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We Can Make These Work: Revisiting Work Requirements in Medicaid Programs Through Administrative Law and Interpreting the Medicaid Statute

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Introduction

Give a man a fish and he will eat for a day; teach a man to fish and he will eat for a lifetime.[1] That is how the old proverb goes, and there is a practical logic to that statement. Education and opportunity for self-improvement may be able to sustain an individual for much longer than merely giving them what they need in that moment.[2] Providing individuals the tools they need to be independent and thrive in a contemporary society where increased education and earnings correlate to better health outcomes for individuals makes sense.[3] After all, if people are working and earning income, they more likely to have access to better resources, health services, and items like healthy foods, that inevitably improve the health of the entire person over time.[4]

Several states including Arkansas and New Hampshire attempted to accomplish through modifications to their Medicaid programs using "§ 1115 waivers" by putting people to work.[5] To provide better health outcomes for the populace in their respective states, these states applied for the ability to experiment with the use of "community engagement requirements," which are colloquially referred to as "work programs."[6] In these programs, specific individuals receiving state Medicaid benefits must participate in specified activities for a minimum amount of time to

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[1] It is unclear who first said this phrase, but it is a common language idiom.
[2] *See* VCU CENTER ON SOCIETY AND HEALTH, *Why Education Matters to Health: Exploring the Causes*, VA. COMMONWEALTH UNIV., (Feb. 13, 2015) https://societyhealth.vcu.edu/work/the-projects/why-education-matters-to-health-exploring-the-causes.html.
[3] *See id.*
[4] *Id*.
[5] Gresham v. Azar, 950 F.3d 93, 97 (D.C. Cir 2020); *see also* Philbrick v. Azar, 397 F.Supp 3d 11 (D.D.C. 2019).
[6] *Id*.

keep those benefits active; should one not participate, the individual would see the benefits revoked during a "penalty period."[7] During this penalty period, the individual is prohibited from reapplying for Medicaid benefits.[8] The ultimate goal of these programs is similar to the old proverb: teach a man to fish, and feed him for a lifetime—and keep him from using state benefits.[9]

Litigation over the legitimacy of the Secretary's approval under the Administrative Procedure Act ensued.[10] After traversing through the D.C. Circuit, the case was pending before the Supreme Court.[11] This case will not proceed as it currently stands.[12] In February 2021, the Department of Justice submitted to the Court a letter explaining that the government no longer recognized the case as one fit for reviewing the issues on their merits because the new Administration desires for remand of the programs to the new Secretary.[13] The letter related that under the new Administration the pending cases "no longer present a suitable context for [the] Court to review that decision on the merits.[14] This change in Administrations does not mean a similar case will not rise to the forefront should more states seek to introduce similar programs. Moreover, work programs are an ongoing issue that will undoubtedly arrive in the form of a new waiver application in this administration or any following administration.[15] While it is unclear that the work programs in their present iterations would have survived review by the Supreme Court,

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[7] *Id.*
[8] *Id*.
[9] *Id.*
[10] *Id*.
[11] Philbrick v. Azar, 2020 WL 2621222 (D.C. Cir. 2020) , *cert. granted*, Azar v. Gresham, 2020 WL 7086046 (U.S. Dec. 4, 2020) (No. 20-37) *consolidated with* Gresham v. Azar, 950 F.3d 93 (D.C. Cir. 2020), *cert. granted*, Arkansas v. Gresham, 2020 WL 7086047 (U.S. Dec. 4, 2020) (No. 20-38).
[12] Arkansas v, Gresham, (Nos. 20-37 and 20-38), https://www.scotusblog.com/case-files/cases/arkansas-v-gresham.
[13] *Id*/.
[14] Philbrick v. Azar, 2020 WL 2621222 (D.C. Cir. 2020) , *cert. granted*, Azar v. Gresham, 2020 WL 7086046 (U.S. Dec. 4, 2020) (No. 20-37) *consolidated with* Gresham v. Azar, 950 F.3d 93 (D.C. Cir. 2020), *cert. granted*, Arkansas v. Gresham, 2020 WL 7086047 (U.S. Dec. 4, 2020) (No. 20-38).
[15] *See* THE FOUNDATION FOR GOVERNMENT ACCOUNTABILITY, *FGA Files SCOTUS Brief Supporting Work Requirements*, (Jan. 28, 2021), https://thefga.org/news/scotus-brief-arkansas/. Foundation for Government Accountability is joined by 18 different states in Amicus in support of Arkansas. This issue is one that remains divisive and hotly contested.

there are changes that could be made to each program to ensure they are aligned with both the primary and secondary objectives of Medicaid in future iterations.

This comment will examine the processes by which states may vary from statutory and regulatory Medicaid requirements using § 1115 waivers, to engage in experiments involving the use of work programs to further of interests in a manner consistent with the purposes of Medicaid. These processes will be explored through the lens of work programs such as that in Arkansas, and how such programs would fair under scrutiny by the current Court. Part I of this comment explains the background of the Medicaid program and the process behind the creation of "§ 1115 waivers." Part II examines the programs that faced opposition up to the Supreme Court in both Arkansas and New Hampshire. Part III examines the decisions made by the D.C. Circuit regarding these work requirements. Part IV analyzes the various ways in which the court could rule on the raised concerns, and which one the current court would likely follow. Part V reviews that placement of work requirements and how such programs need to be adapted in change to meet the standards required by statute and to survive judicial review, potentially through the creation of Totally Accountable Care Organizations.

The intentions of the former Secretary and the States indicate various reasons for the introduction of these programs into the affected Medicaid plans.[16] Questions still arose about the legality of these programs as they were "arbitrary and capricious" because the programs themselves in their designs were contrary to the purpose of the Medicaid statute as written, and the Secretary allegedly ignored that purpose.[17]

Part I: Medicaid, Waivers and Purpose

A. What is Medicaid?

[16] Gresham v. Azar, 950 F.3d 93, 97 (D.C. Cir 2020); *see also* Philbrick v. Azar, 397 F.Supp 3d 11 (D.D.C. 2019).
[17] Brief of Respondent at i, Azar v. Gresham, ___ S. Ct. ___ (2020) (No. 20-37).

Before providing statutory analysis and an examination of judicial review when it comes to Medicaid program waivers, some background of how Medicaid works is of critical importance. By government definition, Medicaid is a program which "provides health coverage to millions of Americans, including eligible low-income adults, children, pregnant women, elderly adults, and people with disabilities."[18] The program is funded in combination by the states themselves and the federal government, but the program is primarily administered by the states.[19] The program is authorized under Title XIX of the Social Security Act, simultaneously created in 1965 with the Medicare program.[20] In 1964, President Johnson championed his vision of the purpose of Medicaid while Congress debated same in the chamber, "Our aim is not only to relive the symptoms of poverty, but to cure it and, above all, to prevent it."[21]

The aim and goal of the original foundation of the original Medicaid statute may not have been so grandiose as President Johnson's vision. In fact, the original Medicaid's focus was on closing "one of the major gaps in the economic security of the elderly by providing protection against the high costs of hospital and medical care, and it brings the existing [old-age, survivors, and disability insurance (OASDI)] program more in line with current economic and social conditions."[22] This statement brings into focus two purposes. The first is an update to keep the existing programming current with economic and social needs.[23] The second is to providing

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[18] CTR. FOR MEDICARE & MEDICAID SERVS, *Medicaid*, MEDICAID.GOV, https://www.medicaid.gov/medicaid/index.html#:~:text=Medicaid%20provides%20health%20coverage%20to, states%20and%20the%20federal%20government, (last visited Jan. 5, 2021),

[19] *Id*.

[20] CTR. FOR MEDICARE & MEDICAID SERVS, *Program History*, MEDICAID.GOV, https://www.medicaid.gov/about-us/program-history/index.html, (last visited Jan. 5, 2021)

[21] President Lydon Johnson, Lydon Baines Johnson First State of the Union Address (Jan. 8, 1964), available at https://www.americanrhetoric.com/speeches/lbj1964stateoftheunion.htm.

[22] Wilbur Cohen and Robert Ball, Social Security Amendments of 1965: Summary and Legislative History 3.

[23] *See e.g.*, John V. Jacobi, *Medicaid, Managed Care, and the Mission for the Poor*, 9 St. Louis J. of Health Law and Policy 187, 187 (arguing that many Medicaid beneficiaries rely on support for both medical care and other social services to which those needs could be coordinated and funded through Medicaid Accountable Care Organization and interagency cooperation).

protection against the high cost of hospital and medical care.[24] This distinction is important to informing the present interpretation of the statue because this implies that the objectives of Medicaid go beyond just giving people insurance coverage. More than a simple number, the needs of the program may be seen as flexible to adapt and to change with economic and health emergencies of the time.

There are minimum requirements that all states must include in their Medicaid plans, including income and other eligibility factors.[25] Standard coverage under Medicaid and prior to the passage of the Affordable Care Act, coverage included the disabled, the blind, the elderly, and families with dependent children.[26] Congress expanded Medicaid as part of the Affordable Care Act in 2010 to include those low-income adults who did not qualify under the previous iterations.[27] After *N.F.I.B. v. Sebelius*, the coverage expansion became optional at the election of each state.[28] Coverage will vary from state to state with some states, such as New Jersey having accepted expanded Medicaid permits single individuals and families to earn up to 138% of the federal poverty level.[29] By contrast, some states did not expand Medicaid and have much more stringent requirements, such as Florida, who did not expand Medicaid and will not cover any non-disabled adult without children or other dependents.[30]

The requirements of Medicaid include specific minimum coverages that must be provided to individual participants in the program.[31] The program provides medical assistance to, or

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[24] *Id*.
[25] The Social Security Act, 42 U.S.C. § 1396a (2018). It would be impossible to discuss all of the tenants of Medicaid here. This is a gross oversimplification of decades of development of a legal framework.
[26] 42 U.S.C. § 1396-1 (2018).
[27] 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (2018); Nat'l Fed'n Ind. Bus. v. Sebelius, 567 U.S. 519, 583 (2012).
[28] *Nat'l Fed'n Ind. Bus.*, 567 U.S. at 583.
[29] Jeanine Skowronski, *A state-by-state guide to Medicaid: Do I qualify?*, POLICYGENIUS, (Jan. 26, 2018), https://www.policygenius.com/blog/a-state-by-state-guide-to-medicaid/
[30] *Id*.
[31] 42 U.S.C. § 1396a (2018).

payment on behalf of, various classes of citizens who do not have their own health care coverage and meet one of several different possible criteria.[32] There are clear guidelines as to what Medicaid must provide in terms of coverage, but what is less clear from this portion of statutory text is what the *purpose* of Medicaid is.[33] The goal, according to President Johnson at the inception of the program, was the elimination of poverty. This, however, may not be Medicaid's current *purpose*. In fact, as shown by the legislative history, Medicaid's objectives and purpose go far beyond handing a person an insurance card.

B. What are Waivers and How Are They Born?

The requirements of Medicaid are not immutable. An entire provision of the Social Security Act is devoted to "Demonstration Projects," frequently referred to as § 1115 waivers.[34] This provision enables the Secretary of Health and Human Services to waive compliance with the requirements of a portion of Medicaid for a State to institute "any experimental, pilot or demonstration project which…is likely to assist in promoting the objectives of [the Medicaid program]."[35] The intention is for these projects to be both temporary and budget neutral for the federal government.[36] The process by which waivers are approved as been criticized for being a secretive or vague process.[37] Moreover, waivers have also received criticism for reflecting the policies of the administration in power at that moment.[38]

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[32] *See* 42 U.S.C. § 1396d (2018).
[33] *See generally* 42 U.S.C. § 1396(a) (2018).
[34] 42 U.S.C. § 1315(a) (2018).
[35] 42 U.S.C. § 1315(a)-(a)(1) (2018).
[36] Sidney Watson, *Out of the Black Box and into the Light: Using Section 1115 Medicaid Waivers to Implement the Affordable Care Act's Medicaid Expansion*, 15 YALE J. OF HEALTH POLICY, LAWS & ETHICS 213, 214 (2015). Despite the temporal nature of these waivers, some have continued for decades without evaluation as to their efficiency or effectiveness. *Id*. at 215.
[37] *Id.* at 214-15. Watson specifically notes that "requests have typically been negotiated behind closed doors: demonstration goals were often not clearly states, the terms of the waivers were sometimes vague, and evaluations of demonstrations were often either done, or not shared with the public or [Health and Human Services]." *Id*. at 215
[38] *See e.g.*, Samuel Bagenstos, *Federalism by Waiver after the Health Care Case*, *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 227 (Nathaniel Persily et al. eds., 2013).

When Congress originally passed § 1115 and enabled the creation of waivers within the Medicaid and Social Security, the Secretary at the time, Wilbur Cohen, believed that is was a minor provision that would not carry a significant affect.[39] The provision has proven beneficial to meeting the diverse needs of the states; as of 2017, thirty-three different states had forty-one approved § 1115 waivers.[40]

Though there have been benefits since the introduction of § 1115 waivers, the Reagan administration used the waivers as a tool to change Social Security by using a combination of state and executive power, circumventing required congressional approval.[41] Administrations after have used waivers or pushed for the use of waivers to circumvent Congressional approval to reach their goals.[42] The executive use or encouragement of waivers does not necessarily have to be negative; the waivers have also been used for programs to address local health care emergencies, such as the rampant use of opioids in Colorado requiring the expansion of substance abuse treatment coverage or the targeting of potential underweight infants in Georgia.[43]

The Patient Protection and Affordable Care Act (ACA) amended both and only Medicaid § 1115 waivers.[44] These amendments add a new section to the Social Security Act, 1115(d).[45] The statute has specific requirements for the implementation of these waivers.[46] First, there must be a

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[39] David A. Super, *A Hiatus in Soft-Power Administrative Law: The Case of Medicaid Eligibility Waivers*, 65 UCLA L. REV. 1590, 1596 (2018).
[40] Elizabeth Hinton et al., *3 Key Questions: Section 1115 Medicaid Demonstration Waivers*, KAISER FAM. FOUND., Feb. 2017, http://files.kff.org/attachment/ Issue-Brief-3-Key-Questions-Section-1115-Medicaid-Demonstration-Waivers
[41] *See* Super, *supra* note 39, at 1596.
[42] *See* Super, *supra* note 39, at 1596-97.
[43] *See* HEALTHY MOTHERS, HEALTHY BABIES COALITION OF GEORGIA, *Great News for Georgia's Planning for Healthy Babies Waiver Program!*, (Aug. 29, 2019), https://hmhbga.org/great-news-for-georgias-planning-for-healthy-babies-waiver-program/ [hereinafter HMHBCG]; *see also* CO. DEP'T OF HEALTH CARE POL. & FINANCING, *Ensuring a Fill Continuum of SUD Benefits*, STATE OF CO., https://www.colorado.gov/pacific/hcpf/ensuring-full-continuum-sud-benefits, (last visited Jan. 5, 2021) [hereinafter Colorado SUD].

[44] Patient Protection and Affordable Care Act (2018) (codified at 42 U.S.C. § 1315(d) (2018)).
[45] *Id.*
[46] *See* 42 C.F.R. § 431.400 (2012).

specific notice and comment process for draft waivers that takes place at the state level.[47] This process must include public hearings that are sufficient to "ensure a meaningful level of public input."[48] Bounds and limits exist for what this public hearing requirement may entail.[49] Notably, these requirements cannot add onto those already required under the Administrative Procedure Act (APA), nor can these pubic notice and comment requirements duplicate the requirements of the APA.[50] These processes at the State level cannot be "unreasonable or unnecessarily burdensome" with respect to state compliance.[51]

Draft waiver requests have specific requirements throughout the public notice and comment process. Requirements dictate the inclusion of five specific requirements to provide a "comprehensive description of the demonstration application or extension to be submitted to CMS" that contains enough detail to "ensure meaningful input from the public."[52] First, is a description of the program including the goals or objectives that will be implemented or extended during the project "including a description of the current or new beneficiaries who will be impacted by the demonstration."[53] Second, if there are any changes or alterations to the health care delivery system, eligibility requirements, coverage, or costs to beneficiaries, those must be detailed and compared to the state's current plan.[54] Third, the comprehensive description must include an "estimate of the expected increase or decrease in annual enrollment" and changes in expenditures.[55] Fourth, a hypothesis related to the benefits of the project and the evaluation

[47] 42 C.F.R. § 431.400(a)(1)(i) (2012).
[48] *Id.*
[49] *See id.*
[50] *Id*.
[51] *Id.*
[52] *See* 42 C.F.R. § 431.408(a)(1)(i) (2012).
[53] 42 C.F.R. § 431.408(a)(1)(i)(A) (2014).
[54] 42 C.F.R. § 431.408(a)(1)(i)(B) (2014).
[55] 42 C.F.R. § 431.408(a)(1)(i)(C) (2014).

parameters of the demonstration.[56] Finally, the state must also include "specific waiver and expenditure authorities that the State believes to be necessary to authorize the demonstration."[57]

States must meet several specific requirements for a satisfactory public notice process. The public notice and comment period must be at least 30-days before submission to CMS.[58] Public notice must also include specific location and internet address so the public may view the application as well as physical and internet addresses where comments can be sent and reviewed by the public.[59] The State must also publish the description of the process and links to the project on both the central CMS website and on the website of the relevant state agency.[60] Hearings must be at a minimum of 20 days prior of submission of the application to CMS, and must have conducted at least two public hearings; one of these hearings must be telephonic or web-based unless in two opposing ends of the state.[61]

Any final waiver application needs to document the public process utilized as well as the State's responses to public comments.[62] Following submission to the federal government, another thirty day comment period again where CMS must post the entire application and supporting documentation to its website and provide an email address to which public comments may be submitted.[63] No decision can be made at the federal level on a waiver until at least 15 days following the end of the public comment period.[64] The agency at the federal level does not need

[56] 42 C.F.R. § 431.408(a)(1)(i)(D) (2014).
[57] 42 C.F.R. § 431.408(a)(1)(i)(E) (2014).
[58] 42 C.F.R. § 431.408(a) (2014).
[59] 42 C.F.R. § 431.408(a)(1)(ii)-(iii) (2014)
[60] 42 C.F.R. § 431.408(a)(2) (2014). The procedures must also follow in accordance with the State's Administrative Procedure Act. *Id*.
[61] 42 C.F.R. § 431.408 (a)(3). There are also additional requirements for these public hearings, such as that they must use at least two different types of forums. *Id.*
[62] Watson, *supra* note 36, at 215.
[63] Watson, *supra* note 36, at 216.
[64] 42 C.F.R. § 431.416 (2014).

to respond to either state or federal comments.[65]

This updated process post-ACA has influenced the states to make modifications to the waivers they were submitting to CMS.[66] Public input has substantially increased in some states as a result of these new procedures.[67] Moreover, the expanded records have enabled more effective judicial review.[68]

C. What is Medicaid's Purpose?

The Secretary has the authority under this statute to process in approving any § 1115 waiver, but the problem lies in that these waivers must promote the objectives of Medicaid; there is confusion as to what "promoting the objectives" actually means.[69] For example, in *Stewart*, a similar case to that involving the Arkansas Works program, the court concluded that the section that authorizes funds to be dispersed to Medicaid controls in the promotion of the objective.[70] The court in that case held that that the objective of Medicaid was to "furnish…medical assistance" to those who cannot afford it.[71] Chief Justice Roberts stated in *N.F.I.B. v. Sibelius* that the objectives of Medicaid had changed with the passing of the ACA.[72] To be specific the Chief Justice iterated that Medicaid "is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage."[73] This statement is in contradiction to the stated purpose of the Medicaid Act that has always been for "the purpose

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[65] *Id*.
[66] Watson, *supra* note 36, at 217. This includes (1) Arkansas dropping three of its seix pending waiver requests in response to comments; (2) Iowa was forced to admit after public "call-out" that the goal of a proposed waiver was to reduce the number of beneficiaries and that the legislature had "made them do it;" (3) Arkansas faced scrutiny for not being "budget neutral;" and (4) Pennsylvania submitted a (now) grossly inadequate waiver.
[67] Watson, *supra* note 36, at 219. Pennsylvania's original waiver application received more than 800 comments when the new public notice and comment requirements were introduced.
[68] *See* Watson, *supra* note 36, at 218.
[69] Gresham v. Azar, 950 F.3d 93, 96 (D.C. Cir. 2020).
[70] 42 U.S.C. § 1396-1 (2018).
[71] *Stewart I*, 313 F.Supp. 3d at 260-61.
[72] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2606 (2012)
[73] *Id.*

of enabling each State, as far as practicable under the conditions in such State, to furnish…medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services."[74]

The purpose of Medicaid, however, may arguably be more than to provide medical coverage.[75] Rather, in the words of former Administrator Seema Veera, the goal should be more than simply the provision of Medicaid as "[w]e have a moral responsibility to do more than just give [Medicaid beneficiaries] a card, we have a responsibility to give them care."[76] When Medicaid was greatly expanded under the Affordable Care Act, the program began to provide coverage for just the "most vulnerable citizens" and instead became a "vehicle to serve working-age, able-bodied adults" by providing those individuals with healthcare coverage, which seems counterintuitive.[77]

There are numerous examples of § 1115 waivers in use around the country to serve beneficial goals that go beyond simply handing one an insurance card.[78] An example of the types of programs created using these waivers are Colorado's Expanding the Substance Use Disorder Continuum of Care.[79] Colorado's program provides an expansion of medical assistance to the coverage of residential, inpatient, and withdrawal substance use disorder services.[80] Another example of such a program, that was recently extended for an additional ten years, is Georgia's

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[74] 42 U.S.C. § 1396-1 (2012).
[75] *See* Seema Verma, Administrator, Ctr. For Medicare & Medicaid Services, Remarks by Administrator Seem Verma at the National Association of Medicaid Directors (NAMD) 2017 Fall Conference, (Nov. 7, 2017), available at https://www.cms.gov/newsroom/fact-sheets/speech-remarks-administrator-seema-verma-national-association-medicaid-directors-namd-2017-fall.
[76] *Id*.
[77] *Id*.
[78] *See e.g.*, CTR. FOR MEDICARE & MEDICAID SERVS, *State Waivers List,* MEDICAID.GOV https://www.medicaid.gov/medicaid/section-1115-demo/demonstration-and-waiver-list/81176, (last visited Jan. 5, 2021) [hereinafter "Waiver List"; HMHBCG, *supra* note 43; Colorado SUD, *supra* note 43.
[79] Waiver List, *supra* note 78.
[80] Colorado SUD, *supra* note 43.

"Planning for Healthy Babies" program.[81] This programs aims—and seemingly succeeds—to reduce the number of low and very low birthweight babies by providing no-cost family planning services to uninsured women whose families are at or below 200% of the federal poverty level.[82] Both of these programs are expansive in nature. That is, these experiments offered by these two states offered services above and beyond what is required to be offered by the original provisions of Medicaid. Both also appear to target specific needs of the population that receive this expanded coverage and benefits.

Part II: Pushing for Work, Arkansas, and New Hampshire

A. The Push for Community Engagement Waivers

In 2018. President Donald J. Trump, Jr.'s administration issued guidance to the States suggesting that the Department of Human Services would approve waivers to the Medicaid program under § 1115 consistent with the Administration's health care goals.[83] This guidance suggested that the submission of waivers that would introduce work-requirements into the Medicaid frameworks would be approved.[84] The guidance relied on Section 1901 of the Social Security Act.[85] This provision states that the Social Security Act allows states to receive funding to provide "(1) medical assistance on behalf of families with dependent children and of the aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care[.]"[86]

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[81] HMHBCG, *supra* note 43.
[82] HMHBCG, *supra* note 43.
[83] Letter From Brian Neale, Dir., Dep't of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs., to State Medicaid Dirs. (Jan. 11, 2018), https://www.medicaid.gov/federal-policy-guidance/downloads/smd18002.pdf [https://perma.cc/V7GP-HSUK].
[84] *See* Super, *supra* note 39, at 1594-95.
[85] Neale, *supra* note 83.
[86] 42 U.S.C. § 1396-1 (2018).

The day after the issuance of this guidance, the State of Kentucky received approval for a proposal to impost a work-requirement on certain qualified individuals.[87] These proposals came from eager states who wanted the flexibility to engage their working-age, able bodied citizens on Medicaid to be "actively engaged in their communicates, whether it be through working, volunteering, going to school, or obtaining job training."[88] Proposals and acceptance for eleven other states including Indiana, Arkansas, and New Hampshire, quickly followed.[89] Not every state who applied received immediate approval.[90] For example, Mississippi listed on its application for such a waiver that the goal was to reduce the costs associated with Medicaid.[91] Mississippi's application was rejected, and the State was told to resubmit its application without the language indicating that the purpose of the waiver was the reduction of costs.[92] The resubmission of the application contained the exact same plan with the only alteration being the removal of the language related to the cutting of costs.[93]

The Trump Administration was not without its reliance on social science philosophy and data that other socioeconomic factors contribute to improved health outcomes for individuals. Medical coverage is not the only thing that determines health, though it is a contributing factor.[94] Health is correlated with wealth and financial independence, signaling that providing escape

[87] Super, *supra* note 39, at 1594-95.
[88] Seema Verma, *supra* note 75.
[89] *See* Super, *supra* note 39, at 1594-95.
[90] Colby Itkowitz, The Health 202: Mississippi Quietly Amends Its Medicaid Work Requirement Waiver, WASH. POST: POWERPOST (Aug. 9, 2018), https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2018/08/09/the-health-202-mississippi-quietly-amends-its-medicaid-work-requirement-waiver/5b6b0fdb1b326b0207955fca/?utm_term=.b0744b559a16 [https://perma.cc/TWN3-ZCA5
[91] *Id*. According to a speech made by Administrator Seema Verma at the National Association of Medicaid Directors (NAMD) 2017 Fall Conference, Medicaid spending has dramatically increase from 10% of state budgets in 1985 to 29% of state spending in 2016. Seema Verma, *supra* note 26.
[92] Itkowitz, *supra* note 90.
[93] Itkowitz, *supra* note 90.
[94] *See* Neale, *supra* note 83.

mechanisms to poverty would be beneficial to the public as a whole.[95] Improved education also provides increases to health outcomes including through the gaining of health knowledge and the instillment of healthy behaviors.[96] Working also correlates with better overall well-being including better physical and mental health.[97] Even volunteering can have a positive impact on a person's health outcomes.[98] From these anticipated benefits, Arkansas and New Hampshire both attempted to institute "work requirement" programs via § 1115 Waiver.[99] The approval of these programs and the requirements of these programs spurred litigation that was pending before the Supreme Court of the United States to answer as to the validity of the programs in light of the purpose of Medicaid and the authority of the Secretary to approve such programs.[100] Before examining these consolidated cases in depth, an examination of the waivers that these two states applied for is required to understand the complete picture of what may be at stake.

B. Arkansas Works (Or Will It?)

Like many other states following the Affordable Care Act, Arkansas took advantage the law to expand coverage to more individuals, albeit in its own way through a Section 1115 waiver.[101] Rather than directly providing coverage to individuals, Arkansas uses Medicaid funds to purchase health coverage by private providers for eligible recipients.[102] Arkansas also had a previous job assistance program called Arkansas Works that encouraged individuals to voluntarily

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[95] Mel Bartley & Ian Plewis, *Accumulated labor market disadvantage and limiting long term illness.* 31 INT. J. OF EPIDEMIOLOGY 336, 336-41 (May 2002)
[96] *See generally* Sarah Abraham, et al. *The association between income and life expectancy in the United States, 2001-2014*, 315(16) JAMA. 750-1766 (Apr. 26, 2016).
[97] Gordon Waddell & A Kim Burton, *Is Work Good For Your Health And Well-Being?* DEP'T FOR WORK AND PENSIONS, (2006).
[98] Caroline Jenkinson, et al., *Is volunteering a public health intervention? A systematic review and meta-analysis of the health and survival of volunteers*, 13 (773) BMC PUB. HEALTH (2013).
[99] Super, *supra* note 39, at 1594-95.
[100] Azar v. Gresham, ___ S. Ct. ___ (2020) (No. 20-37).
[101] Louise Norris, *Arkansas and the ACA's Medicaid Expansion*, HEALTHINSURANCE.ORG, (Jul. 17, 2020), https://www.healthinsurance.org/arkansas-medicaid/; Gresham v. Azar 363 F.Supp 3d 165, 171 (D.D.C. 2019)
[102] Norris, *supra* note 101; Gresham v. Azar 363 F.Supp 3d 165, 171 (D.D.C. 2019)

refer themselves to job assistance services offered by the state.[103] This program would be changed with the acceptance and approval of the § 1115 waiver to adjust it to the *new* Arkansas Works program.[104] This program introduced new requirements that any beneficiaries of the Medicaid program in Arkansas between the ages of 19 and 49 must work or engage in specified education, job training, or job search activities for at least 80 hours per month that must be documented.[105] If one does not meet these requirements for three months, then that person is unenrolled from the Medicaid program and unable to re-enroll for one year.[106]

There are some exemptions that apply to this work requirements under this Section 1115 Waiver, but also several other changes to the Medicaid program in Arkansas. Those who are exempted from the new work requirements are the medically frail, those who are pregnant, those caring for a dependent who is under the age of six, and students.[107] The Section 1115 Waiver also removes guarantees of retroactive coverage under the Medicaid program.[108] The program also reduces the income requirements for coverage from 133% of the federal poverty level back down to 100% of the federal poverty level.[109]

The Secretary approved most of the provisions of the Arkansas Works program.[110] There were some minor changes made to the program before approval was granted.[111] The term "work requirement" was notably changes to "community engagement."[112] The state was also not allowed to complete eliminate retroactive coverage from its original ninety-day requirement; instead,

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[103] Arkansas Administrative Record 2057.
[104] *Id*.
[105] *Id*. at 2063.
[106] *Id.*
[107] *Id*. at 2080-81
[108] Arkansas Administrative Record 2057; *id.* at 2061.
[109] *Id*. 2057
[110] Gresham v. Azar, 950 F.3d 93, 97 (D.C. Cir 2020).
[111] *Id*.
[112] *Id*.

retroactivity could only be limited to the previous thirty days.[113] Arkansas was also not allowed to change the federal poverty level requirement from 133% to 100%.[114] The program also includes a plan by the State, who had faced concerns regarding disruptions in service, to assist those facing unenrollment.[115] Despite these concerns from the public, the Secretary insisted that Arkansas had a plan in place to resolve any issues and perform necessary outreach to prevent people from losing coverage.[116]

The Secretary concluded the program met numerous objectives of the Medicaid program and would promote those objectives.[117] The objectives that the Secretary determined would be promoted by the granting of the waiver included (1) improvement of health outcomes; (2) the addressing of behavioral and social factors that influence health outcomes; and (3) incentivizing Medicaid beneficiaries to engage in their own health care and to achieve better health outcomes.[118] The promotion of these objectives match the socio-economic factors raised in the Trump administrations guidance issued a day before the approval. These programs would have the benefits of encouraging beneficiaries to obtain and maintain employment or undertake other activities correlated to healthier outcomes.[119] The shorter retroactivity period, for example, would also encourage individuals to maintain coverage because less gaps in coverage would be covered under the law.[120]

Not everything was perfect under the implementation of the Arkansas Works program after

[113] *Id*.
[114] *Id*.
[115] *Gresham*, 950 F.3d at 97.
[116] *Id*.
[117] *Id*. at 98.
[118] *Id*.
[119] *Gresham*, 950 F.3d 93 at 98.
[120] *Id*.

its initial introduction.[121] For example, statistics indicated that approximately 18,000 people, or about 25% of those subject to the new rule and program lost coverage within just five months of the initiation of the program.[122] Of these 18,000, 11% of those who had lost coverage regained it the following year.[123] Of those who lost coverage through the program, there is no certainty as to why 89% of people did not reenroll as that data is not tracked.[124] An additional 5% of all Arkansas Works enrollees lost coverage for reasons other than not meeting the reporting requirements under the program including moving out of state or failing to return requested and required information.[125] As of February 2019, approximately 116,000 persons needed to complete the work and reporting requirements as the program would have been phased in and increased to almost 239,000 enrollees.[126] Of those required to report, 88% of enrollees did not report eighty hours of qualifying activities.[127] These data points are inconclusive as to completely understanding the impact this program may have on coverage of individuals.[128]

The collection of data is frozen in time as the Arkansas waiver has been set aside by the courts for not adequately analyzing the impact the program would have on Medicaid's primary objective of providing health coverage.[129] As such, questions surrounding enrollment cannot be answered as to the actual resulting effect.

C. New Hampshire

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[121] ARK. DEP'T OF HUMAN SERVS., Arkansas Works Program 8 (Dec. 2018), https://humanservices.arkansas.gov/images/uploads/011519_AWReport.pdf.
[122] *Id*.
[123] Robin Rudowitz & MaryBeth Musumeci, *An Early Look at State Data for Medicaid Work Requirements in Arkansas*, KAISER FAMILY FOUND. (Mar. 25, 2019), https://www.kff.orgmedicaid/issue-brief/an-early-look-at-state-data-for-medicaid-work-requirements-in-arkansas/.
[124] *Id*.
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] Gresham v. Azar, 950 F.3d 93, 104 (D.C. Cir 2020).

The factual circumstances surrounding the program in New Hampshire—called Granite Advantage—are memorialized in the District Court case that precedes the consolidation and granting of writ of certiorari with its companion case *Gresham v. Azar*.[130] The program requires most adults who are not disabled and between the ages of 19 and 64 to participate 100 hours of employment or "other community activities."[131] The same categories that are exempt under the Arkansas program—those with a dependent child, the frail, and the pregnant—are exempt from these requirements.[132] The rules of reporting are more strict than the Arkansas program as the person can only not report for two months instead of three.[133] Unlike the Arkansas plan, eligibility resumes once the enrollee can demonstrate that they completed 100 hours of qualifying activities or obtaining an exemption.[134] Like Arkansas, New Hampshire sought the elimination of all retroactive coverage.[135]

This waiver was approved by the former Secretary on November 30, 2019 citing the purported improvements to health and wellness of beneficiaries as well as the "fiscal sustainability of the Medicaid program."[136] The Secretary also stated that the requirements were not intended to produce coverage loss.[137]

Part III: Journey to the Supreme Court

A. Court of Appeals Analysis

The question is how the Court should decide the questions put forth by the various parties in their petition and response. The first question is "Whether the Secretary's approval of Medicaid

[130] Philbrick v. Azar, 397 F.Supp. 3d 11 (D.D.C. 2019).
[131] *Id*. at 18.
[132] *Id*.
[133] *Id*.
[134] *Philbrick*, 397 F.Supp. 3d at 18.
[135] *Id*.
[136] *Id*.
[137] *Id.*

demonstration projects in Arkansas and New Hampshire that impose work requirements and limit retroactive coverage was arbitrary and capricious, in violation of the Administrative Procedure Act, because the Secretary failed to consider how the projects would affect health coverage."[138] The second is "Whether the court of appeals [sic.] erred in concluding that the Secretary may not authorize demonstration projects to test requirements that are designed to promote the provision of health-care coverage by means of facilitating the transition of Medicaid beneficiaries to commercial coverage and improving their health."[139]

The questions are relatively the same but framed differently. The first relies on an examination of the proposed § 1115 waiver in light of the arbitrary and capricious standard under the Administrative Procedure Act.[140] This is made clear by the phrasing "arbitrary and capricious" right in the question itself. The second question, by contrast, focuses on the power of the Secretary to authorize projects, but with a different vision of the Medicaid statute. This question invites the Court to appreciate the development and approval of these waivers by the Secretary via *Chevron* deference by showing that the statute is ambiguous in its purpose, and the agency's interpretation would persist/ In the alternative, it suggests the purpose of the statute is simply the improvement of citizen health.

The Court of Appeals analysis moves away from *Chevron* deference and finds that Medicaid statute has a clear and unambiguous purpose.[141] The court noted that other welfare statues like Temporary Assistance for Needy Families do have specific sections outlining a clear purpose.[142] Unlike those statutes, the Court of Appeals found—through a little digging—the

[138] Brief of Respondent at i, Azar v. Gresham, ___ S. Ct. ___ (2020) (No. 20-37).
[139] Question Presented, Azar v. Gresham, ___ S. Ct. ___ (2020) (No. 20-37) (available at https://www.supremecourt.gov/qp/20-00037qp.pdf).
[140] Brief of Respondent at i, Azar v. Gresham, ___ S. Ct. ___ (2020) (No. 20-37).
[141] Gresham v. Azar, 950 F.3d 93, 99 (D.C. Cir. 2020).
[142] *Id*.

unambiguous intent of the Medicaid statute within the section articulating the appropriations of funds.[143] That provision states the purpose is to (1) furnish "medial assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care."[144] There is a consistent focus within the text on providing access to health care coverage.[145]

Other Circuits have used the appropriations provision to provide for the unambiguous purpose of the Medicaid statute as well.[146] For example, in a case later affirmed by the Supreme Court of the United States, the First Circuit stated that the purpose of Medicaid is for states to provide medical services to those whose income and resources are insufficient to meet the cost of required medical services.[147] The Sixth Circuit ruled similarly in 2016.[148] The Third Circuit has also stated that the primary purpose of Medicaid is the "praiseworthy social objective of granting health care coverage to those who cannot afford it."[149] Even the Supreme Court has stated that Medicaid is a program that provides "medical care for individuals who cannot afford to pay their own medical costs."[150]

This means that the Medicaid statute, to the Court of Appeals, satisfies the first prong of *Chevron* as this would be the "unambiguously expressed intent of Congress."[151] The problem for the Arkansas Works program approval is that deference is then not afforded to the agency even

[143] 42 U.S.C. § 1396-1 (2018).
[144] *Id*.
[145] Gresham v. Azar, 950 F.3d 93, 100 (D.C. Cir. 2020).
[146] *See id*.
[147] Pharm. Research & Mfrs. Of Am. v. Concannon, 249 F.3d 66, 75 (1st Cir. 2001), *aff'd*, 538 U.S. 644 (2003).
[148] Price v. Medicaid Dir., 838 F.3d 739, 742 (6th Cir. 2016).
[149] W.Va. Univ. Hosps., Inc. v. Casey, 885 F.2d 11, 20 (3d Cir. 1989), *aff'd* 499 U.S. 83 (1991)
[150] Ark. Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 275 (2006).
[151] Gresham v. Azar, 950 F.3d 93, 100 (D.C. Cir. 2020) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

though the Secretary identified and demonstrated that there were secondary and tertiary objectives that would be satisfied via the approval of this waiver.[152] These tangential goals, however, are not enough when the text of the statute specifically addresses the purpose of Medicaid to provide health care coverage.[153]

With the purpose defined, the Court of Appeals moved to apply the arbitrary and capricious standard under the Administrative Procedure Act.[154] The Court of Appeals when reviewing the record forward that the Secretary's analysis regarding the loss of coverage, which was raised as a concern and resulted in same, it was not enough to "note the concerns of others and dismiss those concerns in a handful of conclusory sentences."[155] Upholding this decision would be the simplest way for the Court to resolve this issue and avoid any further conflict within this area.

B. The Questions Before the Court

The question is, then, what the purpose of Medicaid actually is. This question of purpose becomes one of the central issues of the pending Supreme Court case.[156] The Opposition's Brief highlights the question before the Court as, "Whether the Secretary's approval of Medicaid demonstration projects in Arkansas and New Hampshire that impose work requirements and limit retroactive coverage was arbitrary and capricious, in violation of the Administrative Procedure Act, because the Secretary failed to consider how the projects would affect health coverage."[157] This question gets directly to the heart of the matter as it focuses on the purpose of the Medicaid

[152] *Id*. at 100-101.
[153] *Id*. at 101; Also, historically the other "welfare statutes" such as Temporary Assistance for Needy Families have been amended over the years to specifically include work requirements. *Id*. (internal citations omitted). No such amendments were ever made to the Medicaid statute. Id. The Court of Appeals states this is further evidence that there was no such intention to introduce these requirements into the program. *Id*. Instead, the possibility exists that perhaps deference would be afforded to the Secretary in regard to this situation, as a counterargument.
[154] Gresham v. Azar, 950 F.3d 93, 102 (D.C. Cir. 2020).
[155] *Id*.
[156] Azar v. Gresham, ___ S. Ct. ___ (2020) (No. 20-37).
[157] Brief of Respondent at i, Azar v. Gresham, ___ S. Ct. ___ (2020) (No. 20-37).

statute.[158] For example, if the purpose of the Medicaid Statute is to provide medical coverage to the needy, then the Secretary should consider the effect that any waiver may have on coverage and not approve any waiver that reduces coverage.[159]

This reading of the statute poses an interesting problem because any experimental program or demonstration project under § 1115 may then be required to expand health care coverage.[160] This means that any program may inherently have to be expansive rather than even potentially reductive. For example, should New Jersey seek to create a program that would reduce the amount of coverage provided to individuals under the program in any way, then by default the Secretary would be unable to approve the waiver. An example is a program where a waiver would enable cuts of benefits to plan enrollees for the purpose of saving money with no research demonstrating the cuts would approve health outcomes.[161] This would result because the only identified purpose of the Medicaid statute would be the provision of healthcare coverage. By limiting the possibility for access or reducing services provided to enrollees, such would be in direct contradiction to the purpose of the statute.

In contrast, the question presented asserted by the States and the Department of Health and Human Services frames the issue somewhat differently.[162] Most notably, the Secretary approves the programs that require individuals to "engage in work or skill-building activities (such as job-skills training or general education) as a condition for continued eligibility of Medicaid benefits.[163] Therefore, the question becomes, "Whether the court of appeals [sic.] erred in concluding that the Secretary may not authorize demonstration projects to test requirements that are designed to

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[158] See *id*.
[159] Brief in Opposition by Respondent at 34, Azar v. Gresham, ___ S. Ct. ___ (2020) (No. 20-37).
[160] *Id*.
[161] Watson, *supra* note 36, at 219. This is the actual fact pattern of Beno v. Shalala, 30 F.3d 1057 (9th Cir. 1994).
[162] Question Presented, Azar v. Gresham, ___ S. Ct. ___ (2020) (No. 20-37) (available at https://www.supremecourt.gov/qp/20-00037qp.pdf).
[163] *Id*.

promote the provision of health-care coverage by means of facilitating the transition of Medicaid beneficiaries to commercial coverage and improving their health."[164] This is not a shift in the question, but rather a different framing of what the purpose of Medicaid is. If the purpose of Medicaid is to improve the health and lives of the enrollees as is suggested here, then the Secretary has the authority to approve any program congruent with any of the various aims of Medicaid. These aims would include, as the Secretary posits, improving outcomes for enrollees. This would be congruent with the statements made by CMS Administrator Seema Veera and the memo sent to states with supporting social scientific assertions that the facilitation a transition from a populace dependent on assistance to a self-providing populace better serves the aims of Medicaid as its purpose is to improve health outcomes.

The analysis in this circumstance appears that it would be far more complex than the purpose described by the respondents as the purpose of Medicaid is to provide medical coverage and nothing more. The suggestion that the Secretary has a broader authority to determine merely that outcomes will, in effect, produce a healthier populace carries with it a higher standard for the Secretary to prove on the merits. This higher difficulty is a result of providing evidence that such a program could demonstrably lead to these better health and social outcomes whereas the alternative is merely a question of expansion over potential regression.

Ultimately, the way any of the parties frame these questions are inadequate. The question should be a balance between the defined purpose of Medicaid and its discernable objectives. That is, a program must be looked at as a complete whole rather than a mere numbers game. In doing so, true experimentation becomes a possibility rather than a simple immediate numbered answer. After all, potentially, if one individual loses coverage, but a thousand have better health outcomes

[164] *Id.*

and receive greater long-term benefits, that should be enough to tilt the balance in one way or the other—provided that those changes are supported by the reasons of improving health care and have some scientific or social science support.[165]

C. What Does the APA Have to Do With It?

The other longstanding statute that provides how under the current precedential scheme the Supreme Court could possible rule is the Administrative Procedure Act.[166] The question is usually one of two options: (1) has the agency properly interpreted an ambiguous statute, which would bring a challenge to the agency's decision under *Chevron* deference or (2) if the agency has acted in an arbitrary and capricious manner under § 706 of the Administrative Procedure Act.

The primary case in this area is *Chevon U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). This standard governs the relationship between the legislature, the executive agency, and the role of the courts in regards to ambiguous statutes. The Supreme Court held in *Chevron* that a court reviewing an agency's interpretation of an ambiguous statute must defer to the federal agency's reasonable interpretation of that ambiguous statute.[167] *Chevron* deference only applies in circumstances where the purpose of a statute is unclear.[168] Therefore, an agency is bound by the purpose that Congress has set as well as the methods that Congress has deemed appropriate and proscribed for the pursuit of those purposes.[169] The Administrative Procedure Act provides the standard of how a court may, and most likely will, review such a situation. To

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[165] For example, in Colorado's opioid crisis scenario, there is a defined expansion of the Medicaid program as coverage was expanded. Colorado SUD, *supra* note 43. However, this crisis is also responding to the social needs of a large population of people. Colorado SUD, *supra* note 43. These needs would have to be balanced against each other.

[166] *See* Azar v. Gresham, ___ S. Ct. ___ (2020) (No. 20-37).

[167] *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). For a more detailed analysis of this topic *see* GEORGE CAMERON COGGINS and ROBERT L. GLICKSMAN, § 8:47, PUB. NAT. RESOURCES L., 2nd ed. 2020; *see also* Kent Barnett, et al., *Administrative Law's Political Dynamics*, 27 VAND. L. REV. 1463 (2018).

[168] *Chevron*, 467 U.S. at 843.

[169] *MCI Telecomms*., 512 U.S. at 231 n. 4; Waterkeeper All. v. EPA, 853 F.3d 527, 535 (D.C. Cir. 2017); Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n, 466 F.3d 134, 139 (D.C. Cir. 2006).

reiterate, the only time that *Chevron* deference will come into play

Chevron is divided into a two-step analysis.[170] First, the court asks "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[171] This first step may end the analysis and the court need not proceed further.[172] For step two, if the court is able to find that "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[173] The agency's interpretation at a given moment in time does not have to be the final interpretation; everything is mutable.[174] Any interpretation that the agency provides must be one that is reasonable.[175]

Chevron deference is not the only type of deference that may be afforded to an agency; there is also *Skidmore* deference. Instead of the strict deferential standard set forth in *Chevron*, *Skidmore* deference considers the "totality of the circumstances" including all rulings, interpretations, and opinions of the administrator.[176] Therefore, the amount of deference provided to the agency is based on the persuasiveness of the argument question.[177] For example, under this standard, the Secretary would have to present underlying facts and historical circumstances the agency has looked at in the past.

The problem with either of these standards is that they only examine the Secretary's authority to interpret under a statute; the only final determination is one of reasonableness. In that

[170] *See Chevron*, 467 U.S. at 842-43.
[171] *Id*.
[172] *See id*.
[173] *Id.* at 843.
[174] *Id*. at 863-64.
[175] *Id*.
[176] *See generally* Skidmore v. Swift & Co., 323 U.S. 134 (1944).
[177] *See generally id*.

regard, this is too much deference. Yet, these standards only apply in circumstances where the purpose or meaning of a statute is ambiguous. In other situations, where the purpose of a statute is clear, the Secretary is not afforded such deference. Where Congress is clear in a statute's purpose then the Secretary or agency must follow that purpose. There is no such ambiguity.

In the present circumstances of the Court, this precedential framework that has stood for years may be ripe for overturning.[178] Justice Clearance Thomas leads this charge, relating in a scathing dissent during February 2020 that "*Chevron* is in serious tension with the Constitution, the APA, and over 100 years of judicial decisions."[179] The problem for Justice Thomas is that "*Chevron* compels judges to abdicate the judicial power without constitutional sanction."[180] *Chevron* denies the courts their constitutional power and grants it to the executive agencies.[181] At best, if not exercising judicial power, then the agencies are "unconstitutionally exercising 'legislative Powers' vested in the Congress."[182] *Chevron* is a way to undermine the judiciary from exercising its checking power on the other branches of government.[183]

Beyond that, Justice Thomas is concerned that *Chevron* is even contrary to the Administrative Procedure Act from which it allegedly stems.[184] The Administrative Procedure Act does provide that reviewing courts make the decisions surrounding questions of law, statutory provisions, and the meaning of terms of an agency action.[185] In this section of the Administrative

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[178] James Goodwin, *Will Confirming Judge Barrett be the Death of Chevron Deference?*, UNION OF CONCERNED Scientists, (Oct. 15, 2020, 2:21 PM), https://blog.ucsusa.org/guest-commentary/will-confirming-judge-barrett-be-the-death-of-chevron-deference.
[179] Baldwin v. United States, 589 U.S. ___, 2 (2020) (Thomas, J., dissenting) , *cert. denied*. This dissent is in response to a denial of writ of certorai to revisit the decision in *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U,S, 967 (2005), one in which Justice Thomas himself joined in writing. As Justice Thomas states in this dissent, *Brand X* appears to be an extension of *Chevron* to further provide the executive additional power by giving "the Executive the ability to neutralize a previously exercised check by the judiciary." *Id*.
[180] Baldwin v. United States, 589 U.S. ___, 2 (2020) (Thomas, J., dissenting) , *cert. denied*.
[181] *Id*.
[182] *Id*. at 3.
[183] *Id*. at 4.
[184] *Id*. at 4-5.
[185] The Administrative Procedure Act, 5 U.S.C. § 706 (2018).

Procedure Act, it is the responsibility of the Courts to be able to have the power to review agency decisions and to "hold unlawful and set aside agency action, findings, and conclusions found to be…arbitrary, capricious, an abuse of discretion…[or] unsupported by substantial evidence."[186]

There are genuine and practical concerns, however, that overturning *Chevron* could lead to substantial practical consequences.[187] Concerns include "activist judges" that could use judicial power to substitute their own policy preferences.[188] This could also put a pause on all or most of agency action until Congressional alterations to resolve ambiguities in a statute occur.[189] Agencies could become much less flexible in reacting to ongoing, new, and evolving situations in a way that Congress simply has not or cannot.[190] *Chevron* itself recognized two important concepts for enabling the agency to have such expansive authority. First, Congress either explicitly or implicitly delegated its own authority to interpret a statute and fill in any gaps.[191] Additionally, the *Chevron* Court made it clear the executive agencies are better equipped than the courts to implement a technical and complex scheme.[192]

An alternative is arbitrary and capricious review under Section 706(2)(a) of the Administrative Procedure Act.[193] As mentioned earlier, this standard is to "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[194] In using this standard "the court is not to substitute its judgment for that of the agency. Nevertheless, the agency

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[186] 5 U.S.C. § 706(2) (2018).
[187] *See* Goodwin, *supra* note 178.
[188] Goodwin, *supra* note 178.
[189] Goodwin, *supra* note 178.
[190] *See* Goodwin, *supra* note 178.
[191] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984); Jutice Scalia also noted that *Chevron* allows agencies to move from one interpretation to another because there may not be a single correct interpretation of a statute. Barnhart v. Walton, 535 U.S. 212, 226 (2002).
[192] *Chevron*, 467 U.S. at 856-66.
[193] 5 U.S.C. § 706(2)(a) (2018).
[194] *Id*.

must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[195] However, not all agency change or action must be subject to more searching review, but they must "display awareness that it is changing position…it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one."[196] "It is enough when the new policy is permissible under the statute" and the agency believes the change to be better which is demonstrated by the "conscious change of course."[197] Justice Breyer, in dissent, would advocate that this standard requires the agency to explain why the agency now is making that change.[198]

The most confusing notion regarding *Chevron* and the Administrative Procedure Act is when to apply which, partially because there appears to be some overlap between the two standards. *Chevron*, for example, is supposed to be a way to intervene in agency interpretations of statutes. The arbitrary and capricious standard under the Administrative Procedure Act revolves around the reasoning and evidence supporting agency decisions.[199] These boundaries are often difficult to navigate, in terms of where the agency's interpretation and the evidentiary review begins. Even the D.C. Circuit has remarked that, "*Chevron* review and arbitrary and capricious review overlap at the margins" which exemplifies the difficulty in determining which standard to apply or confusing the requirements of the two.[200] The Supreme Court has even go so far to intermingle the two by suggesting that an inconsistent statutory interpretation would be able to trigger a reversal on arbitrary and capricious grounds.[201] There are even cases where both

[195] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins., 463 U.S. 29, 43 (1983) (internal citations and quotations omitted).
[196] FCC v. Fox Television, 556 U.S. 502, 514-15 (2009).
[197] *Id*. at 515.
[198] FCC v. Fox Television, 556 U.S. 502, 547-48 (2009) (Breyer, J., dissenting).
[199] See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983).
[200] Arent v. Shalala, 70 F.3d 610, 615 (D.C. 1995); *see also id*. at 619-21 (Wald, J., concurring).
[201] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005).

standards have been invoked at the same time.[202]

This is an issue that persists because of the different "framings" of the purpose of the Medicaid statute, and such affects the approval of any § 1115, and § 1115 waivers in general, are reviewed going forward. It should also be briefly noted that the government did attempt to preclude the possibility of judicial review of § 1115 waivers altogether.[203] The Court of Appeals quickly rejected this challenge as that limitation under the Administrative Procedure Act is very narrow and only applies where there is no law to apply—a situation that rarely arises.[204]

Part IV: Possible Rulings

A. Rulings that Do Not Eliminate *Chevron*

Despite the conclusion of the purpose of Medicaid by the Court of Appeals, it is plausible that the ruling in that case regarding the purpose is incorrect. The aims of Medicaid go well beyond merely providing health care coverage. After all, reducing the use of experimental waivers in favor of playing a simple numbers game where the only question to be asked is "Does this expand or further provide additional coverage?" limits the use of these waivers in these programs. If the acknowledged secondary aims of the statute were balanced against the need to provide health care coverage, the quality of coverage may actually improve.

Another alternative is for the Court to rely on *Chevron* deference in the interpretation of the statute as ambiguous and offer deference to the agency to decide on what the outcome could be. As discussed above, there is a possibility that with the current make-up of the Supreme Court, with the addition of the three "Trump" justices that *Chevron* is not long for this world. This could be an instance where the Court uses this statute as a vehicle to provide an alternative method of

[202] *See* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125-26 (2016); It is also typical for challengers to agency action to argue both standards simultaneously.
[203] Gresham v. Azar, 950 F.3d 93, 98 (D.C. Cir. 2020).
[204] *Id*. (internal citations omitted).

analysis. The Court does not have to in this circumstance; this may not be the case to do so. As a stretch, the Court could determine that the primary purpose of the Medicaid statute is a mix between the provision of medical coverage and the improving the health of beneficiaries. Should the Court rely upon the much-maligned *Chevron* analysis, there is no question that the Secretary has the authority to determine which objective to meet provided that the reasoning put forth is reasonable, a standard which may be too lenient in curbing broad agency discretion. The work programs in Arkansas and New Hampshire would be able to continue to exist as currently incarnated.

The final alternative that may be the better solution is to use this case as an instance to recalibrate *Chevron* and recognize that the Medicaid statute is not a simple one size fits all purpose. After all, the waiver program exists to generate exceptions to the program to enable states to have the flexibility they need to meet the needs of their population. The better test then, may be to bridge *Skidmore* with the Court of Appeals original decision. Essentially, this would be a modified *Chevron* in circumstances where there is a primary purpose, but there are also several secondary and tertiary aims or objectives of a given statute. The legislature would not have provided these additional aims if there was no intention of them being met. Therefore, in situations where there are conflicting objectives, deference should be afforded to the Secretary but only insofar as the benefits of meeting the alternative aims and objectives are balanced against the original claims and objectives, which must be supported by data which provides clear and convincing evidence. For example, in the scenario of the Arkansas program, the potential socioeconomic benefits supported by data may outweigh the potential loss of coverage of those unable or unwilling to comply with requirements. In that scenario, deference should be afforded to the Secretary that has the knowledge in that area, as well as the state who understands their needs and the aims they intend

to meet supported by data.

B. If *Chevron* Were Overturned

There are enough justices on the Supreme Court who it is believed would overrule *Chevron* and potentially replace it with something resembling more "traditional" judicial review as directed in the Administrative Procedure Act. As discussed, Justice Thomas is concerned that *Chevron* is even contrary to the Administrative Procedure Act from which it allegedly stems.[205] The Administrative Procedure Act does provide that reviewing courts make the decisions surrounding questions of law, statutory provisions, and the meaning of terms of an agency action.[206] In this section of the Administrative Procedure Act, it is the responsibility of the Courts to be able to have the power to review agency decisions and to "hold unlawful and set aside agency action, findings, and conclusions found to be…arbitrary, capricious, an abuse of discretion…[or] unsupported by substantial evidence."[207]

The question would what the statute says, and not one of silence or ambiguity. For example, *Chevron* deference only applies in circumstances where a statute is unclear.[208] If not deferring to an agency in these situations, the remaining tools for discerning the appropriateness of an agency's action become set by (1) the guidelines of judicial review set forth in the Administrative Procedure Act; and (2) traditional notions of statutory interpretation including but not limited to textualism and purposivism. Although the Court has traditionally relied upon purposivism to yield to the "spirit" of a statute, textualism is the norm that now dominates the conservative majority on the Court.[209]

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[205] *Id*. at 4-5.
[206] The Administrative Procedure Act, 5 U.S.C. § 706 (2018).
[207] 5 U.S.C. § 706(2) (2018).
[208] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
[209] *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71 (2006)

To simplify a complex concepts such as textualism, there are specific tenants that inform this type of statutory interpretation. First, textualists note that after all of the legislative process and debate, what has survived is only the statutory text.[210] Therefore, legislative intentions or purposes detailed throughout the legislative process cannot supplant or "alter the meaning of a duly enacted text."[211] Second, textualists urge judges to focus on how a reasonable user of the words would use the phrases uttered in a statute in context.[212] There are limitations to how to define terms in a statute, however, so textualists must go to "unenacted sources of context" to flesh out the meaning of a statute including its relation to other statutes.[213] By contrast, purposivists begin in the same spot—with the text.[214] Despite this similarity, [e]ven when clear contextual evidence of semantic usage exists, priority is accorded to…contextual evidence of the policy considerations that apparently justified the statute."[215]

The Court would have to read the Medicaid statute with fresh eyes. To reiterate, the Medicaid Act's state purpose is to "enable[e] each State, as far as practicable under the conditions in such State, to furnish…medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services."[216]

Another alternative that is worth examining is the potential for a "Kavanaugh" approach which looks at judicial interpretation differently by being critical of the step which determines whether a statute is ambiguous or not.[217] In Justice Kavanaugh's view, judges should interpret statutes

[210] *Id.* at 73.
[211] *Id.* at 73.
[212] *Id.* at 75. This includes reliance on other law, interpretations, dictionaries, and sometimes even purpose. *See e.g.*, *Id.* 78-85.
[213] Manning, supra note 209, at 78.
[214] Manning, supra note 209, at 78
[215] Manning, supra note 209, at 93.
[216] 42 U.S.C. § 1396-1 (2018).
[217] Brett Kavanaugh, *Book Review: Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2134 (2016).

according to the "clear text."[218] Currently, judges may use a variety of methods to resolve ambiguity including avoiding interpretations that raise constitutional questions, relying on legislative history, and deferring to an agency's reasonable interpretation of a statute through *Chevron* deference.[219] This does not resolve the question as to how judges determine whether a statute is ambiguous or not; Justice Kavanaugh relates that in his anecdotal experience, there is no rhyme or reason as to why judges decide one way or the other.[220] This means that ambiguity is an ill defined concept with no clear interpretive norms.[221]

To resolve this problem, Justice Kavanaugh suggests moving the starting line. He insists, "[judges] should not be diverted by an arbitrary initial inquiry into whether the statute can be characterized as clear or ambiguous."[222] That initial step is skipped leading to an improved two-step process. The first step requires that courts "determine the best reading of the text of the statute, by interpreting the words of the statute, taking into account the whole statute, and applying any other semantic canons of construction."[223] This "best reading" is based on how ordinary users of the English language would read and understand the language in question.[224] Following that step, once judges have completed their "best reading" they can apply any of the other canons that offer a justifiable reason for the departure from the text.[225] For Medicaid, this would result in embracing the primary objective of Medicaid in providing medical insurance to individuals, but also the secondary purposes such as providing improvements to health in general, potentially through the

[218] *Id*.
[219] *Id.*
[220] *Id*. at 2135-36.
[221] *Id*. at 2137-38. In the book review, Justice Kavanaugh iterates that this could be the result of law school and training of lawyers to find ambiguity even in the clearest of scenarios. *Id*. at 2139. Same could also be the result of subconscious tendencies, such as a judge favoring a particular flavor of policy and then deciding something is clear or ambiguous on those grounds. *Id*. at 2140
[222] *Id.* at 2144.
[223] *Id*.
[224] *Id*.
[225] *Id.*

provision of social services programs.[226]

The purpose as the D.C. Circuit as well as other Circuits have discussed when interpreting this statute is to provide health insurance coverage first and foremost. For example, The Frist Circuit stated that the Medicaid appropriations provision in drawing the conclusion that the purpose of Medicaid is for states to provide medical services to those whose income and resources are insufficient to meet the cost of required medical services.[227] The Sixth Circuit ruled similarly in 2016.[228] The Third Circuit has also stated that the primary purpose of Medicaid is the "praiseworthy social objective of granting health care coverage to those who cannot afford it."[229] Even the Supreme Court has stated that Medicaid is a program that provides "medical care for individuals who cannot afford to pay their own medical costs."[230] Under a plain and textualist reading of the statute, these purposes make sense. This may mean, however, that any secondary and tertiary purpose or objective of Medicaid would not matter. The work programs in this case would fail because of the arbitrary and capricious nature of the programs in that they did not meet the one purpose they needed to: they needed to provide health coverage, not take it away. Thus, Arkansas Works and similar programs would fail in that context.

The Court does not have to rely upon a simply textualist interpretation of the statute, but even under a purposivism framework, the Arkansas Works program would also certainly be required to fail. The Secretary would be arbitrary and capricious in his or her decision again. However, in this scenario there would be more objectives of Medicaid to analyze. For example, Chief Justice Roberts suggested that the new version of post-ACA Medicaid is an experiment in

[226] *See* Jacobi, *supra* note 23, at 188 ("Medicaid must broaden its methods from those of a medical insurer to a poverty program cognizant of the need to connect the poor to services beyond medical care" which would improve health outcomes overall).
[227] Pharm. Research & Mfrs. Of Am. v. Concannon, 249 F.3d 66, 75 (1st Cir. 2001), *aff'd*, 538 U.S. 644 (2003).
[228] Price v. Medicaid Dir., 838 F.3d 739, 742 (6th Cir. 2016).
[229] W.Va. Univ. Hosps., Inc. v. Casey, 885 F.2d 11, 20 (3d Cir. 1989), *aff'd* 499 U.S. 83 (1991).
[230] Ark. Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 275 (2006).

socialized medicine, something beyond the limitations of the previous version of Medicaid. Moreover, the Trump administration would point to a goal of improving health outcomes, supported by purveyors of the work program, as another objective of Medicaid. Taking all of this into account, to satisfy the requirements of being a satisfactory waiver, there must be two different things: (1) the provision of health insurance; and (2) better health outcomes for individuals. As presently incarnated, Arkansas Works would fail under this type of analysis. This does not mean, however, that there are no viable structures for work programs that could work.

Part V: Making Work Programs Work

The question is, then, do both of these purposes have to be met simultaneously for an acceptable waiver program? After all, if work programs were to improve health incomes because of the benefits of working, so what if a few persons are no longer able to participate in the program because they could not follow the rules?

As a matter of public policy, the better of the two options requires *both* of these purposes be met. First, Medicaid must provide health insurance. Second, it must also provide better healthcare outcomes for individuals. Admittedly, there is a natural tension between these two aims. For example, the Colorado program related to assisting individuals with the opioid crisis. That program is directly targeted at a specific community need in improving health care outcomes for the individual by providing them access to effective substance abuse treatment. Counterintuitively, one could also say that the goal of a program like this is to help individuals get back on their feet, back into the workforce, and to no longer rely on Medicaid. In a round about way, the need in there is met in improving health outcomes, but once the health outcomes are improved that person may leave the Medicaid program as they begin to piece their life back together. This actually reduces the provision of health care coverage within the healthcare program.

Therefore, there can still be an effective work program solution that accomplishes the purposes of Medicaid while contending with one feature unique to the American system of health care: employer provided health insurance coverage. More than 175 million individuals within the United States are covered by employer coverage of some type.[231] There does not seem to be any significant movement toward the United States moving toward a universal health care system in the near future.[232] Therefore, there must be a way for states to shift from what Chief Justice Roberts referred to as universal healthcare to the preferred system of employer sponsored health insurance. Arkansas may have had the right idea and the proper concern; the philosophy may just have to shift from a model of penalty to a model of assistance.

Before and even during the COVID-19 Pandemic, the United States faces a massive labor skilled labor shortage.[233] This shortage has resulted in the possibility of reduced economic expansion in nearly every state.[234] This shortage creates pressure for each state to recruit new individuals to move to it and to also bring back those individuals who have left the workforce.[235] In all, in 2019 thirty-nine states had more jobs than people looking for them.[236] The situation is so poor in some states that some are offering financial incentives to entice people to move in or to "move back home."[237] In North Carolina, 50% of businesses reported having trouble finding qualified individuals to hire in 2019.[238] One possible solution is to "mak[e] existing workers more productive by giving them new skills, and training new works drawn from disadvantaged groups

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[231] Dan Gorenstein, *Here's how health insurance in the US became tied to jobs*, BUSINESS INSIDER, (Jul. 2, 2017), *https*://www.businessinsider.com/heres-how-health-insurance-in-the-us-became-tied-to-jobs-2017-6.
[232] *Id*.
[233] Tim Henderson, *Help Wanted: Too Many Jobs and Not Enough Workers in Most States,* PEW CHARITABLE TRUSTS, (Oct. 14, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/10/14/help-wanted-too-many-jobs-and-not-enough-workers-in-most-states.
[234] *Id*.
[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] *Id.*

like prisoners and dropouts.[239]

These groups include those who never reentered the workforce after the Great Recession.[240] For whatever reason, perhaps for lack of training or an aversion to skilled work, persons are avoiding these jobs, some of which quickly offer stable salaries at or above $90,000.00 per year.[241] With better and more stable employment, health care outcomes improve. High-earners who make more are generally happier and, more importantly for the purposes here, no longer require Medicaid as a service.

The answer would be for Arkansas, and similarly situated states, to proverbially kill two birds with one stone by teaching people to fish so they can feed themselves for a lifetime. The key part of this is the education. Simply applying for work or volunteering does not necessarily improve skills necessary for the workforce in a meaningful way. Training, however, would. An effective version of Arkansas Works could operate much in the same way that the Colorado waiver program continues to deal with the opioid epidemic. Operate with the purpose of providing persons with health insurance while also offering connections to training or apprenticeships in these skilled professions. This will improve health care outcomes, while simultaneously, like the Colorado program, reducing the number of individuals reliant on Medicaid or other social programs and benefits. While finer details of such a program would be beyond the scope of this paper such as potential incentives for participation, no individual would be able to be cut from this program for not submitting timesheets. Instead, a program like this could move toward new progress and better outcomes for a wide-range of individuals from beneficiaries, their families, their future employers, and the tax payer who no longer pay for that persons health benefits and also have another person

[239] Henderson, *supra* note 233.
[240] Henderson, *supra* note 233.
[241] Henderson, *supra* note 233.

contributing to the tax pool in a more meaningful way. Such a program would meet the two purposes of Medicaid in improving health outcomes and providing insurance coverage. There would be no problem with meeting the bounds of approval of such a program or the Secretary allowing the experimental nature of it. Frame it as education leading to better health outcomes, not handing in a book report every week to show you have applied to multiple jobs under the threat of taking away one's medical coverage.

One type of program that has been emerging in recent years is the "Totally Accountable Care Organization" that would push accountability in a new direction.[242] These organizations are where Medicaid can meet every objective and check every box necessary for its primary purpose and secondary objectives. These organizations, which are funded through Medicaid programs, would be responsible for services in addition to simple medical care including social supports like employment training, mental health, and substance abuse treatment.[243] Such a system reduces costs by targeting the most disadvantaged in our society, those who are facing crisis beyond having medical coverage including chronic unemployment.[244]

These individuals are lacking in health equity wherein the individuals are prevented from reaching their full potential because of their social position or other socially determined circumstance including having gainful employment, education, and earning capacity.[245] More and more research suggests that addressing these additional factors that target these social behaviors or deterrents is more effective at improving health overall than handing an individual a Medicaid card and sending them on their way.[246]

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[242] Stephen Somers & Tricia MGinnis, *Broadening the ACA Story*: *A* Totally *Accountable Care Organization*, HEALTHAFFAIRS, (Jan. 23, 2014) https://www.healthaffairs.org/do/10.1377/hblog20140123.036563/full/.
[243] *Id*.
[244] *See id*.
[245] CENTER FOR DISEASE CONTROL AND PREVENTION, *NCHHSTP Social Determinants of Health: Frequently Asked Questions*, (last visited Apr. 12, 2021) https://www.cdc.gov/nchhstp/socialdeterminants/faq.html.
[246] *Id*.

The best way for Arkansas and other states who wish to institute work requirements into their program is to do so through an experimental Totally Accountable Care Organization. These organizations "go beyond medical care, and sweep in such social services as housing, substance use disorder treatment, and reentry programming for ex-offenders."[247] No reason exists as to why such organizations could not further integrate job training, apprenticeships, and similar programming as part of their social services and mission to improve the health of the poor. The goal is to break the cycle. These states have the ability to stave off their possible of multitudes of crisis with a single experiment: skilled labor shortages, reduction of health care costs, and improvement of health outcomes for their populace. These states should adjust their mindset. While eliminating people from the Medicaid program may benefit the "bottom-line" in the short term, the only thing it does is exasperate costs in the long term. Those who are the sickest, and cannot access health care through other means, are the biggest users of Medicaid and Medicare in general.[248] The way to reduce costs long term is to break the cycle, provide people with what they need, and have them provide for themselves for their lives. As the old proverb could be modernized to, "Hand a man a Medicaid card and he will have medical care, but if you teach a man to be a plumber, then he can have a happy, successful life with employer paid insurance."

Conclusion

Section 1115 waivers for "work programs" that accomplish what states intend to do and meet the requirements of the purposes of Medicaid are a possibility. While the current iterations of work programs may make a return and appear before the Court, the legal circumstances

[247] Jacobi, *supra* note 23, at 199. What is unique about Managed Care Organizations, such as a Totally Accountable Care Organization, is their reimbursement structure, which differs from the typical fee for service model. Jacobi, *supra* note 23, at 200. Given the complexity of that topic, and the theoretical basis of this comment, such is not discussed here.
[248] Jacobi, *supra* 23, at 188.

surrounding how the Court would presently interpret the Medicaid statute are murky at best. The Court may eliminate *Chevron* deference, or the Court could determine that the statute is ambiguous altogether. The Court could even take a new and unique approach, such as that suggested by Justice Kavanaugh, to avoid the seemingly subjective question of ambiguity entirely.

Whatever the Court decides, the states must take a different approach when generating work programs or—as seemingly as the new catchphrase—community engagement waivers. By creating a program that meets the purposes of Medicaid as well as its secondary and tertiary objectives, the states may be able to avoid the judicial review problem altogether, leaving the Court out of the issue. A possible solution to this problem would be the Totally Accountable Care Organization that shifts Medicaid from the simple provision of medical coverage to a provider of health and social services. By providing training to the population as a whole through these services, the states can solve a number of social problems including work shortages, but most importantly, teach people to fish for a lifetime.