

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 11, 2019

Decided February 14, 2020

No. 19-5094

CHARLES GRESHAM, ET AL.,
APPELLEES

v.

ALEX MICHAEL AZAR, II, SECRETARY, UNITED STATES
DEPARTMENT OF HEALTH AND HUMAN SERVICES IN HIS
OFFICIAL CAPACITY, ET AL.,
APPELLANTS

STATE OF ARKANSAS,
APPELLEE

Consolidated with 19-5096

Appeals from the United States District Court
for the District of Columbia
(No. 1:18-cv-01900)

Alisa B. Klein, Attorney, U.S. Department of Justice,
argued the cause for federal appellants. With her on the briefs

were *Mark B. Stern*, Attorney, *Robert P. Charrow*, General Counsel, U.S. Department of Health and Human Services, and *Brenna E. Jenny*, Deputy General Counsel.

Leslie Rutledge, Attorney General, Office of the Attorney General for the State of Arkansas, *Nicholas J. Bronni*, Solicitor General, *Vincent M. Wagner*, Deputy Solicitor General, and *Dylan L. Jacobs*, Assistant Solicitor General, were on the brief for appellant State of Arkansas.

Ian Heath Gershengorn argued the cause for plaintiff-appellees. With him on the brief were *Jane Perkins*, *Thomas J. Perrelli*, *Devi M. Rao*, *Natacha Y. Lam*, *Zachary S. Blau*, and *Samuel Brooke*.

Kyle Druding was on the brief for *amici curiae* American College of Physicians, et al. in support of plaintiffs-appellees.

Edward T. Waters, *Phillip A. Escoriaza*, and *Christopher J. Frisina* were on the brief for *amici curiae* Deans, Chairs, and Scholars in support of plaintiffs-appellees.

Judith R. Nemsick, *Jon M. Greenbaum*, and *Sunu Chandy* were on the brief for *amici curiae* Lawyers Committee for Civil Rights Under Law, et al. in support of appellees and affirmance.

Before: PILLARD, *Circuit Judge*, and EDWARDS and SENTELLE, *Senior Circuit Judges*.

Opinion for the Court filed by *Senior Circuit Judge* SENTELLE.

SENTELLE, *Senior Circuit Judge*: Residents of Kentucky and Arkansas brought this action against the Secretary of

Health and Human Services. They contend that the Secretary acted in an arbitrary and capricious manner when he approved Medicaid demonstration requests for Kentucky and Arkansas. The District Court for the District of Columbia held that the Secretary did act in an arbitrary and capricious manner because he failed to analyze whether the demonstrations would promote the primary objective of Medicaid—to furnish medical assistance. After oral argument, Kentucky terminated the challenged demonstration project and moved for voluntary dismissal. We granted the unopposed motion. The only question remaining before us is whether the Secretary’s authorization of Arkansas’s demonstration is lawful. Because the Secretary’s approval of the plan was arbitrary and capricious, we affirm the judgment of the district court.

I. Background

Originally, Medicaid provided health care coverage for four categories of people: the disabled, the blind, the elderly, and needy families with dependent children. 42 U.S.C. § 1396-1. Congress amended the statute in 2010 to expand medical coverage to low-income adults who did not previously qualify. *Id.* at § 1396a(a)(10)(A)(i)(VIII); *NFIB v. Sebelius*, 567 U.S. 519, 583 (2012). States have a choice whether to expand Medicaid to cover this new population of individuals. *NFIB*, 567 U.S. at 587. Arkansas expanded Medicaid coverage to the new population effective January 1, 2014, through their participation in private health plans, known as qualified health plans, with the state paying premiums on behalf of enrollees. Appellees’ Br. 14; *Gresham v. Azar*, 363 F. Supp. 3d 165, 171 (D.D.C. 2019).

Medicaid establishes certain minimum coverage requirements that states must include in their plans. 42 U.S.C. § 1396a. States can deviate from those requirements if the

Secretary waives them so that the state can engage in “experimental, pilot, or demonstration project[s].” 42 U.S.C. § 1315(a). The section authorizes the Secretary to approve “any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives” of Medicaid. *Id.*

Arkansas applied to amend its existing waiver under § 1315 on June 30, 2017. Arkansas Administrative Record 2057 (“Ark. AR”). Arkansas gained approval for its initial Medicaid demonstration waiver in September 2013. In 2016, the state introduced its first version of the Arkansas Works program, encouraging enrollees to seek employment by offering voluntary referrals to the Arkansas Department of Workforce Services. Dissatisfied with the level of participation in that program, Arkansas’s new version of Arkansas Works introduced several new requirements and limitations. The one that received the most attention required beneficiaries aged 19 to 49 to “work or engage in specified educational, job training, or job search activities for at least 80 hours per month” and to document such activities. *Id.* at 2063. Certain categories of beneficiaries were exempted from completing the hours, including beneficiaries who show they are medically frail or pregnant, caring for a dependent child under age six, participating in a substance treatment program, or are full-time students. *Id.* at 2080–81. Nonexempt “beneficiaries who fail to meet the work requirements for any three months during a plan year will be disenrolled . . . and will not be permitted to re-enroll until the following plan year.” *Id.* at 2063.

Arkansas Works included some other new requirements in addition to the much-discussed work requirements. Typically, when someone enrolls in Medicaid, the “medical assistance under the plan . . . will be made available to him for care and

services included under the plan and furnished in or after the third month before the month in which he made application.” 42 U.S.C. § 1396a(a)(34). Arkansas Works proposed to eliminate retroactive coverage entirely. Ark. AR 2057, 2061. It also proposed to lower the income eligibility threshold from 133% to 100% of the federal poverty line, meaning that beneficiaries with incomes from 101% to 133% of the federal poverty line would lose health coverage. *Id.* at 2057, 2060–61, 2063. Finally, Arkansas Works eliminated a program in which it used Medicaid funds to assist beneficiaries in paying the premiums for employer-provided health care coverage. *Id.* at 2057, 2063, 2073. Arkansas instead used Medicaid premium assistance funds only to help beneficiaries purchase a qualified health plan available on the state Health Insurance Marketplace, requiring all previous recipients of employer-sponsored coverage premiums to transition to coverage offered through the state’s Marketplace. *Id.* at 2057, 2063, 2073.

On March 5, 2018, the Secretary approved most of the new Arkansas Works program via a waiver effective until December 31, 2021, but with a few changes. He approved the work requirements but under the label of “community engagement.” *Id.* at 2. The Secretary authorized Arkansas to limit retroactive coverage to thirty days before enrollment rather than a complete elimination of retroactive coverage. *Id.* at 3, 12. He also approved Arkansas’s decision to terminate the employer-sponsored coverage premium assistance program. *Id.* at 3. The Secretary did not, however, permit Arkansas to limit eligibility to persons making less than or equal to 100% of the federal poverty line. *Id.* at 3 n.1, 11. Instead, the Secretary kept the income eligibility threshold at 133% of the federal poverty line. *Id.* at 3 n.1, 11.

In the approval letter, the Secretary analyzed whether Arkansas Works would “assist in promoting the objectives of

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