

No. 20-37

**In The
Supreme Court of the United States**

ALEX M. AZAR, II, SECRETARY OF HEALTH
AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

CHARLES GRESHAM, ET AL.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

**BRIEF IN SUPPORT FOR THE NEW HAMPSHIRE
DEPARTMENT OF HEALTH AND HUMAN SERVICES**

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ARGUMENT

The petition for a writ of certiorari in this matter seeks review of two opinions of the United States Court of Appeals for the District of Columbia. The first is *Gresham v. Azar*, Nos. 19-5094 and 19-5096 (D.C. Cir. Feb. 14, 2020), reported at 950 F.3d 93. The underlying district court opinion is reported at 363 F. Supp. 3d 165. The second is *Philbrick v. Azar*, Nos. 19-5293 and 19-5295 (D.C. Cir. May 20, 2020), unpublished, but available at 2020 WL 2621222. The underlying district court opinion is reported at 397 F. Supp. 3d 11.

In *Philbrick v. Azar*, the New Hampshire Department of Health and Human Services (“NH DHHS”) intervened in the district court proceeding to defend the petitioners’ approval of New Hampshire’s Section 1115 Medicaid Demonstration Waiver. That waiver enabled New Hampshire to implement the “New Hampshire Granite Advantaged Health Care Program,” codified in N.H. Rev. Stat. Ann. § 126-AA *et seq.*

N.H. Rev. Stat. Ann. § 126-AA *et seq.* expanded New Hampshire’s participation in Medicaid to low-income, able-bodied adults, while moving health care coverage for the expansion population from the Premium Assistance Program to Medicaid managed care under the New Hampshire Granite Advantage Health Care Program. It directed the NH DHHS to “apply for any necessary waivers and state plan amendments to implement a 5-year demonstration program beginning on January 1, 2019” to create the New Hampshire Granite Advantage Health Care Program. N.H. Rev. Stat. Ann. § 126-AA:2, I. It also provided that health

care coverage for the Medicaid expansion population would be provided by managed care organizations (“MCOs”) that, in the past, had only provided coverage to traditional Medicaid recipients. *Id.* Additionally, the statute: made certain changes to the funding for the state’s share of Medicaid expansion, N.H. Rev. Stat. Ann. § 126-AA:3, I; established a community engagement requirement for certain adults in the expansion population, N.H. Rev. Stat. Ann. § 126-AA:2, III(a); and required the Commissioner of the Department of Health and Human Services (“DHHS”) to seek a waiver from the Centers for Medicare & Medicaid Services (“CMS”) “of the requirement to provide 90-day retroactive coverage,” among other things.

N.H. Rev. Stat. Ann. § 126-AA *et seq.* is an important and significant State policy. It strikes a public policy balance that enabled political leaders to agree to expand Medicaid coverage to low-income, able-bodied adults in New Hampshire, while trying to ensure the fiscal sustainability of the State’s Medicaid program. The community engagement requirement in particular seeks to ensure that persons like respondent Ludders, who has chosen to live a subsistence lifestyle that prioritizes living off the land in an area where regular employment is scarce but who is an otherwise able-bodied adult capable of performing regular work and obtaining commercial insurance, from diverting scarce Medicaid resources away from those who need them, either temporarily or for the remainder of his life. New Hampshire’s 1115 Medicaid Demonstration Waiver therefore enables New Hampshire to furnish medical assistance “as far as practicable under the conditions”

in New Hampshire, 42 U.S.C. § 1396-1, and provides methods and standards relating to the utilization of Medicaid care and services that help safeguard against the unnecessary utilization of such care and services in New Hampshire, 42 U.S.C. § 1396a(a)(30)(A), and the petitioners correctly found as much in their decision approving the waiver.

◆

CONCLUSION

The NH DHHS therefore fully supports the petition for writ of certiorari filed in this case for all of the reasons the petitioners advance and respectfully requests that this Court grant it.

Respectfully submitted,

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