

Nos. 20-37 and 20-38

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

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XAVIER BECERRA, SECRETARY OF  
HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

*v.*

CHARLES GRESHAM, ET AL.

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STATE OF ARKANSAS, PETITIONER

*v.*

CHARLES GRESHAM, ET AL.

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*ON WRITS OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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**SUGGESTION OF MOOTNESS AND  
MOTION TO VACATE THE JUDGMENTS OF  
THE COURT OF APPEALS AND TO REMAND**

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

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Pursuant to this Court's Rule 21.2(b), the Solicitor General, on behalf of petitioners in No. 20-37, respectfully moves that the Court vacate the judgments of the court of appeals; remand in *Gresham*, Nos. 19-5094 and 19-5096 (D.C. Cir.), with instructions that the district court's judgment be vacated and that the case be dismissed; and remand in *Philbrick*, Nos. 19-5293 and 19-5295 (D.C. Cir.), with instructions that the underlying matter be remanded to the Secretary of Health and Human Services (HHS). The private respondents consent to the relief requested in this motion, Arkansas

consents to the motion with respect to *Gresham*, and New Hampshire takes no position.

1. These cases concern actions by the Secretary to approve “demonstration project[s]” under the Medicaid program, 42 U.S.C. 1315(a)—time-limited experiments to test variations from the statutory requirements for States’ Medicaid plans. Section 1315(a) authorizes the Secretary to approve any “demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives” of Medicaid. *Ibid.*

At issue are amendments approved by the Secretary in 2018 to existing demonstration projects in Arkansas (at issue in *Gresham*) and New Hampshire (at issue in *Philbrick*) designed to test, *inter alia*, requirements that condition continued Medicaid coverage of certain adults on their performing a specified number of hours per month of work or certain other related activities. Gov’t Br. 14-16. HHS approved Arkansas’s project through December 31, 2021, and New Hampshire’s project through December 31, 2023. 20-37 Pet. App. (Pet. App.) 129a, 144a. The approvals stated that, “upon [those] date[s], unless extended or otherwise amended, all authorities granted to operate th[e] demonstration[s] will expire.” *Ibid.*

Individual Medicaid beneficiaries in both Arkansas and New Hampshire (private respondents here) brought these suits challenging the Secretary’s approvals of those projects. The States intervened to defend HHS’s actions. The district court ruled for the plaintiffs in each case and vacated the Secretary’s approvals. Gov’t Br. 18-19; Pet. App. 22a-59a, 64a-102a.

In *Gresham*, addressing the Arkansas project, the court of appeals affirmed in a published opinion. Pet. App. 1a-19a. The court concluded that Section 1315 did not authorize the Secretary to approve the demonstration

project testing the work-related requirements. *Id.* at 9a-16a.

In light of the court of appeals' decision in *Gresham*, the government moved unopposed in *Philbrick* (concerning New Hampshire's project) for summary affirmance on the basis of *Gresham*, without prejudice to seeking further review. 19-5293 Gov't C.A. Mot. for Summary Affirmance 1-5. The court granted that motion in an unpublished order, citing the government's "acknowledg[ment] that the disposition of th[e] case is controlled by *Gresham*." Pet. App. 20a.

The government filed a petition for a writ of certiorari under Rule 12.4 to review the court of appeals' decisions in *Gresham* and *Philbrick*. 20-37 Pet. 1-35. New Hampshire supported that petition as to *Philbrick*. New Hampshire Cert. Br. 1-3. Arkansas filed its own petition seeking review in *Gresham*. 20-38 Pet. 1-31. This Court granted both petitions and consolidated the cases. 141 S. Ct. 890.

2. As we previously informed the Court, on February 12, 2021, HHS sent letters to Arkansas, New Hampshire, and other States with demonstration projects that included similar work-related requirements, stating that HHS was commencing a review of those requirements to determine whether implementing them would further the objectives of Medicaid in light of markedly changed circumstances, including the COVID-19 pandemic and its aftermath. Gov't Reply Br. 4. HHS invited the affected States to respond to concerns that HHS had identified and to provide any additional relevant information. *Id.* at 5. On March 17, 2021, HHS informed Arkansas and New Hampshire that it had determined to withdraw approval of the work-related

requirements in those States' projects, and HHS explained the basis for that determination. *Id.* at 5-9.

Based on those developments, the government moved in this Court for vacatur of the court of appeals' judgments and urged that the underlying matters be remanded to the agency. Gov't Mot. to Vacate & Remand 1-7. The private respondents consented to that relief, New Hampshire took no position, and Arkansas opposed that request. *Id.* at 7. On April 5, 2021, "[u]pon consideration of the motion," the Court placed these cases in abeyance. 141 S. Ct. 2461.

As we subsequently informed the Court, New Hampshire did not pursue administrative review of HHS's determination to withdraw approval of the work-related requirements in its project. Gov't June 11, 2021, Letter 2. Arkansas did seek review before HHS's Departmental Appeals Board pursuant to HHS regulations. *Ibid.*

3. As noted, HHS approved Arkansas's original project only through December 31, 2021, "upon which date, unless extended or otherwise amended, all authorities granted to operate th[e] demonstration[s] w[ould] expire." Pet. App. 129a. HHS did not extend the project, and the approval of the project thus has now expired.

On February 18, 2022, in light of the expiration of the approval of its project, Arkansas filed an unopposed motion before the Departmental Appeals Board to dismiss as moot Arkansas's administrative appeal of HHS's March 2021 determination to withdraw approval of the work-related requirements. On February 28, 2022, the Board issued a "Notice of Case Closing," which stated that the Board had "granted the motion" to dismiss and "closed the case on its docket" "[b]ased on [Arkansas's] representations" that "the appeal is moot" and that HHS did not

oppose dismissal. Notice of Case Closing, No. A-21-53 (D.A.B.) (capitalization altered; emphasis omitted).

4. a. The expiration of HHS’s approval of Arkansas’s project has mooted the controversy in *Gresham*. Where a “provision of [an Executive action] ‘expire[s] by its own terms,’” an “appeal” concerning the action’s legality “no longer presents a ‘live case or controversy.’” *Trump v. International Refugee Assistance Project*, 138 S. Ct. 353 (2017) (*IRAP*) (quoting *Burke v. Barnes*, 479 U.S. 361, 363 (1987)). The private respondents in *Gresham* brought suit to challenge the lawfulness of HHS’s approval of Arkansas’s project. Pet. App. 6a. But that issue no longer presents a live controversy because the approval has expired.

No exception to mootness principles is implicated. The Secretary’s approval of Arkansas’s project did not end as the result of “voluntary cessation of a challenged practice,” *City of Mesquite v. Aladdin’s Castle*, 455 U.S. 283, 289 (1982), but rather because the original approval “expired by its own terms,” *Barnes*, 479 U.S. at 363; see *ibid.* (holding that “any issues concerning whether [a challenged bill] became a law were mooted when that bill expired by its own terms”). Nor is the dispute “capable of repetition, yet evading review.” *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (citation omitted). “The capable-of-repetition doctrine applies only in exceptional situations, where,” among other things, “the challenged action is in its duration too short to be fully litigated prior to cessation or expiration.” *Ibid.* (brackets, citation, and internal quotation marks omitted). That is not the case here because HHS approved Arkansas’s project for a period of nearly four years—from March 5, 2018, through December 31, 2021. Pet. App. 129a.

b. When a case that would otherwise merit this Court’s review becomes moot “while on its way [to this Court] or pending [a] decision on the merits,” the Court’s “established practice” is to “vacate the judgment below and remand with a direction to dismiss.” *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). That practice ensures that no party is “prejudiced by a decision which in the statutory scheme was only preliminary,” and “prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences.” *Id.* at 40-41; see *U.S. Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18, 21 (1994) (“If a judgment has become moot while awaiting review, this Court may not consider its merits, but may make such disposition of the whole case as justice may require.” (brackets and citation omitted)). The Court has “[f]ollow[ed] [that] established practice” in the particular context of litigation challenging Executive actions or legislative measures that have become moot because they “expired by [their] own terms.” *IRAP*, 138 S. Ct. at 353 (citation omitted) (Executive action); see *Barnes*, 479 U.S. at 365 (legislation).

That approach is appropriate in the circumstances of *Gresham*, where HHS’s challenged action—its approval of Arkansas’s project—expired in the ordinary course before the completion of appellate review. The government and Arkansas sought this Court’s review of the court of appeals’ judgment affirming the district court’s decision holding HHS’s approval of the project unlawful. But the scheduled expiration of HHS’s approval of Arkansas’s project now precludes this Court from passing upon the decision below. The now-unreviewable judgments of the court of appeals and the district court in *Gresham* should therefore be vacated to ensure that



they do not “spawn[] any legal consequences.” *Munsingwear*, 340 U.S. at 41.\*

5. The dispute in *Philbrick*, which concerns New Hampshire’s project, is not currently moot. HHS approved New Hampshire’s project through December 31, 2023. Pet. App. 144a. And although New Hampshire did not pursue administrative review of HHS’s March 2021 determination to withdraw approval of the work-related requirements in New Hampshire’s project, that determination did not affect other aspects of the project, including a waiver of retroactive-coverage requirements that the private respondents in *Philbrick* also challenged. Gov’t June 11, 2021, Letter 1-2. If this Court vacates the court of appeals’ judgment in *Gresham* under *Munsingwear*, however, it would be appropriate to also vacate the court of appeals’ judgment in *Philbrick* and remand that case with instructions that the underlying matter be remanded to HHS.

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\* As noted above, the government previously sought vacatur of the court of appeals’ judgment in *Gresham* on a different ground—*i.e.*, that the case no longer presented a suitable context for review on the merits due to HHS’s intervening termination of the work-related requirements in the Arkansas project, which were principally at issue in that case. Gov’t Reply Br. 2; see p. 4, *supra*. Upon consideration of that motion, the Court placed the case in abeyance. 141 S. Ct. 2461. Now, mootness arising from the expiration of the approval of Arkansas’s project in its entirety provides an independent basis for vacating the judgments below in *Gresham*. Notably, although Arkansas opposed vacatur based on the termination decisions, Gov’t Reply Br. 10, it consents to vacatur under *Munsingwear* now that HHS’s approval of Arkansas’s project has expired and the case is moot. In the case’s current posture, the Court accordingly need not address the implications of HHS’s termination of the work-related requirements for the *Gresham* litigation, including whether that action would have separately warranted vacatur of the judgments below in *Gresham*.

As we have previously explained, *Philbrick* no longer provides a suitable context for this Court to adjudicate the merits of the private respondents' challenges to HHS's approval of New Hampshire's project. Gov't Reply Br. 9. The primary focus of that challenge was the work-related requirements, which are no longer in effect as a result of HHS's determination to withdraw approval of those requirements and New Hampshire's decision not to appeal that termination decision. In light of those greatly changed circumstances, the government previously argued that it would be appropriate to vacate the judgment of the court of appeals and remand. *Ibid.*; see, e.g., *Biden v. Sierra Club*, 142 S. Ct. 46 (2021) (vacating the judgment below in light of "changed circumstances").

Vacatur and remand of the court of appeals' judgment in *Philbrick* would be all the more warranted if the court of appeals' judgment in *Gresham* is vacated. The court's judgment in *Philbrick* is an unpublished order granting summary affirmance based solely on the court's published decision in *Gresham*. Pet. App. 19a-20a. Vacatur of the court of appeals' decision in *Gresham* would thus eliminate the basis for the summary disposition in *Philbrick*.

In that event, vacatur of the court of appeals' judgment in *Philbrick* would be appropriate and analogous to this Court's typical practice in similar contexts. This Court routinely grants certiorari, vacates a lower court's judgment, and remands for further proceedings when an intervening decision of the Court has called into question the basis of a lower-court judgment at issue. See Stephen M. Shapiro et al., *Supreme Court Practice* § 5.12(b), at 5-38 (11th ed. 2019) (collecting cases). The Court has followed a similar course in circumstances

where the Court has already granted review of a lower court's judgment, but a decision of this Court subsequent to the lower-court judgment may have a bearing on that judgment. See, e.g., *Republic of Hungary v. Simon*, 141 S. Ct. 691 (2021) (per curiam); *Perry v. Louisiana*, 498 U.S. 38 (1990); *Zant v. Moore*, 489 U.S. 836 (1989) (per curiam). And the Court has granted certiorari, vacated, and remanded where an intervening decision of a lower court itself affects the basis of its own decision under review. See, e.g., *Baker v. Berryhill*, 139 S. Ct. 1257 (2019); *Sykes v. United States*, 138 S. Ct. 1544 (2018); *Brown v. United States*, 138 S. Ct. 1545 (2018); *Newbold v. United States*, 571 U.S. 1119 (2014).

If the Court vacates the court of appeals' judgment in *Philbrick*, it should remand with instructions that the underlying matter be remanded to the Secretary. The landscape has shifted substantially since the Secretary approved New Hampshire's project in November 2018. See Pet. App. 144a. Particularly in light of the global pandemic and its aftermath, and HHS's now-final determination to withdraw approval of the work-related requirements in New Hampshire's project that had been the principal focus of the litigation, the agency should be afforded the opportunity to determine the appropriate path forward in the first instance. What additional action by the courts below may be needed to effectuate such a remand of the underlying matter to the agency is a matter those courts are best positioned to address.

6. We are authorized to state that the private respondents consent to the relief requested in this motion, that Arkansas consents to the motion with respect to *Gresham*, and that New Hampshire takes no position.

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For the foregoing reasons, the Court should vacate the judgments of the court of appeals, remand in *Gresham* with instructions that the district court's judgment in that case be vacated and that the case be dismissed as moot, and remand in *Philbrick* with instructions that the underlying matter be remanded to the agency.

Respectfully submitted.

ELIZABETH B. PRELOGAR  
*Solicitor General*

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