

Nos. 20-37 and 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.

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 IN SUPPORT OF
MOTION TO VACATE THE JUDGMENTS OF THE
COURT OF APPEALS AND REMAND, TO REMOVE THE
CASES FROM THE MARCH 2021 ARGUMENT CALENDAR,
AND TO HOLD FURTHER BRIEFING IN ABEYANCE
PENDING DISPOSITION OF THE MOTION**

ELIZABETH B. PRELOGAR
*Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

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The federal petitioners, as well as the private respondents who brought these suits and prevailed below, agree that, in light of the marked change of circumstances since the Court granted certiorari in these cases, the appropriate course is to vacate the court of appeals' decisions below and remand so that the Secretary of Health and Human Services (HHS) may determine the appropriate path forward. New Hampshire, one of the two States whose demonstration projects are at issue, takes no position.

Only Arkansas resists that disposition. Although it does not oppose (Opp. 6) our submission that the cases should be removed from the March 2021 argument calendar and that briefing should be held in abeyance pending disposition of the government's motion to vacate and remand, Arkansas urges the Court (Opp. 1) to proceed with review of the cases this Term despite intervening events that have fundamentally altered the landscape. Following the change in Administration, HHS has made a preliminary determination that, in light of the COVID-19 pandemic and its public-health and economic consequences, the central feature of the two States' demonstration projects at issue—work-related requirements—will not promote the statutory objectives of Medicaid. HHS accordingly has commenced a process of determining whether to withdraw approval of those requirements. Yet Arkansas asks the Court (Opp. 1-6) to adjudicate the cases as if those actions (and indeed, the pandemic, Opp. 3) did not exist. Arkansas offers no sound basis for this Court to proceed with further review under these circumstances. Arkansas does not identify any compelling reason for this Court to adjudicate the validity of its demonstration project, which has been materially overtaken by events and expires by its own terms on December 31, 2021. Nor does Arkansas explain why vacatur and remand is an inappropriate disposition. The federal petitioners' motion should be granted.

1. Arkansas does not and cannot demonstrate that these cases continue to warrant plenary review by this Court given the greatly changed circumstances set forth in our motion (at 3-7). The Court granted the federal government's and Arkansas's petitions for writs of certiorari to review the court of appeals' judgments invalidat-

ing the Secretary’s approvals of amendments to Arkansas’s and New Hampshire’s Medicaid demonstration projects under 42 U.S.C. 1315(a). See, *e.g.*, 20-38 Pet. i (“The question presented” by Arkansas’s petition is “[w]hether the Secretary’s approval of the Arkansas Works Amendment was lawful.”). The central features of those projects and the focus of this litigation in the lower courts were work-related requirements that the States had sought to test as potential means of “promoting the objectives of” Medicaid. 42 U.S.C. 1315(a); see Mot. 2-3; Gov’t Br. I, 14-21.

As the federal petitioners and the private respondents have each since explained, however, the landscape today has “fundamentally changed” since the issuance of the decisions below evaluating those work-related requirements. Private Resp. Br. 26 (capitalization and emphasis omitted); see *id.* at 23-27; Mot. 3-6. The COVID-19 pandemic has made implementation of work-related requirements practically infeasible. Mot. 3. Federal legislation providing an increase in federal Medicaid funding to States bars States that accept the funds (as all have done) from enforcing such requirements throughout the pandemic. Mot. 3-4. Most significantly, HHS has exercised its statutory authority to maintain ongoing oversight of previously approved demonstration projects and has made a preliminary determination that allowing Arkansas’s and New Hampshire’s work-related requirements to take effect “would not promote the objectives of the Medicaid program.” Mot. 5 (citation omitted). HHS has accordingly commenced a process of determining whether to withdraw its prior approvals of those work-related requirements. *Ibid.*

Against that backdrop, the validity of the Secretary's earlier approvals of those requirements no longer warrants review. The records that the agency developed when approving those time-limited experiments reflect a markedly different, pre-pandemic world. And the earlier determinations by HHS that the courts below reviewed necessarily did not and could not address the question the Secretary now confronts: whether testing such work-related requirements in the midst of COVID-19 and its aftermath, and the pandemic's manifold public-health and economic effects, will further the Medicaid program's aims. These greatly changed circumstances—and the Secretary's response by invoking his authority to exercise ongoing oversight of approved projects—render these cases unsuitable vehicles to consider the agency's actions, which were taken several years ago in a starkly different world.

Nor would further review serve any practical purpose. Determining whether those earlier determinations “w[ere] lawful” when made in 2018 (20-38 Pet. i) would not assist the agency in carrying out its statutory responsibilities and exercising its expert judgment today. And Arkansas has not identified any real-world benefit it hopes to obtain by urging continued review of the prior agency actions. Even if Arkansas prevailed in this Court, the State could not implement its work-related requirements until after the pandemic ends unless it stopped accepting increased federal funding. Mot. 3-4. And as the State acknowledges, wholly independent of HHS's future actions, the Secretary's prior approval of Arkansas's demonstration project at issue in this litigation will “expire[] on December 31” by its own terms. Opp. 5 n.2. In short, Arkansas asks this Court to press forward notwithstanding the greatly

changed circumstances and to review work-related requirements that will expire before they realistically could take effect.

Arkansas's responses are misdirected. It asserts (Opp. 2-4) that the cases are not yet moot. But the relevant issue is not whether the Court has the power to decide the cases in their current posture, but whether it *should* review them given intervening events following the grant of certiorari. The State's preemptive assertions (Opp. 3-4) of putative procedural and substantive error if the Secretary withdraws his approval of Arkansas's work-related requirements are palpably premature. And even if Arkansas were correct in predicting (Opp. 1) that the underlying legal questions would warrant this Court's review in future litigation, these cases are not suitable vehicles to consider those questions now on records that have been overtaken by events.

2. The only remaining questions concern further proceedings in and disposition of these cases by this Court. Most immediately, the federal petitioners and the private respondents agree, and no party disputes, that the cases should be removed from the March 2021 argument calendar and that further briefing should be held in abeyance pending disposition of the motion. Mot. 7; see Opp. 6 (stating that "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").

As to the disposition of the cases, the federal petitioners and private respondents—who secured the court of appeals' judgments—agree that the appropriate course is to vacate those judgments and to remand,

clearing the way for HHS to determine the path forward. Mot. 7. New Hampshire takes no position. *Ibid.*

Arkansas opposes that disposition (Opp. 1-2, 4-6), but it provides no sound reason to reject that course. Arkansas posits (Opp. 2) that vacating the court of appeals' decisions and remanding to the agency is unnecessary because the agency's "path is clear already." Arkansas's own confidence that such a remand would be redundant is no reason for this Court to leave any doubt. Arkansas elsewhere argues (Opp. 5) that vacatur and remand is insufficient unless the district court's judgments setting aside the Secretary's earlier approvals are also vacated. But what additional action by the courts below may be needed to effectuate a remand of the underlying matters to the agency is a matter those courts are in a position to address.

At a minimum, if this Court does not wish to determine what further steps (including remand to the agency) are necessary and appropriate following vacatur of the court of appeals' judgments, it could alternatively leave those matters to the court of appeals to address on remand in the first instance.

* * * * *

For the foregoing reasons and those stated in the federal petitioners' motion, the Court should vacate the judgments of the court of appeals and remand with instructions that the underlying matters be remanded to the Secretary; remove the cases from the March 2021 argument calendar; and hold further briefing in abeyance pending the Court's disposition of this motion.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

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