

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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RONNIE MAURICE STEWART, et. al.,

Plaintiffs,

v.

Civil Action 18-152 (JEB)

SEEMA VERMA, et al.,

Defendants.

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Washington, D.C
Thursday, March 14, 2019
11:00 a.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JAMES E. BOASBERG
UNITED STATES DISTRICT JUDGE

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P-R-O-C-E-E-D-I-N-G-S

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2 THE DEPUTY CLERK: Your Honor, we're here for the
3 second case, 18-152, Ronnie Maurice Stewart, et al., versus
4 Seema Verma, et al.

5 Counsel, please approach the lecturn and identify
6 yourselves for the record.

7 THE COURT: We need people to consider it as a
8 separate case. Let's just have counsel do this again.

9 MR. GERSHENGORN: Good morning, Your Honor, Ian
10 Gershengorn from Jenner and Block for the plaintiffs. With
11 me at counsel table are Jane Perkins, Catherine McKee and
12 Elizabeth Edwards from the National Health Law Program, and
13 Tom Perrelli, Natacha Lam, and Zach Blau from Jenner and
14 Block.

15 THE COURT: Okay.

16 MR. BURNHAM: Good morning, Your Honor. James
17 Burnham from the Department of Justice. With me is Matt
18 Skurnik, Vinita Andrapalliyal and Michelle Bennett.

19 MR. KUHN: Good morning, Your Honor. Matthew Kuhn
20 for the Commonwealth of Kentucky. With me from Kentucky is
21 Johann Herklotz and Matthew Kleinert.

22 THE COURT: Okay. You folks at least are new faces
23 for this hour, good morning to you.

24 All right. I want to conduct this the same way we
25 conducted the last one, Mr. Burnham. So you're up.

1 MR. BURNHAM: Thank you, Your Honor.

2 So in the last argument I started by quoting the
3 delegation to the Secretary. I didn't get to quote and I
4 would like to, just because I think it will frame the next
5 bit of my presentation.

6 Well, the Senate report that accompanied that
7 provision, and in that Senate report, and I'm sure Your Honor
8 knows this because it's in our briefs, the Senate said that
9 they gave the Secretary this authority so that, quote, "It
10 would not stand in the way of experimental projects designed
11 to test out new ideas and ways of dealing with the problems
12 of public welfare recipients."

13 And I think that's a really important framing to
14 what we're talking about in Kentucky. Because as we talked
15 about before, we have the expansion population, the
16 Affordable Care Act adds traditional Medicaid. A large
17 population of able-bodied adults.

18 I think the Court also has to look at this from the
19 Secretary's perspective. We have 50 states. Some of which
20 have not expanded yet. Some of which have expanded, but
21 might de-expand. And, of course, Kentucky has put that into
22 stark relief. So that there's been an estimate, and we
23 quibble with the details of it, but I'll take it as given for
24 now, of 95,000 people maybe losing coverage under the
25 Kentucky reforms. But I think you have to consider that

1 alongside the possibility of 454,000 people losing coverage
2 because Kentucky decides to discontinue its Medicaid
3 expansion.

4 And so just from the perspective of covering as
5 many people as possible, setting aside all the positive
6 benefits that we think could come out of these reforms,
7 that's a pretty easy choice on the part of the Secretary to
8 grant the waiver, continue the expansion and maintain
9 coverage for as many people as possible.

10 I also think that you have to look at it beyond
11 just Kentucky. So you have 14 states still that have not
12 expanded Medicaid at all. And the idea that these sorts of
13 reforms of linked to states' decisions whether to expand
14 Medicaid, that's not hypothetical at all. So the State of
15 Virginia, just over the river, just expanded Medicaid to
16 cover the expansion population.

17 In the same legislation that expanded Medicaid to
18 cover the population, the Virginia assembly, which the
19 governor then signed, directed the Virginia Department of
20 Health to seek a waiver from the Secretary to try out the
21 same kinds of reforms that we're talking about today in
22 Kentucky.

23 That was a political compromise, I assume, in
24 Virginia that we would -- they would expand Medicaid,
25 provided that they could try this kind of an experiment. I

1 think if this sort of thing, if the Secretary's waiver
2 authority were interpreted to not allow this kind of
3 experimentation, that could have, I think almost certainly
4 would have a directly negative effect on states' willingness
5 to maintain coverage for the expansion populations.

6 THE COURT: So let's talk threshold questions about
7 the expansion population because then I want to get to the
8 fiscal sustainability issue.

9 So, I mean, you would agree that healthcare
10 coverage, as it relates to the embodiment in 1396(1) is an
11 objective for the expansion population as well as the
12 mandatory population?

13 MR. BURNHAM: Yes.

14 THE COURT: Okay. And so you concede that the
15 defendants, the Secretary needed to consider healthcare
16 coverage for this population.

17 MR. BURNHAM: Yes.

18 THE COURT: All right. So, when you then look at
19 the objectives that the government advances, you sort of talk
20 about health, financial independence and fiscal
21 sustainability. Aren't you ultimately relying on the last
22 year? In other words, we've talked about -- I've talked
23 about anyway in Stewart One, the first health isn't -- that's
24 not, you may disagree, but at the end of the day, isn't the
25 centerpiece of Kentucky Two in this whole case your fiscal

1 sustainability argument?

2 MR. BURNHAM: Yes. And so I think the way I would
3 answer that, Your Honor, is the Secretary reasonably
4 concluded that the reforms Kentucky is testing in its
5 demonstration project could, indeed, are likely to have a
6 positive effect on the fiscal sustainability of Medicaid.
7 But not like the 9th Circuit's decision in *Beno* where they're
8 just cutting benefits, saving money, and therefore, you know,
9 having more money left. But because they're creating
10 incentives for people who receive Medicaid to go out, earn a
11 living, engage with their communities and reduce the
12 financial burden on Medicaid. And that's a good thing.

13 That's not a bad thing, because that leaves more
14 money in the Medicaid pot for the people who really need
15 Medicaid. And Kentucky can use that money to give extra
16 services that the Medicaid statute does not require them to
17 provide, vision, dental, things like that, the substance use
18 disorder program that Your Honor is familiar with. And those
19 are all good benefits out of having these kinds of reforms
20 that give people an incentive to go work, and to go and
21 engage in their community. And the reason why those
22 demonstration projects, I think, are coming up now is because
23 of the fundamental way the Affordable Care Act changed
24 Medicaid.

25 It didn't make sense in 1995 to say that we should

1 have a, you know, community engagement requirement for a
2 single mother with dependent children or somebody who is
3 frail and unable to work or disabled. But when we're talking
4 about able-bodied adults at, let's call it 120 percent of the
5 poverty line, it does make sense because those are people
6 who, at least some of them, will be able to go out and have
7 gainful employment and end up improving their lives.

8 THE COURT: All right. So let me ask you, and this
9 is a central question about financial sustainability. Are
10 you arguing that it's a separate objective of the Medicaid
11 Act from promoting coverage or are you arguing that it itself
12 is part of promoting coverage?

13 MR. BURNHAM: Well, it's part and parcel, Your
14 Honor. So, I mean, the way the Court put it in Stewart One
15 was that the central objective of Medicaid is, quote, helping
16 the state furnish medical assistance to citizens.

17 I think financial sustainability is clearly part
18 of that because the fix is not infinite. And so the state's
19 ability to furnish medical assistance depends on the state's
20 ability or willingness because Medicaid is an optional
21 program for the state, particular the expansion portion,
22 well, they both are, but the expansion portion is too, the
23 state's ability and willingness to pay the money to furnish
24 that medical assistance. And so --

25 THE COURT: So it's part of promoting coverage.

1 MR. BURNHAM: Yes.

2 THE COURT: That's the argument.

3 MR. BURNHAM: Yes, yes, yes.

4 THE COURT: Okay. So if that's the case then,
5 don't we have a problem with limiting principles? In other
6 words, every time you propose -- Kentucky proposes an
7 experiment or a state proposes an experiment, then if the
8 choice, if the answer is, well, it's better than not having
9 an expansion population, then everything gets approved under
10 fiscal sustainability, right?

11 MR. BURNHAM: No, because I don't think -- I don't
12 think my argument is that infinite. I think my argument is
13 narrower than that. It's that this is a legitimate
14 experiment to figure out whether these kinds of reforms can
15 make Medicaid more sustainable without depriving the people
16 who need it of medical assistance.

17 THE COURT: But what you're -- if what you're
18 saying on the one hand is the expansion population will be
19 cut out entirely, if we can't -- that's what we're going to
20 do if we can't promote this, if we can't pass this reform.
21 That's the argument, right? Then why isn't that the case?
22 You could say it about anything. That no matter how deep the
23 cuts are, the answer is, well, but it's better than the
24 expanding.

25 MR. BURNHAM: So, Your Honor, I think I have a

1 couple of responses to that. First, that is an argument,
2 that is not the only argument. So my only point with
3 the expansion is that we can't be blind to the reality that
4 if states are unable to experiment with ways to reform
5 Medicaid, the Secretary's unable to allow the states to do
6 the experiments, states may well be disinclined to cover
7 expansion populations. I think that's the whole reason
8 Congress gave the Secretary this very broad waiver authority.

9 No, I'm not saying that that means the states can
10 just do whatever they want and that I can always come to you
11 and say, well, you know, they're still going to cover ten
12 people. That's better than them covering zero people. All
13 I'm saying is that that authority is broad, and that you have
14 to consider those consequences in assessing why the authority
15 is as broad as it is.

16 Now, as far as the program before the Court today,
17 I think the central objective of Medicaid under the Court's
18 analysis in *Stewart One* is the provision of medical
19 assistance. So what the Court has to figure out is whether
20 the Secretary approved the project that is reasonably
21 approximated toward enhancing the provision of medical
22 assistance.

23 So cutting off Medicaid for lots of people, a
24 benefit cut like in the 9th Circuit decision in *Beno*, does
25 not have any, A, any experimental value because it's just a

1 benefit cut, or B, any -- it's not approximated in any way
2 toward the provision of medical assistance. That's not this
3 at all. In an ideal world, no one will lose medical
4 assistance except the people who are -- go out and find work
5 and are able to find employment -- employer provided
6 insurance or purchase insurance under subsidy through the
7 Affordable Care Act exchange.

8 And so in an ideal world if these things worked the
9 way they're supposed to work, fewer people may be on
10 Medicaid, but not for a bad reason, not because they've been
11 kicked off, but because they've been lifted out of it.

12 And so the one decision I would really encourage
13 Your Honor to take a look at, and the plaintiffs barely talk
14 about it in their briefs, because they think it's very hard
15 to distinguish, is the D.C. Circuit's decision in *Farmer*
16 *versus Thompson*. And so as Your Honor, I'm sure knows,
17 *Farmer versus Thompson* is a case where basically the state
18 wanted drug companies to provide cheaper drugs to people who
19 are low income, but not on Medicaid. And if the drug
20 companies refused to do that, they've made it harder to get
21 the drugs through Medicaid. They leveraged Medicaid to get
22 cheaper drugs for low income people. The D.C. Circuit said
23 that was fine. The plaintiffs came in and said that was
24 burdening Medicaid to benefit people not on Medicaid and that
25 was a problem.

1 And what the D.C. Circuit said was, and I'm going
2 quote, "It is reasonable to conclude that these populations,"
3 meaning the borderline populations, "will maintain or improve
4 their health status and be less likely to become Medicaid
5 eligible," and that's at page 825 of the Court's opinion.

6 What the Court was saying there, I think, is that
7 you could impose a burden on Medicaid recipients to try to
8 keep other people off of Medicaid. To try to preserve
9 Medicaid for the people who needed it the most. In other
10 words, not have people fall into it.

11 All we're doing here is the flip. Kentucky is
12 trying to impose some requirements that will help lift people
13 out of Medicaid so that there's more money left in the pot
14 for the people that remain. I think it's the exact same
15 thing.

16 THE COURT: All right. The argument depends on
17 N.F.I.B., right? In other words, if that comes out the other
18 way, you couldn't say this is coverage promoting.

19 MR. BURNHAM: No, I disagree, Your Honor. So I
20 think I could still make the same argument I'm making right
21 now because I would still be here saying that because the
22 Affordable Care Act expanded Medicaid to a large body of
23 people who can work, that therefore the states have a basis,
24 an experimental basis to try these kinds of reforms.

25 I think the fact that N.F.I.B. came out as it did

1 makes my argument very -- much stronger because the states
2 now can now treat the expansion population, I think, as an
3 optional population. I mean, it's separate. N.F.I.B.
4 decoupled it from the traditional Medicaid group.

5 THE COURT: But if I find that, as I talked about
6 in Stewart, that once the state has expanded that everyone
7 has to be viewed in the same pot, all Medicaid recipients,
8 both the mandatory and expansion population, it seems to me
9 that your fiscal sustainability argument relies on the fact
10 that they're lucky to have Medicaid at all. That the state
11 can do anything they want because -- and, I'm sorry, let me
12 take out the preface of the question, the combining the
13 mandatory and expanding because that's not relevant.

14 The point is that, if the baseline expanded is
15 they're lucky to be in it at all, I'm still not sure why your
16 argument doesn't support the Secretary cutting benefits down
17 to even your hypothetical to ten people.

18 MR. BURNHAM: Because that's not what happened in
19 the demonstration project here.

20 THE COURT: But what's, again, what is the limiting
21 principle, I'm saying to you? What you're saying to me is
22 don't worry, that's what happened here was okay, but I'm
23 trying to -- so you've told me all these other states have
24 done it. If those cases come before me, where is the --
25 where does the line get drawn?

1 MR. BURNHAM: Well, so I think the line the Court
2 could draw for purposes of this case, which is a line that I
3 think would be fairly easy to enforce, is that the line is
4 the furnishing of medical assistance. So if I come back to
5 you and, you know, some other state and they've decided to
6 cut everybody ages 30 to 50, but they're going to let
7 everybody else in, and I'm telling you that's a good thing,
8 because we still have 30 percent of the population, we could
9 have a conversation about whether the Secretary's broad
10 waiver authority is really that broad. But that's not this.

11 Kentucky hasn't cut benefits for anyone. All
12 Kentucky has done is ask people who are able to comply, and
13 exempt anyone who couldn't reasonably comply, with the
14 limiting community engagement requirements in order to
15 continue receiving Medicaid.

16 THE COURT: You keep saying they haven't cut. But
17 you came -- we won't use the 95,000 as the number that's set
18 in stone. But clearly there is going to be coverage loss for
19 people. You're not contesting that.

20 MR. BURNHAM: So I think it's totally unknown right
21 now what the effect of these sorts of reforms would be over
22 time.

23 THE COURT: So you're saying no, the number is not
24 95,000, it's zero?

25 MR. BURNHAM: No, I'm not saying that it's 95,000

1 or zero. I'm saying that the point of the experiment is to
2 figure out what kind of effect these sorts of reforms have on
3 Medicaid recipients.

4 THE COURT: Right, but even if it's half of the
5 95,000 to say that people aren't going to lose coverage here
6 or that the benefits aren't being cut here, that's only --
7 that's a pretty technical position, isn't it?

8 MR. BURNHAM: I don't think it's an all technical
9 to say that benefits are not being cut. I mean, it is true
10 that there are some -- I'm sure there will be some people who
11 will choose not to comply with the requirements. And that
12 will then forego Medicaid coverage.

13 THE COURT: And they will lose benefits.

14 MR. BURNHAM: They will lose benefits, but that's
15 not because there's a benefit cut, that's because they
16 declined to comply with the new prerequisite for the program.
17 Your Honor, just like someone who's at 120 at the poverty
18 line and doesn't apply to Medicaid in the first place doesn't
19 have Medicaid. So that person doesn't not [sic] have
20 Medicaid because we've cut their benefits, they don't have
21 Medicaid because they never applied for Medicaid in the first
22 place.

23 And so -- and it can't be that just the possibility
24 of coverage losses invalidated demonstration project because
25 Section 1315 itself explicitly anticipates the possibility of

1 coverage losses. And that's at 42 U.S.C. 1315(d)(1) where it
2 says that demonstrations may, quote, result in an impact on
3 eligibility.

4 THE COURT: But the question then, sure, and
5 that's -- I don't think the plaintiffs are saying, I mean,
6 it's an interesting question, can you ever have coverage
7 loss, and, Mr. Gershengorn, it will be good to hear your
8 response to that. But their answer, I assume is, of course,
9 you can have some coverage loss, but you can't have the
10 substantial coverage loss you have in this case. Why? How
11 can you say that that's not creating a substantial benefits
12 cut, that it ultimately does not create a substantial
13 benefits cut?

14 MR. BURNHAM: Because I don't think we know what
15 will actually happen until we run the demonstration project.

16 THE COURT: And so all these commenters are saying
17 are just wrong?

18 MR. BURNHAM: They don't know. I mean, no state
19 has ever run a demonstration like this one other than the --

20 THE COURT: Arkansas has. Then we've lost all
21 the -- then 17, 18,000 people have lost.

22 MR. BURNHAM: I think that's a great example. And
23 I think it would be really useful to see what happens in
24 Arkansas over the next couple of years. In the last
25 argument, we had this kind of the data versus people. It's

1 not data versus people at all. It's all about people. I
2 mean, it would be useful to see what happens with those
3 people. Some of those people may not have reapplied -- it
4 sounds like, according to Mr. Gershengorn, haven't reapplied
5 for Medicaid at all. I don't know why that is.

6 It could be because they get healthcare through a
7 spouse, or through some other means, or because they have a
8 job or we just don't know. And so I think the point of these
9 reforms is to make people's lives better. And in Kentucky,
10 you actually have a wider array of things in the program that
11 I think are all tailored in that direction. So the community
12 engagement requirements are the most prominent, the most
13 prominent feature.

14 But you've also got, you know, you've also got the
15 my rewards account and things like that that are intended to
16 give people an incentive to engage more with their
17 healthcare. And if they do that, they going to be healthier
18 people. And if they're in compliance, community engagement
19 requirements, some of them will earn a living or will earn
20 more money and be able to obtain healthcare through the
21 private market. And I just think that's a great thing. It's
22 also great for the people in Kentucky who remain on Medicaid.

23 THE COURT: On a fiscal sustainability issue, tell
24 me your position on whether a state has to show financial
25 distress in order to -- could a state simply say, given our

1 budgetary priorities, we'd rather spend a bunch of this money
2 on schools or a bunch on roads. And so, therefore, we're
3 going to -- we only have this pocket we want to spend on
4 Medicaid. And so we're going to make these cuts.

5 Is that fine for the Secretary to approve that or
6 does the state need to have some argument that financially
7 it's really, if not willingness, very difficult for them to
8 sustain?

9 MR. BURNHAM: Just to make sure I understand the
10 question. You're talking about de-expanding when you say
11 these cuts?

12 THE COURT: Yes.

13 MR. BURNHAM: No, I don't think the state has to
14 make any showing at all. So I think N.F.I.B. was very, very
15 clear on this point, and this is why, like I said earlier, I
16 think we win, even without N.F.I.B., but I think we
17 definitely win with N.F.I.B.

18 THE COURT: Okay. I'm sorry, how about the
19 hypothetical with not NFIB expanding but where you're doing
20 what you're doing here. In other words, by the work
21 requirement.

22 MR. BURNHAM: Right. So what we're doing here is
23 not so that Kentucky can go save money for tax cuts or
24 something, it's so that Kentucky can have more money in its
25 Medicaid program for the people who need Medicaid. I mean,

1 that's the point of this --

2 THE COURT: So your argument is they don't need to
3 show any financial distress, they can simply say this is a
4 better use of our Medicaid funds.

5 MR. BURNHAM: They need to show that the project
6 under this Court's opinion in Stewart will further the
7 provision of medical services. And I think Kentucky has
8 absolutely shown that because what Kentucky is saying is that
9 if we impose these reforms, it's going to save money on some
10 of our healthier, more able-bodied Medicaid population
11 because some of them are going to get jobs and not need
12 Medicaid, which again is a good thing. That is a loss of
13 coverage, but only a loss of coverage because they've gotten
14 better coverage or they're going to be healthier and
15 healthier as it relates to fiscal sustainability.

16 And so then we can use the money left over for
17 substance use treatment, substance abuse treatment. They can
18 use the money left over for vision, for dental, for better
19 prescription drugs, all these other wonderful things that we
20 can give to the people who need them the most. So I think
21 that's the way I would think about it, Your Honor. The state
22 has to show the program will advance the provision of medical
23 services.

24 If I could, Your Honor, just real quickly before I
25 sit down.

1 THE COURT: And I have one technical question. Let
2 me just give you just one technical question, I just want to
3 make sure your position on it. If you don't mind turning to
4 the approval letter, page 6, 6723 in the administrative
5 record?

6 MR. BURNHAM: Just give me one moment.

7 THE COURT: Sure. Take your time.

8 You may or may not have the answer to this. I just
9 wanted to check one issue. So it's 6723 --

10 MR. BURNHAM: Okay.

11 THE COURT: -- page 6 of the approval letter.

12 There's four bullets there.

13 MR. BURNHAM: Yes.

14 THE COURT: I just wanted to know, is that an
15 exhaustive list of the additional changes or not, if you
16 know? And again, take your time. And if you don't know, I
17 understand. Just in some digging we were doing --

18 MR. BURNHAM: I'm probably not going to know off
19 the top of my head. But if you'd like, we can submit
20 something.

21 THE COURT: If you don't mind, just to save us a
22 little digging.

23 MR. BURNHAM: Yeah, we'd be happy to do that, Your
24 Honor.

25 THE COURT: So that would be fine. And please go

1 ahead with your last point.

2 MR. BURNHAM: Last point. So I obviously think
3 that we should prevail and that the Court should not vacate
4 the approval. I think if the Court disagrees, relief should
5 be remitted to the named plaintiffs. And we talked about
6 this in our brief. I just want to emphasize two points on
7 that.

8 This case started as a class action. It was filed,
9 the amended complaint was, as a class action. The plaintiffs
10 have not obtained or sought class certification. They've
11 forfeited the ability to obtain class-wide relief. I think
12 they probably couldn't have obtained class certification
13 because their interests are so divergent from the rest of
14 Kentucky.

15 As we know, the Kentucky governor has said in an
16 executive order that he's going to end the Medicaid
17 expansion. So I think if the Court is going to grant relief,
18 it should only grant it as to these plaintiffs because
19 there's a lot of people in Kentucky who may very well be
20 happy to comply with the community engagement requirements
21 rather than risk their healthcare altogether through the
22 expansion program ending.

23 THE COURT: Okay. Thank you very much.

24 MR. BURNHAM: Thank you, Your Honor.

25 THE COURT: All right. Mr. Kuhn.

1 MR. KUHN: May it please the Court.

2 Your Honor, I want to start with two aspects of
3 this Court's previous opinion to frame our discussion. The
4 Court's already held that the secretary should receive
5 significant deference in deciding whether to approve Kentucky
6 health, and the Court got very close to going ahead and
7 holding that the Secretary get Chevron deference in
8 interpreting the objectives of Medicaid.

9 Those two findings narrow this Court's task today
10 considerably. For the time I have, Your Honor, I'd like to
11 address the Court's questions, but focus, if I can, on
12 coverage loss and sustainability as an objective of Medicaid.

13 Start with coverage loss, Your Honor. Three main
14 points here. One thing that hasn't come up yet today is
15 Section 1115(d)(1), which is part of the Section 1115 statute
16 that specifically envisions that coverage loss could occur
17 under a Section 1115 waiver. So the idea that no coverage
18 loss at all is allowed is rejected, we believe, by Section
19 1115 itself.

20 Second point about coverage loss that we have not
21 talked about any today is what Kentucky and the Secretary
22 have done to minimize coverage loss that will occur. So
23 let's say someone loses coverage loss for failing to satisfy
24 the community engagement requirements. They're going to have
25 a chance in the next month to make that up. They're also

1 going to be able to take the course to reenroll.

2 Same thing with premiums. Let's say they don't pay
3 premiums for two months. They're going to have an
4 opportunity to come back in early. So the Secretary in
5 Kentucky worked exhaustively to minimize coverage loss. We
6 got broad exemptions, we got good cause exemptions, we got on
7 ramps. All of those things have to be looked at in
8 considering coverage loss.

9 THE COURT: But this isn't new. In other words,
10 all of these criteria or factors that you talk about, they
11 were considered by the commenters when they estimated the
12 number of coverage, number of people who would lose coverage
13 in Kentucky One, right?

14 MR. KUHN: So we disagree with that. So let me
15 give you a couple of examples. There were a number of
16 guardrails added after the 95,000 projection, if I can call
17 it that. There were a number of guardrails that were added
18 after that.

19 Let me mention the two primary ones that I want the
20 Court to focus on. Prior to the 95,000 projection, the idea
21 was that folks who were complying with SNAP and TANF's work
22 requirements, who were complying only were exempt from
23 community engagement. After the 95,000 projection, that was
24 expanded. If you look at our current approved waiver, it
25 includes not only folks who are complying, but folks who are

1 exempt. So that's an expansion of that exception.

2 And let me point the Court to why that matters.

3 SNAP has some very broad exceptions from its work
4 requirements, one of which is it excludes everyone over the
5 age of 50. So someone who's on SNAP who's over the age of 50
6 is going to be automatically exempt from Kentucky's community
7 engagement. We are running the numbers currently, you know,
8 April 1st is our deadline, so I don't have firm data that I
9 can put into the Court's record. But our initial runs have
10 shown that that's excluding 30,000 folks alone from community
11 engagement.

12 So another SNAP exclusion that is new, SNAP also
13 excludes from their work requirements a parent or other
14 member of a household with responsibility for a dependent
15 child. That's an exception from the SNAP requirement. And
16 that's also then an exception from Kentucky's community
17 engagement requirement. Again, added after the 95,000.

18 Our data is indicating at this point that that also
19 is independently going to exclude another 30,000 individuals
20 from community engagement. So, Your Honor, that is something
21 that was added after the 95,000. Many of these good cause
22 exceptions were added after the 95,000.

23 Another exception to community engagement was added
24 was the physician attestation exception. If you're not
25 determined to be medically frail, but you decide you are

1 medically frail, you go to your doctor, and you get an
2 affidavit or an attestation form from him or her, and you're
3 automatically at that point exempt from community engagement.

4 So, Your Honor, we had the 95,000 projection, and
5 we can go back and forth on whether that's accurate. But
6 even after that, Kentucky and the Secretary took significant
7 steps to minimize that. And I think that needs to be
8 considered.

9 THE COURT: But how do I know that the Secretary
10 considered those?

11 MR. KUHN: Because the exceptions were broadened.
12 If you look, let's talk about SNAP payment. If you look in
13 our application it talks about only excluding those who are
14 meeting the work requirements, and you look at how it's
15 broadened since then.

16 THE COURT: If you tell me these numbers aren't
17 firm, certainly the Secretary couldn't have considered them,
18 right?

19 MR. BURNHAM: I think part of our negotiation with
20 the Secretary was broadening these exceptions. You can see
21 they weren't in our initial application. They are in the
22 final revised approval. So I think the Court can take notice
23 of the fact that it changed and that we, in fact, broadened
24 it.

25 The Secretary said in his November 20th approval,

1 he specifically said that guardrails were added after the
2 95,000. And you can go back through and compare our
3 application to what was ultimately approved. So I think the
4 Secretary absolutely determined that he said he did in his
5 labor.

6 The third point I want to make about coverage, and
7 we talked a little bit about it, is you've got to consider
8 the flip side of the coin. Is there going to be coverage
9 loss? Perhaps. But is there going to be enhanced coverage
10 for those who have it? Yes. Kentucky has no obligation to
11 provide dental, has no obligation to provide vision. But the
12 my rewards account's going to allow that.

13 One thing I want to put in the record is we've been
14 allowed to accumulate my rewards virtual:dollars in advance
15 of this. This shows engagement of our population. Our
16 website currently reports that we have 70 million virtual my
17 rewards dollars ready to be spent on April 1st. This is a
18 significant thing that's going to allow coverage that
19 Kentucky could not otherwise provide, dental, vision,
20 over-the-counter medications, and even fitness related
21 services. This is a huge get for Kentucky's population
22 that's very unhealthy.

23 You'll recall in my previous argument before this
24 Court, I took the Court through the distressing statistics
25 that we have in Kentucky. We're trying to address that.

1 One of the other problems we have is that in the
2 first year of expanding Medicaid in Kentucky, less than ten
3 percent of our enrollees actually got preventive care.
4 That's the biggest predictor of how healthy your population
5 is, and less than ten percent of folks who had this benefit
6 did this. That's why we got this theory, that's why we got
7 this test. We want to come alongside these folks, encourage
8 them to try things out.

9 Let me point the Court to the affidavit that we put
10 in the record with our summary judgment brief that talked
11 about how in Kentucky our expanded Medicaid numbers have gone
12 down 8.3 percent from December 2017 to December of 2018. And
13 honestly, that's a time -- so it's gone down by 8.3 percent.
14 That's a time that the economy had --

15 THE COURT: 8.3 million or 8.3 percent?

16 MR. BURNHAM: 8.3 percent, Your Honor. It's in the
17 affidavit. That's the time of an economic upturn. Imagine
18 what would have happened if we would have had our community
19 engagement requirement at that point in time. As the economy
20 is going, as people are aging out of Medicaid or are incoming
21 out of Medicaid, excuse me, we've got a community engagement
22 program that's going to plug them into their communities.
23 It's going to try to make it stick. It's going to try to
24 keep them out of this permanently thereby preserving Medicaid
25 dollars for those in Kentucky who most need it.

1 Let me turn to sustainability if the Court has no
2 more question on coverage loss. Sustainability, Your Honor,
3 has to be an objective of Medicaid. It says so in 1396(1).
4 Medical assistance is to be provided, quote, as far as
5 practicable under the conditions in such state. As far as
6 practicable under the conditions in such states. The
7 plaintiffs have absolutely no answer for that line in
8 1396(1).

9 THE COURT: Did the Secretary rely on that?

10 MR. KUHN: Yes, Your Honor, that language is quoted
11 as the sustainability -- my recollection is, confirm when I
12 sit down, but my recollection is that's specifically quoted
13 in the November 20th approval as the basis for the
14 sustainability rationale.

15 THE COURT: Because the government's position is,
16 and that's why I asked, this is really part of promoting
17 coverage rather than an independent objective of Medicaid.

18 MR. KUHN: Your Honor, my recollection is, again,
19 that he quoted that language of 1396(1) in discussing, my
20 recollection could be off, but regardless, I think it has to
21 be considered as part of the objectives, consideration of the
22 objectives of Medicaid.

23 Your Honor, the plaintiffs in this case have not
24 disputed as a matter of Kentucky law that Governor Bevin's
25 executive order is, in fact, the law of Kentucky. He's the

1 duly elected chief officer. It's the law of Kentucky at this
2 point. That's undisputed for this record. Instead the
3 plaintiffs, Your Honor, have claimed that there's no
4 budgetary evidence about whether Kentucky can continue absent
5 expanded Medicaid.

6 Two points in response, Your Honor, about the
7 budgetary evidence in the record. You talked to Mr. Burnham
8 a little bit about this. I agree with Mr. Burnham, the
9 weighing of budgetary priorities, deciding what to fund, what
10 not to fund, where to put scarce state resources, that's
11 Kentucky's prerogative, it's not the plaintiffs' prerogative,
12 it's not the Secretary's prerogative.

13 THE COURT: But if, in fact, there is an
14 independent objective of the act, then because if you're
15 relying on, as far as practicable language, then don't you
16 have to submit further evidence, not just that the state
17 chose to do this, but that it is impracticable for them to do
18 otherwise?

19 MR. KUHN: Well, I think that is the Secretary's
20 determination. I think the idea of how to handle competing
21 budget issues is Kentucky's judgment. That's left to its
22 elected leaders. But, Your Honor, even if you think there is
23 a quantum of evidence requirement, I do want to put into the
24 record some of the budgetary issues that we're facing in
25 Kentucky. This is in response to the statements in the

1 Court's opinion about what is our budget.

2 THE COURT: But again, what was in front of the
3 Secretary. And so you tell me this information, again, and I
4 don't -- I'm not being difficult, but there was a number that
5 was wrong last time, at the last oral argument. It's a
6 question of what the Secretary considered. It's not what I
7 think about the budget of Kentucky. And so, why doesn't --
8 didn't Kentucky have to say to the Secretary, here are our
9 financials, this is why it's impracticable for us to do it so
10 that the Secretary could say you're right, as far as
11 practicable, it's not practicable for Kentucky.

12 MR. KUHN: Again, I think that is a judgment that
13 is left to Kentucky. I think that is encapsulated in the
14 governor's executive order. It is on the question of law of
15 Kentucky.

16 Talking about the record, what was before the
17 Secretary, if you look at our waiver application, there was a
18 statement there that said that continuing expanded Medicaid
19 will crowd out other spending for education, for pension
20 obligations. We have one of the highest unfunded liabilities
21 for pensions. It's as high as \$84 billion. So some of those
22 statements were in our initial approval letter.

23 As Your Honor knows, in 2020, our state share is
24 going to go up again to ten percent. So we're going to have
25 even more Medicaid spending related to this. The current

1 appropriation in Kentucky was approximately \$1.8 billion
2 dollars for Medicaid benefits. And that's going to go up.

3 To the question about cost savings and the issue
4 from the previous, there was some confusion on that. I do
5 want to note that because our implementation has been
6 delayed, the projection of how much this would save Kentucky
7 is going to change because year one was at a less favorable
8 rate for us. It was six or seven percent. Whereas now we're
9 going to have an extra year at ten percent. So I do
10 apologize for the confusion in the initial argument. But I
11 do want to point the Court that the five years are going to
12 be different than the five years that were considered
13 initially.

14 THE COURT: Okay. Thanks so much. I appreciate
15 your argument again.

16 MR. KUHN: Thank you, Your Honor.

17 THE COURT: All right. Mr. Gershengorn.

18 MR. GERSHENGORN: Good morning again, Your Honor.
19 And may it please the Court.

20 In Stewart One this Court identified as a glaring
21 problem the agency's failure to address the potential loss of
22 coverage that Kentucky's unprecedented experiment would have
23 accomplished.

24 This Court remanded to the agency to fully consider
25 the scope of the problem and what the Court got back was an

1 agency decision that effectively doubled down on the flawed
2 rationale and failed to engage seriously with the coverage
3 issues this Court identified.

4 That is no surprise in the aftermath of this
5 Court's decision, the Secretary said that H.H.S. was, quote
6 undeterred, and that C.M.S. was going to forge ahead with
7 what he called, quote, the next generation of transformation
8 in Medicaid through our efforts to encourage work and other
9 forms in the community engagement. This wolf comes dressed
10 as a wolf. They did exactly what they said they were going
11 to do.

12 I won't go over for Your Honor the ways, and they
13 just repeated all of the things that they had said before.
14 They continued to tout health benefits which you called --

15 THE COURT: Right. I mean, I want to -- let's cut
16 to the chase.

17 MR. GERSHENGORN: Okay, well, let's cut to the
18 chase. I see three concerns that Your Honor has raised this
19 morning. The question of sustainability, the question of
20 financial distress, and the question of whether the threat of
21 terminating the expansion population is sufficient. And
22 whether a loan or in combination, those are three.

23 So let me start with the financial distress, which
24 is what Your Honor ended with. I think the answer to that is
25 exactly what was said in your opinion. So what you said in

1 your opinion was to the extent you're invoking financial
2 collapse, this isn't practicable, we couldn't possibly do it,
3 put in evidence. You suggested what such evidence might look
4 like, budget, revenues, that evidence is now being presented
5 to this Court now for the first time, which, of course, is
6 not where it's supposed to be presented. It's supposed to go
7 to the Secretary.

8 I think in general there's reason to be dubious. I
9 hate to add evidence to the record, but if that's what we're
10 doing, Kentucky has by some measures the 21st highest tax
11 burden in the nation. Puts it right in the middle. Could
12 they increase taxes? We'll see.

13 You know, there are -- the idea that what's going
14 to happen now is that this Court is going to decide in the
15 first instance without any evidence that this is financially
16 impossible, seems dubious.

17 I will also say that in the context of Medicaid, it
18 seems quite unusual because with the expansion population,
19 which is what we're principally talking about, Congress is
20 paying 94 percent of the budget. These costs are not going
21 away. People's health problems do not disappear. They get
22 shifted to the state.

23 And so, it seems quite unusual to me or I'll go
24 further and say absurd to me to say that what we're talking
25 about is eliminating a 94 percent contribution by the federal

1 government in the name of saving budget for Kentucky. But
2 that's just my view. And the Court isn't bound by that.

3 The critical point is Your Honor identified the
4 issues for the Secretary. They identified the issues for
5 Kentucky. And they just were not grappled with.

6 THE COURT: So let's go back to the question I
7 asked Mr. Burnham about fiscal sustainability and whether --
8 his position was largely that it's a promotion of coverage.
9 And I want to talk about that in a minute. But let's talk
10 first about Mr. Kuhn's position, which is that it's a
11 separate objective of the act because it's incorporated by
12 the "as far as practicable" language.

13 MR. GERSHENGORN: Right.

14 THE COURT: Why isn't that right and why shouldn't
15 I rely on Kentucky's decision of what's practicable or not?

16 MR. GERSHENGORN: Because I think at that point,
17 Your Honor, this goes back to limiting principles, and you're
18 going to hear that a lot from me, I think, over the course of
19 this morning. There isn't -- so first of all, I think the
20 right way to read as far as practicable is we couldn't do
21 what Congress has asked us to do. And there isn't any
22 evidence of that in the record.

23 THE COURT: It goes back to your first point, which
24 is they would have to show in greater detail why it's not
25 practicable, the Secretary.

1 MR. GERSHENGORN: That's right, Your Honor. And if
2 you don't require that, and it's just Kentucky's say so, then
3 essentially we've written -- there's no limiting principle.
4 We've sort of read that out of the act because, of course,
5 the state is always making choices about schools and police
6 officers and Medicaid recipients. And that's where the
7 budget decisions are made.

8 And so if you come in and allow them to say short
9 of distress, well, this just isn't practicable for us, that's
10 a standard we're now meeting. That's absolute deference to
11 the state, and it's completely at odds with the idea that the
12 Secretary is supposed to make a decision about whether this
13 project advances anything.

14 And so I guess I feel like, and again, I'm going to
15 harp on this, and I apologize. There's reason to be
16 skeptical about it in a situation in which they're targeting
17 the expansion population. And that's the one population that
18 Congress is giving the most budget for. Right? Ninety-four
19 percent. And getting all the coverage. Those people need
20 coverage, where they're going to get unpaid services, which
21 the state is going to pick up anyway.

22 And so I guess there's reason to be dubious. But
23 in any event, I think that at least as far as practicable,
24 has to be read in light of, you know, the need for there to
25 be some limiting principle.

1 THE COURT: All right. So let's move back to Mr.
2 Burnham's point, which is it's part of promoting coverage.
3 And so why can't Kentucky say, look, we're considering all of
4 the people eligible for Medicaid, and we may have to cut some
5 in order to increase benefits. They sort of make two
6 arguments. One is increase the types of benefits, vision,
7 dental, et cetera. And the other is we'll have to de-expand.
8 So, why -- take one at a time if you want, why aren't these
9 decisions they can make?

10 MR. GERSHENGORN: So can I start -- let me start
11 with the de-expand because I actually think, again, in terms
12 of what the Secretary actually said in her letter, de-expand
13 is actually the center piece. And if Your Honor thought that
14 wasn't sufficient, that appears like seven or eight times in
15 the answer, I think you would have to send it back because
16 really the core of what the Secretary said was, and you heard
17 it again this morning, is that when you're talking about are
18 we promoting coverage, you have to take into account the
19 throat from Governor Bevin that he's going to pull 450,000
20 people off.

21 Okay. So, and the number of responses, you'll be
22 surprised to learn. The first two don't get to the core of
23 Your Honor's position, but I want to get them out there
24 because I actually think they're important.

25 The first is, we don't think it's at all clear, and

1 Your Honor says it's not a foregone conclusion that they can
2 de-expand. And so Your Honor is well aware of the -- of the
3 federal arguments.

4 I would point to a different part of N.F.I.B. where
5 it was clear what the Chief Justice was concerned about, was
6 this sort of post-acceptance change, and that what he said
7 was Congress is powered to legislate under the spending power
8 is broad, it does not include surprising participating states
9 with post-acceptance or retroactive conditions.

10 And so what N.F.I.B. was about was not letting the
11 state make that initial choice. I don't think what the Court
12 held that they then can treat it is an optional population,
13 even though the statute makes it a mandatory population.

14 But be that as it may, that's not the only
15 constraints on the power to de-expand despite what the
16 attorney for Kentucky said, the governor does not make the
17 law in Kentucky, the legislature does, and the legislature in
18 Kentucky, Revenue Statue 205.520 said, "It is the policy of
19 the commonwealth to take advantage of all federal funds that
20 may be available for medical assistance."

21 It is our position that that would prevent the
22 governor from de-expanding when they could a 94 percent
23 federal contribution for the coverage.

24 I don't know that Your Honor is going resolve that
25 today, but I just want -- I don't think it's at all clear you

1 can un-expand.

2 The second point, which is smaller, I'm not sure
3 that Your Honor is going to view it this way, but I will
4 point out that this notion of the linkage between the
5 expansion population and these requirements, is not new,
6 right? That was in the first letter.

7 Now, Your Honor didn't address it expressly, but
8 this is all that the Secretary did in the second piece. And
9 this is clearest on page 14 where he references back to the
10 January letter, is put this out in more detail. But this is
11 not something new.

12 But let me just get to the heart of it. I do not
13 think that the Court can look to the possibility of
14 withdrawing the expansion population even if you thought it
15 was legal and even if this were something new. And the
16 reason for that is the following:

17 What the Secretary is supposed to do when he
18 considers the legality of the project is consider the effect
19 of the project, not how other people will react to that. In
20 other words, the Secretary is supposed to say, here is the
21 program Congress enacted and now I am comparing it to the
22 program that Congress enacted with these provisions gone.
23 It's not -- it's intrinsic to the -- it's not extrinsic to
24 the project. And you can see that in the statutory language.
25 The statutory language directs the Secretary to consider --

1 just give me one second, Your Honor -- is to consider whether
2 the project is likely to assist in promoting the objectives
3 of the relevant subchapter.

4 And it has to be that way. It has to be how the
5 project will, not how other people react to it because quite
6 honestly, Your Honor, that way madness lies. It seems to me
7 there are two possibilities. The first is that the Secretary
8 just defers and somebody comes in and says, well, I'm going
9 to de-expand, I'm going to take away the expansion
10 population.

11 Well, if the Secretary just takes that, Your
12 Honor's opinion is a dead letter, right? What you said was
13 we have to think about loss of coverage and promotion of
14 coverage. But if you can only say I can get out of the
15 expansion or for that matter, Medicaid is voluntary. No
16 state has to do it. Then the state can just say I'm going to
17 dump Medicaid if you don't let me cover the blind, if you
18 don't let me cover these services or those services. That's
19 a dead letter.

20 THE COURT: And that's the hypothetical in part
21 that I'm raising to Mr. Burnham. But his response is, well,
22 don't worry about -- you don't need to create a limiting
23 principle here because what the Secretary did with Kentucky
24 is permissible. And so why shouldn't I not worry about how
25 far down the slippery slope we could go, but say look, what

1 happened here, I have to give deference is appropriate.

2 MR. GERSHENGORN: Well, because I guess deference
3 to what, Your Honor? There are a couple of different ideas
4 packed into that question. Deference is to whether the
5 Secretary is going to actually de-expand. That's not
6 something the Secretary has any authority, or any wisdom, any
7 more than yours or mine. We're talking, remember, about not
8 a -- we're talking about an executive order to pursue at the
9 end of all appeals, which Your Honor said in X time period, X
10 month, X years, I don't know what it is.

11 We have an election coming up in Kentucky in the
12 fall. I have no idea who's going to prevail in that
13 election. I have no idea whether, in fact, somebody can pull
14 450,000 as a political matter in Kentucky. I have no idea
15 whether having given up 94 percent of the federal matching
16 funds, hundreds of millions of dollars, that that's something
17 that the people of Kentucky and the legislative would be
18 happy with. I don't know that, you don't know that, and the
19 Secretary doesn't know that.

20 And so it seems to me you either have the Secretary
21 making a judgment that he can't possibly make or you take
22 their word for it in which case there is no review at all,
23 and your opinion is a dead letter. And so either one of
24 those, it seems to me, is quite unsatisfying.

25 You know, again, you look at the -- you look at the

1 reasons why people have gone with this expansion population.
2 I mean, you look at what's happened, that the uninsured in
3 Kentucky have gone from 35 percent to 11 percent. You know,
4 450,000 people now have coverage. You know, this is a good
5 deal. There's a reason why 50 states have adopted Medicaid.
6 There's a reason why 36 or 37 states have adopted the
7 expansion.

8 And so I guess to me the critical point comes back
9 to you cannot justify this program on the basis of the threat
10 that the governor might follow through or some governor might
11 some day follow through on an effort to remove the
12 expansion -- one last -- I'm sorry.

13 THE COURT: Go ahead.

14 MR. GERSHENGORN: And the one last point on that, I
15 mean, I just can't help but saying, of course, that the
16 underlying theory here is targeting the expansion population,
17 right? It's the very thing Your Honor said they can't do.
18 The expansion population is the one that's 94 percent
19 reimbursed. The regular population is 71 percent.

20 Now, I'm not advocating that they terminate anybody
21 elsewhere. But what's really going on, and you heard Mr.
22 Burnham say it, is a disagreement, a view as the Secretary
23 and the administrator have said over and over that Congress
24 has improperly fundamentally transformed Medicaid. But
25 that's Congress's job. Congress can add additional

1 populations. And so your hostility to that in your view that
2 somehow those peopler are not as deserving, I just don't
3 think that's much weight in the analysis.

4 THE COURT: But then can there be any kind of
5 coverage losses? I mean, when we talk about limiting
6 principles --

7 MR. GERSHENGORN: Yeah.

8 THE COURT: -- their demonstration projects
9 certainly can have some kind of coverage loss, either with
10 people or benefits, I trust you'd agree. So why -- go ahead.

11 MR. GERSHENGORN: No, no, you finish. I'm sorry,
12 Your Honor, it's a bad habit.

13 THE COURT: So where are you drawing your lines on
14 permissible coverage losses?

15 MR. GERSHENGORN: So I think that's a fair
16 question. And I think you and I had a similar colloquy last
17 time. And I guess my sense of that is this: I'd like to
18 just frame a couple of things first.

19 What we are talking about here before the Court,
20 and this is ducking a little bit your limiting principle, but
21 I'll work my way around it, because I think this is the easy
22 case, right?

23 What we're talking about here is not just work
24 requirements, right? We are talking about a combination of
25 premiums, which have been shown in even small numbers to

1 cause lots people time and again to lose coverage. We're
2 talking about the loss of retroactive coverage which again
3 has been shown time and again to create gaps in coverage.
4 We're talking about lockouts from things like
5 redetermination, and we're talking about work requirements.
6 So we're talking about a massive dislocation.

7 This isn't theoretical. I mean, I heard Mr.
8 Burnham say, well, we don't know if there's going to be
9 coverage loss. But in the record in Kentucky, it's not just
10 that estimate, which, you know, we've talked about, but
11 actually the actual experience in Arkansas is in the record.
12 So whether or not it's in the record in Arkansas, it's in the
13 record in Kentucky too. And there isn't any doubt that those
14 numbers are substantial. And so we're talking about massive
15 coverage loss.

16 Now, so in terms of what I think about how to
17 approach it. I think there are three things. First, I think
18 at the very least that massive location, dislocation and
19 coverage loss has to be talked about. That's the insight in
20 Stewart One. And I think that drives, that's sufficient to
21 decide this case. You have to discuss and take seriously
22 that coverage loss.

23 Second, I think that that kind of massive coverage
24 loss would require an extraordinary showing on the other side
25 and can't be shown even remotely in this record.

1 So, are you going to press me exactly what's
2 massive, is it 20 percent, is it 15 percent, is it 25
3 percent? Fair questions. I don't think I could answer what
4 the numerical cutoff is. But I can say that 18,000 people
5 off in Arkansas and that 95,000 people off in Kentucky, we
6 should say, like they poked holes in the 95,000, but there
7 are estimates from amici and others which Your Honor has
8 referenced, which are many times higher than that.

9 But when you're dealing with that kind of massive
10 dislocation, no, that is not an acceptable experiment, that
11 is not the kind of thing that you can weigh, that you can
12 balance.

13 And I will say, I mean, I don't won't to diminish
14 any benefit or any person, but the idea that you're kicking
15 thousands and thousands and thousands of people off all
16 coverage so that people can get vision, dental and gym
17 memberships, which is what we're talking about, that's not a
18 serious comparison from my perspective. The loss of coverage
19 is devastating. Congress understood that. Your examples
20 from the legislative history in Stewart One reflected that,
21 right? We're not talking about -- and again, I don't mean to
22 minimize vision, which would be very important, but you're
23 talking about comparing that to actual loss of coverage for
24 tens of thousands of people.

25 So then the third question is, well, what is that

1 you're saying, Mr. Gershengorn, you can never have coverage
2 loss. I don't think I can say that. I don't think I can say
3 you can never have coverage loss. But what I will say is you
4 have to view that with some skepticism, right? That is the
5 animating future of the act. Your Honor said that in Stewart
6 One, and it was exactly right. Providing coverage is the
7 purpose of Medicaid.

8 And so if you are actually taking away coverage, I
9 think that has to be viewed with deep skepticism. And prior
10 waivers have reflected that, right? Prior waivers were to
11 expand coverage, improve delivery of care, experiment with
12 payment methods, right? What's unusual, right, is not --
13 either there was -- there was -- what's a changed in 2017 is
14 that the Secretary and the administrator have made a, not a
15 secret decision, a public decision which they have trumpeted
16 to transform Medicaid.

17 THE COURT: But if, and maybe this merges back into
18 the sustainability as a separate objective, but what if there
19 is evidence that a state financially can't support this kind
20 of coverage for all of these folks? Then it's okay or is it
21 never okay?

22 MR. GERSHENGORN: So, Your Honor, I guess -- here
23 is my view on that. So I think we're a million miles from
24 that. But I guess I will stay with what I think is the right
25 answer and the hard line position, which is no, you cannot

1 engage in substantial cuts to save the program. And here's
2 why I say that. Like Medicaid is a deal from Congress,
3 right? And what Congress says is we are going to pay a
4 substantial portion of the cost of your people for Kentucky
5 for the regular traditional population of 71 percent, it
6 varies obviously from states, and for the expansion
7 population is currently 94 percent.

8 But there is a tradeoff for that, right? It
9 becomes with a package of coverage and benefit requirements.
10 This is not a la carte, right? The Court -- the state is not
11 allowed to say, well, I don't want to cover breast cancer
12 screening, I don't want to cover emergency treatment, I don't
13 want to cover the blind from Your Honor's, you know, Your
14 Honor's hypothetical.

15 And so, I understand that that's an uncomfortable
16 position. And we and my cocounsel, you know, are advocating
17 for Medicaid rights. That's not something I like to say, but
18 that is the deal from Congress. And so I guess I would say
19 if the state really says we just can't make Medicaid work,
20 and so we want to cut all these people from the roles and cut
21 all these benefits, then the answer is Medicaid isn't for
22 you.

23 Now, the reason no state has done that despite
24 budget troubles and all the very -- and financial situations
25 of all 50 states goes back to what I said, and I apologize, I

1 will repeat, which is, it's a good deal for the states,
2 right? Seventy-one percent coverage, 94 percent coverage.
3 Health benefits proven. This is the kind of thing that
4 states realize helps their budget. Does that mean it's free?
5 Of course not, right? It's a partnership, it's a
6 federal/state partnership.

7 THE COURT: All right. Let me just go to the two
8 last issues. The first, Mr. Kuhn's position that there are
9 these new guardrails which substantially reduce the number of
10 uninsured and that those new guardrails were, in fact, were
11 considered by the Secretary this time around, but not the
12 first time around.

13 MR. GERSHENGORN: So, I apologize, I'm not going to
14 have as good an answer. My understanding from listening was
15 that those guardrails that were post the 95,000 estimate.

16 THE COURT: Yes.

17 MR. GERSHENGORN: And so that's poking holes in the
18 95,000 estimate. Your Honor, I'm not wedded to the 95,000
19 estimate. As I've mentioned to you --

20 THE COURT: You think it's higher.

21 MR. GERSHENGORN: -- and I think Your Honor, you
22 know, think it's much higher. But actually the critical
23 thing is, and I think we had Arkansas before it. Again,
24 Arkansas is in the record, and that was, you know, 18,000
25 people that were kicked off. So, you know, whether you're

1 talking 95,000, 47,000, that's a huge difference, but I might
2 say, it's way higher. It seems to me neither here nor there
3 for Your Honor's decision.

4 THE COURT: All right. And then the last issue is
5 Mr. Burnham's last point regarding relief should be limited
6 to the named plaintiffs.

7 MR. GERSHENGORN: So I think that, first of all, I
8 think that's completely inconsistent with what Your Honor
9 said in -- what Your Honor did in Stewart where you did not
10 allow the program to go forward for all but the 16 named
11 plaintiffs. I also think it's inconsistent with D.C. Circuit
12 precedent. The idea is that an APA challenge, and you
13 challenge the rule under the APA, the result is that the rule
14 is vacated.

15 Now, I recognize there's a good deal of controversy
16 and discussion, which I saw first hand about the
17 appropriateness of injunctive relief beyond the plaintiffs.
18 I don't think, respectfully, that that's what is at issue
19 here where there's an APA violation. If there were
20 constitutional violations, someone coming in and challenging
21 the government program on constitutional grounds, then there
22 may be arguments about the appropriateness of nationwide
23 injunctions extending beyond the plaintiffs, et cetera.

24 But in an APA case, where the challenge is to the
25 rule, the APA says, and I think the D.C. Circuit has

1 repeatedly and, indeed, this Court did in Stewart, come to
2 the same place, which is that you vacate the rule, not just
3 the rule as it applies to the 16 people.

4 THE COURT: Okay. Thank you very much.

5 MR. GERSHENGORN: Thank you, Your Honor.

6 THE COURT: All right. Mr. Burnham, last word.

7 And why don't we just start there. Why isn't what you're
8 asking me to do here on the relief, if we get to that point,
9 contradicted by what I did in Stewart One? In other words,
10 as Mr. Gershengorn just said.

11 MR. BURNHAM: So I don't believe this issue was
12 teed up really in Stewart One. And so I don't think Your
13 Honor had to pass on the argument that I'm making today,
14 which is that we believe it needs to be limited to the
15 plaintiffs. Actually I haven't look at those briefs in a
16 little while, but I don't believe we presented the issue to
17 the Court then.

18 THE COURT: Yeah, and I actually, I don't --

19 MR. BURNHAM: And so I don't think it's been passed
20 upon. I think it's an open issue for the Court in this
21 round. And I do think, you know, there is plenty of
22 precedent out there for courts limiting relief even in APA
23 cases to the plaintiffs before the Court. We cite some cases
24 in our brief. The one that I'll give Your Honor right now is
25 a 9th Circuit case called *Los Angeles Haven Hospice*,

1 *Incorporated versus Sebelius*, that's at 638 F.3d 644. And I
2 just think as a matter of your equitable discretion, the
3 states in Kentucky with the possible de-expansion make clear
4 why relief should be so limited.

5 If I may, Your Honor, I just had four really quick
6 points I wanted to make in response to Mr. Gershengorn's
7 presentation.

8 THE COURT: Please.

9 MR. BURNHAM: So first, Mr. Gershengorn points out
10 that Medicaid is not an a la carte program, that's true. But
11 that's why Congress gave the secretary 1315 waiver authority.
12 What Congress said when they did it was that they didn't want
13 the federal requirements to stand in the way of experimental
14 projects. And so that's why, even though it's not an a la
15 carte program, the Secretary has the authority to approve
16 demonstration projects like the one before the Court today.

17 Now, on the rationale, I think this got a little
18 bit confused between the various presentations. I'd like to
19 just read Your Honor a somewhat long sentence from the
20 approval letter that I think ties together what I was saying
21 and what Mr. Kuhn was saying.

22 THE COURT: All right. With moderate speed.

23 MR. BURNHAM: Yes, Your Honor, I'm sorry. And this
24 is at 6719 of the administrative record.

25 "Section 1115 demonstration projects also provide

1 an opportunity for states to test policies that ensure the
2 fiscal sustainability of the Medicaid program, better
3 enabling each state as far as practicable under the
4 conditions in such state to furnish medical assistance.
5 Section 1901, while making it more practicable for states to
6 furnish medical assistance to a broader range of persons in
7 need."

8 And so I think the rationales are so intertwined
9 it's kind of hard to disentangle them.

10 THE COURT: Well, again, as I'm pondering this
11 opinion, and my question is am I -- are these independent
12 arguments that you're raising that you can win on either to
13 prevail. And so, it seemed to me that in your earlier
14 argument you were arguing that it was really promoting
15 coverage. Mr. Kuhn was arguing the other. I mean, if you're
16 arguing both, then I'm happy to address both.

17 MR. BURNHAM: Yes, I think we're advancing both.
18 My point was that conceptually I don't know that there's much
19 difference.

20 And then so Mr. Gershengorn made a point about how
21 subsidized coverages and the exchanges, the 94 percent
22 number, not to be a quibbler, three percent this year, and
23 then it actually goes down to 90 percent in 2020. So the
24 financial burden on the states recovering the expansion
25 population is real. It is a substantial amount of money in

1 the state budgets. And C.M.S.'s view, and I think this is
2 clearly the correct view, the state does not have to justify
3 to C.M.S. whether it can afford to or to not participate in
4 Medicaid.

5 So when Kentucky comes to C.M.S. and says we're
6 going to de-expand if we're not allowed to run an experiment
7 that we think and maybe you think falls within the heart of
8 your 1315 waiver authority, C.M.S. doesn't have the authority
9 after -- particularly after N.F.I.B., to require the state to
10 make a budget presentation about its tax rate and about its
11 education funding and about whether, you know, it could
12 cut --

13 THE COURT: So you're saying that C.M.S. simply has
14 to entirely defer to a state that says it's not practicable
15 for to us do this?

16 MR. BURNHAM: So on the de-expansion point, I think
17 that answer is yes. I think on the rationale for approving
18 this, no, but I think what happened in the project here is
19 C.M.S. looked at the project and said this will enhance
20 coverage for everybody because if it works the way that it's
21 supposed to work, people will leave Medicaid, but they'll
22 leave Medicaid for good reasons.

23 THE COURT: But I guess, again, as I'm trying to
24 address this, your point there seems to be returning to where
25 you were in your initial argument, which is that we're not

1 really pressing this as far as practicable because if that,
2 if financial sustainability is the independent objective of
3 the act that relies on the "as far as practicable" language
4 seems to me that the state has to make some showing that it's
5 not practicable as opposed to your argument earlier in which
6 I agree, they don't need to make that showing.

7 MR. BURNHAM: So, I think that the Secretary's
8 rationale was, the only way Kentucky could afford to maintain
9 its expansion is by implementing these reforms, then that
10 would be what Your Honor has just hypothesized. That's not
11 this. And so that -- we're not relying on that rationale
12 then in that sense. What I think we're relying on is
13 Kentucky has come and said, look, here's an experiment we
14 want to run where we think we can get better care for less
15 money.

16 THE COURT: That it promotes coverage.

17 MR. BURNHAM: Correct, yes, yes.

18 THE COURT: So again, so that's what I'm saying. I
19 think that you're back to arguing that that's really your
20 central thesis, which is not the independent basis, but that
21 it's part and parcel promoting coverage.

22 MR. BURNHAM: In this project, yes, I don't want
23 to -- yes, I think, Your Honor, I think we're on the same
24 page.

25 And then so I'm on my third of the four points. So

1 the other point I wanted to make on de-expansion issue. It's
2 not just that that's what I think is clearly the consequence
3 of N.F.I.B. That's also what C.M.S. told the states when
4 they expanded.

5 So there's a letter in the record that the
6 Secretary sent to Arkansas that said you can de-expand or
7 expand at your discretion. And so I just don't think there's
8 any real question that if Kentucky -- you know, the
9 plaintiffs apparently have a disagreement with the governor
10 about what Kentucky law provides, the federal government
11 hasn't taken a position on that, but if the state wants to
12 de-expand, there's nothing that we can do to stop them.

13 And I do think while it is true that under the
14 terms of the Affordable Care Act the populations are the
15 same, but the state is entitled as a matter of its own
16 discretion, I think, to say that we're going to prioritize
17 the traditional Medicaid population over the expansion
18 population, I mean, there's a reason --

19 THE COURT: So you're saying they could give
20 certain benefits to the mandatory population and not the
21 expansion population?

22 MR. BURNHAM: No, that wasn't quite what I meant.
23 What I meant was that as a matter of whether it expands or
24 not or whether it maintains the expansion or not, that is a
25 policy choice the state can make. I don't think that the

1 state can --

2 THE COURT: Can discriminate within the two --

3 MR. BURNHAM: Correct. I don't think they can say
4 cancer coverage for the traditional, not for the expansion.

5 THE COURT: Right.

6 MR. BURNHAM: What they can do, I think, is try
7 things like what they're doing here, the community engagement
8 requirements, that generally make the most sense as applied
9 to the expansion population.

10 And then the final point I wanted to make is just
11 that I think this is exactly the kind of project that 1315
12 exists to allow the Secretary to allow the states to conduct.
13 It's a way to figure out whether there's a way to provide
14 better care for the people who need Medicaid, for less money
15 in a way that's going to make the program more sustainable.
16 And it's the Affordable Care Act itself that created the
17 conditions that gave rise to, sort of the population where
18 this kind of an experiment makes sense. And so I would
19 encourage Your Honor to not vacate their approval.

20 THE COURT: Okay.

21 MR. KUHN: Your Honor, can I just add one more
22 thing?

23 THE COURT: You may.

24 MR. KUHN: I don't want to -- the question you
25 asked of Mr. Gershengorn about when the SNAP TANF payment,

1 expansion came in, my point is not that it came in after
2 Stewart One, my point is it came in after the 95,000.

3 THE COURT: Okay. And that was not clear to me.
4 So thank you very much for correcting that.

5 MR. KUHN: Thank you, Your Honor.

6 THE COURT: All right. So here's -- first of all,
7 thank you all counsel in both cases for all of your able
8 work. It doesn't make my job any easier, but I appreciate
9 your sophisticated and thoughtful submissions and arguments
10 today.

11 So, just as with Stewart One, that I thought it was
12 imperative to get out an opinion before the program went into
13 effect, just on -- for disruption reasons, I plan to do so if
14 at all possible with this as well.

15 And my plan, not a broad oath, but my plan is to
16 issue the opinion simultaneously because as we talked about
17 in Arkansas there is certainly some overlap, and then some --
18 that how I ultimately rule on Stewart can arguably affect the
19 outcome in Arkansas. So my hope is to issue both of these by
20 the end of the month.

21 And so any -- so I know on that one issue, Mr.
22 Burnham, you're going to get something back to me, the
23 sooner, the better on that. And again, I will hope to have
24 these. And then we'll go from there. All right?

25 So thank you all very much. I appreciate it.

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(Court recessed at 12:15 p.m.)

