneously vacating Kentucky's approval—it wrongly believed that neither health nor "financial self-sufficiency" are "independent objective[s] of the [Medicaid] Act." *Stewart II*, 366 F. Supp. 3d at 143-45; *Gresham*, 363 F. Supp. 3d at 179 ("express[ing] skepticism" that those objectives are "properly considered . . . objective[s] of the Act"). Indeed, the district court's ultimate conclusion that

Medicaid's "core purpose" is the mere perpetuation of coverage with no specific goal in mind conflicts with commonsense, text, and precedent.

Further, even if the district court were correct that the Secretary failed to consider coverage maximization, that alone would not warrant vacatur. To the contrary, so long as the Secretary reasonably identified at least one Medicaid objective and reasonably predicted a demonstration project would advance that objective—as he did—the Secretary did not act arbitrarily and capriciously and the approval must stand. *See Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999) ("When an agency must balance a number of potentially conflicting objectives . . . judicial review is limited to determining whether the agency's decision reasonably advances at least one of those objectives and its decisionmaking was regular." (citing *Melcher v. FCC*, 134 F.3d 1143, 1154 (D.C. Cir. 1998)); *Music Choice v. Copyright Royalty Bd.*, 774 F.3d 1000, 1007 (D.C. Cir. 2014) (same) (citing *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220, 1224 (D.C. Cir. 2009)); *see also MobileTel, Inc. v. FCC*, 107 F.3d 888, 895 (D.C. Cir. 1997) (where agency is charged with pursuing multiple objectives, "only the [agency] may decide how much precedence particular policies will be granted when several are implicated in a single decision," and its action will be upheld if that action is consistent with some of those objectives).

A. The Secretary's interpretation of Medicaid's "objectives" is entitled to *Chevron* deference.

In reviewing Arkansas's proposed amendment, the Secretary was required to determine whether that amendment was "likely to assist in promoting the objectives" of Medicaid. 42 U.S.C. 1315(a). But the Medicaid Act does not specifically define those objectives. Rather, it leaves it to the Secretary to determine whether a particular demonstration project is consistent with the Act's underlying objectives. And under *Chevron*, that interpretation is entitled to deference.

For its part, the district court was less than clear about whether it believed the Secretary's interpretation of Section 1115's reference to Medicaid's "objectives" was entitled to deference. *See Gresham*, 363 F. Supp. 3d at 176 ("As it did in *Stewart I*, the Court assumes that the Secretary's identification of those objectives is entitled to *Chevron* deference."); *Stewart II*, 366 F. Supp. 3d at 138 ("The Court need not reach Plaintiffs' contention that this case is an exceptional one in which *Chevron* should not apply at all."); *id.* at 144 ("While the Court assumes that the Secretary is entitled to *Chevron* deference . . . it cannot uphold his interpretation [of Medicaid's objectives as including health] even under that standard."); *but see id.* at 148-49 (deferring under *Chevron* to the Secretary's reading Medicaid's objectives to include fiscal sustainability). That caginess was

unwarranted. The Secretary's interpretation of Section 1115's reference to Medicaid's objectives was unquestionably entitled to *Chevron* deference.

To begin with, this Court has already decided an almost identical question. In *Pharmaceutical Research & Manufacturers of America v. Thompson*, 362 F.3d 817 (D.C. Cir. 2004), this Court held that the Secretary's "authority to review and approve state Medicaid plans" is an "'express delegation'" of the authority to interpret the statutory requirements that Medicaid plans must meet. *Id.* at 822 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)). Consequently, as this Court explained, the "interpretations of the Medicaid Act" rendered by the Secretary in approving plans "are . . . entitled to *Chevron* deference." *Id*. In fact, this Court found that delegation so explicit that it concluded deference was required even though the Secretary's interpretations are "not the result of a formal administrative process[.]" *Id.* at 821.

Applying that same principle here, the Secretary's authority to interpret the statutory requirements governing state Medicaid demonstration projects is likewise entitled to deference. Like *Thompson*, "[t]his is not a case of implicit delegation of authority through the grant of general implementation authority." *Id.* at 821-22. Rather, as above, Congress has specifically delegated to the Secretary the authority to approve Medicaid demonstration projects, and in so doing, to make the statutorily required assessment of whether they are likely to promote Medicaid

objectives. In fact, if anything, the conclusion is even more apparent here since unlike in *Thompson*, the relevant statutory language expressly leaves the meaning of that requirement to the Secretary's "judgment." *Compare* 42 U.S.C. 1315(a) (authorizing the Secretary to waive Medicaid requirements for "demonstration project[s] which, *in the judgment of the Secretary*, [are] likely to assist in promoting [Medicaid's] objectives") (emphasis added) *with* 42 U.S.C. 1396a(b) ("The Secretary shall approve any plan which fulfills the conditions specified in subsection (a)," including the best-interests condition addressed in *Thompson*)[2]

The plaintiffs argued below that the meaning of Medicaid's objectives is too important for *Chevron* to apply, but here too, precedent dictates deference. In *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990), the agency's authority, as here, was conditioned on its assessment of whether action would "further[] the statutory purposes" of the statute it administered. *Id.* at 648. But observing that the statute did not expressly state a purpose, the Court deferred under *Chevron* to the agency's interpretation of them. *See id.* at 649–52. And in

[2] Unlike in *Thompson*, the Secretary was also required to use notice-and-comment procedures in approving Arkansas's proposed amendment, thus triggering deference under *Mead*. *See* 42 U.S.C. 1315(d)(2)(C) (Secretary must adopt regulations providing "process for public notice and comment" on demonstration projects); 42 C.F.R. 431.416(b) (providing for notice and comment); *Mead*, 533 U.S. at 230 ("It is fair to assume" that Congress intends for deference "when it provides for a relatively formal administrative procedure," such as notice-and-comment). This is so even though the procedure Congress required was not notice-and-comment *rulemaking*. *See id.* at 231 (describing "notice-and-comment *process*" as a trigger for deference (emphasis added)).

Judulang v. Holder, 565 U.S. 42 (2011), the Court—though technically applying arbitrary and capricious review—concluded that the factors on which an agency must rest its decisions need only be "tied . . . *loosely*, to the purposes of the . . . laws" they administer. *Id.* at 55 (emphasis added).

Likewise, where a statute's stated purposes "use 'vague, general language," this Court has deferred to agency interpretations of those purposes. *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) (quoting *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 421 (5th Cir. 1999)). Here, as discussed below, Medicaid has *no* purposes section. Instead, Congress left it to the Secretary to infer Medicaid's purposes from the totality of the Act. And even the provision of the Act the district court misidentified as a comprehensive purposes section is written in "vague, general" terms. *Id.* Deference is required.

B. The Secretary's interpretation of Medicaid's objectives was reasonable.

Given that *Chevron* applies, the threshold question in this case is whether the Secretary's interpretation of Section 1115's reference to "the objectives" of Medicaid was unambiguously foreclosed or unreasonable. It was not.

Section 1115 itself does not specify the objectives of Medicaid, or tell the Secretary where to look to find them. Indeed, unlike many other parts of the Social Security Act, the Act's Medicaid subchapter does not contain any expressly denominated purpose sections. Thus, unlike those other parts of the Act, the

Secretary is left to infer Medicaid's objectives from the totality of the Medicaid subchapter. Employing that discretion, in approving Arkansas's demonstration project, the Secretary rationally concluded that beneficiary health was "the ultimate objective" of a government *healthcare program*. AR 2; JA__. Moreover, given the Medicaid appropriation section's express reference to beneficiary independence, the Secretary also rationally concluded that independence is a Medicaid objective.

Ultimately here—and explicitly in the companion Kentucky case—the district court rejected both objectives and instead argued that enrollment alone, as moderated by fiscal sustainability, was Medicaid's sole objective. *See Stewart II*, 363 F. Supp. 3d at 143-49; *Gresham*, 363 F. Supp. 3d at 179 ("[T]he agency's 'focus on health is no substitute for considering Medicaid's central concern: covering health costs' through the provision of free or low-cost health coverage.") (quoting *Stewart I*, 313 F. Supp. 3d at 266). That conclusion was misguided in two broad respects. First, the district court erroneously treated Section 1901's general statements about the "purpose" of Medicaid *appropriations*, 42 U.S.C. 1396-1, as an exhaustive list of the "objectives" that the Secretary could consider under Section 1115. Second, it misread that statement of appropriative purpose—which states that funds are appropriated "to furnish . . . medical assistance" and "services to help [Medicaid beneficiaries] attain or retain capability for independence or self-

care," *id.*—to somehow unambiguously preclude the Secretary's consideration of improving health and achieving financial independence. Neither rationale represents the best reading of the statutory text, let alone unambiguously forecloses the Secretary's approach.

1. Section 1901 is not an exhaustive statement of Medicaid's "objectives."

In evaluating the Secretary's interpretation, the district court looked to Section 1901 of the Act, Medicaid's appropriations section. *See Gresham*, 363 F. Supp. 3d at 176; *Stewart I*, 313 F. Supp. 3d at 260-61, 266-68, 271. That section is entitled "Appropriations," and it appropriates funds to finance Medicaid. It also states that those funds were appropriated "[f]or the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of [traditional pre-Medicaid-expansion classes of Medicaid beneficiaries], and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care[.]" 42 U.S.C. 1396-1. Undeniably, the objectives of Medicaid itself include those purposes, but those purposes do not, as the district court declared, represent an exhaustive list of Medicaid's objectives. To the contrary, Section 1901 is best read—and can at least permissibly be read—as a mere statement of the kinds of services on which Medicaid appropriations are to be spent, not the objectives of the program.

To start, Section 1901 only states "the purpose . . . [for which Medicaid funds are] authorized to be appropriated," 42 U.S.C. 1396-1, not the purpose of Medicaid *itself*. Yet according to the district court, Section 1901 clearly *and exhaustively* delineated Medicaid's objectives because, in its view, there could be no "better place" to set forth "the purpose of a spending program . . . than in the provision that sets up the '*purpose*' of its appropriations[.]" *Gresham*, 363 F. Supp. 3d at 180. But that is hardly self-evident. In fact, in at least five Social Security Act spending programs, Congress found a better place: expressly captioned purposes sections that stated "the purpose(s) of this program," "subchapter," "division," or "subpart," apart from those programs' appropriations sections. *See, e.g.*, 42 U.S.C. 601(a) (TANF's "Purpose" section, stating "[t]he purpose of this part"); 42 U.S.C. 603 (appropriating TANF funds); 42 U.S.C. 621 ("Purpose" section of Stephanie Tubbs Jones Child Welfare Services Program, stating "[t]he purpose of this subpart"); 42 U.S.C. 625 (appropriating that program's funds); 42 U.S.C. 629 ("Purpose" section of Promoting Safe and Stable Families program, stating "[t]he purpose of this program"); 42 U.S.C. 629f (appropriating that program's funds); 42 U.S.C. 1397aa(a) ("Purpose" section of SCHIP, stating "[t]he purpose of this subchapter"); 42 U.S.C. 1397dd (appropriating program funds); 42 U.S.C. 1397n ("Purposes" section of Social

Impact Demonstration Projects program, stating "[t]he purposes of this division"); 42 U.S.C. 1397n-13 (appropriating program funds).

Against that backdrop, the district court was not entitled to simply presume that Congress intended to create an exhaustive list of objectives in the appropriations provision. Indeed, the difference between the phrase "the purpose(s) of this program" and Section 1901's provision that Medicaid funds are "authorized to be appropriated" "[f]or the purpose" stated therein underscores that Congress did not intend the latter to be an exhaustive statement of objectives. *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002) ("[I]t is a general principle of statutory construction that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (internal quotation marks omitted) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *Ford v. Mabus*, 629 F.3d 198, 206 (D.C. Cir. 2010) ("[I]t is through the 'dint of . . . phrasing' that Congress speaks, and where it uses different language in different provisions of the same statute, we must give effect to those differences.").

Moreover, the district court's focus on Section 1901's statement that funds were to be appropriated to "furnish . . . medical assistance on behalf of [traditional classes of Medicaid beneficiaries], 42 U.S.C. 1396-1, is particularly problematic.

Far from establishing an objective of Medicaid, the phrase "[m]edical assistance" is a term of Medicaid art, defined as "payment of part or all of the cost of" some thirty-nine distinct types of care or services. *See* 42 U.S.C. 1396d(a)(1)–(30). Those services include such detailed items as "counseling and pharmacotherapy for cessation of tobacco use by pregnant women," 42 U.S.C. 1396d(a)(4)(D), "prescribed . . . dentures," 42 U.S.C. 1396d(a)(12), and eyeglasses that are "prescribed by a physician skilled in diseases of the eye or by an optometrist, whichever the individual may select." *Id.* And it would be absurd to suggest, as the district court's approach does, that Section 1115 requires the Secretary to pursue those provisions as objectives in determining whether to *waive* program requirements. Rather, Section 1901 is best read as stating, by way of reference to the minutely detailed definition of its key term, a list of services for which money is appropriated, while Section 1115's reference to Medicaid's "objectives" is best read as invoking the more holistic purposes that Medicaid ultimately serves.

Next, Section 1901 is not an unambiguously exhaustive statement of the purposes of the Medicaid expansion because it says *nothing* about the purposes of the Medicaid expansion or even that of Medicaid expansion appropriations. The demonstration projects at issue here only concern the Medicaid expansion, not traditional Medicaid beneficiaries. Thus, the Secretary was required to consider the "objectives" of Medicaid *as expanded* in reviewing those projects. Section

1901, however, only states "the purpose of . . . furnish[ing] (1) medical assistance on behalf of families . . . and . . . individuals [of the sorts covered by the program when Section 1901 was enacted in 1965], and (2) rehabilitation and other services to help *such* families and individuals attain or retain capability for independence or self-care[.]" 42 U.S.C. 1396-1 (emphasis added). As far as Section 1901 is concerned, Medicaid has *no* purpose to serve the Medicaid expansion population at all. Therefore, Section 1901 is simply not a place to look for unambiguous guidance as to the Medicaid expansion's objectives.

In response, the district court suggested that: 1) the substantive provisions of the Medicaid expansion "confirm[ed] that Congress intended to provide medical assistance to the expansion population," *Stewart I*, 313 F. Supp. 3d at 269; 2) Congress had previously added several other classes of beneficiaries without stating any purpose to assist them in Section 1901, *see id.* at 270; and 3) in light of these past expansions, "it [wa]s inconceivable that Congress intended to establish separate Medicaid programs, with differing purposes." *Id*. Ultimately, however, the district court resorted to declaring that Congress's failure to amend Section 1901 to refer to the expansion group was "inartful drafting," *id.* at 269 (quoting *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015)), and that Section 1901 should be read as if it stated the same purposes with respect to the expansion group. The

district court relied on this reasoning in *Gresham*. *See Gresham*, 363 F. Supp. 3d at 180.

The first step of the district court's reasoning was obviously correct; one does not need an express statement of purpose to know that *a* purpose of the Medicaid expansion was providing Medicaid coverage to Medicaid-expansion-eligible beneficiaries. That can be inferred from the Medicaid expansion itself, though the district court's willingness to make that inference is at odds with—and illustrates the infirmity of—its general insistence on solely considering the purposes stated in Section 1901.

The rest, however, does not follow. Whatever the purposes of the previous incremental expansions were, it is perfectly conceivable that the purposes of the Medicaid expansion differed in small or large ways from the purposes of traditional Medicaid—though Arkansas would not concede that Section 1901 is an exhaustive statement of even *those* purposes. After all, as the district court itself observed, *Stewart I*, 313 F. Supp. 3d at 269, *NFIB v. Sebelius* establishes that the Medicaid expansion is "a new health care program," not just "a mere alteration of existing Medicaid[.]" 567 U.S. 519, 584 (2012). Indeed, that conclusion was the very basis for the Court's holding that Congress could not constitutionally condition receipt of traditional Medicaid funds on expansion program participation. *See id.* at 584-85. Far, then, from it being "inconceivable that

Congress intended to establish [a] separate Medicaid program[]" when it created the Medicaid expansion, *Stewart I*, 313 F. Supp. 3d at 270, that is precisely what the Supreme Court held Congress did. Therefore, the district court's suggestion that pre-expansion Medicaid and the Medicaid expansion share identical purposes and that Section 1901's (supposed) statement of purposes automatically applies to the former conflicts with *NFIB*.

Finally, the district court claimed that, "[w]hile the 'objectives' of Section 1115 may be ambiguous, courts have traditionally looked to [Section 1901] . . . to discern those objectives." *Stewart I*, 313 F. Supp. 3d at 260 ;*see also Stewart II*, 366 F. Supp. 3d at 138 (claiming it "followed other courts that have considered this issue in beginning with" Section 1901). But contrary to that claim, both courts and the agency have historically looked far more broadly. In fact, the only case the district court cited to support its conclusion was *Pharmaceutical Research & Manufacturers of America v. Concannon*, 249 F.3d 66 (1st Cir. 2001), *aff'd*, *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644 (2003), and that case did not even concern Section 1115. Rather, in deciding a claim that Medicaid impliedly preempted a state law, the First Circuit simply asserted that the provision of "medical services" to Medicaid-eligible persons, under Section 1901, was Medicaid's "primary purpose." *Id.* at 75.

The only other support the district court could muster for its approach was a law student note. *Stewart I*, 313 F. Supp. 3d at 260 (citing Jonathan R. Bolton, *The Case of the Disappearing Statute: A Legal & Policy Critique of the Use of Section 1115 Waivers to Restructure the Medicaid Program*, 37 Colum. J.L. & Soc. Probs. 91, 132 n.235 (2003)). That student note adds an additional citation to an Eleventh Circuit opinion on implied preemption that quoted *Concannon*, and predated the Supreme Court's decision affirming *Concannon* on different grounds.[3] Bolton, *supra*, at 132 n.235 (citing *Pharm. Research & Mfrs. of Am. v. Meadows*, 304 F.3d 1197, 1208 (11th Cir. 2002) (quoting *Concannon*, 249 F.3d at 75)). But this is not an implied preemption case, where what is being reviewed is a state statute in light of a court's best judgment of Medicaid's purposes; it is a Section 1115 case that involves the Secretary's *Chevron*-eligible understanding of Medicaid's objectives, under a statute that instructs the Secretary to render "judgment" on what those objectives are. 42 U.S.C. 1315(a).

In any event, *Concannon* does not even state the correct approach to Medicaid preemption. When the Supreme Court affirmed *Concannon*, it did not look to Section 1901 to define Medicaid's purposes. Instead, it identified several "rather obvious Medicaid purpose[s]" that the state program at issue served by

[3] Tellingly, while urging courts to employ Section 1901 in striking down the Section 1115 waivers of its day, the student note could not cite a single Section 1115 case that looked to Section 1901 to define Medicaid's objectives.

inferring from the program as a whole. *Walsh*, 538 U.S. at 663 (plurality opinion). For example, the Court held that reducing prescription drug prices for *non*-Medicaid-eligible individuals served the Medicaid purpose of reducing the likelihood that "their conditions [would] worsen, causing [them to] end up in the Medicaid program," thus reducing Medicaid expenses. *Id.* It is that opinion—and not the First Circuit opinion it affirmed—that states the correct approach to discerning Medicaid objectives in an implied-preemption context. Indeed, faced with a similar implied-preemption claim in *Pharmaceutical Research & Manufacturers of America v. Thompson*, this Court followed the *Walsh* plurality and held, without even a citation to Section 1901, that preventing Medicaid's ranks from growing by lowering drug prices for *non*-Medicaid beneficiaries serves the "goals and objectives of the Medicaid program." 362 F.3d 817, 825 (D.C. Cir. 2004).

As for Section 1115 cases, they have taken a mix of approaches to identifying Medicaid's objectives, none of which include treating Section 1901 as an exhaustive statement of what those objectives are. In *California Welfare Rights Organization v. Richardson*, 348 F. Supp. 491 (N.D. Cal. 1972), the first major Section 1115 Medicaid case, the court found some guidance in Section 1901, but reasoned that several substantive provisions of the Act "would also seem to furnish the basis for deriving an objective of the title." *Id.* at 496. Subsequent cases

gleaned general purposes from different Medicaid provisions to the exclusion of Section 1901, *see Georgia Hospital Ass'n v. Department of Medical Assistance*, 528 F. Supp. 1348, 1355 (N.D. Ga. 1982), or gave absolute deference to the Secretary's judgment of what Medicaid's objectives were. *See Crane v. Mathews*, 417 F. Supp. 532, 539 (N.D. Ga. 1976).

Most notably, in *Newton-Nations v. Betlach*, 660 F.3d 370 (9th Cir. 2011), the Ninth Circuit reviewed a demonstration project that expanded Medicaid to beneficiaries who were *statutorily ineligible* for Medicaid sans for the Secretary's Section 1115 authority, but subjected them to heightened cost-sharing. *See id.* at 376. By definition, that project could not advance the purposes stated in Section 1901, namely, "furnish[ing] (1) medical assistance" to *Medicaid-eligible* "families" and "individuals," "and (2) rehabilitation and other services to help *such* families and individuals[.]" 42 U.S.C. 1396-1 (emphasis added). In lieu of considering the purposes stated in Section 1901, the Ninth Circuit deferred to the Secretary's judgment that one of Medicaid's objectives was "ensur[ing] wider health benefit coverage to low-income populations" beyond the populations statutorily eligible for Medicaid coverage at the time. *Newton-Nations*, 660 F.3d at 381 (internal quotation marks omitted). That court ultimately faulted the Secretary for inadequately considering that objective, despite its not being stated in Section 1901 or the Medicaid subchapter. *Id.* (faulting the Secretary for saying too little to

allow "review [of] the agency's consideration of the impact Arizona's demonstration project would have on the economically vulnerable").

The Ninth Circuit's approach is not an outlier. Rather, it represents the Secretary's consistent historic understanding that Medicaid's objectives transcend Section 1901 and underscores the great deference usually given the Secretary. For instance, this Court has twice recognized—and treated as uncontroversial—so-called Section 1115 expansion waivers providing Medicaid coverage to individuals who statutorily "would not otherwise qualify for Medicaid." *Cookeville Regional Medical Center v. Leavitt*, 531 F.3d 844, 845 (D.C. Cir. 2008); *see also Cooper Hosp. Univ. Med. Ctr. v. Price*, 688 F. App'x 11 (D.C. Cir. 2017). In both cases, this Court held that the Secretary, in calculating Medicaid payments owed to hospitals that serve a disproportionate share of Medicaid beneficiaries, *see* 42 U.S.C. 1395ww(d)(5)(F)(i), may count "otherwise Medicaid-ineligible" patients who receive expansion-waiver Medicaid benefits. *Cooper Hosp. Univ. Med. Ctr.*, 688 F. App'x at 12; *see also Cookeville Reg'l Med. Ctr.*, 531 F.3d at 847-49. Contrary to the district court's approach, which tethers the Secretary's experimental discretion to the permanent objects of Medicaid funds in Section 1901, those holdings assume that expansion waivers—which by definition direct Medicaid funds to beneficiaries beyond the Section 1901 pale—are perfectly legal.

In short, Section 1901 textually can only be read to state the objects of Medicaid funds, not the purposes of the program. The Medicaid expansion's absence from its stated purposes, in any event, precludes it from being read as an unambiguously exhaustive statement of Medicaid expansion objectives. And the well-settled permissibility of expansion waivers, which direct Medicaid benefits to statutorily Medicaid-ineligible beneficiaries, is irreconcilable with a reading of Section 1115's Medicaid "objectives" as exhausted or even substantially limited by the Section 1901's appropriations purposes. Indeed, the Medicaid objectives the Secretary recognized here—the health and independence of statutorily Medicaid-*eligible* individuals—are dramatically less far afield from the objectives Congress directly pursued in Medicaid or even from Section 1901's purposes.

2. Improving health is a Medicaid objective.

The district court's suggestion that improving health is not an objective of Medicaid and that the Secretary may consider it in approving a Section 1115 demonstration project is equally flawed. The Medicaid expansion "transformed [Medicaid] into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level." *NFIB*, 567 U.S. at 583. It should go without saying that an objective of such a program—undoubtedly the "ultimate objective," AR 2; JA__—is to improve the health of that population. After all, "there is little intrinsic value in paying for [health care]

services if those services are not advancing the health and wellness of the individual receiving them[.]" *Stewart* AR 6719; JA__.

Yet the district court nevertheless held that "health is not a freestanding objective of the statute." *Stewart II*, 366 F. Supp. 3d at 145. It reasoned that, though health was admittedly a congressional "aim" in enacting the Medicaid expansion, *id.* at 144, and a "reason Congress wanted to provide health insurance to needy populations," *Stewart I*, 313 F. Supp. 3d at 267 (emphasis added), the Secretary could not "choose his own means to that end." *Id.* at 266. Thus, in other words, confusing objectives with means, the district court held that the Secretary was "bound not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *Id.* at 44-45 (quoting *Waterkeeper Alliance v. EPA*, 853 F.3d 527, 535 (D.C. Cir. 2017)); *Stewart II*, 366 F. Supp. 3d at. According to the district court, that congressionally selected *means*, which the Secretary must treat as though it were Medicaid's *objective*, was payment for the costs of medical services.

That approach is a profoundly misguided way of interpreting a statute that literally instructs the Secretary to consider Medicaid's objectives in determining whether to experimentally *waive* compliance with the means Congress chose to effectuate those objectives. *See* 42 U.S.C. 1315(a)(1) (providing that, if the Secretary believes a demonstration project "is likely to assist in promoting the

objectives" of Medicaid, he may "waive compliance with any of the requirements of . . . [42 U.S.C.] 1396a," the heart of Medicaid).

To justify its approach, the district court cited *Waterkeeper*'s language that agencies are bound by both congressional statements of purpose and the means Congress selected to pursue them. *See* 853 F.3d at 535 (citing *Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139–40 (D.C. Cir. 2006)). Of course that is true. But cases like *Waterkeeper* invoke that principle in instances where agencies plead purpose in the face of specific statutory provisions that bar what they are doing. *See id.* (vacating EPA's broad exemption from "a sweeping reporting mandate" enacted by Congress); *Colorado River Indian Tribes*, 466 F.3d at 140 (holding that there was no "statutory basis empowering the [agency]" to regulate particular type of gaming and that the agency therefore could not regulate it, even if doing so might have advanced Congress's purpose in providing for the more limited regulation it did). No case holds that where Congress delegates to an agency the discretion to experiment with (or waive) its own means to pursue Congress's objectives, the agency nevertheless remains bound by Congress's baseline means. And under that principle, it is the district court's holding that the Secretary could not seek to advance beneficiary health—and not the Secretary's decision—that violates Section 1115's plain terms.

The correct approach to Section 1115's delegation of discretion to pursue non-statutory means to achieve programmatic objectives is exemplified by *Pharmaceutical Research and Manufacturers of America v. Thompson*. There, this Court reviewed the Secretary's judgment that a state Medicaid plan satisfied the statutory requirement of being in "the best interests of Medicaid recipients." *Thompson*, 362 F.3d at 824 (citing 42 U.S.C. 1396a(a)(19)). The Secretary interpreted this language to require a state plan to "further the goals and objectives of the Medicaid program," and, in turn, concluded that a program that used Medicaid incentives to induce drug manufacturers to sell drugs to non-Medicaid beneficiaries at cheaper prices "serve[d] Medicaid goals" by preventing people outside the program from sliding into Medicaid and thereby making "more resources . . . available for existing Medicaid beneficiaries." *Id.* at 825. Relying on *Walsh*, this Court found that interpretation permissible. *See id.* Of course, drug discounts for non-Medicaid beneficiaries were not, even remotely, one of the means Congress chose to advance Medicaid's purposes. But that did not matter. Rather, it was sufficient—even in the context of approving a non-experimental Medicaid plan—that the Secretary reasonably predicted those purposes would be advanced by such discounts. The Secretary's discretion here is broader and includes the power to waive compliance with the statute.

Finally, insofar as congressional means are relevant, Congress has in fact mandated that the Secretary pursue the "freestanding objective" of health through various demonstration programs. For example, in 2006, Congress mandated that the Secretary approve health opportunity account demonstration programs, where Medicaid beneficiaries would pay for their healthcare out of accounts to which states contributed. *See* 42 U.S.C. 1396u-8. These demonstration programs were required to "[p]rovid[e] incentives to patients to seek preventive care services," 42 U.S.C. 1396u-8(a)(3)(B), including by offering "additional account contributions for an individual demonstrating healthy prevention practices." 42 U.S.C. 1396u-8(a)(3). That is, Congress directed the Secretary to experiment with conditioning beneficiaries' degree of coverage on whether they did something—there, prevention practices—that would make them healthier.

Later, when it enacted the Medicaid expansion program, Congress called for further experimentation to incentive healthy behavior. In the Medicaid Incentives for Prevention of Chronic Disease program, Congress required the Secretary to award states grants to give incentives to Medicaid beneficiaries for various "healthy behaviors," Pub. L. 111-148, § 4108(a)(1)(A)(ii), 124 Stat. 119, 561 (codified at 42 U.S.C. 1396a note)), including "[c]easing use of tobacco products," "[c]ontrolling or reducing their weight," "[l]owering their cholesterol," or successfully "[a]voiding the onset of diabetes[.]" Pub. L. 111-148, 4108(a)(3)(A),

124 Stat. 119, 561. Under this congressionally mandated arm of Medicaid, states paid Medicaid beneficiaries graded cash incentives if they lost seven to ten percent of their body weight, hit specific blood pressure, blood sugar, or cholesterol levels, reduced fat and caloric intake, exercised a certain number of hours per week, or proved they had quit smoking. *Medicaid Incentives for Prevention of Chronic Diseases: Final Evaluation Report* 40-44 (2017), https://downloads.cms.gov/files/cmmi/mipcd-finalevalrpt.pdf. This program did not pursue health through the mediating means of paying for healthcare services; it directly pursued health itself by paying Medicaid beneficiaries to behave healthily. The last three administrations—taking Congress's hint—have gone further and granted a variety of Section 1115 waivers conditioning coverage and cost-sharing on healthy behavior.[4] All, on the district court's view, would be invalid.

In light of those provisions, it cannot be said that the Secretary's choice to pursue beneficiary health is unambiguously foreclosed. Rather, it is, if anything, the district court's holding that "health is not a freestanding objective" of Medicaid that is unambiguously foreclosed by the statute. This Court should uphold the Secretary's reasonable, if not compelled, interpretation of Medicaid's objectives to include the objective of beneficiary health.

[4] *See* MACPAC, *The Use of Healthy Behavior Incentives in Medicaid*, at 2 (August 2016), https://tinyurl.com/yam48hm8 (discussing four Section 1115 waivers that included healthy behavior incentives).

3. Beneficiary independence is a Medicaid objective.

The Secretary's determination that beneficiary independence is a Medicaid objective was equally reasonable, and the district court erred in holding otherwise. Section 1901 states *two* purposes of Medicaid appropriations, and as relevant here, one of those is "furnish[ing] . . . rehabilitation and other services to help [Medicaid beneficiaries] attain or retain capability for *independence* or self-care[.]" 42 U.S.C. 1396-1 (emphasis added). Thus, even if—as the district court wrongly concluded—Section 1901 contained an exhaustive statement of Medicaid's objectives, "independence or self-care" would certainly be an objective of Medicaid. And in the absence of a specific definition of that term, the Secretary could reasonably conclude that term encompassed financial independence and approve Arkansas's proposed amendment on that basis.

That interpretation is supported by case law from two circuits reviewing Section 1115 waivers and interpreting substantially similar language from another provision of the Social Security Act. In particular, interpreting AFDC's former purpose section's language expressing Congress's goal of helping beneficiaries "attain . . . self-support and personal independence," 42 U.S.C. 601 (1940), in an opinion by Judge Friendly, the Second Circuit upheld an experimental AFDC work requirement. *Aguayo v. Richardson*, 473 F.2d 1090, 1104 (2d Cir. 1973). In so doing, Judge Friendly explained that the above-quoted language clearly conveyed

Congress's desire to achieve "the ideal . . . situation in which the family 'breadwinner' would win the needed bread." *Id.* Similarly, in reviewing a Section 1115 waiver, the Third Circuit read that language as expressing Congress's objective to "aid[] AFDC recipients in slaying their own personal welfare dragon." *C.K. v. N.J. Dept. of Health & Human Servs.*, 92 F.3d 171, 184 (3d Cir. 1996) (internal quotation marks omitted). And both courts did so despite other statutory language—reminiscent of Section 1901—expressing the cross-cutting purpose of "furnish[ing] financial assistance and rehabilitation and other services" to AFDC beneficiaries. 42 U.S.C. 601 (1940).

Yet the district court here simply rejected the Secretary's similar reading of the term "independence or self-care" on the grounds that it supposedly conflicted "with the surrounding statutory language and aims." *Stewart II*, 366 F. Supp. 3d at 146. That approach falls short. First, the district court's suggestion that Section 1901's textually stated purpose of "furnish[ing] rehabilitation and other services" that promote independence or self-care was inconsistent with a work requirement, *id.*, is obviously incorrect. When a state provides medical assistance conditioned on behaviors that advance independence (namely, work and volunteering), it is furnishing a service (namely, medical assistance) designed "to help [Medicaid beneficiaries] attain or retain capability for independence or self-care[.]" 42 U.S.C. 1396-1.

Second, equally unconvincing is the district court's holding that Section 1901's "independence or self-care" language unambiguously means something entirely different than the "self-support and independence" at issue in the Second and Third Circuit cases. Initially, the district court cryptically suggested that independence in AFDC only meant welfare independence because of the stated purposes surrounding it, like keeping families intact, a purpose absent from Medicaid. *See Stewart II*, 366 F. Supp. 3d at 147. That is a complete non sequitur; the word "independence" in an entitlement program's purposes can mean independence from that program whether or not another of its purposes is intact families.

The district court also claimed that Judge Friendly only held "independence" meant financial independence in *Aguayo* because AFDC included some statutory work requirements, whereas Medicaid purportedly "does not." *Id.* The distinction is both irrelevant and factually incorrect. As to its relevance, *Aguayo* did not turn on AFDC's existing work requirements; the phrase "self-support and independence" could easily have been interpreted to mean welfare independence even if AFDC had not had work requirements. Judge Friendly thought it could, *see Aguayo*, 473 F.2d at 1104 (finding that "self-support and independence" plainly referred to financial independence *before* discussing existing AFDC work requirements in a satellite AFDC program), as did the Third Circuit in *C.K.*, which

interpreted AFDC's purpose section as Judge Friendly did *after* the AFDC work requirements his opinion mentioned in passing had been repealed. *See Aguayo*, 473 F.2d at 1104 (citing 42 U.S.C. 630-53 (repealed 1988)); *C.K.*, 92 F.3d at 184-85 (relying solely on AFDC's purpose section in concluding that one purpose of AFDC was financial independence). As to the distinction's accuracy, Medicaid in fact permits states to terminate beneficiaries who also receive TANF (Temporary Assistance for Needy Families) assistance and "refus[e] to work[.]" 42 U.S.C. 1396u-1(b)(3)(A)(iii). The district court acknowledged this work requirement, *see Stewart II*, 366 F. Supp. 3d at 147, but brushed it off as a "specific statutory provision" that only applied narrowly to a subset of Medicaid beneficiaries. *Id.* The same could be said of the repealed "Work Incentive (WIN) Program," *Aguayo*, 473 F.2d at 1104, on which the district court strained to suggest Judge Friendly's interpretation was based. *See* Stephen F. Gold, *The Failure of the Work Incentive (WIN) Program*, 119 U. Pa. L. Rev. 485, 489-92 (1971) (explaining, contemporaneously with *Aguayo*, that under WIN, state welfare agencies evaluated AFDC beneficiaries for discretionary referral to WIN, were not required to assess mothers, and only selected those most likely to obtain employment).

Finally, the district court's rejection of the Secretary's reading of Section 1901 also fails because—despite rejecting a reading that mirrors Judge Friendly's interpretation of essentially identical language in a parallel section of the Act—it

could not identify a plausible alternative meaning of the term "independence or self-care." And the district court's suggestion that the Secretary is unambiguously foreclosed from encouraging beneficiary independence from Medicaid conflicts with both *Walsh* and this Court's holding in *Thompson* that preventing non-Medicaid beneficiaries from becoming dependent on Medicaid serves Medicaid objectives. This Court should uphold the Secretary's interpretation of Section 1901.

II. The Secretary correctly concluded that the Arkansas Works amendment was likely to assist in promoting the objectives of Medicaid.

Section 1115 allows the Secretary to approve a demonstration project if, "in the judgment of the Secretary," it "is likely to assist in promoting the objectives" of Medicaid. 42 U.S.C. 1315(a). As the district court correctly concluded, "Section 1115(a) asks whether a 'project' would promote the Act's objectives, not whether each component, 'viewed in isolation,' would." *Stewart I*, 313 F. Supp. 3d at 260 (quoting *Wood v. Betlach*, 922 F. Supp. 2d 836, 843 (D. Ariz. 2013)). "While it may be relevant to the Secretary's determination whether any given component is consistent with the Act's objectives, he must ultimately determine whether, on balance, the project as a whole passes muster." *Id.*

Due to the inherently experimental nature of Medicaid demonstration projects, the Secretary must make "predictive judgments" about whether a given project will assist in promoting Medicaid's objectives—judgments that receive

"particularly deferential" arbitrary-and-capricious review. *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009). That particular deference arises from this Court's recognition that "certainty is impossible" where an agency "must make predictive judgments about" the effects of a proposal such as the Arkansas Works Amendment. *Id*.

In circumstances involving agency predictions of uncertain future events, "complete factual support in the record for the [agency's] judgment or prediction is not possible or required," and will necessarily rely on expert knowledge. *Melcher v. FCC*, 134 F.3d 1143, 1151 (D.C. Cir. 1998) (quoting *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 813-14 (1978)*; see also BellSouth Corp. v. FCC*, 162 F.3d 1215, 1221 (D.C. Cir. 1999) ("When . . . an agency is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, [a court's] role is more limited; [courts] require only that the agency so state and go on to identify the considerations it found persuasive.") (quoting *Melcher*, 134 F.3d at 1152); *accord SoundExchange, Inc. v. Librarian of Cong.*, 571 F.3d 1220, 1223-24 (D.C. Cir. 2009).

Given the considerable uncertainty involved in an experimental demonstration project such as Arkansas Works, this Court affords great deference to the Secretary's predictive judgment that the project would assist in promoting the objectives of Medicaid and the assumptions underlying that judgment. The

correct approach to reviewing an agency's prediction of the efficacy of an untested policy is exemplified by the Supreme Court's decision in *Baltimore Gas and Electric Co. v. NRDC*, 462 U.S. 87 (1983). In *Baltimore Gas*, the Nuclear Regulatory Commission assumed that heretofore untested nuclear waste storage would never leak into the environment. *See id.* at 91-92 (discussing this "'zero-release' assumption"). That assumption, as "the Commission itself acknowledged . . . [wa]s surrounded with uncertainty." *Id.* at 96. Any number of "diverse factors" could cause leaks, *id.* at 99, and the effects of those leaks would be serious "if time prove[d] the zero-release assumption to have been seriously wrong." *Id.* at 98. These "substantial uncertainties," *id.*, however, did not lead the Court to overturn the agency's predictive judgment. Instead, the Court explained that when faced with predictions of this kind, "a reviewing court must generally be at its most deferential," *id.* at 103, and upheld the assumption as an optimistic "policy judgment" that the agency could reasonably make in the face of uncertainty. *Id.* at 105. Under this deferential standard, the Secretary's approval easily passes muster.

A. The district court did not dispute the Secretary's reasonable conclusion that the Arkansas Works amendment would likely assist in promoting beneficiary health and wellness.

The record supports the Secretary's decision to approve the Arkansas Works Amendment. Based on studies in the record, he found that work and volunteering

are "positively correlated with improvements in individuals' health," which thus could at least "potential[ly] benefit[]" beneficiaries' health and wellness. AR 4; JA__. Finding that Arkansas's prior, voluntary work-referral program had effectively incentivized beneficiaries to obtain employment or volunteer work, the Secretary "allow[ed] Arkansas to test whether the stronger incentive model" of a community-engagement requirement for coverage "is more effective in encouraging participation." AR 5; JA__. And though he could not foretell the precise results of that experiment before it was tested, the Secretary predicted that the experiment would be a success, stating that he believed "the community engagement requirements create appropriate incentives for beneficiaries to gain employment." AR 6; JA__.

In other words, the Secretary predicted that beneficiaries would comply with the community-engagement requirement—and enjoy the increased health and wellness correlated with that engagement—rather than give up the valuable benefits of the program. Given that conclusion, the Secretary predicted that the health benefits to compliant beneficiaries would outweigh any potential health detriment to those who did not comply. Specifically, the Secretary predicted "that the overall health benefits to the [a]ffected population through community engagement" incentivized by the community-engagement requirement "outweigh

the health-risks with respect to those who fail to respond and who fail to seek exemption[s]" from the requirement. AR 7; JA__.

The district court did not find this prediction was unreasonable. Instead, it rejected the Secretary's interpretation of the Medicaid Act. As explained above, the district court in *Stewart II* surprisingly concluded—in contravention of the Secretary's interpretation of the Medicaid Act—that "health is not a freestanding objective of the statute[.]" 366 F. Supp. 3d at 145. Because of that mistaken conclusion, in none of its three opinions below did the district court grapple with the merits of the Secretary's finding that the community-engagement requirement would advance beneficiaries' health and wellness.

Based on that finding, and supported by the substantial evidence in the record, the Secretary predicted that the Arkansas Works amendment would assist in promoting some of the goals of Medicaid—beneficiary health and wellness. As a result, his approval was not arbitrary and capricious. *See Fresno Mobile Radio*, 165 F.3d at 971. The district court's ruling to the contrary rests on a misinterpretation of the Medicaid Act. Had the district court instead deferred to the Secretary's reasonable interpretation that beneficiary health and wellness are objectives of Medicaid, it could have found no fault with the Secretary's decision to approve the Arkansas Works amendment.

B. The Secretary sufficiently considered beneficiary coverage changes.

If the district court correctly concluded that beneficiary health and wellness are objectives of Medicaid, then it could have found no fault with the Secretary's decision to approve the Arkansas Works amendment, regardless of the Secretary's consideration of other Medicaid objectives.

1. The Secretary was not required to assess the Arkansas Works amendment's effects on objectives other than health and wellness.

"When an agency must balance a number of potentially conflicting objectives . . . judicial review is limited to determining whether the agency's decision reasonably advances at least one of those objectives and its decisionmaking was regular." *Fresno Mobile Radio*, 165 F.3d at 971. The Secretary reasonably identified an objective of Medicaid—beneficiary health and wellness—and predicted the demonstration project would assist in furthering that objective. Further analysis was unneeded. Section 1115 allows the Secretary to determine, without judicial interference, at which objectives demonstration projects should be directed. *See Cont'l Air Lines v. Dep't of Trans.*, 843 F.2d 1444, 1451 (D.C. Cir. 1988) ("It is . . . for the agency to decide the exact trade-off among conflicting goals that best promotes the Congressional goal in question.") (internal quotation marks omitted).

The district court did not defer to the Secretary's predictive judgment that the Arkansas Works amendment was likely to assist in promoting beneficiary health and wellness. Instead, the district court concluded that the Secretary's approvals were arbitrary and capricious for failing to adequately consider the amendment's supposed effect on coverage, a *different* objective of Medicaid. Under the district court's reasoning, "the Secretary needed to consider whether the demonstration project would be likely to cause recipients to lose coverage and whether it would cause others to gain coverage." *Gresham*, 363 F. Supp. 3d at 177 (emphasis omitted). The district court similarly faulted the Secretary for only "brief[ly] referenc[ing]" the promotion of coverage in his approval. *Id*. at 179.

But the district court's role was "limited to determining whether the" Secretary's approval "reasonably advances at least one of th[e] objectives" of Medicaid, not its consideration of other objectives. *Fresno Mobile Radio*, 165 F.3d at 971. Having identified an objective of Medicaid—beneficiary health and wellness—that the amendment would likely assist in promoting, the Secretary was not required to independently assess the program's effects on other objectives. The district court strayed outside of its proper role in imposing such a requirement on the Secretary, and this Court should reverse.

2. The Secretary reasonably predicted that any coverage losses would be outweighed by health and wellness benefits.

As discussed above, the Secretary was not required to independently assess the impact of the Arkansas Works amendment, particularly the community-engagement requirement, on coverage. Yet, the Secretary did predict that any such impact would be outweighed by the amendment's benefits to beneficiary health and wellness. Indeed, one of the Secretary's goals was to test this exact prediction. Thus, to the extent any consideration of the amendment's effect on coverage was necessary, the Secretary adequately discussed his prediction that the community-engagement requirement would sufficiently incentivize beneficiaries to comply, avoiding any substantial coverage losses.

It is important at the outset to note that Arkansas's community-engagement requirement was not proposed and approved in a vacuum. Indeed, the first Arkansas Works amendment in 2016 sought to increase community engagement among Medicaid expansion enrollees, particularly by incentivizing enrollees to seek employment. Dkt. No. 39-2 ¶ 4; JA__. In January 2017, the Arkansas Department of Human Services implemented a program to refer all individuals enrolled in Arkansas Works to the Arkansas Department of Workforce Services, allowing enrollees to voluntarily seek assistance with job training and job placement. But enrollees did not make use of this assistance as hoped. Although only 4.7% of enrollees had acted upon the referral and used the offered services by

October 2017, of those who used the services, 23% became employed. *Id*. ¶ 5; JA__. In approving the Arkansas Works amendment, the Secretary acknowledged Arkansas's experience that "referrals alone, without any further incentive, may not be sufficient to encourage the Arkansas Works population to participate in community engagement activities." AR 4-5; JA__. It was against this backdrop that the Secretary considered and approved the community-engagement requirement.

Given the health and wellness benefits the Secretary predicted would be bestowed by community engagement, it is thus no surprise that he endorsed Arkansas's proposal to "design and test incentives for beneficiary compliance." AR 3; JA__. The Secretary specifically wished to test whether Arkansas's "stronger incentive model is more effective in encouraging participation." AR 4; JA__. This "stronger incentive model" is, of course, the "encourage[ment] of compliance" by making compliance with the community-engagement requirement "a condition of continued coverage." *Id*. While the Secretary could not know the results of the experiment in advance, he "believe[d] that the overall health benefits to the [a]ffected population through community engagement" incentivized by the community-engagement requirement "outweigh the health-risks with respect to those who fail to respond and who fail to seek exemption[s]" from the requirement. AR ; JA__7.

Unsurprisingly, the Secretary received comments reflexively predicting a loss of coverage if the amendment were approved. The Secretary acknowledged the comments' predictions, writing that "[m]any commenters who opposed the community engagement requirement emphasized that the community engagement requirements would be burdensome for individuals and families or create barriers to coverage for non-exempt people who might have trouble accessing care." AR 6; JA__. The Secretary responded, however, that he believed "the community engagement requirements create appropriate incentives for beneficiaries to gain employment." *Id.* He noted that the agency would "require Arkansas to provide written notices to beneficiaries that include information [on] how to ensure that they are in compliance with the community engagement requirements," *id.*, and that Arkansas would "implement an outreach strategy to inform beneficiaries how to report compliance with the community engagement requirements." AR 7; JA__.

In sum, the Secretary approved an experimental project designed to test whether stricter compliance incentives would adequately incentivize compliance with the community-engagement requirement. He predicted it would and that the project as a whole would likely advance the objective of promoting beneficiary health and wellness, even accounting for those who would not comply with the community-engagement requirement and would thus be disenrolled from Medicaid. The Secretary also acknowledged that he might be wrong and promised

that the agency would monitor the situation. Such was his reasoned judgment, supported by substantial evidence, and nothing more was required of him.

3. The district court paid too little deference to the Secretary's predictive judgments regarding coverage.

The district court did not adequately defer to the Secretary's consideration of the Arkansas Works Amendment's effect on Medicaid coverage. *Rural Cellular*, 588 F.3d at 1105 (noting the "particularly deferential" review afforded to agency "predictive judgments"). Indeed, the district court erroneously concluded that the "Secretary's approval letter *did not consider* whether" the Arkansas Works amendment "would reduce Medicaid coverage." *Gresham*, 363 F. Supp. 3d at 177 (emphasis altered). Claiming that the Secretary failed to "grapple with the coverage issue[,]" *id.*, the district court completely ignored the Secretary's statement that "[a]ny system that requires individuals to fulfill certain requirements as a condition of receiving benefits necessarily places some degree of responsibility on these individuals." AR 7; JA__. Some individuals will invariably shirk that responsibility. But the Secretary "believe[d] that the overall health benefits to the [a]ffected population through community engagement" incentivized by the community-engagement requirement "outweigh the health-risks with respect to those who fail to respond and who fail to seek exemption[s]" from the requirement. AR 7; JA__. That weighing is exactly what the district court purported to require of the Secretary. *See Gresham*, 363 F. Supp. 3d at 178

(noting that the Secretary should "weigh" prospective coverage losses "against the advancement of other Medicaid objectives"). The district court simply hand-waved this judgment away.

The district court likewise erroneously criticized the Secretary for failing to engage with commenters purporting to predict coverage losses. The Secretary's ultimate prediction, however—that whatever coverage losses might occur would be outweighed by the health benefits to program beneficiaries—was made in response to those comments. *See* AR 7; JA__. The district court would have had the Secretary "explain . . . whether it agree[d] with the commenters' coverage predictions." *Gresham*, 363 F. Supp. 3d at 178. But the district court tacitly acknowledged that no commentator even provided a numerical estimate of coverage losses. At best they predicted some loss of coverage for "substantial numbers of people"—with no explanation as to what that estimate entailed. *Id*.

Even setting aside the lack of specificity in the commenters' predictions, their comments provided no serious reason to doubt the efficacy of the community-engagement requirement. They certainly did not cast a modicum of doubt such that Arkansas's experiment would be a foregone conclusion. *Cf. Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 225 (D.C. Cir. 2007) (noting that even in notice-and-comment rulemaking, agencies are required to respond to comments that are "relevant and significant"). For example, the district court pointed to one

comment that cited policy papers studying weaker Medicaid incentives that, unlike the Arkansas Works amendment, were poorly publicized programs that merely tinkered with levels of cost-sharing and that were unrelated to community engagement. AR 1268; JA__. The district court also relied on papers that studied work requirements in welfare, which did nothing more than acknowledge mixed opinion about those requirements' success or failure. AR 1269; JA__. Numerous others recycled similar conjecture based on TANF work requirements, an inapposite comparison for purposes of estimating noncompliance because of the different volunteer and job training options allowed by the Arkansas Works amendment. *E.g.*, AR 1269; 1277; 1421; JA__; JA__ ; JA__.

In the end, none of the comments to which the district court alluded cast any serious doubt on the Secretary's conclusion, and the Secretary was not required to spill ink simply to point out the lack of anumerical estimates of coverage losses and the lack of engagement with the specifics of the Arkansas Works amendment. *Cement Kiln Recycling Coal.*, 493 F.3d at 225. Given the Secretary's consideration of the potential for loss of coverage in this highly deferential context, the district court could not have concluded that the Secretary did too little to approve the Arkansas Works amendment.

4. The district court improperly relied on inapposite reasoning in its *Stewart I* decision.

Despite the district court's repeated insistence that the "demonstration project under consideration in Kentucky involves different considerations from the Arkansas project," *Gresham*, 363 F. Supp. 3d at 181, its treatment of the Arkansas Works approval was inevitably tainted by its prior review of Kentucky's program. In *Stewart I*, the district court held that the Secretary "'entirely failed to consider' Kentucky's estimate that 95,000 persons would leave its Medicaid rolls" on account of Kentucky's work requirement. *Stewart I*, 313 F. Supp. 3d at 260 (quoting *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The district court concluded that the Secretary "never once mention[ed] the estimated 95,000 people who would lose coverage, which g[a]ve[] the Court little reason to think that he seriously grappled with the bottom-line impact on healthcare" of Kentucky's demonstration project. *Id.* at 262 (emphasis omitted). Indeed, such was the importance of the 95,000 coverage-loss estimate that the district court's opinion in *Stewart I* mentions it no less than a dozen times.

Alluding to the similarities in the approval letters in *Gresham* and *Stewart I*, the district court stated that the "Arkansas approval letter no more addresses the program's effects on Medicaid coverage than the Kentucky approval letter." *Gresham*, 363 F. Supp. 3d at 177. Yet a key difference in the two cases is that Arkansas did not predict that its community-engagement requirement would cause

significant coverage losses, as the district court understood Kentucky to have done. In the absence of any prediction of significant coverage loss by the State, and unpersuasive, speculative comments from commenters predicting unspecified coverage loss for reasons that had little to do with the specifics of Arkansas's proposed demonstration project, the two cases are on very different footing. *Cf. Chamber of Commerce v. SEC*, 412 F.3d 133, 142 (D.C. Cir. 2005) (noting that "an agency need not—indeed cannot—base its every action upon empirical data"). The district court understood Arkansas to argue "that the Secretary did not need to consider any reduction in coverage" because of a lack of such a prediction on Arkansas's part, *Gresham*, 363 F. Supp. 3d. at 178, but that is a misunderstanding. Arkansas's argument is merely that, the district court's concerns regarding the Secretary's consideration of coverage in *Stewart I* centered almost entirely on the lack of engagement with the 95,000 person coverage loss estimate; absent that estimate, there is no indication that the district court would have had the same concerns.

Ultimately, the Secretary did all that the statute required of him in order to approve the Arkansas Works amendment. To conclude to the contrary, the district court reached beyond the statute, substituting its own judgment in place of the Secretary's and erecting a standard so high that few, if any, of the numerous

demonstration projects approved by the last several administrations would survive. This Court should reverse the district court's misunderstanding.

CONCLUSION

This Court should reverse the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,240 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it was prepared using Microsoft Word in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ Nicholas J. Bronni
Nicholas J. Bronni

CERTIFICATE OF SERVICE

I certify that on May 15, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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