Nos. 20-37 and 20-38

In the Supreme Court of the United States

XAVIER BECERRA, SECRETARY OF
HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

CHARLES GRESHAM, ET AL.

STATE OF ARKANSAS, PETITIONER

v.

CHARLES GRESHAM, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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No. 20-37

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This Court granted review to address whether the Secretary of Health and Human Services (HHS) acted within his authority under 42 U.S.C. 1315(a) in approving certain work-related requirements as part of time-limited demonstration projects in Arkansas's and New Hampshire's Medicaid programs. The approvals of those work-related requirements—made well over a year before the COVID-19 pandemic—have been overtaken by events.

[1] Secretary Becerra is automatically substituted as a party for his predecessor in office pursuant to Rule 35.3 of the Rules of this Court.

As we previously informed the Court, on February 12, 2021, HHS commenced a review of both States' work-related requirements—which are not currently in effect—to determine whether implementing them in the markedly different environment facing Medicaid beneficiaries today and going forward in the pandemic's aftermath would further Medicaid's objectives. See Gov't Mot. to Vacate & Remand (Mot.) 4-7. HHS has now completed that review and has determined that testing those requirements is not "likely to assist in promoting the objectives of" Medicaid. 42 U.S.C. 1315(a). The agency has accordingly withdrawn its approval of those requirements. Although the withdrawals will not take effect until the completion of any administrative appeals the States may pursue, HHS's action makes clear that there is no longer any present need for this Court's plenary review.

In light of these greatly changed circumstances, the appropriate course is to vacate the judgments below and remand with instructions that the underlying matters be remanded to the agency. Mot. 4-7. The private respondents who commenced these suits agree. Mot. 7. If the Court nevertheless considers the merits, it should simply clarify that Section 1315(a) does not preclude the Secretary, in determining whether to approve a demonstration project, from considering indirect (as well as direct) effects that the project may have on the statutory objective of providing healthcare coverage. The Court then should vacate the court of appeals' judgments in light of that holding and remand to that court for further proceedings, including a further remand to the district court or to the Secretary as appropriate.

I. THESE CASES NO LONGER PRESENT A SUITABLE CONTEXT TO ADDRESS THE QUESTION PRESENTED

As we explain in our pending motion to vacate the court of appeals' judgments and remand, these cases no longer provide a suitable context in which to decide the merits of the question presented because the landscape has materially changed since the Court granted certiorari. Mot. 4-7; see Gov't Reply in Support of Mot. to Vacate & Remand 1-6. The private respondents who obtained the court of appeals' judgments support vacatur and remand. Mot. 7. Further developments since briefing on that motion was completed make even clearer that plenary review in these cases is no longer necessary or warranted.

A. This Court granted certiorari to review the court of appeals' judgments that invalidated HHS's approvals of amendments to Arkansas's and New Hampshire's Medicaid demonstration projects under 42 U.S.C. 1315(a). The central features of those projects, and the focal point of the litigation in the lower courts, were work-related requirements that the States proposed and HHS approved to test as possible means of "promoting the objectives of" Medicaid. *Ibid.*; see Mot. 2-3; Gov't Br. 14-21.

As the government and the private respondents have recounted, however, developments since the decisions below have "fundamentally changed" the landscape. Private Resp. Br. 26 (capitalization and emphasis omitted); see *id.* at 23-27; Mot. 3-6. The COVID-19 pandemic as well as the uncertainty surrounding the long-term effects on economic activity and opportunities make implementing these work-related requirements infeasible in practice. Mot. 3. Federal legislation in response to the pandemic that provides an increase in federal Medicaid funding to States bars States that accept the increase (as all States have done) from enforcing work-related requirements

like those at issue here throughout the pandemic. Mot. 3-4. And on February 12, 2021, HHS informed Arkansas and New Hampshire that the agency had "preliminarily determined"—in light of the pandemic, its public-health and economic consequences, and its uncertain aftermath—"that allowing work and other community engagement requirements to take effect in" Arkansas and New Hampshire "would not promote the objectives of the Medicaid program."[2]

In informing the States of those preliminary determinations, HHS explained that it has both the authority and ongoing responsibility to maintain continued oversight of previously approved demonstration projects to ensure that they are still likely to assist in promoting Medicaid's objectives. See Mot. 4-5. HHS further explained that it had serious concerns that testing work-related requirements in the aftermath of the COVID-19 pandemic and in the associated economic environment presents a risk of a substantial loss of health-care coverage in the near term. Those include concerns about the pandemic's adverse effects on Medicaid beneficiaries' health, economic conditions and opportunities, and access to transportation and affordable child care necessary for beneficiaries to engage in work-related activities, as

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[2] Letter from Elizabeth Richter, Acting Administrator, Centers for Medicare & Medicaid Servs. (CMS), HHS, to Dawn Stehle, Director, Arkansas Medicaid 1-2 (Feb. 12, 2021), https://go.usa.gov/xs4xu; Letter from Elizabeth Richter, Acting Administrator, CMS, HHS, to Lori Shibinette, Commissioner, New Hampshire Dep't of Health & Human Servs. 1-2 (Feb. 12, 2021), https://go.usa.gov/xs4aq; see Mot. 4-5; see also Exec. Order No. 14,009, § 3(a)(ii), 86 Fed. Reg. 7793 (Feb. 2, 2021) (following the change in Administration, directing HHS to "review" existing demonstration projects that "may reduce coverage under or otherwise undermine Medicaid," particularly given the pandemic).

well as the extent to which those impacts will persist beyond the pandemic. Mot. 5. HHS observed that it had accordingly commenced a process of determining whether to withdraw its prior approvals of the work-related requirements in the States' projects. *Ibid.* HHS afforded each State an opportunity to respond to the concerns that HHS raised about implementing those requirements in the public-health and economic environment, inviting each State to submit within 30 days any additional information that in its view would support not withdrawing the approval of its work-related requirement.

B. Since it issued the February 12 letters, HHS has completed its review of the work-related requirements in both States' demonstration projects. On March 17, 2021, following the completion of its review, HHS informed each State that the agency has determined to withdraw its previous approvals of those requirements in the States' projects. See Letter from Elizabeth Richter, Acting Administrator, CMS, HHS, to Dawn Stehle, Deputy Director for Health and Medicaid, Arkansas Department of Human Servs. 1-16 (Mar. 17, 2021) (Arkansas Withdrawal Decision), https://go.usa.gov/xss2r; Letter from Elizabeth Richter, Acting Administrator, CMS, HHS, to Lori Shibinette, Commissioner, New Hampshire Dep't of Health & Human Servs. 1-14 (Mar. 17, 2021) (New Hampshire Withdrawal Decision), https://go.usa.gov/xss2Y. HHS's March 17 withdrawal decisions explained that the agency's review confirmed the central concern that HHS had identified in its February 12 letters: that testing the work-related requirements during and in the aftermath of the COVID-19 pandemic would present a significant risk of coverage losses and harm to beneficiaries and, on balance, is unlikely to promote the statutory objectives of Medicaid. See *ibid.*

HHS observed that significant coverage loss and harm to beneficiaries had occurred even before the pandemic in the periods in 2018 and 2019 during which each State's work-related requirement was in effect. Arkansas Withdrawal Decision 4-10; New Hampshire Withdrawal Decision 3-9. That experience illustrated the risks of linking Medicaid eligibility to compliance with work-related requirements, which would likely be exacerbated by the COVID-19 pandemic and its aftermath. See *ibid.* Arkansas witnessed significant coverage loss in that period: more than 18,000 individuals were disenrolled from coverage for failing to report the required number of hours of qualifying activities. Arkansas Withdrawal Decision 4; see *id.* at 4-6. Arkansas experienced no associated increase in employment or other qualifying activities in that period. *Id.* at 6-7. Indeed, HHS explained that the "data suggest that nearly everyone who was targeted by the Arkansas Works community engagement requirement (97 percent of the respondents 30 to 49 years of age in Arkansas in [a particular 2019 study])" either "already met the [work-related] requirement or was exempt from it." *Ibid.* Similarly, HHS noted that nearly 17,000 beneficiaries in New Hampshire—approximately 40% of those subject to the State's work-related requirement, which represents roughly one-third of the population covered under the demonstration project—"were set to be suspended for non-compliance and lose Medicaid coverage." New Hampshire Withdrawal Decision 9; see *id.* at 3-7. HHS also noted a similar experience in Michigan where 80,000 beneficiaries in Michigan, nearly one-third of those subject to the State's work requirements, were set to lose Medicaid coverage. Arkansas Withdrawal Decision 7-8; New Hampshire Withdrawal Decision 7-8.

HHS found that "[t]he COVID-19 pandemic and the uncertainty surrounding the long-term effects on economic activity and opportunities across the nation exacerbate the risks associated with tying a community engagement requirement to Medicaid eligibility, making such requirements infeasible under the current circumstances." Arkansas Withdrawal Decision 10. The agency explained that the "[j]ob and income loss" experienced during the pandemic has been especially "acute among the low-income population, those who have the least wherewithal to withstand economic shocks and are disproportionately enrolled in Medicaid." *Ibid.* For example, HHS noted that "[f]ifty-two percent of lower income adults (annual income below $37,500) live in households where someone has lost a job or taken a pay cut due to the pandemic." *Id.* at 10-11. HHS additionally found that "the potential for coverage loss would be particularly harmful in the aftermath of the pandemic" in light of "the short- and long-term negative consequences from the loss of timely access to necessary health care" and "uncertainty regarding the lingering health consequences of COVID-19 infections." *Id.* at 13-14; see New Hampshire Withdrawal Decision 9-11, 13.

HHS additionally explained that, although it had set forth its concerns in the February 12 letters and invited each State to submit any additional information that in the State's view might warrant not withdrawing HHS's approvals of the work-related requirements, neither State submitted information that addressed HHS's concerns. Arkansas Withdrawal Decision 3, 14-15; New Hampshire Withdrawal Decision 2. New Hampshire did not make any further submission. New Hampshire Withdrawal Decision 2. Arkansas submitted a letter in

which it argued that HHS should not reconsider previously approved demonstration projects generally, and should not revisit its approval of Arkansas's work-related requirement in light of the pandemic in particular at this time; raised questions about HHS's "process for reconsidering Arkansas's approved project"; and requested an additional period of "not less than 90 days" to submit information showing why the approval of Arkansas's work requirement should not be withdrawn.[3]

HHS observed in response that Arkansas's submission "did not assuage the concerns [HHS] raised in the February 12, 2021 letter." Arkansas Withdrawal Decision 3; see *id.* at 14-15. Arkansas had not "dispute[d] that the COVID-19 pandemic has had a significant impact on the health of Medicaid beneficiaries and that there is uncertainty about the lingering health effects of COVID-19." *Id.* at 3; see *id.* at 15. Nor did Arkansas "dispute the pandemic's likely impact on economic opportunities for beneficiaries" to engage in work and other community-engagement activities. *Id.* at 15. HHS further noted that Arkansas also had not "demonstrate[d] that it has the infrastructure in place—such as subsidies for job-skills training, transportation, and child care—that may be necessary to make compliance with the community engagement requirements feasible for beneficiaries and prevent large-scale coverage losses." *Ibid.* Arkansas also "did not provide evidence that such infrastructure would be in place in the aftermath of the pandemic." *Id.* at 3. And, HHS observed, New Hampshire had declined to address HHS's concerns at all. See New Hampshire Withdrawal

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[3] Letter from Dawn Stehle, Deputy Director for Health and Medicaid Director, Arkansas Dep't of Human Servs., to Elizabeth Richter, Acting Administrator, CMS, HHS 1-2 (Mar. 12, 2021), https://go.usa.gov/xss2a; see Arkansas Withdrawal Decision 14.

Decision 2. Confronted with serious concerns, confirmed by its review, that testing the work-related requirements was not likely to advance Medicaid's objectives—and presented with no countervailing information from the States—HHS withdrew the approvals of those requirements in each project. See Arkansas Withdrawal Decision 15-16; New Hampshire Withdrawal Decision 14.

C. In light of HHS's rescission of its approvals of the work-related requirements, these cases no longer provide a suitable context for this Court to adjudicate the merits. The original agency actions under review have been overtaken by subsequent events. And the administrative records that HHS had developed and that the lower courts had considered reflected a markedly different, pre-pandemic world that bears little resemblance to the real-world landscape today or the likely future landscape based on the agency's judgment. The validity of the agency's original approvals of the work-related requirements is now academic in light of the agency's intervening determinations that the work-related requirements should not be implemented. Regardless of whether HHS had authority to approve those requirements in 2018, it has determined—in the exercise of the expert judgment and discretion that Congress has vested in the agency under Section 1315—not to authorize the States to implement those requirements today.

The appropriate course in light of the greatly changed circumstances is to vacate the judgments below and to remand with instructions that the underlying matters be remanded to the Secretary, so that the agency may determine the appropriate path forward in the first instance. See Mot. 6-7. The private respondents agree with that approach. Mot. 7. New Hampshire takes no position. *Ibid.*

Only Arkansas opposes that disposition. Ark. Opp. to Gov't Mot. to Vacate & Remand 1-6. It contends that the cases are not yet moot. *Id.* at 2-4. But regardless of the Court's jurisdiction to decide the cases, Arkansas identifies no sound justification for adjudicating the merits, given that the original agency actions under review have been overtaken by events.[4]

Arkansas's observation (Opp. to Gov't Mot. to Vacate & Remand 3-5) that the withdrawal determinations remain subject to further review within the agency does not establish a need for plenary review of the original approvals by this Court. As the government previously observed, and as the withdrawal decisions note, each State is entitled to request an administrative hearing before the withdrawal of its work-related requirements takes effect. Gov't Br. 18 n.7; Arkansas Withdrawal Decision 16-17; New Hampshire Withdrawal Decision 15. And although the prior approval of Arkansas's demonstration project expires by its terms on December 31, 2021, Opp. to Gov't Mot. to Vacate & Remand 5 n.2, Arkansas has intimated that it might nevertheless seek judicial review of a final withdrawal decision, see *id.* at 3-5. But the prospect of further review of the withdrawal determinations provides no reason for this Court to adjudicate the validity of the earlier, original approvals.

The withdrawal determinations are based on HHS's present judgment that allowing Arkansas and New Hampshire to implement measures, approved in a pre-

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[4] Arkansas previously contended that HHS's preliminary determinations that the work-related requirements were not likely to advance Medicaid's objectives were too tentative to constitute a "changed circumstance." Opp. to Gov't Mot. to Vacate & Remand 4. But HHS has now rendered decisions to withdraw the Secretary's approvals of the work-related requirements, and those decisions confirm that vacatur and remand is warranted.

pandemic world, that "require work and community engagement as a condition of eligibility" is "not likely to promote the objectives of the Medicaid statute." Arkansas Withdrawal Decision 3; New Hampshire Withdrawal Decision 3. As Arkansas has noted (Opp. to Gov't Mot. to Vacate & Remand 3, 5), any review of the withdrawal determinations would not focus on the question this Court granted certiorari to decide: the Secretary's authority to approve the original projects. Rather, it would address the Secretary's judgment embodied in the withdrawal determinations themselves not to permit testing of the work-related requirements at this time in light of adverse effects caused by the pandemic and its aftermath. It is *that* judgment by HHS, based on its current application of Section 1315 and the relevant provisions of the Medicaid statute, that should be the focus of any consideration of work-related requirements in demonstration projects at the present time. And whatever "substantive" and "procedural" challenges to the withdrawals (*ibid.*) Arkansas might assert in future proceedings would not warrant immediate review in the first instance in this Court—"a court of final review and not first view," *Bethune-Hill* v. *Virginia State Bd. of Elections*, 137 S. Ct. 788, 800 (2017) (citation omitted).

Arkansas's speculation that review of the withdrawal determinations might continue "well after the conclusion of this Term," Opp. to Gov't Mot. to Vacate & Remand 3—indeed, beyond the expiration of Arkansas's approval on December 31, 2021, *id.* at 5 n.2—only underscores the absence of any need for this Court to pass upon the validity of the original approvals. Whatever proceedings ensue in connection with review of the withdrawals, this Court's adjudication of the approvals is not necessary today.

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In short, HHS's recent actions make clear that plenary review in these cases is no longer warranted. Instead, the appropriate course is to vacate the court of appeals' judgments and to remand with instructions that the underlying matters be remanded to HHS.

II. IF THE COURT CONSIDERS THE MERITS, IT SHOULD CLARIFY THAT THE SECRETARY HAS AUTHORITY TO APPROVE DEMONSTRATION PROJECTS TO TEST MEASURES THAT INDIRECTLY ADVANCE MEDICAID'S OBJECTIVE OF PROVIDING HEALTH-CARE COVERAGE

If the Court nevertheless proceeds to decide these cases on the merits, there is neither need nor reason to address whether the Secretary erred in approving the work-related requirements in Arkansas's and New Hampshire's demonstration projects, given that those approvals have now been withdrawn based on the agency's determination that the work-related requirements are not "likely to assist in promoting the objectives" of Medicaid. 42 U.S.C. 1315(a). The materially altered landscape—and the expert judgments by HHS in applying the statute, on which those withdrawal determinations rest—could complicate or potentially frustrate the Court's review of the original approvals of the work-related requirements.

Instead, if the Court elects to consider the merits, it should focus on the threshold legal issue presented in the federal government's petition: whether 42 U.S.C. 1315(a) authorizes the Secretary to approve a demonstration project to test requirements that in his judgment are "likely to assist in promoting" (*ibid.*) the Medicaid program's objective of providing health-care coverage in *indirect* ways. See 20-37 Pet. I. The Court should clarify that Section 1315 does authorize the Sec-

retary to do so, unless the project would *directly* undermine that statutory objective by causing substantial coverage loss. To the extent the court of appeals' judgments rest on a contrary understanding of the Secretary's authority, those judgments should be vacated, and the cases should be remanded for further proceedings, including a further remand to the district court or to the Secretary as appropriate.

A. Section 1315 authorizes "any * * * demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of" the Medicaid program. 42 U.S.C. 1315(a). The court of appeals in *Gresham* took as given that "the principal objective of Medicaid is providing health care coverage." 20-37 Pet. App. (Pet. App.) 9a-10a (citing 42 U.S.C. 1396-1). The federal government does not dispute that overarching Medicaid objective. Although the statute promotes that objective in a variety of particular ways, Congress undoubtedly sought to prioritize the provision of health-care coverage.

It follows that, in determining whether a particular demonstration project "is likely to assist in promoting the objectives of" Medicaid, 42 U.S.C. 1315(a), the Secretary must carefully assess the anticipated effects of the project on the provision of coverage. The Secretary thus could not approve a demonstration project without making a judgment that it is likely to promote the expansion or continued provision of health-care coverage overall. Nor could he approve a demonstration project to test measures that would directly undermine coverage or result in significant disenrollment of individuals who have not obtained health-care coverage by other means—even if he believes those measures may also have a modest indirect, downstream effect of promoting the provision of coverage.

In evaluating whether a particular demonstration project proposed by a State is likely to promote the overarching objective of providing health-care coverage, the Secretary can and should consider other relevant factors that in his judgment bear on whether approving the project is appropriate. The statute takes into account a range of other considerations that are reflected in various statutory provisions, including the limits of what may be "practicable under the conditions in [a particular] State." 42 U.S.C. 1396-1. And in the context of a federal program established to furnish health-care coverage to financially or medically needy individuals, the Secretary may appropriately consider a project's potential positive or negative effects on beneficiaries' health. But the Secretary may not prioritize those other considerations over and above the provision of health-care coverage. The government thus does not disagree with the private respondents' contention (Br. 52) that "cutting costs cannot come at the expense of substantial coverage loss." On that fundamental point, the government's and the private respondents' positions—and the court of appeals' conclusions—are in accord.

B. The court of appeals' opinion in *Gresham*, however, suggested an additional restriction, not grounded in the statutory text or context, on the manner in which the Secretary may evaluate a project's potential to promote the goal of providing coverage. The court stated that the "objectives of better health outcomes and beneficiary independence are not consistent with Medicaid." Pet. App. 16a. It further stated that the "one primary purpose" of Medicaid—and thus in the court's view the only appropriate object of the Secretary's analysis in deciding whether to approve a Section 1315

demonstration project—"is providing health care coverage *without any restriction* geared to healthy outcomes, financial independence or transition to commercial coverage." *Ibid.* (emphasis added). To the extent the court was addressing only demonstration projects to test measures that pursue those or other ends at the substantial *expense* of promoting the provision of health-care coverage for eligible beneficiaries, that statement is correct—indeed, unremarkable.

The language of the court of appeals' opinion in *Gresham*, however, appears to go further. Read literally, the court's statement could be understood to bar the Secretary from considering the beneficial *indirect* effects that certain measures—such as provisions that improve care coordination—may have on the ultimate objective of providing health-care coverage. Such a limitation would lack any sound basis in the statutory text, context, or purpose. Section 1315 does not permit demonstration projects that subjugate the Medicaid program's statutory objectives to other ends. But by authorizing projects that the Secretary adjudges "likely to *assist in promoting* th[ose] objectives," 42 U.S.C. 1315(a) (emphasis added), Congress contemplated experiments that may advance the Medicaid program's aims—including the provision of coverage—by indirect means, so long as those projects do not undermine those aims *directly*, such as by causing coverage loss among otherwise-eligible beneficiaries.

In practical effect, such an interpretation of Section 1315 could preclude HHS from approving even demonstration projects to test measures that indirectly promote the expansion of coverage without directly undermining that objective. For example, the Secretary may wish to consider a demonstration project to test a new

delivery-of-care model—which no State is obligated to offer—that does not directly expand coverage but restricts choice and enrolls beneficiaries diagnosed with serious mental illness into a specialized plan that improves care coordination. HHS also may wish to consider demonstration projects to test other delivery-of-care models that provide targeted benefits not otherwise covered under Medicaid based on beneficiary needs. Such alternative delivery-of-care approaches have the potential to promote the provision (even expansion) of coverage indirectly by improving care coordination and health outcomes—which may in turn help a State conserve scarce Medicaid resources that can be used to provide or sustain other coverage—without directly undermining that objective; indeed, such approaches may also directly promote the goal of providing coverage as well, by providing additional benefits targeted to beneficiary need. Yet if Section 1315 were construed categorically to preclude the agency from considering a project's indirect effects on the provision of coverage, or from considering "any restriction geared to healthy outcomes," Pet. App. 16a, it is unclear whether or how such approaches could pass muster.

In addition, Section 1315 authorizes the Secretary to approve Medicaid-supported expenditures in a demonstration project for additional items or services not encompassed by the default Medicaid model. 42 U.S.C. 1315(a)(2). Pursuant to that authority, the Secretary may wish to consider permitting States to test measures that offer additional forms of direct assistance beyond coverage for medical services that may contribute to improving beneficiary health—such as certain nutritional supports, or home modifications to improve accessibil-

ity (where the beneficiaries do not meet the requirements for receiving such services under any other authorities). So long as a demonstration project testing such measures promotes and does not undermine the overarching objective of providing healthcare coverage, the statute should not be understood to bar the Secretary from approving the project merely because it also includes components aimed at maintaining or improving beneficiary health in additional ways. But if pursuing the additional "objective[ ] of better health outcomes" is categorically "not consistent with Medicaid," Pet. App. 16a, even as part of a broader project that the Secretary adjudges is likely to promote the provision of health-care coverage, demonstration projects that include such measures could be prohibited as well.

To be sure, whether any particular demonstration project designed to test such measures is "likely to assist in promoting the objectives of" Medicaid is a question that Congress committed to the Secretary's "judgment." 42 U.S.C. 1315(a). The Secretary exercises that discretion in the context of evaluating each specific project as a whole. But construing the statute to impose a blanket ban on any project that promotes the provision of health-care coverage by indirect means, that can be said to impose a "restriction geared to healthy outcomes," Pet. App. 16a, or that pursues improvements to beneficiary health as an additional goal, would appear to cut off the Secretary's discretion even to consider such approaches at all.

C. No party in this Court advocates such a rigid reading of Section 1315(a). Although the private respondents argue (Br. 51-52) that HHS may not elevate other objectives above promoting the provision of coverage, they have not urged a rule that would preclude

HHS from authorizing States to test alternative delivery-of-care models that do not undermine the provision of coverage or to provide additional items or services aimed at improving beneficiary health. And although the private respondents contend (*ibid.*) that HHS may not pursue other objectives in the guise of promoting coverage, they do not urge reading Section 1315(a) to forbid the Secretary from considering a project's indirect effects—whether beneficial or adverse—on the provision of coverage.

Instead, the private respondents have principally contended that the court of appeals' decision in *Gresham* should not be construed as adopting, and its summary affirmance in *Philbrick* should not be viewed as applying, any categorical rule regarding projects that pursue other objectives (such as beneficiary health) as means to the end of promoting the provision of coverage. See, *e.g.*, Br. in Opp. 22-23, 25-26; Private Resp. Br. 23, 49. But whether the court of appeals adopted and applied an erroneous interpretation of the statute that no party in this Court defends, or whether its opinion in *Gresham* inadvertently articulated the legal standard in imprecise terms that sweep beyond its intended holding, the appropriate course for this Court—if it proceeds to reach the merits—is the same. If the Court does not vacate and remand with instructions to remand to HHS, as the government and the private respondents agree is appropriate (Mot. 7), the Court should make clear that Section 1315 does not preclude the Secretary from considering indirect effects on coverage or from approving projects to test measures that are likely to promote the provision of coverage indirectly, as long as the Secretary concludes that the

project is likely to promote Medicaid's overarching objective of providing health-care coverage. The Court should then vacate the court of appeals' judgments in light of that holding and remand to that court for further proceedings, including a further remand to the district court or to the Secretary as appropriate.

* * * * *

For the foregoing reasons, the Court should vacate the judgments of the court of appeals and remand with instructions that the underlying matters be remanded to the Secretary. In the alternative, if the Court reaches the merits, it should clarify that Section 1315 does not prohibit the Secretary from approving demonstration projects that use indirect means or encourage healthy outcomes, as long as the Secretary concludes that the project is likely to promote Medicaid's overarching objective of providing health-care coverage. The Court then should vacate the court of appeals' judgments in light of that holding and remand to that court for further proceedings, including a further remand to the district court or to the Secretary as appropriate.

Respectfully submitted.

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MARCH 2021