UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAMUEL PHILBRICK, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 1:19-cv-00773 (JEB)
	)	
ALEX M. AZAR II, et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND PLAINTIFFS' UNIFIED RESPONSE IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS AND FEDERAL DEFENDANTS' AND STATE OF NEW HAMPSHIRE INTERVENOR'S MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

As Plaintiffs explained in their opening brief, the Secretary's reasoning in approving Granite Advantage is nearly identical to the reasoning this Court rejected as arbitrary and capricious in *Stewart v. Azar*, 366 F. Supp. 3d 125 (D.D.C. 2019) ("*Stewart II*"). Defendants' responses offer nothing that would warrant a different outcome than in *Stewart II*, *Stewart v. Azar*, 313 F. Supp. 3d 237 (D.D.C. 2018) ("*Stewart I*"), or *Gresham v. Azar*, 363 F. Supp. 3d 165 (D.D.C. 2019). All the evidence in the record shows that thousands of people will lose medical coverage as a result of Granite Advantage. As was the case with the Kentucky and Arkansas approvals, the Secretary made no attempt to grapple with this evidence and failed to rationally consider how erecting barriers to coverage could possibly promote the Medicaid Act's core objective of furnishing medical assistance to people whose incomes are insufficient to meet the cost of necessary medical care. Instead, he argued that any coverage losses were irrelevant because New Hampshire could end the entire expansion at any time. But this interpretation is "'an impermissible construction of the statute . . . because [it] is utterly unreasonable in' its breadth." *Stewart II*, 366 F. Supp. 3d at 154 (quotation omitted). Plaintiffs respectfully request that this Court grant their motion for partial summary judgment and vacate the Secretary's approval of Granite Advantage.

I. The Secretary's Approval Is Reviewable and Not Entitled to Deference.

Federal Defendants seek to insulate the Granite Advantage approval from review by arguing that the Section 1115 waiver authority is committed as a matter of law to the absolute "judgment of the Secretary." Mem. Supp. Fed. Defs.' Mot. to Dismiss or, in the Alternative, for Summ. J. and in Opp'n to Pls.' Mot. for Summ. J., ECF No. 30-1, at 12 ("Fed. Br."). This Court has already repeatedly rejected that argument. *Stewart I*, 313 F. Supp. 3d at 256; *Gresham*, 363 F. Supp. 3d at 173, as has "every court which has considered the issue." *Stewart I*, 313 F. Supp. 3d at 256 (quotation marks and brackets omitted); *Stewart II*, 366 F. Supp. 3d at 137.

Nor can the Secretary avoid meaningful scrutiny of his decision by seeking refuge under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Supreme Court repeatedly has held that deference is not appropriate when an agency decision touches on issues "of deep 'economic and political significance' that [are] central to [a] statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)). That is especially true where, as here, the "agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy" and asserts that power in a way that would "bring about an enormous and transformative expansion" in the agency's authority "without clear congressional authorization." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (internal quotation marks omitted).

Here, the Administration has forcefully stated its intent to explode the ACA's Medicaid expansion and fundamentally transform Medicaid. As evidenced by the Granite Advantage approval, this includes transforming Medicaid from a program designed to ensure health care coverage for needy individuals to a work program that strips their coverage in a manner inconsistent with Medicaid's fundamental purpose. The Secretary's approval of Granite Advantage "carries national consequences . . . that will likely be felt . . . broadly across the nation." *Stewart v. Azar*, 308 F. Supp. 3d 249 (D.D.C. 2018). Given the breadth of the Secretary's ambition, he cannot constrict the scope of this Court's review through the mere incantation of *Chevron*. *See King*, 135 S. Ct. at 2489.

Moreover, even if the *Chevron* framework were to apply, the Secretary's interpretations of the Medicaid Act's objectives still are not entitled to deference because they are plainly "inconsisten[t] with the design and structure of the statute as a whole." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442 (alteration in original). As this Court has already pointed out, the Medicaid

Act's "overarching purpose" is to "furnish [] medical assistance . . . and [] rehabilitation and other services" to low-income populations whose incomes are insufficient to cover the cost of necessary medical services. *Stewart I*, 313 F. Supp. 3d at 260 (quoting 42 U.S.C. § 1396-1). The Secretary's approval of Granite Advantage continues to distort and discount that purpose, framing the Act's objectives instead as promoting health and well-being, improving self-sufficiency, and saving money, all at the expense of providing coverage. No deference is owed to an agency's interpretation of a statute that is fundamentally at odds with the statute's express purpose.

Defendants' citation to *Pharmaceutical Research & Manufacturers of America v. Thompson*, 362 F.3d 817 (D.C. Cir. 2004), does not change this outcome. There, the Court of Appeals concluded only that state plan amendments ("SPAs") are generally the kind of agency action that can be entitled to *Chevron* deference. *Id.* at 822. That does not mean every federal approval receives deference; courts still must determine if deference is warranted in a particular case. *See Cal. Ass'n of Rural Health Clinics v. Douglas*, 738 F.3d 1007, 1014 (9th Cir. 2013) (no deference to SPA approval because statute unambiguous); *Christ the King Manor, Inc. v. Sec'y U.S. Dep't of Health & Human Servs.*, 730 F.3d 291, 313 (3d Cir. 2013) (no deference where SPA approval rests on incorrect interpretation); *Beno v. Shalala*, 30 F.3d 1057, 1071 (9th Cir. 1994) (stating in Section 1115 case that *Chevron* deference is not appropriate when agency's interpretation conflicts with the statute or has been adopted for purposes of litigation and is not supported by the record). Defendants' argument that all Section 1115 approvals are entitled to deference—regardless of content, context, or scope—misconstrues *Thompson* and *Chevron*.

Equally meritless are Defendants' arguments that the Secretary's decisions under Section 1115 are subject to "the utmost deference" because they entail "[p]redictive judgments" about areas that are purportedly within his unique "policy and scientific expertise." Fed. Br. at 12; NH

Br. at 19. As courts have recognized, "new agency policies often will involve some element of prediction about the future effects of those policies," but this does not render "any agency decision . . . by definition unimpeachable." *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 821-22 (D.C. Cir. 1983) (vacating agency action where the agency did not give "sufficient consideration to factors that may be highly relevant to" its predictive judgment) (quotation marks omitted). Rather, a predictive judgment "must be based on reasoned predictions." *Metlife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d 219, 237 (D.D.C. 2016); *see Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1113 (D.C. Cir. 2019) (vacating new FCC policy because the agency's predictive judgments were not supported by substantial evidence).

II. The Plaintiffs Have Standing To Pursue This Case.

As this Court has previously concluded, a plaintiff who has standing to challenge one part of an 1115 waiver approval has standing to challenge the approval "as a whole" on the same statutory basis. *Stewart I*, 313 F. Supp. 3d at 253 (finding Plaintiffs have standing to challenge approval "writ large" where they showed injury from one component of approval); *Stewart II*, 366 F. Supp. 3d at 136 ("[b]ecause the Court will examine whether the [1115 waiver project] reapproval as a whole—rather than its individual components—violates the APA, it will again consider only whether Plaintiffs have standing to bring that global challenge") (citing *Davis v. FEC*, 554 U.S. 724, 734 (2008)). Defendants do not dispute that Plaintiffs have standing to challenge the work requirements. *See* Pls.' Mem. in Supp. of Mot. for Partial Summ. J., ECF No. 19-1, at 14-15 (Pls.' Br.) (describing risk of losing coverage from work requirements as well as increased financial and health burdens from efforts to comply).

Federal Defendants assert, however, that Plaintiffs' risk of injury from the elimination of retroactive coverage is "speculative" because each Plaintiff is currently covered by Medicaid, and

"fears of future disenrollment" are insufficient to demonstrate standing. Fed. Br. at 24. However, Plaintiffs' declarations show a "real and immediate" threat of experiencing gaps in Medicaid coverage or losing coverage altogether. *Nat. Res. Def. Council v. Pena*, 147 F.3d 1012, 1022 (D.C. Cir. 1998); *see* Philbrick Decl. ¶ 12 (describing expected inability to meet work requirements due to work schedule and ensuing termination of Medicaid coverage); J. VLK Decl. ¶¶ 6, 12-14 (describing ongoing uncertainty regarding work schedule, ability to meet exemption, and submission of all necessary paperwork, concerns which would lead to inability to meet work requirements and termination of Medicaid coverage); K. VLK Decl. ¶¶ 19-20, 23 (describing fear of being unable to meet work requirements and termination of Medicaid coverage due to ongoing health problems); Ludders Decl. ¶¶ 13-16 (describing fear of Medicaid coverage suspension due to inability to meet work requirements). Whether because of inability to meet work requirements or difficulty in meeting onerous paperwork requirements, Plaintiffs are likely to experience gaps in coverage.

Furthermore, Plaintiffs suffer from chronic conditions that require regular visits to specialists and prescription medication, making it virtually certain that during gaps in coverage, the waiver of retroactive coverage will cause Plaintiffs to incur uncovered medical bills or forgo critical treatment altogether. *See, e.g.* K. VLK Decl. ¶¶ 10-13, 15-16, 22 (discussing ongoing treatment needs arising from progressive neurological disease, Attention Deficit Hyperactivity Disorder, Obsessive Compulsive Disorder, and inability to meet family medical expenses without Medicaid coverage); J VLK Decl. ¶¶ 10-11, 14 (describing need for Medicaid to cover ongoing treatment of severe anxiety, mild depression, and Attention Deficit Hyperactivity Disorder, as well as ongoing drug counseling); Philbrick Decl. ¶¶ 7-8, 12 (describing Medicaid coverage of insomnia medication that enables him to maintain employment). *See also, e.g.*, *NB ex rel. Peacock*

v. District of Columbia, 682 F.3d 77, 83 (D.C. Cir. 2012) (finding Medicaid recipient requiring prescription inhalers for chronic asthma was "virtually certain to need Medicaid prescription coverage on a monthly basis for the foreseeable future"). Any potential disruptions in continuity of coverage are thus likely to severely impact the Plaintiffs. *See also* Ludders Decl. ¶¶ 12, 14-16 (describing importance of Medicaid coverage in case of job-related injury arising from farm work); AR 1492, 2238-39, 2246, 2714-17, 2975, 3659-60 (evidence-based comments observing that waiving retroactive eligibility will create coverage gaps, diminish enrollees' access to care, and put low-income individuals at risk of negative health outcomes and crushing medical debt); Amicus Br. of Justice in Aging, Nat'l Acad. of Elder Law Att'ys., & Disability Rights Educ. Fund in Supp. of Plaintiffs, ECF No. 26 at 11-13 (explaining that absence of retroactive coverage will deprive injured and ill persons of medical coverage and expose them to high medical debt). Accordingly, Plaintiffs have standing to challenge the Secretary's approval of Granite Advantage.

III. The Secretary Cannot Fundamentally Restructure The Medicaid Act By Rewriting The Objectives Of The Act.

The central purpose of the Medicaid Act is to furnish medical assistance to individuals whose income is insufficient to afford necessary care. 42 U.S.C. § 1396-1; *Stewart II*, 366 F. Supp. 3d at 138-39. With his approval of Granite Advantage, however, the Secretary "continues to press his contention that the program promotes his alternative proposed objectives," of fiscal sustainability, beneficiary health, and financial independence. *Stewart II*, 366 F. Supp. 3d at 138. The Secretary identifies each of those objectives as a primary objective of Medicaid, displacing the statutes' core objective of promoting coverage. Permitting the Secretary to prioritize these non-statutory objectives at the expense of coverage in this way would make his Section 1115 authority limitless. The Court must reject the Secretary's rationale as inconsistent with the statute and find the approval of Granite Advantage arbitrary and capricious.

A. Fiscal sustainability

i. Cost savings as a primary objective

The Secretary seeks to justify approval of Granite Advantage by claiming the project is needed to save New Hampshire money. According to the Secretary the project will help make beneficiaries "less costly to cover," allowing New Hampshire to "stretch its limited resources." AR 2, 6. But even if the Secretary may properly consider fiscal concerns when evaluating Section 1115 proposals, he cannot place saving money on par with the Medicaid Act's primary objective of furnishing medical assistance. *See Newton-Nations v. Betlach*, 660 F.3d 370, 381 (9th Cir. 2011); *Beno*, 30 F.3d at 1069.

Allowing the Secretary to treat cost savings as a goal in its own right would stretch his waiver authority to limits beyond those contemplated by the Medicaid Act. First, were cost savings its own distinct objective, any cut to Medicaid services would advance that goal. "But it would be nonsensical to conclude that any cut therefore always promotes the Act's objectives." *Stewart II*, 366 F. Supp. 3d at 152. Second, the Secretary's approach here impermissibly seeks to resuscitate health and well-being as permissible objectives under the guise of "fiscal sustainability." The primary mechanism the Secretary identifies for achieving cost savings from Granite Advantage stems from increased beneficiary health and corresponding reductions in medical expenses. *See, e.g.*, AR 6, 11; Fed. Br. at 4 ("Policies that help these Medicaid recipients become healthier lower the cost of their care for the simple reason that healthy and productive people are less expensive to insure."); NH Br. at 20-21. But this reasoning is nothing more than an attempted end-run around the Court's prior ruling that health and financial independence are not distinct goals of the Medicaid Act. *See Stewart I*, 313 F. Supp. 3d at 267-68; *Stewart II*, 366 F. Supp. 3d at 145-47. If healthier and more financially independent beneficiaries are less expensive to cover, then any

project aimed at improving beneficiary health and financial independence—including "conditioning coverage on a special diet or certain exercise regime"—could be justified under this rationale by invoking eventual cost savings. *Id.* at 145. This Court rejected such "bizarre results" and should continue to do so. *Id.* (quoting *Stewart I*, 313 F. Supp. 3d at 267).

The cases Defendants cite in support of an independent fiscal sustainability objective do not suggest a different conclusion. First, Defendants cite *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644 (2003), for the proposition that "it is a legitimate objective of Medicaid to conserve state resources via measures that reduce the likelihood of borderline groups becoming Medicaid-eligible." Fed. Br. at 14; *see also* NH Br. at 14-15. But *Walsh* addressed a preemption challenge to a state Medicaid program offering reduced-cost drugs to individuals not enrolled in Medicaid and did not purport to define or determine the objectives of the Medicaid Act for the purpose of Section 1115. *Walsh*, 538 U.S. at 653-54. Reducing the costs of medicine—and in doing so both providing broader access to prescription drugs and reducing unnecessary Medicaid spending—is the kind of fiscally sound policy that also promotes the provision of medical assistance. *See id.* at 664 (noting the state program did not restrict access to prescription drugs for Medicaid enrollees except through prior authorization as explicitly already allowed by Medicaid). That the Medicaid Act does not preempt such a policy has no bearing on whether the Secretary's waiver authority extends to authorizing a massive benefits cut, the purpose of which is to reduce costs. In fact, the *Walsh* Court found that providing cheaper drugs to individuals not enrolled in Medicaid and cutting Medicaid costs "would not provide a sufficient basis for upholding the program if it severely curtailed Medicaid recipients' access to prescription drugs." *Id.* at 664-65.

Nor does *Pharmaceutical Research & Manufacturers. of America*, 362 F.3d at 824-25, support treating cost savings as a stand-alone objective. Like *Walsh*, *Thompson* considered the Secretary's approval of a program that provided low-cost coverage for prescription drugs to Medicaid beneficiaries and to individuals participating in state health programs. *Id.* at 819. Following *Walsh,* the *Thompson* panel concluded that this program did not violate the requirement to administer the Medicaid program in recipients' best interests, because the burden it imposed on access to certain drugs was limited. *Id.* at 826-27. The D.C. Circuit observed that "undisputed evidence establishes that" the program under consideration "affords Medicaid beneficiaries reasonable and prompt access to those drugs." *Id.* at 826; *see also id.* at 827 ("[T]he available data confirm that in practice the prior authorization requirement has proved neither burdensome nor overly time-consuming."). It reasoned that "the absence of any demonstrable significant impediment to Medicaid services from [the] prior authorization requirement" meant the program passed muster. *Id.* at 826. Thus, *Thompson* and *Walsh*, in fact, underscore that Medicaid's primary concern is furnishing medical assistance—and that programs which "severely curtail[]" or impose "significant impediment[s] to" that medical assistance do not promote that objective, regardless of the cost savings they might achieve. *See Stewart II*, 366 F. Supp. 3d at 152.

Next, Federal Defendants cite two cases concerning Aid to Families with Dependent Children ("AFDC") to argue that Medicaid's objectives include cost considerations: *Aguayo v. Richardson*, 473 F.2d 1090, 1103-04 (2d Cir. 1973), and *New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973). Fed. Br. at 13. But AFDC and Medicaid are different programs with fundamentally different purposes. AFDC included goals, such as keeping children in their own homes, "maintain[ing] and strengthen[ing] family life," and achieving "maximum self-support," 42 U.S.C. § 601 (1994), which are nowhere to be found in the Medicaid statute. The

AFDC statute also included work requirements, *see* Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 105, 76 Stat. 172, 186-88, but Medicaid does not. Whether AFDC's work requirement includes cost savings as one of its purposes has no bearing on whether Medicaid does. Moreover, *Dublino* also featured a preemption challenge. *Dublino,* 413 U.S. at 407. Again, the question of whether a state's program conflicts with a federal program's purpose is not the same as whether a state's project is likely to affirmatively promote the federal program's purpose. *See Stewart II*, 366 F. Supp. 3d at 151 (*Dublino* did not "analyze the propriety of the state program or its approval.").

New Hampshire, for its part, cites two district court cases—*Crane v. Mathews*, 417 F. Supp. 532 (N.D. Ga. 1976), and *California Welfare Rights Organization v. Richardson*, 348 F. Supp. 491 (N.D. Cal. 1972)—in support of fiscal considerations. NH Br. at 15. But the Section 1115 waivers in those cases did not provide for broad eligibility terminations to achieve cost savings. Rather, the states sought to impose nominal copayments on a limited subset of the Medicaid population for a quite limited duration (one year) to determine whether the copayments would curtail overutilization of "marginally needed" health care. *See Crane,* 417 F. Supp. at 537; *Cal. Welfare Rights. Org.*, 348 F. Supp. at 495 n.3. These cases considered waivers far different and far more restrained than here and have no bearing on whether the Secretary's actions here were lawful. *See Stewart II*, 366 F. Supp. 3d at 133. [1]

New Hampshire also notes that the clause "as far as practicable" appears in Section 1396-1. But it incorrectly concludes from that observation that fiscal considerations may be considered

[1] New Hampshire also points to statutory provisions it claims justify the Secretary's approval of Granite Advantage on fiscal grounds, NH Br. at 13-14, but these statutes did not form a basis for the Secretary's decision and were not cited in the administrative record. *See Michigan v. EPA,* 135 S. Ct. 2699, 2710 (2015) ("[A] court may uphold agency action only on the grounds that the agency invoked when it took the action").

on par with coverage. *See* NH Br. at 17-18. That language remains at best, a "qualifier" of, and is subordinate to, the guiding principle of furnishing coverage. *See* Pls.' Br. at 17-18. *Cf. Stewart II,* 366 F. Supp. 3d at 133 ("[W]hile cost savings may be one result of the demonstration project, they cannot excuse the Secretary's failure to consider coverage.") (quotation omitted).

In short, coverage remains the fundamental objective of the Medicaid Act. Nothing about the statute's text, structure, or interpretation in case law sanctions projects that put fiscal considerations *in conflict* with coverage. But that is precisely what the Secretary has done here. *See* AR 10 ("any loss of coverage as the result of noncompliance must be weighed against the benefits New Hampshire hopes to achieve through the demonstration project, including . . . the state's enhanced ability to stretch its Medicaid resources and maintain the fiscal sustainability of the program."). The Secretary's reasoning is, therefore, inconsistent with the governing statute.

ii. Cutting costs to promote coverage

The Secretary also argues that cutting costs promotes coverage, as it enables states to continue to cover the Medicaid expansion population, other optional eligibility categories, and optional services. According to the Secretary, measures that "enable states to stretch their resources further[,] enhance their ability to provide medical assistance to a broader range of persons in need, including by expanding the services and populations they cover," and "preserv[ing] . . . the optional services and coverage they already have in place." AR 2; *see* Fed. Br. at 4, 8, 15-16. Specifically, the Secretary claimed that "[i]f CMS were to disapprove the Granite Advantage demonstration, we recognize that the state plans to end its current coverage of the new adult group." AR 6.

The Secretary argues that a state law conditioned New Hampshire's Medicaid expansion on CMS's approval of work requirements. *See* AR 3, 6, 10 (referring to Senate Bill 313); *see also* Fed. Br. at 8. True, the state law provides that if all the waivers requested in the Granite Advantage

application were not approved by December 1, 2018, the Medicaid agency was to notify program participants that the program was not authorized beyond December 31, 2018. N.H. Rev. Stat. Ann. § 126-AA.2. *See also* Pls.' Br. at 11-12. But the state law also directs that other provisions of that law—which include covering the expansion population—will continue even if some parts of the waiver are not approved by CMS. *See* AR 756 (providing that "[i]f any provision of this act . . . is not approved by the Centers for Medicare and Medicaid Services, the . . . nonapproval does not affect other provisions . . . which can be given effect without the invalid provisions or applications."). And while the Secretary says the State legislature "*could* respond by ending the expansion," AR 10 (emphasis added), that is not the path that State has followed when parts of the waiver were rejected: the Secretary refused to approve the State's request to impose an asset test and to require additional citizenship documentation, as the state legislature had directed; yet, the State did not end the expansion. *See* Pls.' Br. at 11-12. Notably, New Hampshire is not claiming that it would have ended the Medicaid expansion.

Even if there were a real threat that New Hampshire would attempt to end the expansion, it is "far from a foregone conclusion" that it could. *See Stewart I*, 313 F. Supp. 3d at 252. Federal Defendants assert, without citation, that *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) ("*NFIB"*), "functionally" made the expansion population optional. Fed. Br. at 6. But *NFIB* includes no such language. The *NFIB* Court concluded that the Spending Power "does not include surprising participating States with post-acceptance or 'retroactive' conditions." 567 U.S. at 584 (citation omitted and alteration adopted). As the "full[] remedy" for the unconstitutional violation, the Court prohibited the Secretary from "withdrawing existing [federal] funds from a state that refused to expand, *id.* at 585-86, and otherwise left the Medicaid statutory scheme intact, *id.* at 586. Thus, *NFIB* established only whether requiring coverage of the expansion

population *without a state's opt-in* was coercive. But it did not deem the expansion population an optional coverage population nor does it hold that a state may *terminate* coverage for the expansion population. *See* Pls.' Br. at 18-19.

Federal Defendants also cite Frequently Asked Questions published by CMS after *NFIB* was decided. Fed. Br. at 3. This document is entitled to no deference from the Court. "In case after case, courts have affirmed this fairly intuitive principle, that courts need not, and should not, defer to agency interpretations of opinions written by courts." *Citizens for Responsibility & Ethics in Washington v. FEC*, 209 F. Supp. 3d 77, 87 (D.D.C. 2016) (collecting cases); *Rural Tel. Coal. v. FCC*, 838 F.2d 1307, 1313 (D.C. Cir. 1988) ("Deference to administrative expertise does not extend to judging the constitutionality of a statute or regulatory scheme.") (citation omitted); *accord Miller v. Johnson*, 515 U.S. 900, 922-23 (1995) (rejecting state's reliance on federal agency's interpretation of a constitutional question). Further, since the FAQ contains no reasoning, this Court should not consider CMS's standalone statement persuasive in its analysis of whether states may later withdraw coverage for a mandatory population—here, individuals with incomes below 133% of FPL. *See, e.g.*, *Texas Children's Hosp. v. Azar*, 315 F. Supp. 3d 322, 338 (D.D.C. 2018) (FAQ not entitled to deference because it lacked "power to persuade"); *Oceana, Inc. v. Evans*, No. CIV.A.04-0811(ESH), 2005 WL 555416, at *34 (D.D.C. Mar. 9, 2005) (giving no weight to FAQ as the "document is merely an informal statement").

Regardless of whether New Hampshire actually could or would terminate coverage for the expansion population, a threat to do so cannot turn a coverage-reducing project into a project promoting coverage. This claim—that the Secretary properly found that Granite Advantage was likely to promote coverage because it "[was] accompanied by a threat that the state will de-expand"—would make the Section 1115 authority limitless. *Stewart II*, 366 F. Supp. 3d at 131. As

Plaintiffs described in their opening brief, Pls.' Br. at 19, any proposed project that cuts spending—or, as here, simply threatens to end coverage—would pass muster under Section 1115 so long as the state continued to cover some populations and/or services. *Stewart II*, 366 F. Supp. 3d at 154. The reasoning is not limited to the Medicaid expansion population or, for that matter, the fiscal sustainability rationale. There would be no reason for a state to cover *any* populations under their state Medicaid plan and grapple with the strings Congress attached. *Id.* Using Section 1115, state and federal officials could consign all of these people to parallel programs of their choosing, with the state slicing and dicing coverage in any way the Secretary would allow, so long as the state threatened to withdraw some Medicaid coverage. *Id.* Defendants' responses offer no limiting principle whatsoever.

Finally, Federal Defendants' citation to *Spry v. Thompson*, 487 F.3d 1272 (9th Cir. 2007), does not support the Secretary's reasoning. Fed. Br. at 15. *Spry* did not evaluate the approval of a Section 1115 waiver. *Spry* instead found that certain Medicaid Act provisions did not apply to categories of individuals who were *not* described in the Medicaid Act—at the time before the ACA—childless adults without a qualifying disability. According to *Spry*, individuals who were "statutorily ineligible for Medicaid under federal law" could not be covered through the state Medicaid plan absent a waiver. *Spry*, 487 F.3d at 1274 (emphasis in original). Those individuals thus were not "made worse off" by the Section 1115 project providing them limited coverage, because they otherwise would have received no Medicaid coverage at all. *Id.* at 1276. In stark contrast, the Medicaid Act now describes the eligibility group subject to Granite Advantage, making them statutorily eligible under the Medicaid Act. *See* 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII). Indeed, unlike the population in *Spry*, the Medicaid expansion group is currently covered through the state plan. *See* Pls.' Br. at 6 (citing New Hampshire State Plan Amendment 14-0004); *see also*

Fed. Br. at 7, 8 n.8 (acknowledging state plan coverage). Thus, the baseline for determining whether they will be "made worse off" by the project is not no coverage at all—as it was in *Spry*, pre-ACA—but the coverage Congress has since provided in the Medicaid Act. Accordingly, it was arbitrary and capricious for the Secretary to conclude that Granite Advantage promoted the objectives of the Medicaid Act because, "the state plans to end its current coverage of the new adult group." AR 6.

B. Health and well-being

No matter how "emphatic[]" the Secretary's belief that health and general well-being should be objectives of the Medicaid Act, Fed. Br. at 4, it remains unsupported by the statute. *See Stewart II*, 366 F. Supp. 3d at 144. The Secretary's high level reading of Medicaid's purpose to advance broad goals such as health, wellness, and happiness, Fed. Br. at 16, ignores the Act's more specific—and express—purpose of "furnish[ing] . . . medical assistance . . . and [] rehabilitation and other services" to low-income individuals who are in medical need. 42 U.S.C. § 1396-1. While improving public health and health outcomes might be a desirable result of furnishing medical assistance, the Secretary has no authority to isolate those desired outcomes from the specific mechanisms Congress prescribed. *See Waterkeeper Alliance v. EPA*, 853 F.3d 527, 535 (D.C. Cir. 2017) ("[A]gencies are . . . 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." (quotation marks omitted)); *Ams. for Clean Energy v. EPA*, 864 F.3d 691, 712 (D.C. Cir. 2017) ("[T]he fact that EPA thinks a statute would work better if tweaked does not give EPA the right to amend the statute."); *see also* Pls.' Br. at 15-16 (noting that this alternative objective would empower the Secretary with unlimited authority).

C. Self-sufficiency

As in *Stewart II*, the Secretary "does not specify the statutory basis from which he derives financial independence," instead asserting that "there is little intrinsic value in paying for services if those services are not advancing the health and wellness of the individual receiving them, or otherwise helping the individual attain independence." *Compare* Fed. Br. at 16 (quoting AR 1) *with Stewart II*, 366 F. Supp. 3d at 146. But, again, the Secretary "is not free to generalize or otherwise extrapolate the ultimate value of the program Congress designed." *Id.* at 146. The text of the Medicaid Act makes plain that its goal is to furnish assistance to individuals "whose income and resources *are*" too low, not to reduce dependency on public programs. *See* Pls.' Br. at 16 (citing 42 U.S.C. § 1396-1 (emphasis added)). Because "financial self-sufficiency is not an independent objective of the Act," it "cannot undergird the Secretary's finding under § 1115 that the project promotes the Act's goals." *Stewart II.*, 366 F.3d at 145.

IV. The Secretary's Approval of Granite Advantage Was Arbitrary and Capricious and Exceeded His Authority.

A. Simply labeling Granite Advantage an "experiment" does not relieve the Secretary of his obligation to engage in reasoned decision-making.

Federal Defendants repeatedly justify approval of Granite Advantage by noting that it is a time-limited experiment. Fed. Br. at 15, 18-19, 22. Plaintiffs do not contest that Congress enacted Section 1115 to allow states to carry out time-limited demonstrations designed to test novel ideas and that Congress has used the results of past projects to inform its Medicaid policy decisions.[2]

[2] Plaintiffs do contest any suggestion that the Secretary abides by the limits in Section 1115. Among other things, he routinely approves projects that no longer have experimental value. For example, even though Congress made it possible for states to use managed care and to cover a family planning eligibility category through state plan amendments (as opposed to a Section 1115 project), *see* Fed. Br. at 23, the Secretary continues to use Section 1115 to allow states to implement these very policies. In fact, CMS recently stated that Section 1115 projects need not be innovative, experimental, or time-limited. *See* Ctrs. for Medicare & Medicaid Servs., CMCS Informational Bulletin: Section 1115 Demonstration Process Improvements 4 (2017),

But nothing in the record indicates that New Hampshire designed and the Secretary approved Granite Advantage as a legitimate experiment. Rather, this is an approval in search of an experiment. *See* Amicus Br. of Deans, Chairs and Scholars, ECF No. 24 at 16-17 ("CMS authorized the State to launch Granite Advantage . . . without requiring the State to have a comprehensive evaluation in place. . . . Granite Advantage falls well short of requisite, quality experimental standards . . . the approval documents contain no sound evaluation hypotheses related to the effects of work requirements."). In fact, there is ample reason to doubt that the true purpose of Granite Advantage is experimental. *See* Pls.' Br. at 26. As Defendants acknowledge, CMS has allowed several states to maintain ongoing waivers of retroactive eligibility. Fed. Br. at 25. Permitting yet another state to experiment with these features is not likely to yield additional useful information. *See, e.g.*, *Newton-Nations*, 660 F. 3d at 381. And, while novel to Medicaid, work requirements have long been a condition of eligibility in other federal programs. The record's substantial research shows that such requirements have failed to effectively promote work, while increasing poverty, financial insecurity, and even mortality. *See* Pls.' Br. at 31.

Critically, it is not enough under Section 1115 for a project to be experimental. It must also be likely to promote the objectives of the Medicaid Act. Accordingly, even if Granite Advantage were experimental, the Secretary needed to consider its impact (*i.e.*, coverage loss and promotion) on the individuals that the Medicaid program was enacted to protect. *See Newton-Nations*, 660 F.3d at 381; *Stewart II*, 366 F. Supp. 3d at 140-41. The Secretary cannot escape that obligation by simply declaring that the project is a demonstration, the exact outcomes of which are unknowable. *See* Fed. Br. at 22-23. Contrary to Defendants' assertions, Plaintiffs do not claim that the Secretary must perfectly predict the exact outcomes of a proposal. *See id.* Instead, the Secretary must

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https://www.medicaid.gov/federal-policy-guidance/downloads/cib110617.pdf (announcing that CMS will approve certain "routine, successful" Section 1115 projects for a period up to 10 years).

reasonably weigh the evidence in the record regarding the probable outcomes of Granite Advantage. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983). As described below, he did not do so here.

B. The Secretary failed to adequately examine how the project would affect coverage.

Because the central objective of the Medicaid Act is to furnish medical assistance to low-income individuals, the Secretary must adequately examine whether Granite Advantage "would cause recipients to lose coverage [and] whether the project would help promote coverage." *Stewart I*, 313 F. Supp. 3d at 262. Ultimately, Defendants argue that the Secretary satisfied that requirement by finding that without Granite Advantage, New Hampshire would terminate coverage for the entire expansion population and perhaps (some undisclosed) optional coverage groups as well. Fed. Br. at 15-16. For the reasons described above, that flawed logic cannot carry the day. *Stewart II*, 366 F. Supp. 3d at 140. Instead, the Secretary needed, but failed, to reasonably evaluate how Granite Advantage would affect coverage vis-à-vis "full compliance with the Act's requirements." *Stewart II*, 366 F. Supp. 3d at 154.

Abundant evidence in the record indicates that the project will result in massive coverage loss. *See* Pls.' Br. at 21-28. The Secretary did not engage with that evidence—including the data from Arkansas's implementation of work requirements showing massive coverage losses. *Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018) (holding that "agency cannot ignore evidence that undercuts its judgment"). Thus, the Secretary did not fulfill his duty to "adequately analyze" what effect the project would have on coverage. *Stewart II*, 366 F. Supp. 3d at 140 (quoting *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017).

The Secretary failed to provide any estimate of coverage loss, and he now takes the position that it would have been impossible for him to do so. Fed. Br. at 18-19. But commenters presented

substantial research from health care and policy experts to explain why "many thousands" of people would lose coverage. *See* Pls.' Br. at 21; *see also* Amicus Br. of the Am. Academy of Pediatrics & the Am. Med. Association, ECF No. 29, at 3-4; Amicus Br. of Deans, Chairs and Scholars, ECF. No. 24, at 20 (estimating coverage losses between 15,000 and 23,000 people). *Cf. Stewart II*, 366 F. Supp. 3d at 140 ("Whatever the precise calculation, the number is undoubtedly substantial."). Nothing in the record indicates that the Secretary made an effort to grapple with any of those expert projections. *See Am. Wild Horse Press Campaign*, 873 F.3d at 923 (agency must "examine all relevant factors and record evidence").

In an attempt to side-step this deficiency, Defendants emphasize that the Secretary recognized that some individuals "may lose coverage" and included a heading entitled "Comments on Coverage Loss." Fed. Br. at 17; NH Br. at 20. But "stating that a factor was considered is not a substitute for considering it." *Stewart I*, 313 F. Supp. 3d at 259 (internal quote and alterations omitted). And these aspects of the approval letter do not show a reasoned evaluation of the coverage loss. *See* Pls.' Br. at 22-23. First, under this heading the Secretary once again impermissibly compared the loss of coverage under the waiver to no coverage at all. *See* AR 10.

Second, the Secretary appears to argue that temporary coverage loss does not actually constitute coverage loss or is otherwise irrelevant. *See* AR 5, 8; Fed. Br. at 18. That is nonsensical. Commenters did not base their concerns about coverage loss on an assumption that it would be permanent; rather, they anticipated temporary coverage loss and explained that gaps in coverage have serious health and financial consequences. *See, e.g.*, AR 2242-43, 2723-24, 2494-95, 3660; *see also Stewart II*, 366 F. Supp. 3d at 142; Amicus Br. of the Am. Academy of Pediatrics & the Am. Med. Association, ECF No. 29, at.14. The Secretary offered no response at all to those concerns. In fact, the Secretary elsewhere acknowledges that gaps and delays in obtaining coverage

are harmful to individuals and to the health system. *See* AR 3, 5 (noting that gaps in coverage prevent individuals from obtaining preventative care, "potentially resulting in worse health outcomes."); Fed. Br. at 25. It was arbitrary for the Secretary to dismiss gaps in coverage as irrelevant when considering the consequences of coverage loss. *See also Stewart II*, 366 F. Supp. 3d at 142 (Secretary must consider coverage loss "whether it represents primarily permanent losses of coverage or a high incidence of gaps.").

Next, Defendants underscore that the Secretary speculated that coverage loss may be attributable in part to individuals transitioning from Medicaid to private insurance. AR 4-5, 11; Fed. Br. at 13; NH Br. at 8. However, substantial evidence in the record undermines any claim that Granite Advantage will increase access to commercial coverage. *See* Pls.' Br. at 23 n.5 (citing evidence that few low-wage workers have access to commercial coverage), 26, 31 (citing evidence that work requirements have failed to effectively promote work or financial security). And yet again, the Secretary did not attempt to quantify "how many beneficiaries might make that transition," *Stewart I*, 313 F. Supp. 3d at 264, or "cite evidence or otherwise provide a reasoned basis for the assertion that some number of people will transition to commercial coverage." *Stewart II*, 363 F. Supp. 3d at 142.

Defendants also continue to assert that the exemptions, good cause exceptions, and other safeguards "seek[] to make compliance achievable," and minimize coverage loss. Fed. Br. at 20-21; *see also id.* at 9-10; NH. Br. at 4-5, 8, 16, 20. Plaintiffs addressed those unsupported claims in detail in their opening brief, *see* Pls.' Br. at 24-26, highlighting that these purported "guardrails," were "baked in" to the concerns commenters raised about coverage loss, *see Stewart I*, 313 F. Supp. 3d at 263, supported by evidence from SNAP and TANF, and that the Secretary actually *narrowed* certain exemptions and limited certain safeguards when approving Granite Advantage. Pls.' Br. at

24-25; *see also* Fed. Br. at 10 n.4 (noting additional limitation on "opportunity to cure."). Defendants offer no response.

With respect to retroactive coverage, Defendants simply repeat the assertion that eliminating retroactive coverage will encourage more individuals to enroll when healthy. Fed. Br. at 25-26. But the Court has repeatedly rejected this reasoning as conclusory, given that ending retroactive coverage by definition reduces coverage. *Stewart II*, 366 F. Supp. 3d at 143*; Stewart I*, 313 F. Supp. 3d at 265; *Gresham*, 363 F. Supp. 3d at 179. Defendants point to no new reasoning or evidence that warrants a different conclusion here.[3]

The Secretary's retroactive coverage reasoning fails for an additional, independent reason. In 2015, the Secretary acknowledged that waiving retroactive coverage could lead to gaps in coverage and required New Hampshire to demonstrate that beneficiaries had seamless coverage at renewals, before allowing the waiver. *See* Pls.' Br. at 28. In approving Granite Advantage, however, the Secretary did not acknowledge that he was removing this important beneficiary protection, let alone explain how removing this protection could somehow promote coverage. Federal Defendants repeat the same error, equating the conditional approval from 2015 with the Secretary's decision here. *See* Fed. Br. at 25 n.7 (citing the 2015 conditional approval as Ex. I). This unexplained inconsistency renders the Secretary's decision arbitrary and capricious. *Id.*

Finally, Federal Defendants attempt to lower the Secretary's obligations to consider coverage loss by noting that Section 1115 "explicitly contemplates" that a project may cause

[3] Defendants cite an extra-record study to show that "churn" occurs in the Medicaid program. *See* Fed. Br. at 25 n.8. The agency cannot rely on *post-hoc* reasoning. *Michigan*, 135 S. Ct. at 2710. Moreover, the mere fact that churn occurs does not substantiate the Secretary's unsupported assertion that people decide to sign up only when they are sick. As commenters explained, churn in the expansion population is the result of fluctuating incomes and difficulty completing paperwork, not purposeful delay. AR 2441-43, 2524-25, 2580, 3414-15 (describing research showing that paperwork and reporting requirements cause churn); AR 2242, 2431, 2698 (describing how fluctuations in income cause churn).

coverage loss. Fed. Br. at 17. But the statute only contemplates that a project may "result in an impact on eligibility." 42 U.S.C. § 1315(d)(1). That provision, in fact, underscores that Congress intended the Secretary to carefully consider how a proposed project could "impact" eligibility and coverage. *See id.* § 1315(d)(2) (requiring Secretary to issue regulations ensuring demonstration applications affecting eligibility are subject to public comment and include, among other things, "coverage projections of the demonstration project"). And it "does not . . . sanction a demonstration that would result in significant coverage loss." *Stewart II*, 366 F. Supp. 3d at 140; *see also Walsh*, 538 U.S. at 664-65 (explaining that a program that serves "Medicaid-related purposes . . . would not provide a sufficient basis for upholding the program if it severely curtailed Medicaid recipients' access to" services). Nothing in the statute relieves the Secretary of his obligation to reasonably examine whether a proposed project is likely to promote Medicaid coverage.

C. The Secretary did not reasonably conclude that Granite Advantage would promote New Hampshire's fiscal sustainability.

Although Defendants argue that fiscal sustainability is an appropriate objective of the Medicaid Act, they fail to show that the Secretary reasonably concluded Granite Advantage would actually result in any cost savings. As Plaintiffs have explained, the Secretary failed to make any findings about the fiscal effects of Granite Advantage. *See* Pls.' Br. at 32-33. In response, Defendants identify no record evidence whatsoever. Instead, they merely repeat the conclusory assertion that "independent," "healthy and productive people are less expensive to insure." Fed. Br. at 4; *see also id.* at 9, 13; NH Br. at 8-9. The Secretary, however, did not estimate the cost savings New Hampshire might realize from the purported improvements in health and financial independence. Nor did the Secretary contend with the evidence in the record that undercut his conclusion. *See Genuine Parts Co.*, 890 F.3d at 312. For instance, there is ample record evidence that Granite Advantage will actually harm beneficiaries' health and financial independence,

resulting in increased costs to the State. *See infra* Sections IV.C, IV.D; *see also* AR 2711, 2494-95, 2243; Amicus Br. of the Am. Academy of Pediatrics & the Am. Med. Association, ECF No. 29, at.18-19. Defendants also fail to identify any place in the record where the Secretary seriously considered the significant increase in administrative costs to the State from imposing work requirements that commenters highlighted. *See* Pls.' Br. at 32; *see also* Amicus Br. of Deans, Chairs and Scholars, ECF No. 24 at. 12; Amicus Br. of the Am. Academy of Pediatrics & the Am. Med. Association, ECF No. 29, at 18-19. Without estimating either the purported savings or increased costs, the Secretary could not reasonably conclude that Granite Advantage would save money. *Stewart II*, 366 F. Supp. 3d at 149-50.

Defendants also fail to identify any record evidence regarding the overall fiscal health of New Hampshire's Medicaid program. There is no evidence that New Hampshire lacks the funding to maintain coverage of the expansion population (or other optional groups or services) without Granite Advantage. *See Stewart I*, 313 F. Supp. 3d at 271. Moreover, Defendants proffer no evidence in the record that the New Hampshire Medicaid program is "actually at risk" of financial collapse. *See Stewart I*, 313 F. Supp. 3d at 270-71. Nor do they explain why "cuts to the expansion population would be the best remedy for any budget woes." *Id.* at 271; *see also* Amicus Br. of Deans, Chairs and Scholars, ECF No. 24 at. 27 (noting the positive economic impact the Medicaid expansion has for the state). In fact, Defendants did not respond to the evidence Plaintiffs cited showing that increasing the number of uninsured individuals in the State will increase the financial burdens on the health care system itself. Amicus Br. of Deans, Chairs and Scholars, ECF No. 24 at 33; *see also* AR 33 (STC 24(u) acknowledging that individuals whose coverage is suspended will still seek care from free health clinics, demonstrating CMS's expectation that uncompensated care costs will be borne by those health clinics). "[W]ithout a finding about the savings that [the

1115 waiver] could be expected to yield—the Secretary could not make a reasoned decision that it would promote fiscal sustainability." *Stewart II*, 366 F. Supp. 3d at 150. Nor could he adequately weigh those cost savings against the burdens imposed on Medicaid recipients. *Id.* at 152. As a result, the approval is arbitrary and capricious even under Defendants' reading of the objectives.

D. The Secretary did not reasonably conclude that Granite Advantage would promote health and financial independence.

As Plaintiffs explained in their opening brief, Pls.' Br. at 29-31, the Secretary could not have reasonably determined that Granite Advantage will promote health and financial independence—even assuming, which Plaintiffs strongly contest, that such goals are permissible.

First, as to health, the Secretary's approval letter offered nothing more than speculation that forcing people to work or volunteer "may lead to improved health and wellness." AR 4. *See Coburn v. McHugh*, 679 F.3d 924, 934 (D.C. Cir. 2012) ("At the very least, the [agency] must provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision."). But the Secretary did not identify any studies or evidence to support this claim in the approval letter, and Defendants' bare citations to studies in the briefs, without explanation, do not show whether the Secretary grappled with the limitations on what those studies actually conclude. *Compare* Fed. Br. at 27 *and* NH BR. at 21, *with* Pls.' Br. at 29-30. And as Plaintiffs already explained, the very studies the Secretary includes in the record refute the simple causal relationship he asserted. *See* Pls.' Br. at 29-30. Defendants offer no response.

But even if the Secretary had a rational basis for finding that work leads to improved health, he completely ignored the array of record evidence showing that work *requirements* do not increase the number of people working or help them earn more money, and in fact often increase extreme poverty. Pls.' Br. at 31 (citing AR 2209-10, 2702-05, 3585-86, 3656). Again, Defendants fail to identify anywhere in the record where the Secretary adequately analyzed this evidence,

rendering his decision arbitrary and capricious, even under his reading of the statute. *See Stewart II,* 366 F. Supp. 3d at 147 (rejecting as insufficient Secretary's assertion that some number of people will "gain employment and move onto commercial coverage or otherwise attain financial independence" in the absence of "any attempt to estimate" the number of people who will do so or any analysis of the mechanism of by which they are likely to do so."); *see also id*. at 148. And the Plaintiffs' opening brief identified another reason the Secretary's approval fails: he did not analyze the magnitude of the health and financial harms individuals would suffer against any purported benefits. Pls.' Br. at 30-31, 32; *see also Stewart II*, 366 F. Supp. 3d at 145. Defendants' responses, once again, identify no place in the record where this required analysis took place.

Lacking any record support for the Secretary's decision, Defendants instead take aim at the legal standard itself. *See* Fed. Br. at 26. They rely on *Aguayo* and *C.K.* to assert that the Secretary need only address comments that "negate any appreciable possibility of success" of the project. *Id.* Those cases are inapposite because they do not engage in the "searching" review of the record required under subsequently decided Supreme Court and D.C. Circuit precedent. *See C.K. v. New Jersey Dep't of Health & Human Servs.*, 92 F.3d 171, 183 (3d Cir. 1996); *Aguayo*, 473 F.2d at 1103-05. *Aguayo*, which *C.K.* follows, pre-dates *State Farm*, which requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action." 463 U.S. at 43. In this circuit, "an agency cannot ignore evidence contradicting its position." *Butte City v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010); *see also, e.g., Genuine Parts Co.*, 890 F.3d at 312. As this Court has already concluded, the Secretary "needed to at least consider those objections." *Stewart I,* 313 F. Supp. 3d at 263 (quote and alteration omitted). This is not, as Defendants claim, an "impossibly high standard for approval." Fed. Br. at 40. Rather, it is the straightforward application of the basic obligation that an agency must engage in "reasoned decisionmaking." *State Farm*, 463 U.S. at 52.

The Secretary was required to "adequately engage[] the record evidence." *Hawaiian Dredging Constr. Co., Inc. v. NLRB*, 857 F.3d 877, 885 (D.C. Cir. 2017).

Finally, Defendants contend that considering the record evidence would require the Court improperly to referee a battle of the experts or wade through conflicting evidence. Not so. This is not a situation where both sides possess evidence the Court must weigh. The only evidence the Secretary cites is simply inapposite. The Administrative Procedure Act charges this Court with the authority and responsibility to hold the Secretary accountable for his failure to acknowledge, let alone weigh or refute, the relevant data and expert evidence in the record that contradicts his conclusion. *See Genuine Parts Co.*, 890 F.3d at 313; *United Airlines, Inc. v. FERC*, 827 F.3d 122, 130 (D.C. Cir. 2016) (vacating agency order where agency "provided no reasoned explanation for its choice of the . . . data" it used). Holding the Secretary to his burden is a core role of the judiciary here. Even assuming the Secretary was pursuing proper objectives, he failed to contend with the robust evidence presented in the comments, rendering the approval arbitrary and capricious.

E. The Secretary Lacks Authority to Approve Granite Advantage.

Plaintiffs' opening brief explained why the narrow authority Congress gave the Secretary to "waive" certain Medicaid provisions simply does not authorize him to fundamentally transform Medicaid from a program that guarantees health coverage for low-income people to one that conditions health coverage on work. Pls.' Br. at 33-36.

In response, Defendants do not contest Plaintiffs' reading of the term "waive," Pls.' Br. at 34, but instead, erroneously argue that allowing states to impose work requirements follows "the ordinary course" with respect to the use of that narrow authority. Fed. Br. at 23; *see also* NH Br. at 21-23. They contend that the Secretary granted states Section 1115 waivers to impose work requirements in AFDC, leading Congress to add work requirements into the SNAP and TANF

statutes in 1996. Fed. Br. at 23. Thus, they argue, Section 1115 gives the Secretary the authority to "experiment" at will with similar work requirements in Medicaid. Fed. Br. at 23-24. But Defendants ignore two crucial facts. First, AFDC and Medicaid are distinct statutes with distinct purposes, as Plaintiffs describe in detail above. *See* Section II.A, *supra* (comparing 42 U.S.C. § 601 and 42 U.S.C. § 1396-1). Second, the AFDC and SNAP statutes themselves long included work requirements, *see* Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 105, 76 Stat. 172, 186-88, An Act to Amend the Food Stamp Act of 1964, Pub. L. No. 91-671, § 5(c), 84 Stat. 2048, 2050 (1971), meaning the Secretary only approved waivers to allow states to adjust the precise nature and scope of the requirements. The history of work requirements in AFDC (and later TANF) actually underscores Plaintiffs' position: the decision to include work requirements in a particular public assistance program (or not) is a choice for Congress, not the Secretary, to make in the first instance.

Congress's steadfast refusal to incorporate work requirements wholesale into Medicaid extends through its recent failure to pass two bills that would have imposed, or allowed states to impose, work requirements on Medicaid enrollees. *See* Pls.' Br. at 35. These failed attempts indicate Congress's belief that congressional action is required to impose work requirements and that such work requirements are ill-advised. *See* Pls.' Br. at 35. They should be considered together with the statutory text, structure, and history, which all support the conclusion that the Secretary exceeded his authority in approving the work requirements. *Id*. In fact, CMS previously agreed that the Secretary lacks authority to approve work requirements in Medicaid. *See* Pls.' Br. at 28; *Stewart I,* 313 F. Supp. 3d at 245. CMS articulated a consistent policy rooted in the clear directives of the Medicaid Act: "the Secretary does not have the authority to permit a state to require Medicaid beneficiaries to work." The Fiscal Year 2017 HHS Budget Before the Subcomm. on

Health of the H. Comm. on Energy & Com., 114th Cong. 86 (2016) (responses of Sec'y of Health & Hum. Servs. Sylvia Burwell).

For its part, New Hampshire cites 42 U.S.C. § 1396a(b) to argue that the Secretary has authority to impose work requirements as a condition of eligibility. NH Br. at 21-22. However, the Secretary did not base this, or any other, work requirement waiver on this provision. This lack of reliance is not surprising as courts have repeatedly struck down state attempts to include eligibility conditions on Medicaid beneficiaries that were not enumerated in 1396a(b). *See, e.g., Comacho v. Tex. Workforce Comm'n,* 408 F.3d 229, 235 (5th Cir. 2005) (striking down Texas' rule requiring termination of Medicaid coverage for TANF recipients who failed to ensure children's immunizations, wellness check-ups, school attendance, and avoid substance use, stating "Texas cannot add additional requirements for Medicaid eligibility."); *Jones v. T.H.,* 425 U.S. 986 (1976) (affirming lower court striking down a Utah regulation as inconsistent with the Medicaid statute because it imposed a parental consent requirement on minors seeking Medicaid-covered family planning services).

V. The State Medicaid Director Letter Is A Final Agency Action That Violates The APA

The Secretary insists the SMD Letter is not a "final agency action" and did not require notice and comment. Fed. Br. at 30-31. This argument fails. Agency action is "final," and therefore subject to judicial review under the APA, if two factors are present. "'First, the action must mark the consummation of the agency's decisionmaking process.'" *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

"'[S]econd, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.'" *Id.* Both are true of the SMD Letter.

First, the SMD Letter clearly marks the consummation of CMS's decision making process regarding its position on state efforts to impose work requirements on Medicaid coverage. The Letter unequivocally "announc[es] a new policy," AR 57, "committing to support state demonstrations that require eligible adult beneficiaries to engage in work or community engagement activities." AR 59 (emphasis added); *see* Fed. Br. at 30 (stating that non-final agency guidance is one that does not "commit[] CMS to a course of action"). For example, the Letter sets forth numerous specific requirements that "States must comply with" to receive CMS approval for a demonstration project imposing work requirements. AR 61-64 (emphasis added). These requirements include exemptions for individuals deemed "medically frail" and provisions that "automatically" consider individuals who comply with TANF or SNAP work requirements to be complying with Medicaid work requirements. AR 61. The Letter thus reflects the "agency's settled position, a position it plans to follow in reviewing State-issued [Section 1115 proposals]." *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022-23 (D.C. Cir. 2000) (finding EPA guidance document constituted "final agency action" where the document "consist[ed] of requir[ements] State [] authorities" must satisfy in order to receive EPA approval of proposed regulatory permits).

Second, the SMD Letter has real "legal consequences." *Hawkes Co.*, 136 S. Ct. at 1813. Federal Defendants protest that "CMS itself characterizes the letter as nonbinding guidance." Fed. Br. at 31. But, at the outset, courts do not accept at face value the labels an agency applies to its actions. *Appalachian Power*, 208 F.3d at 1022-24. And it "has been settled in this circuit for many years" that "the issuance of a guideline or guidance may constitute final agency action" warranting judicial review. *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000); *see*,

e.g., *Mendoza v. Perez*, 754 F.3d 1002, 1008 (D.C. Cir. 2014) (finding guidance letters that "update[d] special procedures" for "seeking [] certification in [certain] occupations" constituted final agency action); *Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023, 1028, 1032 (D.C. Cir. 2016) (finding agency letter was final agency action because it "establishe[d] legal consequences," even though it "created no new legal obligations").

The Secretary emphasizes that CMS did not cite the Letter as authority for the November 2018 approval of Granite Advantage. Fed. Br. at 31. But, as noted in Plaintiffs' opening brief, he did cite it before litigation began, for example in the initial approval of work requirements in the New Hampshire Premium Assistance Program in May 2018, AR 103, and in November 2018, he relied on the criteria cited in the letter though he did not specifically refer to it. Pl. Br. at 40-41, AR 8, 60, 63. Moreover, the Secretary has consistently cited states' compliance with the terms of the SMD Letter as a basis for approving Section 1115 projects involving work requirements. *See* Pls.' Br. at 41 (discussing CMS's reliance on SMD Letter and the Letter's requirements in approving Arkansas, Indiana, and Maine waivers). Likewise, since issuing the SMD letter, CMS has itself communicated that it has binding effect—in numerous tweets, and in recent guidance. *See* Pls.' Br. at 41-42. Regardless of how CMS initially characterized the Letter, its application proves that it has legal effect. *See Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (the "most important factor" is "the actual legal effect" of the guidance).

It is plain that the SMD Letter has direct legal consequences for any state seeking to implement work requirements: failure to comply with the Letter's requirements will result in a denial, while meeting the requirements makes a proposal eligible for approval. Through the SMD Letter, CMS "has given the States their 'marching orders' and expects the States to fall in line. . . ." *Appalachian Power*, 208 F.3d at 1023; *see also Alabama v. Ctrs. for Medicare & Medicaid Servs.*,

780 F. Supp. 2d 1219, 1227 (M.D. Ala. 2011) (holding CMS "Dear State Health Official" letter establishing "obligations of states who seek recovery from fraud-and-abuse defendants" was final agency as the action was one from which 'legal consequences will flow'" (quoting *Bennett*, 520 U.S. at 178)), *aff'd*, 674 F.3d 1241 (11th Cir. 2012). This Court therefore has authority to review the SMD Letter.

It is undisputed that notice and comment did not occur. The Secretary argues that the Letter is exempt from those requirements because it is a "[g]eneral statement[] of policy." that "'compels action by neither the recipient nor the agency.'" Fed. Br. at 31 (quoting *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 944 (D.C. Cir. 2012)). But this is not the test, either under *Holistic Candlers*—which did not even address the issue of substantive rules—or any other precedent.

The correct test is well established: If an agency pronouncement "substantially curtails [the agency's] discretion," then it "meets . . . [the] affirmative definition of a legislative rule" and must be promulgated pursuant to notice and comment procedures. *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1322 (D.C. Cir. 1988). To make this determination, courts look at whether the "language" in the agency's statement "strongly suggests that [the agency] will treat the [statement] as a binding norm," and, even "[m]ore critically," whether the agency's "later conduct applying [the statement] confirms its binding character." *Id.* at 1320-21. As described in Plaintiffs' opening brief and above, the language of the SMD Letter, CMS's conduct applying the Letter, and CMS' subsequent March 2019 guidance further implementing the policies announced in the Letter indicate that it is a substantive rule with binding effect, not a mere policy statement. *See* Pls.' Br. at 40-41. By announcing what is necessary to win CMS approval to impose work requirements, the SMD Letter "constrains the agency's discretion" over its Section 1115 decision-making.

McLouth, 838 F.2d at 1320; *see also Gen. Elec. Co. v. EPA*, 290 F.3d 377, 385 (D.C. Cir. 2002) (holding that "Guidance Document" was a substantive rule because it imposed "obligations upon applicants to submit applications that conform to the Document"). Because the SMD Letter is a substantive rule and was issued without the required notice and comment, it must be vacated.

VI. The Approval of Granite Advantage and the SMD Letter Should Be Vacated.

Federal Defendants assert that, even if Plaintiffs succeed on their APA challenge, any relief should be limited to the four plaintiffs and the project components that injured them. Fed. Br. at 27-29. This Court has rejected the invitation to limit relief from an illegal Section 1115 waiver to individual plaintiffs. *See Stewart II*, 366 F. Supp. 3d at 155; *Gresham v. Azar*, 363 F. Supp. 3d. at 184-85. Indeed, the "ordinary result" when a court finds an agency action unlawful is to vacate the action, not merely limit the relief to individuals. *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989); *see also, e.g.*, *Illinois Pub. Telecomms. Ass'n v. FCC*, 123 F.3d 693, 693 (D.C. Cir. 1997). *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). Accordingly, this Court and others have consistently "reject[ed] the government's invitation to confine its grant of relief strictly to the plaintiffs." *Nat'l Ass'n for the Advancement of Colored People v. Trump*, 298 F. Supp. 3d 209, 243 (D.D.C. 2018); *see, e.g.*, *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 631 (S.D.N.Y. 2019); *Doe 2 v. Mattis*, 344 F. Supp. 3d 16, 23 (D.D.C. 2018); *E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 867 (N.D. Cal. 2018); *Desert Survivors v. U.S. Dep't of the Interior*, 336 F. Supp. 3d 1131, 1136 (N.D. Cal. 2018).

"[T]he question of what relief [a court] may or must order is a 'merits' question of substantive law that is ultimately for the legislature to decide," and in the APA context, "Congress has required that agency action be reasonable and has prescribed that *courts must set it aside* where it is not." *New York*, 351 F. Supp. 3d at 675 (emphasis added); *see* 5 U.S.C. § 706(2). In other

words, so long as Plaintiffs have established Article III standing to sue, which they have done here, "a court has both the power *and* the duty to order the remedy Congress created." *New York*, 351 F. Supp. at 673-74. *See supra* Section II. That remedy is vacatur of the Secretary's approval, not some individualized or applied form of relief.[4]

Defendants also argue that this Court should limit any relief to the individual components of Granite Advantage that the named plaintiffs have standing to challenge. Fed. Br. at 28-29. This argument fails for similar reasons. First, Plaintiffs' Count II challenges the Granite Advantage Approval as a whole, and Plaintiffs have standing to bring that global claim. *See supra* Section II. Moreover, even if assessed separately, Plaintiffs have standing to challenge both the work requirements and waiver of retroactive eligibility, which are the two components of Granite Advantage. *Id.* This Court has repeatedly held that the "default" and "presumptive" remedy for unlawful agency action is to set it aside completely, *Stewart I,* 313 F. Supp. 3d at 272, *see also Stewart II,* 366 F. Supp. 3d at 155; *Gresham* 363 F. Supp. 2d at 182. Defendants provide no compelling legal or factual support for departure from this ordinary practice, and there is none here. Like the waiver approvals at issue in *Stewart* and *Gresham*, the Secretary's failure to consider the effect of Granite Advantage on coverage "infected his entire approval." *Stewart I,* 313 F. Supp. 3d at 272; *see also Gresham,* 363 F. Supp. 3d at 182 (finding the legal error infecting the Secretary's approval went "to the heart" of his decision). In short, there is no severability question in this case because the project as a whole is invalid.[5]

[4] Because the APA prescribes vacatur of the entire agency action as the proper remedy, not any individualized relief, Federal Defendants' argument about class certification, regardless of its merit, is also off the mark. *See* Fed. Br. 42.

[5] The decisions Federal Defendants cite for vacating only components of the waiver are inapposite because they address considerations related to severability of *statutory* provisions, which is governed by a different doctrine than relief from APA violations. Fed. Br. at 29, Statutory severability analysis is rooted in constitutional separation of power concerns and turns on analyzing Congress's intent for the statute, absent the offending provisions. *See, e.g., Murphy v.*

As an alternative, Federal Defendants assert that any remand should be without vacatur. *See* Fed. Br. 29. But, as this Court has previously recognized, there is no reason to deviate from the presumptive remedy of vacatur in this case. *See Stewart II*, 366 F. Supp. 3d at 155; *Stewart I*, 313 F. Supp. 3d at 272-73. Conspicuously, the government offers *no* rationale for why remand without vacatur is appropriate. For remand without vacatur to be appropriate, the Court must consider "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). As this Court held in *Stewart II*, neither of those factors weighs against vacatur. 366 F. Supp. 3d at 155.

With respect to the first factor, courts "have not hesitated to vacate a rule when the agency has not responded to empirical data or to an argument inconsistent with its conclusion." *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009). As explained above, the Secretary's approval of Granite Advantage suffers from "major shortcomings," including his failure to address the important effects of the program and his decision to "turn[his] back on the implications" of the program. *Humane Soc'y of the U.S. v. Zinke*, 865 F.3d 585, 614-15 (D.C. Cir. 2017). The deficiencies in the Secretary's approval thus are serious, substantive, and cannot be explained away. Moreover, the deficiencies in the Secretary's waiver approval are "not merely procedural; rather . . . the agency acted outside of the scope of its statutory authority." *Children's Hosp. Ass'n of Texas v. Azar*, 300 F. Supp. 3d 190, 211 (D.D.C. 2018). Where the Secretary has misinterpreted the

NCAA, 138 S. Ct. 1461 (2018) (asking whether "Congress would have wanted to sever" the offending provision). In the APA context, however, Congress has made its intentions clear by directing that "a reviewing court *shall* . . . hold unlawful and set aside agency action," that is arbitrary and capricious. 5 U.S.C. § 706(2); *see also New York*, 351 F. Supp. 3d at 675 (*"*Congress . . . has prescribed that courts must set [unreasonable agency action] aside.").

statute, including the scope of his waiver authority, or "neglected to consider one of Medicaid's central objectives," "vacatur [is] appropriate." *Stewart I*, 313 F. Supp. 3d at 273.

As for the second factor—the disruptive consequences of vacatur—that consideration is "weighty only insofar as the agency may be able to rehabilitate its rationale for the regulation." *Comcast*, 579 F.3d at 9. For reasons Plaintiffs have described, the approval cannot be rehabilitated and, therefore, the Court need not reach the second factor. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 97 (D.D.C. 2017). But even if the Court were to consider this second factor, it plainly weighs in favor of vacatur. As in *Stewart*, this waiver has not proceeded to the point where people are being terminated from coverage; that would not start until August 1, 2019. And while the Federal Defendants (but not the State Defendants) have suggested that all Medicaid expansion recipients in New Hampshire might have their coverage terminated if the waiver is invalidated, this prospect is highly speculative and legally questionable. "[F]orecasted harms [that] are imprecise or speculative" do not warrant "departure from the presumptive remedy of vacatur." *Pub. Emps. for Envtl. Responsibility v. U.S. Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 3 (D.D.C. 2016); *see also Standing Rock*, 282 F. Supp. 3d at 107. By contrast, allowing the approval to remain in effect will indisputably disrupt access to health insurance coverage and medically necessary care for tens of thousands of Medicaid enrollees. Vacatur will leave the status quo in place.

Not only does the Secretary's approval suffer from fundamental deficiencies that cannot be rehabilitated on remand, but allowing the approval to remain in effect while the Secretary takes a fruitless second look at the waiver would result in enormous disruptions to the ability of tens of thousands of low-income New Hampshire residents to access medical care. In light of these severe potential harms, "preserving the status quo—including Plaintiffs' continuity of coverage—is

appropriate." *Stewart I*, 313 F. Supp. 3d at 273. Accordingly, the Court should vacate the Secretary's unlawful actions.

VII. Plaintiffs Have Pleaded A Justiciable Claim Under The Take Care Clause

Plaintiffs allege that the Executive Branch's approval of Granite Advantage usurps Congress's legislative power by unilaterally rewriting the Medicaid statute with the explicit intent of undermining the ACA's Medicaid expansion. Compl., ECF. No. 1, ¶¶ 12, 107-28, 202-219. In response, Federal Defendants ask the Court to conclude that the Take Care Clause is categorically unenforceable. Fed. Br. at 32. The Court should reject that sweeping claim, which cannot be squared with fundamental notions of separation of powers.

Under the Take Care Clause, when legislation is enacted, the Executive has a duty to ensure that the laws are "faithfully execute[d]." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2446; *Clinton v. City of New York*, 524 U.S. 417, 438 (1998); *Angelus Milling Co. v. Comm'r*, 325 U.S. 293, 296 (1945); *Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 612-13 (1838). That obligation applies to "the President . . . personally and through officers whom he appoints." *Printz v. United States*, 521 U.S. 898, 922 (1997) (*citing* U.S. Const. art. II, § 2). Thus, when officers—such as the Secretary—exercise the President's Article II power to "execute" the laws, they are bound by the Article II duty to do so "faithfully." *Util. Air Regulatory Grp*., 134 S. Ct. at 2446.

Defendants' citation to *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1866), does not change this conclusion. That case stands for the narrow principle that the Court may not enjoin the President, personally, to affirmatively take an official action that was committed to his discretion. *Id.* That the courts are, however, empowered to enjoin executive officials whose actions exceed the limits of their constitutional authority is beyond debate. *See, e.g., Bowen v. Michigan Acad. Of Family Physicians*, 476 U.S. 667, 681 (1986) (courts will "ordinarily presume that Congress

intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command."); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("When an executive acts ultra vires, courts are normally available to reestablish the limits on his authority."). And Federal Defendants' passing assertion that the Clause is not privately enforceable runs counter to the long history of courts permitting private plaintiffs to hold executive officials accountable for ultra vires actions. *See, e.g., Util. Air Regulatory Grp.*, 134 S. Ct. at 2446; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Angelus Milling Co.*, 325 U.S. at 296; *Kendall*, 37 U.S. at 612-13.

The Take Care Clause provides an important means for courts to review the actions of subordinate executive officials when, as here, they act as lawmakers and arrogate to themselves Congress's exclusive legislative power. *See Youngstown* Co., 343 U.S. at 587. In the administrative realm, courts have explained the relationship between the Legislative and Executive powers as requiring that "Congress must lay down by legislative act an intelligible principle, and the agency must follow it." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) (Kennedy, J. concurring) (internal quotations omitted); *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). The Take Care Clause and non-delegation principles form two sides of the same coin: Congress may not delegate its legislative authority to define a law's intelligible principle and the Executive, in "faithfully execut[ing]" that law, may not exercise that core legislative power. *See Clinton*, 524 U.S. at 445-47 (line item veto unconstitutional though "Congress intended such a result," because it gave "the President the unilateral power to change the text of duly enacted statutes"). If Congress may not give away its legislative power, it is certainly unconstitutional for the Executive to take it without permission. *See Util. Air Regulatory Grp*., 134 S. Ct. at 2446.

That is precisely what the Secretary has done here. Because Plaintiffs have stated a claim that the Secretary has overstepped and disregarded his constitutional obligation to take care that the laws are faithfully executed, the Court should deny Federal Defendants' motion to dismiss.

CONCLUSION

Plaintiffs ask the Court to grant their motion for partial summary judgment; deny Defendants' motions; and vacate the approval of Granite Advantage. Plaintiffs also ask the Court to enjoin the SMD Letter as improperly promulgated under the APA.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2019, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send an electronic notice to all authorized CM/ECF filers.

By: /s/ Jane Perkins
Jane Perkins