IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MONTE A ROSE, JR., ***et al.***, Plaintiffs, v. **ALEX M. AZAR II**, ***et al.***, Defendants.	Civil Action No. 1:19-cv-2848 (JEB)

FEDERAL AND STATE DEFENDANTS' JOINT MEMORANDUM IN SUPPORT OF MOTION FOR A STAY PENDING RESOLUTION OF D.C. CIRCUIT APPEALS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR AN EXPEDITED SCHEDULE

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I. INTRODUCTION

Plaintiffs' motion to set an expedited schedule should be denied and this case should be stayed pending resolution of the appeals in *Stewart v. Azar*, No. 19-5096 (D.C. Cir.), and *Gresham v. Azar*, No. 19-5094 (D.C. Cir.). As in those cases, the instant action involves a challenge to a Section 1115 Medicaid demonstration project approved by the Secretary of Health and Human Services ("HHS"). Called the Healthy Indiana Plan ("HIP"), the project here was proposed by the state of Indiana and approved as an extension and amendment of a preexisting demonstration in February 2018.

Like the demonstrations challenged in *Stewart* and *Gresham*, HIP was approved in part to test the efficacy of a work and community engagement requirement. The project includes other components as well, including a waiver of retroactive eligibility, a monthly premium requirement; lockout periods; and limitations on non-emergency medical transportation ("NEMT"). But with the exception of the community engagement requirement and certain lockouts for individuals who fail to complete the annual redetermination process, the components of HIP that plaintiffs now challenge have generally been in place in Indiana in some form for several years, without prior legal challenge.

This case should be stayed pending resolution of the appeals in *Stewart* and *Gresham* for several reasons. To start with, the work and community engagement requirement was the focus of this Court's decisions in *Stewart* and *Gresham* and is the focus of the appeals. This Court vacated the demonstrations in those cases because it concluded that the Secretary did not adequately weigh the potential benefits of the requirements against the risk that coverage would be lost due to noncompliance. But Indiana recently announced that it will not disenroll any beneficiary for noncompliance with the work and community engagement requirement during the pendency of this lawsuit, and, as plaintiffs concede, the state has already paused implementation of lockouts for failure to complete redetermination. *See* Ind. Family & Soc. Servs. Admin. News Release, "Pending resolution of federal lawsuit, FSSA will temporarily suspend Gateway to Work reporting requirements," (Oct. 31, 2019) (Exh. 1); Pls.' Mot.

2. As a result, plaintiffs and other beneficiaries in Indiana will suffer no harm from newly added components during the pendency of a stay.

In addition, there is little question that the D.C. Circuit's decisions in *Stewart* and *Gresham* will provide guidance on, if not resolve entirely, the issues raised in this case relating to the work and community engagement requirement. And to the extent the D.C. Circuit specifically addresses other components of the Kentucky and Arkansas demonstrations, such as premiums or the waivers of retroactive eligibility, its reasoning on those points will control here as well. Accordingly, proceeding with this case at this time would result only in unnecessary and duplicative briefing or, worse, rulings that are potentially overcome in the near future by controlling authority.

On the other hand, staying proceedings here would preserve the status quo in Indiana. The challenged components of HIP other than the community engagement requirement and lockouts for individuals who fail to complete redetermination have generally been in place in Indiana in some form—and remained unchallenged—for years. And, as noted, neither the community engagement requirement nor the redetermination lockouts will result in harm to the plaintiffs through the pendency of this lawsuit, including through any stay granted by the Court. A stay would also avoid significant disruption to the state and confusion for beneficiaries, as an immediate ruling could result in the Court vacating HHS's approval now, only to have the D.C. Circuit thereafter rule in a way that may require a different result.

Because plaintiffs did not bring this lawsuit until more than a year and a half after the Secretary's February 2018 approval, and significantly longer since most of the challenged components of the demonstration were put in place, plaintiffs' motion for an expedited schedule should be denied and this case should be stayed pending resolution of the appeals in *Stewart* and *Gresham*.

II. FACTUAL BACKGROUND

A. The Healthy Indiana Plan ("HIP")

In 2007, the Centers for Medicare & Medicaid Services ("CMS") approved a Section 1115 demonstration project that provided health care coverage to certain low-income adults in Indiana who were not otherwise eligible for coverage under the Medicaid Act.[1] Compl. ¶¶ 68–69, ECF No. 1. That project, HIP, coupled its optional provision of healthcare coverage with several features, including a monthly premium requirement; termination of coverage and a 12-month lockout period for enrollees who did not pay their premiums; a lockout period for beneficiaries who did not complete the annual redetermination process by the deadline; elimination of retroactive eligibility; and elimination of non-emergency medical transportation ("NEMT"). Compl. ¶ 72.

In July 2014, Indiana submitted an application to extend HIP for five additional years, with certain modifications ("HIP 2.0"). In particular, Indiana proposed to include parents and caretakers and the entire Medicaid expansion population in the project.[2] Compl. ¶ 78. In January 2015, CMS approved HIP 2.0 for three years, effective February 1, 2015.[3] Compl. ¶ 79.

As Plaintiffs themselves acknowledge, HIP 2.0's features "mirrored those of the initial HIP project" that CMS approved in 2007. Compl. ¶ 81. For example, HIP 2.0's approved features allowed Indiana to charge enrollees monthly premiums, terminate coverage for individuals with household

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[1] Given the early stage of the proceedings, these facts are largely taken from the allegations in the Complaint.

[2] HIP was originally approved through December 31, 2012. Compl. ¶ 72. After the Affordable Care Act became law in 2010, the Indiana legislature gave the Secretary of Indiana's Family and Social Services Administration permission to amend HIP "in a manner that would allow Indiana to use the plan to cover" the Medicaid expansion population. Compl. ¶ 75 (citation omitted). Between 2012 and 2015, CMS approved several short-term extensions of HIP while it negotiated with Indiana regarding the State's plan to cover the expansion population. Compl. ¶ 76. The extensions included some minor modifications. *See id.*

[3] Also effective February 1, 2015, Indiana amended its state plan to cover the Medicaid expansion population. Compl. ¶ 80.

incomes above 100% of FPL who did not pay their premiums and impose a lockout on re-enrolling in the project for six months, eliminate retroactive eligibility, and eliminate NEMT for the expansion population.[4] Compl. ¶ 81. One new component the Secretary approved in 2015 was a "Gateway to Work" initiative, through which the State referred certain eligible HIP participants—adults who did not have a disability, were working fewer than 20 hours per week, and were not full time students—to its workforce training and work search resources. Compl. ¶ 83. Participation in Gateway to Work was voluntary. Compl. ¶ 84.

On February 1, 2018, CMS approved the State's request to amend HIP and extend it through December 31, 2020. Compl. ¶ 100; *see also* Letter from Demetrios Kouzoukas to Allison Taylor (Feb. 2018), ECF No. 1-10.[5] Much like the earlier approvals of HIP and HIP 2.0, this most recent approval permitted Indiana to charge monthly premiums, terminate coverage for individuals with household incomes above 100% of FPL who do not pay their premiums and impose a lockout on re-enrolling in the project for six months, eliminate retroactive eligibility, and eliminate NEMT for the expansion population. Compl. ¶¶ 117–42. Like the initial approval of HIP in 2007, the 2018 approval also expanded the lockout periods to apply to beneficiaries who did not complete the annual redetermination process by the deadline. Compl. ¶¶ 131–36. However, as plaintiffs concede, the state has paused implementation of that component. Pls.' Mot. 2; *see also* HIP Monitoring Plan, Q4 Quarterly Report 5 (Exh. 2) ("Effective October 18, 2018, FSSA decided to pause the implementation of the HIP lockout provision for failure to comply with the annual redetermination process . . ."). Moreover, the intervenor state defendant commits that the redetermination lockout will remain paused during the pendency of this case. In addition, the 2018 approval included a new substance

[4] Unlike the original approval of HIP in 2007, the 2015 approval of HIP 2.0 did not include a lockout for failure to complete annual redetermination by the deadline.

[5] Upon Indiana's application for, and CMS's approval of, the program's renewal in 2018, the program is now simply referred to as "HIP."

abuse disorder program. Letter from Demetrios Kouzoukas to Allison Taylor (Feb. 2018) 3, ECF No. 1-10.

The 2018 approval also permitted Indiana to reformulate the "Gateway to Work" component into a mandatory work and community engagement requirement, which the State began implementing on January 1, 2019 and has phased in over time. *See* Compl. ¶ 108. According to the terms of the program, every December the State will review enrollees' compliance with the community engagement requirements over the course of the calendar year. If an enrollee who was subject to the requirements failed to meet them in more than four months of the year, the State will suspend coverage on the first day of the next calendar year. Beneficiaries can regain coverage if they complete the required hours for one month, qualify for an exemption, or become eligible for Medicaid under a population group not included in HIP. Compl. ¶¶ 112–13. Originally, the state planned to begin suspending coverage for non-compliant beneficiaries on December 31, 2019. Compl. ¶ 10.

B. This Lawsuit

On September 23, 2019, Plaintiffs filed this lawsuit, challenging the Secretary's 2018 extension and amendment of the HIP program. *See* Compl. In particular, Plaintiffs challenge the following aspects of the approval: (1) the work and community engagement component; (2) the premium requirements; (3) lockouts for failure to comply with the Medicaid redetermination procedures; (4) the waiver of the retroactive coverage requirement; and (5) the waiver of the NEMT benefit. *See* Compl. ¶¶ 241–73. Plaintiffs also challenge the project as a whole, as well as a state Medicaid Director letter that HHS issued in January 2018. Compl. ¶¶ 227–40, 274–91.

C. D.C. Circuit Appeals

In a suit brought by fifteen Medicaid recipients, this Court vacated CMS's approval of a similar demonstration project in the state of Kentucky on the ground that the agency had not adequately considered whether the project "would in fact help the state furnish medical assistance to its citizens,

a central objective of Medicaid." *Stewart v. Azar*, 313 F. Supp. 3d 237, 243 (D.D.C. 2018) (*Stewart I*). Like Indiana's current demonstration, Kentucky's project included work and community engagement requirements, premiums, limits on retroactive eligibility, lockout periods for failure to pay premiums or timely complete redetermination, and limited coverage of non-emergency medical transportation (though Indiana and Kentucky do have different implementation processes and program specifications). *Id.* at 246. After an additional period of public comment, HHS issued a new approval letter in November 2018 that explained why it determined that Kentucky's demonstration project is likely to help the State furnish medical assistance to its citizens. On March 27, 2019, several days before Kentucky's project was due to begin, this Court again vacated HHS's approval of the project. *See Stewart v. Azar*, 366 F. Supp. 3d 125 (D.D.C. 2019) (*Stewart II*). This Court concluded that the approval was contrary to the Medicaid Act and arbitrary and capricious because the Secretary "failed to 'adequately analyze'" the issue of whether the project would promote or lead to a decrease in health care coverage. *Id.* at 140 (citation omitted).

On the same day that this Court vacated the approval of the Kentucky demonstration project, it also vacated HHS's approval of the amendments to Arkansas's Section 1115 Medicaid demonstration project, entitled Arkansas Works. The amendments to Arkansas Works included a work and community engagement requirement as well as a waiver of retroactive eligibility. *See Gresham v. Azar*, 363 F. Supp. 3d 165 (D.D.C. 2019). This Court similarly concluded that the Secretary "had not adequately considered whether the program would in fact help the state furnish medical assistance to its citizens." *Id.* at 169(citation omitted). The Government appealed both cases.

Both appeals are now fully briefed, and oral argument was heard on October 11, 2019. *See Gresham v. Azar*, No. 19-5094 (D.C. Cir.), ECF No. 1811072; Dkt. 1811077, *Stewart v. Azar*, No. 19-5096 (D.C. Cir.), ECF No. 1811077. The government has requested an expedited decision in both

cases.[6] *See* Mot. Expedite Case, *Stewart v. Azar*, No. 19-5096 (D.C. Cir.), ECF No. 1782525.

D. Recent Developments

On October 31, 2019, Indiana announced that its Family and Social Services Administration will not suspend the benefits of any Medicaid beneficiary for failure to comply with the Gateway to Work program until this lawsuit is resolved. *See* Exh. 1. While beneficiaries can still report their qualifying community engagement activities and hours to the state, no consequences will flow from a beneficiary's failure to do so. *Id.* Further, "[b]efore the program is reinitiated, participating members would receive substantial advance notice." *Id.*

Prior to plaintiffs filing their motion to set an expedited schedule, counsel for the federal defendants and counsel for Indiana conferred with plaintiffs regarding whether plaintiffs would consent to a motion to stay this case in light of Indiana's forthcoming announcement that it would not suspend benefits on December 31, 2019 due to noncompliance with the community engagement requirement, as originally planned. Plaintiffs indicated that they opposed such a motion.

III. STANDARD OF REVIEW

This Court has the inherent authority to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). That broad discretion includes the "inherent power to control the sequence in which it hears matters on its calendar." *United States v. W. Elec. Co.*, 46 F.3d 1198, 1207 n.7 (D.C. Cir. 1995). Such authority applies "especially in cases of extraordinary public moment," when "a plaintiff may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *Clinton v. Jones*, 520 U.S. 681, 707

[6] On October 25, 2019, the Government filed a notice of appeal in *Philbrick v. Azar*, *see* Notice of Appeal, No. CV 19-773 (JEB) (D.D.C.), ECF 54, in which this Court vacated New Hampshire's Section 1115 Medicaid demonstration project, *Philbrick v. Azar*, 2019 WL 3414376 (D.D.C. July 29, 2019). That project, as approved by the Secretary, also contained work and community engagement requirements, as well as a waiver of retroactive eligibility. *See id.* at *3–*4.

(1997) (citation omitted). In evaluating a stay motion, the "key interests to consider" are "hardship to the parties and benefits to judicial economy." *Nat'l Indus. for the Blind v. Dep't of Veterans Affairs*, 296 F. Supp. 3d 131, 137 (D.D.C. 2017). Discretion to stay proceedings "may be appropriately exercised where a separate proceeding bearing upon the case is pending." *Hulley Enterprises Ltd. v. Russian Fed'n*, 211 F. Supp. 3d 269, 276 (D.D.C. 2016).

IV. ARGUMENT

Plaintiffs' motion to set an expedited briefing schedule should be denied and this case should be stayed pending resolution of the appeals in *Stewart* and *Gresham*. The resolution of the issues in those appeals will impact, if not resolve entirely, the issues here. As a result, a stay would prevent potentially needless and duplicative litigation and promote judicial economy. Moreover, in light of (1) Indiana's announcement that it will not suspend Medicaid benefits for non-compliance with its work and community engagement requirement during the pendency of this lawsuit, and (2) its longstanding decision, made in October 2018, to pause implementation of lockouts for failure to complete redetermination, a stay preserves the status quo: it allows the State to continue the new components of its demonstration other than mandatory community engagement and redetermination lockouts (such as substance use disorder treatment), as well as components which have been in place in various forms for many years. And in the meantime, no beneficiary will suffer harm from the new requirements. Plaintiffs waited more than a year and a half after HHS approved the extension of HIP to bring this lawsuit, and given the State's recent announcement, there is no cause for an expedited schedule or for any further proceedings before resolution of the appeals in *Stewart* and *Gresham*.

A. A Stay Would Promote Judicial Economy Because The D.C. Circuit's Decision In *Stewart* And *Gresham* Will Provide Controlling Guidance On The Issues In This Case.

District courts routinely stay proceedings where resolution of an appeal in another matter may provide guidance to the district court in deciding issues before it. *See Landis*, 299 U.S. at 254; *see, e.g.*, *Fed. Home Loan Mortg. Corp. v. Kama*, 2016 WL 922780, at *8-*9 (D. Haw. Mar. 9, 2016) (granting stay

where circuit court's resolution of related cases "w[ould] likely involve an analysis of" issues that would "provide further guidance" to the district court). Doing so not only preserves resources for both the parties and the court, but also "reduce[s] the risk of inconsistent rulings that the appellate court[] might then need to disentangle." *Washington v. Trump*, 2017 WL 1050354, at *5 (W.D. Wash. Mar. 17, 2017) (citation omitted). Indeed, "litigating essentially the same issues in two separate forums is not in the interest of judicial economy or in the parties' best interests." *Naegele v. Albers*, 355 F. Supp. 2d 129, 141 (D.D.C. 2005) (citation omitted).

The plaintiffs here bring the same claims as the plaintiffs in *Stewart* and *Gresham* and seek the same relief. As noted, Indiana's HIP contains a work and community engagement requirement, just as did the projects in *Stewart* and *Gresham*. And while implementation processes and program specifications differ considerably between Indiana and other states, the Secretary approved the project here for reasons substantially similar to the original Kentucky demonstration and the amendments to Arkansas Works. *Compare* Letter from Demetrios Kouzoukas to Allison Taylor (Feb. 2018), ECF 1-10, *with* Letter from Seema Verma to Cindy Gillespie (March 5, 2018), *Gresham v. Azar*, Civ. No. 1:18-cv-1900-JEB (D.D.C.), ECF No. 1-3, *and* Letter from Demetrios Kouzoukas to Stephen P. Miller (Jan. 2018), *Stewart v. Azar*, No. 1:18-cv-152-JEB (D.D.C.), ECF No. 1-3. Notably, plaintiffs themselves designated this case as "involv[ing] common issues of fact" and "grow[ing] out of the same event or transaction" as *Stewart* and *Gresham* (and *Philbrick*). *See* Notice of Related Case, ECF No. 2.

More fundamentally, the central issue on appeal in *Stewart* and *Gresham* substantially overlaps with the central issue raised here: namely, the scope of the Secretary's authority to approve demonstration projects that contain work and community engagement requirements. In resolving that issue, questions such as what level of deference should be afforded to the Secretary's approval of Section 1115 demonstrations, what findings the Secretary must make in approving such demonstrations, and what purposes such demonstrations may further, all may be addressed by the

D.C. Circuit. *See generally* Br. for the Fed. Appellants, *Gresham v. Azar*, No. 19-5094 (D.C. Cir.), ECF No. 1787676, *Stewart v. Azar*, No. 19-5096 (D.C. Cir.), ECF No. 1787677 (raising these and other issues). If the D.C. Circuit rules on these issues, as it is likely to do, such a ruling plainly will impact the issues before this Court. In fact, "it is possible that the D.C. Circuit will resolve th[is] case in its entirety"—by, for instance, holding that approvals of Section 1115 demonstrations are committed to agency discretion by law, or, alternatively, holding that work and community engagement requirements can never further the purposes of Medicaid. *Owner-operator Indep. Drivers Ass'n, Inc. v. Lahood*, 2013 WL 12330195, at *2 (D.D.C. Sept. 25, 2013) (citation omitted). These considerations cut sharply in favor of a stay while the *Stewart* and *Gresham* appeals are resolved. *See Fairview Hosp. v. Leavitt*, 2007 WL 1521233, at *3 (D.D.C. May 22, 2007) (granting stay of proceedings pending related case where the complaints were "strikingly similar" and the defenses raised were "nearly identical").

Given that the *Stewart* and *Gresham* appeals were fully briefed and argued weeks ago and the government has requested an expedited decision from the D.C. Circuit, it would make little sense to proceed with this case now, before controlling guidance is obtained. *Cf. Fonville v. D.C.*, 766 F. Supp. 2d 171, 173 (D.D.C. 2011) (granting stay pending state court appeals involving state law issues that were "likely to be extremely persuasive to, if not binding upon" the district court). Indeed, proceeding with this case at this time would likely invite only further litigation, as any briefing or rulings would soon be overtaken by the D.C. Circuit's decision. And "[a]lthough a stay would immediate[ly] delay the resolution of the parties' dispute, it would still likely be shorter than the possible delay that would occur if this Court were to [rule on plaintiffs' APA claims] and the [D.C. Circuit] were to then [provide contrary guidance]." *Matter of Arbitration of Certain Controversies Between Getma Int'l & Republic of Guinea*, 142 F. Supp. 3d 110, 114 (D.D.C. 2015) (citation omitted). These considerations of judicial economy, which plaintiffs can hardly dispute, counsel that a stay is warranted.

B. A Stay Pending Resolution of the *Stewart* and *Gresham* Appeals Preserves The Status Quo.

The Court should stay this case for the additional reason that a stay would preserve the status quo. Other than the mandatory work and community engagement requirement and lockouts for failure to complete redetermination, none of the components of HIP that Plaintiffs challenge are new features. And because Indiana has paused both of the new components that plaintiffs challenge, neither will cause plaintiffs harm during through the pendency of this lawsuit. Accordingly, a temporary stay while the *Stewart* and *Gresham* appeals are resolved would not leave plaintiffs or other beneficiaries in a materially different position than they have been in previously. They would continue to receive Medicaid coverage on terms similar to those existing before the 2018 approval that plaintiffs now challenge in this action. In such circumstances, any purported harms to plaintiffs flowing from the preexisting requirements of HIP during resolution of the *Stewart* and *Gresham* appeals is outweighed by the Court's and the parties' interests in avoiding unnecessary litigation.

This is all the more true given that plaintiffs waited more than a year and a half from the Secretary's February 2018 approval of the HIP amendment and extension to bring this lawsuit. Plaintiffs cannot seriously contend they now face significant or imminent harm from the demonstration after sitting on their hands for such an extended period. Indeed, plaintiffs' dilatory approach extends even earlier than 2018, as the components of HIP that plaintiffs challenge and would remain in effect during the stay have been in place in some form for years before 2018 and were part of the program at the time Indiana decided to expand Medicaid. Given plaintiffs' delay, it seems apparent that plaintiffs brought this action when they did only because of the impending start date for disenrollment based on noncompliance with the work and community engagement requirement, which was set to begin on December 31, 2019. Plaintiffs' own motion makes this clear. *See* Pls.' Mot. 2 (noting that their proposed expedited schedule "could allow this Court to make a decision in advance of December 31, 2019"). This leaves little doubt that the real object of plaintiffs' lawsuit is the work

and community engagement requirement, not the other components. But now that disenrollment for noncompliance with that community engagement requirement will not occur through the pendency of this lawsuit—including through any stay granted by the Court—there is no reason to enter an expedited schedule or proceed in this case *at all* until the D.C. Circuit provides controlling guidance.

On the other hand, if the Court were to proceed with this case and ultimately vacate Indiana's demonstration project, and the D.C. Circuit were then to issue guidance demanding a different result, the harms to the state would be significant. The state's demonstration project and data collection efforts would be interrupted, and beneficiaries would face serious confusion, as the terms by which they receive coverage are altered and then potentially changed back again. *See Gresham*, 363 F. Supp. 3d at 183 (recognizing "practical concerns" and "probable disruptions" from pausing enforcement of Arkansas's demonstration). In light of the fact that a stay pending resolution of the *Stewart* and *Gresham* appeals would promote judicial economy, preserve the status quo, and result in minimal, if any, harm to plaintiffs, plaintiffs' motion to set an expedited schedule should be denied and the state's and federal defendants' cross-motion for a stay should be granted.

V. CONCLUSION

The federal defendants and the state respectfully request that proceedings in this case be stayed pending resolution of the appeals in *Stewart v. Azar*, No. 19-5096 (D.C. Cir.) and *Gresham v. Azar*, No. 19-5094 (D.C. Cir.). Within fourteen days of the mandates issuing from those appeals, the parties should be required to file a joint status report proposing further proceedings.[7]

Dated: October 31, 2019

JOSEPH H. HUNT
Assistant Attorney General

[7] In the event that the Court denies the state's and federal defendants' cross-motion for a stay, the federal defendants would not be prepared to produce an administrative record by plaintiffs' proposed date of November 1, 2019, and would respectfully request that they be given until November 21, 2019 to do so.

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