Nos. 20-37 & 20-38

In the Supreme Court of the United States

NORRIS COCHRAN, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.
Petitioners,
v.
CHARLES GRESHAM, *et al.*,
Respondents.

STATE OF ARKANSAS,
Petitioner,
v.
CHARLES GRESHAM, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

ARKANSAS'S OPPOSITION TO THE FEDERAL GOVERNMENT'S MOTION TO VACATE

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Petitioner the State of Arkansas respectfully opposes the federal parties' motion to vacate the judgments of the court of appeals. The "changed circumstances" the Government cites, Mot. 6—namely its proposals to revoke the waivers at issue here—do not moot these cases. Nor, given the Government's feeble justification for beginning that process, are these cases even likely to become moot. And the central question in these cases—what Medicaid's objectives are—will likely return to this Court in litigation over the revocations the Government claims make review of that question unwarranted.

This Court granted certiorari in these cases to decide whether the Secretary of Health and Human Services reasonably determined that two States' experimental community-engagement requirements, Arkansas's and New Hampshire's, were likely to promote the objectives of Medicaid, after the court of appeals below held that health care *coverage* alone, not health, was Medicaid's overriding objective. A decision on whether that holding is correct remains as pressing today as when this Court granted certiorari.

First, however it is read, the Government's proposal is without precedent. The Government asks the Court to vacate the court of appeals' judgments and remand with instructions to remand to the agency. Yet if "remand" means what it ordinarily does, that *was* the court of appeals' judgment. *See* Pet.App. 24a (district court order, vacating and remanding); Pet.App. 20a (affirming district court). Thus, if that's what the Government seeks, its motion is really just a request that the Court vacate the court of appeals' opinion. But "[t]his Court reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam). And the Government cannot ask

the Court to vacate an opinion that "threatens to significantly curtail [its] authority," Mot. 6-7, unless it is also willing to seek relief from that opinion's accompanying judgment.

Alternatively, the Government's motion might be read as a request to remand to the agency to consider revocation. But that is not what remands to agencies do; courts remand matters to agencies for them to consider new action, not to ponder rescinding a challenged one. And though the Government suggests such a remand would "clear the path" for it to revoke its approvals, Mot. 7, that path is clear already; indeed, the Government has already started down it.

Second, these cases are not moot. The Government notes that it has made a preliminary determination, subject to the States' comment and a subsequent hearing, that "allowing" their community-engagement requirements to "take effect" would not promote the objectives of Medicaid in light of the pandemic, Mot. 5—although a statute prevents them from going into effect during the pandemic. Mot. 3-4. Of course, preliminary proposals to rescind agency action do not moot challenges to or defenses of it. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 627 n.5 (2018) ("Because the WOTUS Rule remains on the books for now, the parties retain a concrete interest in the outcome of this litigation." (internal quotation marks omitted)). Indeed, this Court has traditionally refused to even hold briefing in abeyance pending a proposed rescission of a challenged agency action, much less vacate a lower court's judgment in light of one. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 137 S. Ct. 1452 (2017).

Third, these cases are not likely to become moot. Even assuming the Government ultimately decides to

revoke its approvals of the States' community-engagement requirements, that will not moot these case. To the contrary, the Government's proposed revocations are vulnerable on both substantive and procedural grounds. And if the revocations were successfully challenged—or are under challenge, as will likely be true well after the conclusion of this Term—whether the States' requirements were permissibly approved in the first place would remain a live issue.

The Government's proposed revocations are substantively vulnerable because the reason the Government has given for its proposed revocations—the pandemic—is fully addressed by a COVID-response statute that bars the States' requirements from taking effect during the pandemic. Mot. 3-4. The Government may fear the pandemic's aftereffects on "economic opportunities' and "access to transportation," Mot. 5, which it suggests might make compliance with community-engagement requirements difficult. But the time to assess the pandemic's aftereffects on the post-pandemic economy is post-pandemic, not now, especially given that the statute barring implementation during the pandemic makes any immediate determination entirely unnecessary.

The Government's proposed revocations are procedurally vulnerable because, if they became effective under the timetable the Government proposes, they would breach an agreement that the Centers for Medicare and Medicaid Services executed with Arkansas just last month. In January, CMS agreed any revocation would not take effect until nine months after the agency gave Arkansas notice of its proposed revocation, App. 4a, and Arkansas agreed that amount of notice was adequate. App. 2a. The Government has purported to rescind that agreement in order to hasten its

premature revocations. Letter from Elizabeth Richter, Acting Adm'r, Ctrs. for Medicare & Medicaid Servs., to Dawn Stehle, Dep. Dir. for Medicaid, Ark. Dep't of Hum. Servs. 2 (Feb. 12, 2021).[1] But while the Government might—subject to APA review—rescind its own procedural rule, it cannot unilaterally rescind a bilateral agreement.

Fourth, the Government's proposed revocations do not even rise to the level of the sorts of sub-mootness changed circumstances for which this Court has granted vacatur. In the cases the Government cites, Mot. 6, some post-cert development, not just a potential one, injected a new question into the case that potentially obviated resolving the question presented and that the Court declined to resolve in the first instance. In *Madison County v. Oneida Indian Nation of New York*, after the Court granted certiorari to resolve a question of tribal sovereign immunity, the tribe appeared to waive its immunity. 562 U.S. 42, 42 (2011). As the scope of the waiver was unclear, the Court vacated and remanded for the court of appeals to decide its scope. *Id.* at 43. In *Department of Justice v. City of Chicago*, 537 U.S. 1229 (2003), after the Court granted certiorari on the scope of a FOIA exemption, Congress enacted an appropriations rider that prohibited agency spending on disclosing the materials at issue. *See City of Chicago v. Dep't of Treasury*, 384 F.3d 429, 431 (7th Cir. 2004). The Court, accordingly, vacated and remanded for the court of appeals to decide the rider's effect. *Dep't of Justice*, 537 U.S. at 1229.

Nothing like that has occurred here. To start, as of yet there is no changed circumstance at all—only a

[1] https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/ar-cms-ltr-state-02122021.pdf.

proposed revocation, like the proposed rescission of the WOTUS rule the Court deemed insufficient to even hold briefing in abeyance in *National Association of Manufacturers*. But even if the proposed revocations mature into final agency action, they wouldn't present any new question for the court of appeals to consider. Rather, the revocations would be reviewed in separate APA actions brought by the States in their regional Circuits. If those challenges were successful, the court of appeals would be precisely where it started, presumably reinstate its vacated judgment, and present anew the same question on which this Court has already granted certiorari. The Government's proposed revocations might ultimately moot these cases if they become final and are upheld, but unless and until they are they do not justify vacatur.[2]

Fifth, and perhaps most critically, merely vacating the court of appeals' judgments with instructions to remand to the agency would seemingly leave the *district court*'s judgments vacating the agency's approvals in place, potentially making any challenge to its proposed revocations futile and the district court's judgments unreviewable. It would also deprive the parties and lower courts of critical guidance on what Medicaid's objectives are. The Government's proposed revocation says it believes community-engagement requirements would not promote Medicaid's objectives, Mot. 5, a yet does not identify those objectives. A holding from this Court on whether the court of appeals' interpretation of Medicaid's objectives, or that of the prior

[2] This might suggest that an abeyance pending the Government's decisions on revocation and any challenges thereto would be a wiser course. But in Arkansas's case, that could preclude review of the decision below because Arkansas's approval expires on December 31.

administration, was correct would assist the Government in deciding whether revocation is appropriate; assist lower courts in deciding whether any revocations the Government ultimately issues are valid; and likely avoid a circuit split over those revocations' validity, as the Government has proposed to potentially revoke waivers in as many as eleven States in eight different regional Circuits. *See* Mot. 4; Gov't Br. 15 n.6.

Sixth, and lastly, Arkansas does not oppose the Government's request to hold briefing in abeyance and remove the cases from the March argument calendar pending a ruling on the Government's motion, provided that if the Court denies vacatur, it hears argument this Term. *Cf.* n.2, *supra*.

CONCLUSION

This Court should deny the Government's motion for vacatur and remand.

Respectfully submitted,

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February 22, 2021

APPENDIX

APPENDIX

[LOGO]
CMS
Center for Medicare & Medicaid Services
Office of the Administrator

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, Maryland 21244-1850

January 4, 2021

Dawn Stehle
Deputy Director for Health & Medicaid
Arkansas Department of Human Services
112 West 8th Street, Slot S401
Little Rock, AR 72201-4608

Dear Ms. Stehle:

Your state currently operates at least one Medicaid section 1115 demonstration. These demonstrations have proven to be a cornerstone of state innovation from which new best practices can emerge and next generation program design be fostered. They represent one of the most critical elements of our commitment to state flexibility and building a state and federal partnership centered on accountability and results.

By their nature, section 1115 demonstrations represent a contract between the state and federal government, governed by established terms and conditions and only approved after a determination by the Secretary of the Department of Health and Human Services (HHS) that such a demonstration would advance the objectives of the Medicaid program. In the rare event that CMS makes a determination that it must terminate,

amend, or withdraw waiver authority, the standard terms and conditions in each demonstration generally provide for a process in which CMS will notify the state in writing and afford the state an opportunity to request a hearing prior to effective date.

Your terms and conditions describe this process at only a high level, without describing the advance notice or the specific timeline in which such an opportunity to be heard would occur. While a decision to terminate or withdraw waiver authority would likely only be made as a last measure, states have the right to due process over that decision as well as adequate notice to prepare to transition their programs to a new state of authority. That is why I am sending you today a letter of agreement outlining additional details of the process, which CMS commits to applying prior to the effective date of any amendment or withdrawal of a demonstration.

By signing the letter of agreement, you are agreeing to abide by this process should CMS in the future take any such relevant action against an existing 1115 demonstration operating in your state. If you would like to commit to adhering to this process, I ask that you return this agreement, signed by the state Medicaid director or appropriate authority, as soon as possible. Please sent to me directly or email the signed agreement to 1115demorequests@cms.hhs.gov.

Sincerely,

/s/ Seema Verma
Seema Verma

Enclosure

CENTERS FOR MEDICARE & MEDICAID SERVICES

PROCEDURES FOR WITHDRAWING OR MODIFYING A SECTION 1115 DEMONSTRATION

CMS regulations state that each Section 1115 demonstration's Terms and Conditions "will detail any notice and appeal rights for the State for a termination, suspension or withdrawal of waivers or expenditure authorities." 42 CFR § 431.420(d)(3). While the precise language in each demonstration's Terms and Conditions varies slightly, these documents set forth only a general outline of the procedure to apply, for example: "CMS will promptly notify the State in writing of the determination and the reasons for the amendment and withdrawal, together with the effective date, and afford the State an opportunity to request a hearing to challenge CMS' determination prior to the effective date." This letter agreement sets forth the procedures that CMS commits to applying prior to the effective date of any amendment or withdrawal of a demonstration.

If CMS determines that it will either (1) suspend or terminate a demonstration in whole or in part because the State has materially failed to comply with the terms of the demonstration project, or (2) withdraw waivers or expenditure authorities based on a finding that the demonstration project is not likely to achieve the statutory purposes, see 42 CFR § 431.420(d)(1)–(2), CMS will promptly notify the affected State in writing of its determination and the reasons for the suspension, termination, amendment, or withdrawal. CMS will also provide an effective date for its determination and a schedule for a hearing to challenge CMS' determination.

In order to ensure that affected states have adequate notice and opportunity to be heard, CMS shall make

the effective date for its determination no sooner than 9 months after the date on which CMS transmits its determination to the affected State. The hearing and associated briefing shall adhere to the following schedule:

- Within 15 days of the date of CMS' determination, the affected State shall provide notice in writing to CMS that it disagrees with CMS' determination and plans to invoke its right to a hearing as part of a preliminary appeal.
- Within 90 days of the date of CMS' determination, the affected State shall submit a written brief to CMS outlining the bases for its disagreement.
- Within 90 days of the date the State submits its written brief, CMS shall send a written response to the affected State responding to the major arguments raised by the State.
- Within 60 days of the date that CMS sends its written response, the State shall submit a written rebuttal responding to the major arguments raised by CMS.
- Within 45 days of the date that the State sends its written rebuttal, CMS shall hold a hearing and provide the State with an opportunity to be heard regarding its disagreement with CMS' determination.
- Following the hearing, CMS shall issue a written decision either modifying or finalizing its initial determination.

The decision resulting from this preliminary appeals process shall be appealable to the Departmental Appeals Board using the procedures at 45 CFR Part 16. *See*

Appendix A to 45 CFR Part 16, C. (b). Monetary damages cannot remedy a breach of this preliminary appeals process. Any breach constitutes irreparable harm and final agency action.

The preliminary appeals process set forth above applies to the following demonstrations:

Arkansas Tax Equity & Fiscal Responsibility Act (TEFRA-like)
Arkansas Works

/s/ Dawn Stehle
Dawn Stehle
Deputy Director for Health & Medicaid
Arkansas Department of Human Services
Division of Health and Medicaid Services
State of Arkansas

Date: January 13, 2021

/s/ Seema Verma
Seema Verma
Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health & Human Services

Date: January 4, 2021