UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAMUEL PHILBRICK, et al.,

Plaintiffs,

v.

ALEX M. AZAR II, et al.,

Defendants.

Civil Action No. 1:19-cv-00773 (JEB)

PROPOSED BRIEF OF JUSTICE IN AGING, NATIONAL ACADEMY OF ELDER LAW ATTORNEYS, AND DISABILITY RIGHTS EDUCATION AND DEFENSE FUND AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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Other Authorities

AARP Public Policy Institute, *Chronic Care: A Call to Action for Health Reform* (March 2009) 9

Center on Budget and Policy Priorities, *Taking Away Medicaid for Not Meeting Work Requirements Harms Older Americans* 2 (Dec. 5, 2018), https://www.cbpp.org/research/health/taking-away-medicaid-for-not-meeting-work-requirements-harms-older-americans 15

H. Stephen Kaye, *How Do Disability and Poor Health Impact Proposed Medicaid Work Requirements?*, Community Living Policy Center (Feb. 2018) 8

Health Care Cost Institute, *2016 Health Care Cost and Utilization Report Appendix*, (Jan. 2018), https://www.healthcostinstitute.org/images/pdfs/2016-HCCUR-Appendix-1.23.18-c.pdf 10

Heather Hahn et al., *Work Requirements in Social Safety Net Programs*, Urban Institute (Dec. 2017) 16

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Kaiser Family Foundation, *Medicaid Waiver Tracker: Approved and Pending Section 1115 Waivers by State* (current through April 18, 2019), https://www.kff.org/medicaid/issue-brief/medicaid-waiver-tracker-approved-and-pending-section-1115-waivers-by-state/#Table2 ....3, 11

Leighton Ku & Erin Brantley, *New Hampshire's Medicaid Work Requirements Could Cause More Than 15,000 to Lose Coverage*, The Commonwelath Fund (May 9, 2019) 6-7

MaryBeth Musumeci et al., *How Might Medicaid Adults with Disabilities Be Affected by Work Requirements in Section 1115 Waiver Programs?*, Kaiser Family Foundation (Jan. 2018) 9

MaryBeth Musumeci & Julia Zur, *Medicaid Enrollees and Work Requirements: Lessons from the TANF Experience* 8

National Institute on Aging and National Institutes of Health, *Growing Older in America: The Health & Retirement Study* (March 2007) 10

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Steven Machlin et al.*, Agency for Healthcare Research and Quality*, *Statistical Brief #203: Health Care Expenses for Adults with Chronic Conditions*, *2005*, (May 2008) 9

USDA Office of Inspector General, *FNS Controls Over SNAP Benefits for Able-Bodied Adults Without Dependents* (Sept. 29, 2016) 16

Virginia Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor* (2018 St. Martin's Press New York) 17

Yeheskel Hasenfeld, et al., *The Logic of Sanctioning Welfare Recipients: An Empirical Assessment*, Social Service Review (June 2004) 15-16

CORPORATE DISCLOSURE STATEMENT

Amici are non-profit organizations. No publicly held company has a 10% or greater ownership interest in any *amici*.

INTERESTS OF AMICI CURIAE

Justice in Aging is a national, nonprofit law organization that uses the power of law to fight senior poverty through securing access to affordable health care, economic security, and the courts for older adults with limited resources. Justice in Aging conducts training and advocacy regarding Medicare and Medicaid, and provides technical assistance to attorneys from across the country on how to address problems that arise under these programs. Justice in Aging frequently appears as friend of the court on cases involving health care access for older Americans. Like each of the proposed amici in this case, Justice in Aging twice appeared as friend of the court in this Court in a recent case involving the federal government's approval of a Medicaid waiver application submitted by Kentucky. *See Stewart v. Azar I*, 313 F. Supp. 3d 237 (D.D.C. 2018); *Stewart v. Azar II*, 366 F. Supp. 3d 125 (D.D.C. 2019).

The National Academy of Elder Law Attorneys, Inc. (NAELA) is a professional organization of attorneys concerned with the rights of the elderly and disabled, providing a professional center, including public interest advocacy, for attorneys whose work enhances the lives of people with special needs and of all people as they age. Its member attorneys represent New Hampshirites who are affected by the New Hampshire Granite Advantage Health Care Program waiver (hereafter, "Granite Advantage"), and NAELA appears frequently as friend of the court. *See, e.g.*, *Hughes v. McCarthy*, 734 F.3d 473, 480-81 (6th Cir. 2013) (Sixth Circuit noting agreement with position advanced by NAELA as friend of court).

The Disability Rights Education and Defense Fund (DREDF) is a national law and policy center that protects and advances the civil and human rights of people with disabilities through legal advocacy, training, education, and development of legislation and public policy. DREDF is committed to increasing accessible and equally effective healthcare for people with disabilities

and eliminating persistent health disparities that affect the length and quality of their lives. DREDF has significant experience in Medicaid law and policy, given that disabled individuals disproportionately live in poverty and depend on Medicaid services and supports.

All Amici are national organizations affected by Defendants' approval of Granite Advantage. At least fifteen states have requested waivers involving work or "community engagement" requirements; in nine instances, these waivers have been approved (although the waiver approvals for Arkansas and Kentucky were vacated by this Court in *Gresham v. Azar*, 363 F. Supp. 3d 165 (D.D.C. 2019), and *Stewart II*).[1] The Court's ruling will have a nationwide impact on the extent to which low-income persons have access to health care, and whether such health care will be subject to the types of restrictions established by Granite Advantage.

Granite Advantage applies to Medicaid coverage for New Hampshirites from age 19 to 64 whose eligibility is not dependent upon meeting federal Medicaid law's definition of "disabled." AR 4383-84. As organizations that focus on the interests of older Americans and persons with disabilities, Amici have an interest in Granite Advantage and in this litigation for at least two reasons. First, Granite Advantage is likely to harm New Hampshirites with chronic conditions and functional impairments who have not been classified as "disabled" under Medicaid law. Second, Amici have an interest in older persons and persons with disabilities, chronic conditions, and/or functional impairments who receive services in Medicaid programs outside New Hampshire; and this Court's decision will affect Defendants' ability and willingness to grant similar waivers in other states. This Court's ruling will have a dramatic impact on

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[1] *See* Kaiser Family Foundation, *Medicaid Waiver Tracker: Approved and Pending Section 1115 Waivers by State* (current through April 18, 2019), https://www.kff.org/medicaid/issue-brief/medicaid-waiver-tracker-approved-and-pending-section-1115-waivers-by-state/#Table2.

Medicaid beneficiaries across the country, regardless of the beneficiary's age and level of disability.

INTRODUCTION

Defendants are federal officials who have granted the State of New Hampshire a broad waiver of certain long-standing Medicaid protections. To grant such a waiver, Defendants must assess 1) whether the project truly is an "experimental, pilot, or demonstration project;" 2) whether the project is likely to assist in promoting the Medicaid program's objectives; and 3) the length of time for which the project is necessary. *Newton-Nations v. Betlach*, 660 F.3d 370, 380 (9th Cir. 2011).

The validity of the waiver depends in large part on identifying the Medicaid program's objectives. This Court has cited 42 U.S.C. § 1396-1 to identify a central objective of the Medicaid Act: "to furnish medical assistance to persons who cannot afford it." *Gresham*, 363 F. Supp. 3d at 176 (internal citation omitted); *see also Stewart II*, 366 F. Supp. 3d at 138 (almost identical statement of law).

As Amici explain — and contrary to Defendants' allegations — Granite Advantage does not "assist in promoting" this objective. Rather Granite Advantage would terminate or reduce Medicaid coverage for thousands of low-income residents from ages 19 to 64. Defendants attempt to evade responsibility by characterizing the affected population as "able-bodied" (AR 4383, 4453), but this this term glosses over beneficiaries' needs and vulnerabilities. Many of these "able-bodied" people have chronic conditions and significant care needs. The challenged aspects of Granite Advantage are punitive, and do next to nothing to improve health care for New Hampshire's Medicaid beneficiaries.

Amici also discuss how Granite Advantage disadvantages beneficiaries by eliminating all coverage for the three months prior to the month of application. Then, Amici explain why administrative errors likely will magnify the harm to low-income New Hampshirites, and emphasize that illegal waiver provisions cannot be justified by threats to eliminate Medicaid eligibility entirely for the age 19 to 64 population.

ARGUMENT

I. GRANITE ADVANTAGE WILL HARM VULNERABLE NEW HAMPSHIRITES WHO DEPEND ON MEDICAID FOR THEIR HEALTH CARE COVERAGE.

A. Granite Advantage Will Cause Thousands of New Hampshirites to Lose Health Care Coverage.

Granite Advantage threatens a devastating reversal of recent coverage gains. Granite Advantage applies to the "new adult group" who gained eligibility through the Affordable Care Act's expansion of Medicaid eligibility, and by New Hampshire's subsequent decision to offer coverage to this group. *See* AR 17; *see* 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII); Pub. L. No. 111-148, Title II, § 2001 (2010) (provision of Affordable Care Act). The new group is comprised of persons between ages 19 and 64 who are not considered "disabled" under federal Medicaid law and have income of no more than 138% of the federal poverty level. *See* AR 17. This brief frequently will refer to these beneficiaries as the "expansion" population, because they gained eligibility through the recent expansion of Medicaid through the Affordable Care Act.

Medicaid expansion has been a New Hampshire success story, leading to an additional 51,000 persons being insured (as of October 2018). AR 10. As a result, the uninsured population has dropped significantly: as New Hampshire stated in the waiver application, "since

the Medicaid expansion was implemented, the insured rate has decreased from 10.7% in 2013 to 5.9% in 2016. AR 4394.

Many of these gains would be reversed under Granite Advantage, but neither Defendants nor New Hampshire have acknowledged the inevitable coverage terminations. This failure is fatal to Defendants' arguments. Since the objective of Medicaid is providing health care coverage, Defendants act arbitrarily and capriciously when they approve a waiver without identifying and addressing coverage losses. *See Gresham*, 363 F. Supp. 3d at 177 (federal government not considering whether waiver would reduce coverage); *Stewart II*, 366 F. Supp. 3d at 140 (federal defendants failing to provide "bottom-line estimate" of coverage losses).

The State's refusal to address coverage losses is particularly deceptive. The State's waiver application opines with little support that enrollment "will not change materially" over five years. AR 4386. The State further suggests that "active outreach" will prevent beneficiaries from losing coverage for noncompliance with the work requirements, and makes the unsupported assumption that eliminating pre-application coverage will somehow expand coverage overall. AR 4386-87. These opinions seem to have no supporting facts, and their flimsiness highlights the failure by Defendants and the State to even acknowledge the administrative record's extensive documentation of likely coverage losses. *See, e.g.*, AR 2206-07, 2585-87, 2694-96, 2960, 2974-75, 3644-45, 3656.

Although neither Defendants nor the State have been willing to own up to coverage losses, outside experts have examined the likely impact of Granite Advantage. A recent health policy analysis finds that Granite Advantage's work requirements will lead to terminating from a third to almost a half of New Hampshire's Medicaid expansion beneficiaries:

> Our analysis indicates that between 30 percent and 45 percent of the 51,000 low-income adults subject to the work requirements in New Hampshire — between

> 15,000 and 23,000 individuals — will likely be terminated within one year because they either can't meet the work requirements or have difficulty completing the necessary paperwork. This will jeopardize their access to health care, as well as reduce revenue for safety-net health care providers.

Leighton Ku & Erin Brantley, *New Hampshire's Medicaid Work Requirements Could Cause More Than 15,000 to Lose Coverage*, The Commonwealth Fund (May 9, 2019).

Such coverage losses would be consistent with the demonstrated coverage losses resulting from Arkansas' similar work requirements. Prior to this Court's ruling that vacated Arkansas' Medicaid waiver, the initial three months of data showed over 12,000 terminations, even with much of the expansion population not yet phased into the waiver program. Doc. 19-6, at 2, 11 & 20 (4,353, 4,109 & 3,815 terminations in Aug., Sept., & Oct. 2018, respectively; 12,277 total terminations) (reports from Arkansas Dep't of Human Services).

B. Coverage Losses Would Impose Significant Hardship on New Hampshirites with Chronic Conditions and Functional Impairments.

A significant burden of coverage losses would fall on expansion population beneficiaries in their 50s and 60s, and on younger beneficiaries with chronic conditions or functional impairments. These people are not eligible for Medicare because they are not 65 years of age and (in most cases) do not meet programmatic definitions of "disabled," but they are relatively more likely to be facing significant health problems. *See* 42 U.S.C. § 1395c (Medicare eligibility standards).

In seeking approval of Granite Health, New Hampshire has characterized the affected population (those age 19-64) as "able-bodied." *See* AR 271, 330, 741, 1200, 4383. Use of this term, however, is deceiving: the term "able-bodied" hides many harms that likely would result if Granite Advantage were implemented.

The expansion population includes many vulnerable persons. Medicaid law classifies a beneficiary as either "aged" (age 65 or older) or not. *See, e.g.*, 42 U.S.C.§ 1396d(a)(3). But in reality, some beneficiaries in their 50s or early 60s face many of the same health challenges that confront beneficiaries formally classified as "aged" (i.e., age 65 and older).

Likewise, although Medicaid eligibility rules may classify a person as "disabled" or "not disabled," disability in real life is a continuum. A Medicaid beneficiary may not be formally "disabled" under Medicaid law, nor "medically frail" or otherwise qualified for a disability-based exemption under Granite Advantage's work requirements, but nonetheless face significant health-related challenges that can impact employment. *See, e.g.*, AR 3741-42 (MaryBeth Musumeci & Julia Zur, *Medicaid Enrollees and Work Requirements: Lessons from the TANF Experience*, Kaiser Family Foundation, at 3-4 (Aug. 2017)); *see also* AR 24 (exemption for "medically frail" beneficiaries).

Data from the National Center for Health Statistics show that approximately 40% of working-age Medicaid beneficiaries "have broadly defined disabilities, most of whom are not readily identified as such through administrative records." AR 2991 (H. Stephen Kaye, *How Do Disability and Poor Health Impact Proposed Medicaid Work Requirements?*, Community Living Policy Ctr., at 2 (Feb. 2018)). Similarly, data from the March 2017 Current Population Survey (reflecting 2016 health insurance coverage) show that, among New Hampshire's non-elderly Medicaid population who are not receiving Supplemental Security Income due to disability, 49% cited being ill or disabled as the reason for not being employed. AR 2271 (Rachel Garfield et al., *Understanding the Intersection of Medicaid and Work*, Kaiser Family Foundation, at 10 (Appendix Table 2) (Jan. 2018)).

Other data sources are in accord. Among Medicaid beneficiaries not classified as aged or disabled, 52 percent reported serious difficulty with mobility, and 51 percent noted serious difficulty with cognitive functioning. Forty-two percent experienced serious difficulty with independent living tasks (e.g., shopping). Another 21 percent reported serious difficulty with daily living activities such as dressing or bathing. MaryBeth Musumeci et al., *How Might Medicaid Adults with Disabilities Be Affected by Work Requirements in Section 1115 Waiver Programs?*, Kaiser Family Foundation, at 3-4 (Jan. 2018); *see also* AR 2531 (Rachel Garfield et al., *Implications of Work Requirements in Medicaid: What Does the Data Say?*, Kaiser Family Foundation, at 2 (June 2018) (prevalence of chronic conditions among non-working Medicaid beneficiaries)).

Problems are particularly more likely for older Medicaid beneficiaries. Prevalence of chronic conditions, including both physical and mental health conditions, increases markedly with age. Based on health care expense data, the Agency for Healthcare Research and Quality found that 57% percent of persons from ages 55 through 64 have at least two chronic conditions. Steven Machlin et al*., Agency for Healthcare Research and Quality*, *Statistical Brief #203: Health Care Expenses for Adults with Chronic Conditions*, *2005*, Figure 1 (May 2008). An additional 20.3% of these persons have one chronic condition; only 22.7 percent of this population have no chronic conditions. *Id*. AARP came to similar conclusions in an analysis of data for the age 50-64 population, finding that 72.5 percent of this population have at least one chronic condition, and almost 20% experience mental illness. AR 3184-85 (AARP Public Policy Institute, *Chronic Care: A Call to Action for Health Reform*, at 11-12 (March 2009)).

The National Institute on Aging and National Institutes of Health reached similar results based on surveys of tens of thousands of respondents. Sixty percent of respondents from the age

of 55 to 64 reported at least one health problem, with 25 percent reporting at least two problems. For the purposes of this study, a "problem" was defined as being linked to one of six categories: hypertension, diabetes, cancer, bronchitis/emphysema, heart condition, and stroke. AR 3064 (Nat'l Institute on Aging and Nat'l Institutes of Health, *Growing Older in America: The Health & Retirement Study*, at 23 (March 2007)).

Another marker of health need is an increase in health care expenses. In examining employer-sponsored health care, the Health Cost Institute documented how health care expenses rise significantly with age. For persons from ages 55 to 64, average annual health care expenses were 44 percent higher than for persons age 45 to 54, and 116 percent higher than for persons age 26 to 44.[2]

Finally, health status tends to vary with income, with lower-income persons experiencing more chronic conditions. For persons of at least age 50 with income below 200 percent of the federal poverty level, 70 percent report fair to poor health and/or at least one chronic condition. Sara Rosenbaum et al., *Medicaid Work Demonstrations: What Is at Stake for Older Adults?*, Commonwealth Fund (March 2018), https://www.commonwealthfund.org/blog/2018/medicaid-work-demonstrations-what-stake-older-adults. This percentage increases to 83 percent by age 55. Notably, these percentages in each case are at least 20 percentage points higher than the rates for persons with incomes exceeding 200 percent of the federal poverty level. *Id.*

All these data demonstrate how low-income beneficiaries in their 50s and 60s—along with some younger low-income beneficiaries with chronic conditions or functional impairments

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[2] Health Care Cost Institute, *2016 Health Care Cost and Utilization Report Appendix*, at 1 (Table A1) (Jan. 2018), https://www.healthcostinstitute.org/images/pdfs/2016-HCCUR-Appendix-1.23.18-c.pdf. Annual health care expenses for the 55 to 64 population, the 45 to 54 population, and the 26 to 44 population were $10,137, $7,026, and $4,695, respectively. (10,137 ÷ 7,026 = 144%; 10,137 ÷ 4,695 = 216%).

— will be deprived of needed health care and suffer consequences under the restrictions imposed by Granite Advantage. Loss of Medicaid coverage has a human cost: less preventive care, greater decline, and avoidable deterioration in physical and mental health.

II. DEFENDANTS IMPEDE MEDICAID OBJECTIVES BY WAIVING THE PROTECTION THAT ALLOWS FOR COVERAGE PRIOR TO THE APPLICATION MONTH.

A. Coverage Prior to the Application Month Protects Low-Income People Who Have Suffered Injury or Another Health Setback.

Defendants have waived the important patient protection that allows Medicaid coverage to begin up to three months prior to the application month, for months during which the applicant met Medicaid eligibility standards. AR 3, 5-6, 15, 23-24. Defendants similarly have waived pre-application coverage for seven other states. This coverage waiver was approved for the Medicaid expansion population in Arkansas and Indiana, for a non-expansion Medicaid population in Florida, and for both the expansion population and a non-expansion population in Arizona, Iowa, Kentucky, and New Mexico. *See* Medicaid Waiver Tracker, *supra* at 3 n.1. The approvals for Arkansas and Kentucky subsequently were vacated by this Court. *See Gresham*, 363 F. Supp. 3d at 179, 182-85; *Stewart II*, 366 F. Supp. 3d at 143, 155-56.

Waiver of pre-application coverage seriously impedes Medicaid objectives by denying Medicaid coverage for persons who cannot afford health care expenses or private health insurance. In 1973, Congress enacted 42 U.S.C. § 1396a(a) (34), which requires a state Medicaid program to provide coverage for up to three months prior to the application month, as long as the person met eligibility requirements during those months. Before then, states had the *option* of offering such coverage, and 31 states in fact did so. AR 3348 (S. Rep. No. 92-1230, at 209 (1972) (contained within Vol. 3 of Amendments to The Social Security Act 1969-1972, p. 221 of 1273)). In recommending that all states be required to provide this coverage, a Senate

committee report noted that the amendment would "protect[] persons who are eligible for [M]edicaid but do not apply for assistance until after they have received care, either because they did not know about the [M]edicaid eligibility requirements or because the sudden nature of their illness prevented their applying." *Id.*; *see also Cohen ex rel. Cohen v. Quern*, 608 F. Supp. 1324, 1332 (N.D. Ill. 1984) (quoting from Senate report).

This accommodation to applicants made (and continues to make) good sense. In states that did not offer coverage prior to the month of application, injured persons often were unable to receive needed health care. The Secretary of Health, Education, and Welfare explained the problem in testimony supporting the legislative amendment:

> Providers have been reluctant in many instances to care for potential Medicaid eligibles because frequently the patient has not applied for Medicaid prior to his illness and, therefore, the providers would not be eligible to receive payment for their services.

Statement by Elliot L. Richardson, Sec'y of HEW, before the Sen. Fin. Comm., at 11 (July 14, 1970) (contained within Vol. 8 of Amendments to The Social Security Act 1969-1972, p. 1262 of 1267). This problem is no less vexing today, as lack of health care coverage continues to limit persons' access to needed health care.

Today, the right to pre-application coverage is established through 42 U.S.C. §§ 1396a(a)(34) and 1396d(a) (which defines Medicaid's "medical assistance" as including up to three pre-application months). Notably, Congress has rejected recent legislative efforts to amend §§ 1396a and 1396d to eliminate this protection. *See* H.R. 1628, 115th Cong. § 114(b) (2017); H.R. 180, 115th Cong. § 1 (2017); H.R. 5626, 114th Cong. § 1 (2016); S. Amdt. 270 to S. Amdt. 267, 115th Cong., Tit. I of Better Care Reconciliation Act of 2017, § 127(a) (2017), within 163 Cong. Rec. S4196, S4205 (July 25, 2017). Also, a demonstration waiver has no authority to modify or

eliminate any provision of § 1396d. *See* 42 U.S.C. § 1315(a)(1) (specifying statutes subject to waiver).

Amici routinely witness the importance of this Medicaid protection. Needless to say, many hospitalizations are unplanned. Our members and clients suffer strokes, auto accidents, and falls, among other setbacks, and unexpectedly find themselves in hospitals and nursing homes, often struggling with terrifying new medical realities. It is little surprise that many do not file a Medicaid application within the initial month, particularly when the "month" of admission may just be a day or two before one month turns into another. Under Granite Advantage, a woman could be hit by an uninsured driver on the evening of June 29, and be liable for thousands of dollars of hospital expenses due to the "failure" to file a Medicaid application within 36 hours, when June becomes July. A comparable fact pattern was present in a Sixth Circuit decision involving § 1396a(a)(34): an emergency hospitalization had led to pre-Medicaid-application health care bills totaling approximately $50,000. *Schott v. Olszewski*, 401 F.3d 682, 685 (6th Cir. 2005) (more than $40,000 in unpaid bills, and more than $8,000 in reimbursement due to patient for bills she had paid herself).

B. Because Medicaid Beneficiaries By Definition Cannot Afford Private Insurance, Medicaid Policies Regarding Coverage Effective Dates Should Not Be Based on Private Insurance Practices.

New Hampshire justifies waiver of pre-application coverage by making comparisons to private insurance, which generally does not become effective until the applicant pays the relevant premium. New Hampshire claims that eliminating pre-application coverage will make Medicaid coverage "better align with commercial health insurance coverage policies." AR 4394. New Hampshire also claims that the elimination of this coverage "will encourage beneficiaries to obtain and maintain health coverage." *Id.*

This Court has criticized Defendants' previous conclusory statements that elimination of pre-application eligibility will facilitate private insurance. *See Gresham*, 363 F. Supp. 3d at 179; *Stewart II*, 366 F. Supp. 3d at 143. New Hampshire's claims are similar, and their flaws are in the premises that underlie them—that Medicaid beneficiaries can afford private insurance, and that Medicaid should emulate private insurance policies. But persons are eligible for Medicaid precisely because they cannot afford private health insurance. Limiting Medicaid coverage does not incentivize purchase of private health insurance, but instead leads inexorably to more uninsured persons, deficient health care, and unpaid health care bills, as evidenced by New Hampshire's higher rate of uninsured persons prior to Medicaid expansion.

Accordingly, Medicaid should not be administered like private insurance. Medicaid coverage is based on financial need, not on payment of premiums—indeed, the federal Medicaid statute either prohibits premiums or, for persons with incomes above 150% of the federal poverty level, caps total cost sharing at 5% of income. 42 U.S.C. §§ 1396o(c)(1), 1396o-1(b)(1)-(2). Thus, New Hampshire has no pro-health-care policy reason to deny Medicaid coverage for health care received within three months prior to the application month; such coverage only is available for months in which the person meets Medicaid's financial eligibility requirements. 42 U.S.C. § 1396a(a)(34); 42 C.F.R. § 435.915(a)(2).

If, for example, a patient applies for Medicaid coverage in May, and his low-income financial situation met Medicaid financial eligibility standards for the preceding February and all subsequent months, a safety-net health care program should authorize coverage starting in February. Put another way, eliminating pre-application coverage for February, March and April would frustrate Medicaid's objectives. The patient might not be able to obtain needed services in

February, March or April or, if he received care, would face unaffordable bills. The health care provider also would be injured with no way to obtain reimbursement for any services provided.

New Hampshire claims that it wants to encourage Medicaid enrollment when persons are healthy, but its efforts to emulate private coverage are counterproductive. Medicaid works for its low-income population by, among other things, not requiring premiums and by providing for coverage up to three months prior to the month of application. By changing these features, New Hampshire will not move Medicaid beneficiaries into private insurance. Instead, it will make it more likely that many low-income New Hampshirites will be denied care or saddled with unaffordable bills, and that health care providers will not be reimbursed for care provided. In turn, this will push private insurance even further out of reach — not pull it closer.

III. GRANTITE ADVANTAGE'S UNFAIRNESS WOULD BE MAGNIFIED BY FORESEEABLE ADMINISTRATIVE ERRORS.

As discussed above, Granite Advantage imposes significant and unfair obligations upon low-income New Hampshirites, with the evident intent to reduce Medicaid enrollment. The many negative impacts will only be exacerbated by predictable administrative errors and bottlenecks: "[r]ed tape and paperwork requirements have been shown to reduce enrollment in Medicaid across the board, and people coping with serious mental illness or physical impairments may face particular difficulties meeting these requirements." Ctr. on Budget and Policy Priorities, *Taking Away Medicaid for Not Meeting Work Requirements Harms Older Americans* 2 (Dec. 5, 2018), https://www.cbpp.org/research/health/taking-away-medicaid-for-not-meeting-work-requirements-harms-older-americans.

Research on the Temporary Assistance for Needy Families (TANF) program (which provides cash benefits) found that beneficiaries with disabilities and poor health are more likely to lose benefits due to an inability to navigate the system. AR 2306-307 (Yeheskel Hasenfeld, et

al., *The Logic of Sanctioning Welfare Recipients: An Empirical Assessment*, Social Service Review, at 306-307 (June 2004)). In accord, a review of the research finds that the existence of exemptions does not necessarily ameliorate problems because a beneficiary may likely have difficulty understanding and obtaining the exemption. *See* AR 3688 (Heather Hahn et al., *Work Requirements in Social Safety Net Programs*, Urban Institute, at 18 (Dec. 2017)).

In a similar vein, a recent nationwide report from the U.S. Department of Agriculture found that implementing work requirements for the Supplemental Nutrition Assistance Program (SNAP) was an "administrative nightmare" that was "error prone" in multiple states. AR 3315 (U.S. Dep't of Agric., Office of the Inspector Gen., *FNS Controls Over SNAP Benefits for Able-Bodied Adults Without Dependents*, at 5 (Sept. 29, 2016)). In several instances, the Department found that SNAP benefits were terminated even though the beneficiary qualified for an exemption. *Id.*

Granite Advantage imposes administrative obligations that make it more likely a beneficiary will lose coverage inappropriately. Under the work requirements, beneficiaries must engage in and report at least 100 hours of work or other "community engagement" per month. AR 24-26. A beneficiary can be disqualified by (among other things) misunderstanding what constitutes a qualifying activity or an exemption, or failing to provide adequate documentation. *Id.* If a beneficiary seeks to be exempted from such requirements, he or she must meet one of the grounds for an exemption, such as the exception for persons deemed "medically fragile." *See* AR 24-25 (exemptions). All such requirements "lead to high administrative costs for states and the federal government and substantial coverage losses among eligible people." Jennifer Wagner & Judith Solomon, *States' Complex Medicaid Waivers Will Create Costly Bureaucracy and*

Harm Eligible Beneficiaries, Ctr. on Budget and Policy Priorities, at 6 (May 23, 2018), https://goo.gl/eyqtWq.

The State of Indiana provides one example of how the imposition of new systems and requirements can lead to unjust results. The State of Indiana upended its public assistance program systems and contracted with IBM to manage it. Indiana eventually sued IBM alleging breach of contract when IBM failed to implement the system properly. IBM's failures included: incorrectly categorizing documents, inaccurate and incomplete data gathering of recipient and applicant information, failing to mail correspondence properly, not responding to or resolving help-ticket requests, and untimely processing of applications. Despite individual beneficiaries' efforts to comply with state requirements, they were disenrolled due to the faulty administrative systems. *State v. IBM*, 51 N.E. 3d 150, 152-53, 157 (Ind. 2016); *see* Virginia Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor*, 43-44, 49-58 (2018 St. Martin's Press New York) (Medicaid-eligible Indiana residents losing coverage due to state's system failures).

It is foreseeable that eligible New Hampshirites will experience similar administrative barriers to coverage resulting from the new requirements and processes. The result: unnecessary administrative burdens will deny Medicaid coverage to people who desperately need health care.

IV. GRANITE ADVANTAGE CANNOT BE JUSTIFIED BY THREATS TO TERMINATE MEDICAID FOR PERSONS AGE 19 TO 64.

Defendants cannot justify their actions by characterizing the options as limited to either 1) implementing the waiver or 2) eliminating all coverage for the expansion population. *See* AR 10 (discussing eliminating coverage for expansion population "if the state is unable to implement the demonstration project"). This Court previously has rejected this argument, pointing out that Defendants' argument would justify any minimal retention of coverage "as long as the state

threatens to terminate all of Medicaid in the absence of waiver approval." *Stewart II*, 366 F. Supp. 3d at 153-54. Justifying coverage loss in that way "makes little sense," as this Court explained. *Id.*

CONCLUSION

If implemented, Granite Advantage will harm low-income persons with functional impairments and chronic conditions of all ages, but especially those ages 50 to 64. The results will be more low-income people without health care and without the ability to maintain function and independence. Because these effects contravene the Medicaid Act's stated objectives, the Court should grant Plaintiffs' motion for partial summary judgment.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Local Civil Rule 7(o). This brief consists of 18 pages of text, exclusive of the Table of Contents, Table of Authorities, Attorney identification and Certificate of Compliance, and contains 2 footnotes containing 8 aggregate lines of text.

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2019, I electronically filed the foregoing Proposed Brief of Justice In Aging, National Academy of Elder Law Attorneys, and Disability Rights Education and Defense Fund As *Amici Curiae* In Support Of Plaintiffs' Motion For Partial Summary Judgment with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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