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14 UNITED STATES DISTRICT COURT

15 DISTRICT OF ARIZONA

16 Flint Wood; Phonesagnam Silivongxay: )  
17 Cynthia Roberts; and Flisha Mumaw, on )  
18 behalf of themselves and all others )  
19 similarly situated, )

20 Plaintiffs, )

21 v. )

22 Thomas Betlach, Director of the Arizona )  
23 Health Care Cost Containment System; )  
24 and Kathleen Sebelius, Secretary of the )  
25 United States Department of Health and )  
26 Human Services, in their official )  
27 capacities, )

28 Defendants. )

No.

**COMPLAINT FOR INJUNCTIVE  
AND DECLARATORY RELIEF**

**PRELIMINARY STATEMENT**

1. This case is brought on behalf of low income Arizona residents who qualify for medical services through Arizona’s Medicaid program, the Arizona Health Care Cost Containment System (“AHCCCS”). Plaintiffs seek declaratory and injunctive relief to enjoin Defendants from continuing to violate the Medicaid provisions of the Social Security Act, which strictly limit the imposition of “copayments” on AHCCCS

1 participants. A copayment is a monetary amount that a patient pays directly to the health  
2 care provider at the time a service is rendered.

3 2. On October 1, 2003, AHCCCS, with retroactive permission from the U.S.  
4 Department of Health and Human Services, implemented an amended rule that required  
5 certain Medicaid-eligible Arizonans to pay copayments that exceed the limited,  
6 “nominal” copayments authorized by the federal Medicaid Act. The Arizona rule also  
7 allowed health care providers to deny care and services to Medicaid beneficiaries who are  
8 unable to pay the copayment, in violation of the federal Medicaid Act. The copayment  
9 rule was amended in 2010 and the challenged heightened and mandatory copayments  
10 were continued. The copayments currently are charged to single adults and couples who  
11 do not have a minor child living with them. The Secretary approved the mandatory and  
12 heightened copayments for a second time in 2006 and for a third time on October 21,  
13 2011.

14 3. As a result of the copayment requirements, eligible AHCCCS participants,  
15 including persons with significant medical conditions, for example, persons with  
16 deformities of the back and spine, asthma, and major depression do not have the money  
17 to pay for their copayments and are going without needed medical care. As a result of the  
18 copayment requirements, Medicaid-eligible persons are not fully participating in the  
19 AHCCCS Medicaid program and their health is being adversely affected.

#### 20 **JURISDICTION AND VENUE**

21 4. This action arises under the Social Security Act. The Court has jurisdiction  
22 pursuant to the following statutes:

- 23 a. 28 U.S.C. § 1331, which gives district courts original jurisdiction  
24 over all civil actions arising under the Constitution, laws, or treaties  
25 of the United States;
- 26 b. 28 U.S.C. § 1361, which gives district courts original jurisdiction  
27 over actions in the nature of mandamus to compel an officer or  
28

1 employee of the United States or any agency thereof to perform a  
2 duty owed to plaintiffs; and

3 c. 28 U.S.C. §§ 1343(a)(3) and (4), which give district courts original  
4 jurisdiction over suits to redress the deprivation under state law of  
5 any rights, privileges, or immunities guaranteed by the Constitution  
6 or by acts of Congress.

7 5. Plaintiffs' action for declaratory, injunctive relief, and other appropriate  
8 relief is authorized by 28 U.S.C. §§ 1651, 2201, and 2202.

9 6. Venue is proper under 28 U.S.C. §§ 1391(b) and 1391(e).

10 **PARTIES**

11 7. Plaintiff Flint Wood is a 48 year old male living in Apache County,  
12 Arizona, who currently receives medical assistance from AHCCCS. He is required to  
13 pay the heightened and mandatory copayments.

14 8. Plaintiff Phonesagnam Silivongxay is a 34 year old male living in Yuma,  
15 Arizona, who current receives medical assistance from AHCCCS. He is required to pay  
16 the heightened and mandatory copayments.

17 9. Plaintiff Cynthia Roberts is a 53 year old female living in Parker, Arizona,  
18 who current receives medical assistance through AHCCCS. She is required to pay the  
19 heightened and mandatory copayments.

20 10. Plaintiff Flisha Mumaw is a 23 year old female living in San Tan Valley,  
21 Arizona, who currently receives medical assistance through AHCCCS. She is required to  
22 pay the heightened and mandatory copayments.

23 11. Defendant Kathleen Sebelius is the Secretary of the United States  
24 Department of Health and Human Services and, as such, has the responsibility to  
25 administer the federal Medicaid program consistent with the Social Security Act,  
26 including the Medicaid Act. She is sued in her official capacity.

27 12. Defendant Thomas Betlach is the Director of the Arizona Health Care Cost  
28 Containment System and, as such, has the responsibility to administer the Medicaid

1 program in Arizona consistent with the Medicaid Act and the United States Constitution.  
2 He is sued in his official capacity.

3 **CLASS ALLEGATIONS**

4 13. Plaintiffs bring this suit both individually and on behalf of a statewide class  
5 of persons similarly situated pursuant to Fed. R. Civ. P. 23(a) and (b)(2). The class is  
6 composed of all residents of Arizona who have been or will be charged copayments  
7 pursuant to Arizona Administrative Code R9-22-711(F) or who will be deterred from  
8 obtaining or denied Medicaid-covered services because they cannot pay the copayments.  
9 The heightened and mandatory copayments currently are charged to single adults and  
10 couples without minor children living with them. These persons are referred to as  
11 “childless adults.”

12 14. The prerequisites of Fed. R. Civ. P. 23(a) are met in that:

- 13 a. The class is so numerous that joining all members is impracticable.  
14 The class has over 123,000 persons residing throughout Arizona.  
15 The class members are geographically dispersed, have limited  
16 financial resources, and are unlikely to institute individual actions;
- 17 b. There are questions of fact and law that are common to all members  
18 of the class;
- 19 c. The claims of the named Plaintiffs are typical of the claims of the  
20 class they represent; and
- 21 d. Plaintiffs and their counsel will fairly and adequately protect the  
22 interests of the class.

23 15. The requisites of Fed. R. Civ. P. 23(b) are met in that the Defendants have  
24 acted or refused to act on grounds generally applicable to all members of the class,  
25 making final declaratory and injunctive relief appropriate with respect to the class as a  
26 whole.

27 **STATUTORY AND REGULATORY FRAMEWORK**

28 16. Title XIX of the Social Security Act, codified at 42 U.S.C. §§ 1396-1396w-

1 5, establishes the Medicaid Act, a cooperative federal-state medical assistance program.  
2 The purpose of Medicaid is to enable each State, as far as practicable, “to furnish . . .  
3 medical assistance on behalf of families with dependent children and of aged, blind, or  
4 disabled individuals, whose income and resources are insufficient to meet the costs of  
5 necessary medical services.” 42 U.S.C. § 1396.

6 17. States do not have to participate in the Medicaid program. The federal  
7 Medicaid Act lists the requirements for states that do choose to participate at 42 U.S.C. §  
8 1396a and following provisions. If a state does participate, it must comply with all  
9 provisions of the Medicaid Act and implementing regulations, except insofar as  
10 individual requirements for states may be waived by the Secretary of the U.S.  
11 Department of Health and Human Services (“DHHS”) pursuant to the limited authority  
12 granted to her by Congress.

13 18. To participate in Medicaid, the state must have and maintain a  
14 comprehensive plan for medical assistance which has been approved by DHHS. The  
15 federal government, in turn, pays the state the statutorily established federal share of “the  
16 total expended . . . as medical assistance under the State plan. . . .” 42 U.S.C. §  
17 1396b(a)(1).

18 19. Arizona participates in Medicaid through the program known as the  
19 Arizona Health Care Cost Containment System (“AHCCCS”). A.R.S. § 36-2901 through  
20 § 36-2972. AHCCCS was initiated in 1982, after the DHHS granted Arizona an  
21 “experimental, pilot, or demonstration project” waiver, pursuant to 42 U.S.C. § 1315(a)  
22 (§ 1115 of the Social Security Act).

### 23 **Medicaid’s Strict Limits on Copayments**

24 20. The Medicaid Act permits states to impose copayments on program  
25 beneficiaries only under strict limitations. 42 U.S.C. §§ 1396o, 1396o-1. The federal law  
26 also includes nominality requirements. With one exception, states are precluded from  
27 imposing copayments unless they are “nominal” in amount. 42 U.S.C. §§ 1396o(a)(3)  
28 and (b)(3). The Medicaid Act refers to the definition of “nominal” contained in duly

1 promulgated regulations in effect on July 1, 1982. *Id.*

2 21. The federal regulations tie the permissible copayment to the amount the  
3 state Medicaid program pays for the service subjected to the copayment. *See* 42 U.S.C.  
4 1396o-1(b); 42 C.F.R. § 447.54(a)(3). These amounts can be adjusted for the medical  
5 component of the consumer price index. *Id.* Currently, copayments may range from \$.65,  
6 when the Medicaid payment for the service is \$10.00 or less, up to a maximum of \$3.80,  
7 when the Medicaid payment for the service is \$50.01 or more. CMS Informational  
8 Bulletin, September 30, 2011, found at [http://downloads.cms.gov/archived-](http://downloads.cms.gov/archived-downloads/CMCSBulletins/downloads/CIB-9-30-2011.pdf)  
9 [downloads/CMCSBulletins/downloads/CIB-9-30-2011.pdf](http://downloads.cms.gov/archived-downloads/CMCSBulletins/downloads/CIB-9-30-2011.pdf).

10 22. States have some flexibility for cost sharing but for persons with incomes  
11 up to 100% of the federal poverty level, states may only impose nominal copayments and  
12 there is a limit to the total amount of the copayments. 42 U.S.C. §§ 1396o-1(a)(2)(A) and  
13 (B), 42 U.S.C. §§ 1396o-1(e)(2)(B). For these persons, states must prohibit participating  
14 health care providers from denying care or services because an individual cannot pay a  
15 copayment. 42 U.S.C. §§ 1396o(e); 1396-o1(a)(2)(A)..

### 16 **Social Security Act Waiver Provisions**

17 23. The Social Security Act grants the Secretary of DHHS limited authority to  
18 waive the requirements of the Medicaid Act.

19 24. The Social Security Act allows the Secretary of DHHS to grant a “[w]aiver  
20 of State plan requirements” in the case of an “experimental, pilot, or demonstration  
21 project.” 42 U.S.C. § 1315(a). The Secretary may only approve a project which is  
22 “likely to assist in promoting the objectives” of Title XIX and may only “waive  
23 compliance with any of the requirements [of the act] ... to the extent and for the period  
24 necessary” for the state to carry out the project. *Id.* at § 1315(a)(1).

25 25. State expenditures on experimental, pilot, or demonstration projects  
26 approved by the Secretary “shall, to the extent and for the period prescribed by the  
27 Secretary, be regarded as expenditures under the State plan or plans approved under . . .  
28

1 [Title XIX] . . . or for the administration of such State plan or plans, as may be  
2 appropriate.” 42 U.S.C. § 1315(a)(2).

3 **Recent Healthcare Law**

4 26. The Patient Protection and Affordable Care Act (“ACA”) was passed in  
5 March 2010. Under the ACA, the state must cover all persons with incomes up to 133%  
6 of the federal poverty level by January 1, 2014. 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

7 **Constitutional and Medicaid Due Process Requirements**

8 27. The Due Process Clause of the Fourteenth Amendment to the United States  
9 Constitution prohibits the State from terminating a beneficiary’s health services without  
10 first providing the individual adequate notice and an adequate hearing. U.S. Const.  
11 Amend. XIV; *Goldberg v. Kelly*, 397 U.S. 254 (1970).

12 28. The Medicaid Act requires the state Medicaid agency to “provide for  
13 granting an opportunity for a fair hearing before the State agency to any individual whose  
14 claim for medical assistance under the plan is denied or is not acted upon with reasonable  
15 promptness. . . .” 42 U.S.C. § 1396a(a)(3).

16 29. Medicaid regulations implement the Constitution and Act by requiring for  
17 notice as follows:

18 (b) The agency must, at the time specified in paragraph (c) of  
19 this section, inform every applicant or recipient in writing–

- 20 (1) Of his right to a hearing;  
21 (2) Of the method by which he may obtain a  
22 hearing; and  
23 (3) That he may represent himself or use legal  
24 counsel, a relative, a friend, or other  
25 spokesman.

26 (c) The agency must provide the information required in  
27 paragraph (b) of this section –

- 28 (1) At the time that the individual applies for  
Medicaid;  
(2) At the time of any action affecting his or her  
claim; . . . .

42 C.F.R. § 431.206.

30. Medicaid Act regulations require the written notice to contain:

- 1 (a) A statement of what action the State . . . intends to take;
- 2 (b) The reasons for the intended action;
- 3 (c) The specific regulations that support, or the change in  
Federal or State law that requires, the action;
- 4 (d) An explanation of–
  - 5 (1) The individual’s right to request an evidentiary  
hearing if one is available, or a State agency  
hearing; or
  - 6 (2) In cases of an action based on a change in law,  
7 the circumstances under which a hearing will be  
granted; and
- 8 (e) An explanation of the circumstances under which  
9 Medicaid is continued if a hearing is requested.

10 42 C.F.R. § 431.210.

11 **FACTUAL BACKGROUND**

12 31. In November 2000, the citizens of Arizona passed Proposition 204, to  
13 expand AHCCCS to cover all persons who have incomes up to 100 percent of the federal  
14 poverty level. A.R.S. § 36-2901.01.

15 32. In January 2001, DHHS granted Arizona permission to amend its  
16 demonstration waiver to include individuals with incomes up to 100 percent of the  
17 federal poverty level.

18 33. Prior to October 1, 2003, AHCCCS imposed the following copayments:

- 19 a. Doctor’s office or home visit, including any  
20 x-ray/laboratory services associated with the visit: \$1.00 per visit
- 21 b. Nonemergency surgery: \$5.00 per visit
- 22 c. Nonemergency use of the emergency room: \$5.00 per visit

23  
24 Arizona Administrative Code R9-22-711(A). AHCCCS prohibited health care providers  
25 from denying care or services on account of an individual’s inability to pay the co-  
26 payment. R9-22-711(B).

27 34. In May 2003, AHCCCS requested a waiver from DHHS to increase the  
28 copayments. In June 17, 2003, DHHS advised AHCCCS that it did not need to amend its



1 state Medicaid plan or obtain a waiver to increase the copayments. Rather, DHHS  
 2 advised AHCCCS that “information on cost sharing . . . could be included in a new  
 3 section on cost sharing to be added to [AHCCCS’] financial operational protocol.” The  
 4 operational protocol was amended to increase the copayments.

5 35. On October 1, 2003, AHCCCS published a final amended rule that imposed  
 6 copayments on single adults and childless couples with incomes below the federal  
 7 poverty level as follows:

- |  |                          |
|--|--------------------------|
| a. Generic prescription, or brand prescription<br>where no generic is available: | \$4.00 per prescription  |
| b. Brand name prescription when generic<br>is available:                         | \$10.00 per prescription |
| c. Non-emergency use of the<br>emergency room:                                   | \$30.00 per visit        |
| d. Physician office visit:   | \$ 5.00 per visit.       |

15 Amended Rule R9-22-711(E).

16 36. The above copayments exceeded the nominal amounts allowed by the  
 17 Medicaid statute and regulations. 42 U.S.C. §§ 1396o(a)(3), 1396o(b)(3), 42 C.F.R. §  
 18 447.54.

19 37. The amended rule also stated: “The provider may deny a service if the  
 20 member does not pay the required copayment.” R9-22-711(E). This rule conflicted with  
 21 the Medicaid Act’s prohibition on the denial of services to persons unable to pay the  
 22 copayment amount. 42 U.S.C. § 1396o(e).

23 38. In October 2003, then Director Rogers began sending a written “AHCCCS  
 24 Co-Payment Notice” to Medicaid beneficiaries. The AHCCCS Co-Payment Notice  
 25 stated that, beginning on a specific date, often the date of the notice, new copayment  
 26 amounts will be effective and mandatory. The notice did not include a statement of the  
 27 reasons why the Medicaid beneficiary was subject to the copayments that would allow  
 28 the beneficiary to know whether the new law was correctly applied to him or her. Thus,

1 the beneficiary lacked sufficient information about whether to challenge the application  
2 of the copayments to their case.

3 **The *Newton-Nations* Litigation**

4 39. In December 2003, the lawsuit *Newton-Nations v. Rogers*, CIV 03-2506  
5 PHX EHC, was filed challenging the heightened and mandatory copayments in Amended  
6 Rule R9-22-711(E) and the AHCCCS notice. The federal Secretary retroactively  
7 approved the challenged copayments in 2004 after the case was filed. A class was  
8 certified, *Newton-Nations v. Rogers*, 221 F.R.D. 509 (D. Ariz. 2004), and an injunction  
9 was entered prohibiting the challenged copayments. *Newton-Nations v. Rogers*, 316  
10 F.Supp.2d 883 (D. Ariz. 2004).

11 40. The district court enjoined the challenged copayments in April 2004. In  
12 2006, while the injunction was in place, the demonstration project came up for a renewal.  
13 As part of the renewal, AHCCCS requested re-approval of the challenged copayments  
14 (which are the same copayments that are still at issue in this case). The Centers for  
15 Medicare & Medicaid Services (“CMS”) approved continuation of the challenged  
16 copayments.

17 41. The injunction on the copayments remained in effect until March 2010,  
18 when the district court ruled against plaintiffs on all issues. Plaintiffs appealed.

19 **AHCCCS Action After *Newton-Nations* District Court Decision**

20 42. In July 2010, AHCCCS published another Amended Rule R9-22-711. The  
21 challenged copayments were continued in the amended rule and are now found in Section  
22 711 (F) (formerly Section (E)).

23 43. The amended rule requires childless adults covered only under the Section  
24 1115 waiver, and not covered in any other part of the rule, with incomes equal to or under  
25 100% of the federal poverty level, to pay the following copayments:

- 26 a. Generic prescriptions, or brand name  
27 prescriptions if generic is not available: \$ 4.00 per prescription drug

1	b. Brand name prescriptions when	
2	generic is available:	\$10.00 per prescription drug
3	c. Nonemergency use of the	
4	emergency room:	\$30.00 per visit
5	d. Physician office visit:	\$ 5.00 per office visit

6       44. In October 2010, AHCCCS began to use a “Notice of Changes in Your Co-  
7 pays for AHCCCS Services” to inform recipients of the challenged copayments. These  
8 notices failed to provide the recipients with (1) sufficient information so that he or she  
9 could determine the accuracy of AHCCCS’ decision to charge them the heightened and  
10 mandatory copayments and, therefore, whether to protest the imposition of the  
11 copayments; (2) any information on appeal rights; (3) an explanation how the current  
12 copayments could remain in effect pending the appeal; and (4) the statutory or regulatory  
13 cites that support the action.

14       **Ninth Circuit *Newton-Nations* Decision**

15       45. On October 27, 2011, the Ninth Court held that the Secretary’s approval of  
16 the heightened and mandatory copayments did not comply with the requirements of the  
17 demonstration project statute, 42 U.S.C. § 1315, or *Beno v. Shalala*, 30 F.3d 1057 (9th  
18 Cir. 1994), and thus was arbitrary and capricious under the Administrative Procedure Act  
19 (“APA”). *Newton-Nations v. Betlach*, 660 F.3d 370 (9<sup>th</sup> Cir. 2011). The district court  
20 ruling on the APA claim was reversed and remanded with directions to vacate the  
21 Secretary’s decision and remand to the Secretary for further consideration consistent with  
22 the Ninth Circuit’s opinion. *Id.*

23       46. The Ninth Court’s decision in *Newton-Nations* noted the Secretary’s  
24 consideration of a demonstration request for the copayments must adhere to the factors  
25 listed in 42 U.S.C. § 1315 and comply with the *Beno* requirements:

26       In assessing whether the Secretary’s waiver in *Beno* was  
27 arbitrary or capricious, we explained that for the Secretary to  
28 act within her § 1315 authority, the administrative record  
must demonstrate that she “examine[d] each of th[ree]  
issues.” *Id.* at 1069. First, whether the project is an

1 “Experimental, Pilot or Demonstration Project.” *Id.* Second,  
2 whether the project is “Likely To Assist in Promoting The  
3 Objectives Of The Act.” *Id.* Third, “the extent and period”  
4 for which she finds the project is necessary. *Id.* at 1071.

4 *Newton-Nations*, 660 F.3d. at 380.

5 47. Regarding the first requisite to acting under § 1315, that the proposal have  
6 some “experimental, pilot, or demonstration” purpose, the *Newton-Nations* Court found  
7 no evidence that the Secretary had determined that the challenged copayments had any  
8 research or experimental value. *Id.* at 381.

9 48. The court rejected the Secretary’s argument that the Secretary could look  
10 at the demonstration project as a whole rather than at the copayments alone as a basis to  
11 approve the copayments. Instead, the inquiry must be on the merits of the copayment  
12 project by itself. *Id.*

13 49. The Ninth Circuit referred to plaintiffs’ expert evidence that copayments  
14 are not novel or experimental and questioned whether the Secretary “could have made  
15 such a finding.”

16 Plaintiffs’ public health expert stated that “[o]ver the last 35  
17 years, a number of studies have looked at the effects of cost  
18 sharing on the poor. Of all forms of cost sharing, copayments  
19 are the most heavily studied.” The administrative record  
20 contains no finding from the Secretary that Arizona’s  
21 demonstration project will actually demonstrate something  
22 different than the last 35-years worth of health policy  
23 research.

22 *Id.*

23 50. The Ninth Circuit also noted that the only reason the State provided for its  
24 proposal to charge the mandatory and heightened copayments in 2003 and 2006 was to  
25 save money. The court found these grounds impermissible, noting that under *Beno*, “the  
26 Secretary must make some judgment that the project has a research or demonstration  
27 value. A simple benefits cut, which might save money, but has no research or  
28 experimental goal, would not satisfy this requirement.” *Id.* at 380 (quoting *Beno*, 30

1 F.3d at 1069).

2 51. Regarding the second § 1315 factor, the court reiterated that under *Beno* the  
3 record must show the Secretary considered the impact of the copayment project on those  
4 the Medicaid Act was enacted to protect. *Newton-Nations*, 660 F.3d at 380 (relying upon  
5 *Beno*). The court held that a claim that the whole demonstration project would continue  
6 to ensure wider health coverage was not evidence that the Secretary considered the  
7 impact of the copayments on the participants. *Id.*

8 52. The Secretary is bound by the Ninth Circuit's decision in *Newton-Nations*  
9 for any approval of heightened and mandatory copayment requests under 42 U.S.C. §  
10 1315.

#### 11 **The Secretary's Approval of the Challenged Copayments on October 21, 2011**

12 53. In 2011, the State of Arizona requested a continuation of the copayments  
13 challenged in the *Newton-Nations* case.

14 54. As in 2003 and 2006, the only reason the State gave for the copayments  
15 was to save money. Specifically, in her March 31, 2011, letter (page 1) to Defendant  
16 Sebelius, the Governor of Arizona stated the State needed "help" to manage the "costs"  
17 of its Medicaid program and discussed the "fiscal challenges" facing the State.  
18 [www.azahcccs.gov/reporting/Downloads/1115Waiver/WaiverPacket\\_3\\_31\\_11.pdf](http://www.azahcccs.gov/reporting/Downloads/1115Waiver/WaiverPacket_3_31_11.pdf). On  
19 page one of the amended waiver request, the Governor stated the "goal" of the plan was  
20 to "manage its Medicaid program within budgetary constraints." *Id.*

21 55. In April 2011, Plaintiffs' counsel submitted objections to CMS concerning  
22 AHCCCS's renewed request to continue to impose the challenged copayments.  
23 Plaintiffs' counsel raised the same issues and concerns that they had previously brought  
24 to the Secretary's attention in the *Newton-Nations* case, namely that the only reason for  
25 the copayment request was to save money, a reason not sufficient under *Beno*; that the  
26 mandatory and heightened copayments will not test a unique or previously untested use  
27 of copayments; and that the copayments will harm Medicaid beneficiaries and prevent  
28 them from receiving the medical care they need.

1           56. Dr. Leighton Ku is a national expert on Medicaid and cost sharing. In  
2 support of their April 2001 objections to CMS, Plaintiffs' counsel submitted the 2008  
3 Second Declaration of Dr. Ku filed in the *Newton-Nations* case at Docket No. 137. This  
4 is the same declaration the Ninth Circuit specifically cited and relied upon to find the  
5 Secretary's approval of the challenged copayments was arbitrary and capricious.  
6 *Newton-Nations*, 660 F.3d at 381.

7           57. In his declaration submitted to CMS, Dr. Ku stated that there is nothing  
8 novel or experimental about copayments because of all forms of cost sharing,  
9 copayments are the most heavily studied; the effects of copayments on the poor have  
10 been extensively researched and studied for over 35 years; and he knows of no unique or  
11 untested aspect of copayments.

12           58. Based on this extensive research, Dr. Ku explained that three conclusions  
13 can be drawn. First, copayments keep many low-income people from getting needed  
14 medical care or medications. Second, low-income persons cannot always afford these  
15 copayments and must choose between health care and other basic necessities of life.  
16 Third, copayments are not an efficient Medicaid cost saving measure for states.

17           59. Dr. Ku also noted the harm that copayments can cause. He explained that:

- 18           (1) A substantial and rigorous body of research has consistently  
19           concluded that individuals with incomes below the federal poverty  
20           level are more vulnerable to the adverse effects of copayments than  
21           other groups.
- 22           (2) Copayments cause these individuals to use substantially fewer  
23           *essential* and *effective* medical services or medications.
- 24           (3) Copayments lead to an increase in emergency room visits and more  
25           hospitalizations when persons go without essential medications.
- 26           (4) Copayments have been shown to lead to poorer health for low-  
27           income persons.

1 (5) When individuals limit their use of medications because of the  
2 inability to pay for copayments, they are significantly more likely to  
3 experience heart attacks, strokes, and declining health.

4 60. On October 21, 2011, the Secretary for the third time in eight years  
5 approved the continuation of the copayments challenged in this case. The approval letter  
6 noted that many aspects of the demonstration project continue “such as ... cost sharing  
7 requirements for the childless adults.” [www.azahcccs.gov/reporting/Downloads/1115](http://www.azahcccs.gov/reporting/Downloads/1115)  
8 [waiver/AZLetter\\_State.pdf](http://www.azahcccs.gov/reporting/Downloads/1115).

9 61. The Secretary’s approval of the challenged copayments does not contain  
10 the review and analysis required by the Ninth Circuit decisions in *Newton-Nations* and  
11 *Beno*.

12 62. The approval does not refer to or address the concerns raised by Plaintiffs’  
13 counsel.

14 63. The approval does not address Dr. Ku’s expert opinion that copayments  
15 have been heavily studied for over 35 years; there is nothing novel or experimental about  
16 copayments; and there is no untested aspect of copayments.

17 64. The approval does not address Dr. Ku’s expert opinion that copayments  
18 harm the participants.

19 65. The approval does not consider the impact of the copayments on the  
20 beneficiaries.

21 66. The approval does not explain how a request based solely on an effort to  
22 save money can be justified in light of the controlling law of the case and precedents  
23 established in the *Newton-Nations* and *Beno* decisions, both of which reject projects that  
24 are requested to save money and clearly require section 1315 projects to accomplish an  
25 experimental, pilot or demonstration purpose.

26 67. The Secretary’s approval has an evaluation component but the State is not  
27 required to submit a *plan* for evaluation until April 2012. *Id.* at page 2. In the Special  
28 Terms and Conditions for the AHCCCS Medicaid Section 1115 Demonstration

1 Approval, in section 26(c) “cost sharing evaluation,” the Secretary lists four hypotheses  
2 that are to be evaluated for the cost sharing described in section 17(d), but that section is  
3 not limited to the challenged copayments in this case.  
4 [www.azahcccs.gov/reporting/Downloads/1115waiver/1115 WaiverApprovalPkg.pdf](http://www.azahcccs.gov/reporting/Downloads/1115waiver/1115%20WaiverApprovalPkg.pdf).

5 68. The first hypothesis is: “How will utilization of needed preventive, primary  
6 care, and treatment services be affected.” There is nothing novel or experimental about  
7 this hypothesis. As explained by Dr. Ku, it already has been repeatedly tested by more  
8 than the 35 years of research that consistently concludes that the imposition of  
9 copayments on lower income beneficiaries results in these individuals using substantially  
10 fewer *essential* and *effective* medical services or medications and an increase use of  
11 emergency rooms.

12 69. The second hypothesis is: “To what extent will the imposition of the  
13 pharmacy co-payments and copayments related to non-emergent use of emergency rooms  
14 ensure appropriate utilization of emergency room care and appropriate utilization of cost  
15 and clinically effective generic and brand name drugs.” This hypothesis also adds  
16 nothing to the 35 years of multiple studies that, as Dr. Ku noted, have consistently  
17 concluded that higher copayments for prescription drugs cause low-income persons to  
18 use substantially fewer *essential* and *effective* medications and lead to increased use of  
19 the emergency room. (emphasis in original).

20 70. The third hypothesis is: “Will the mandatory co-payments affect State and  
21 federal expenditures (per enrollee) in the short and long term.” This hypothesis, which  
22 looks at long and short term cost expenditures, is not a proper basis for a section 1315  
23 proposal. Rather, the Secretary must look at the impact of the project on those whom the  
24 Medicaid Act is intended to serve, namely low income people. *Newton-Nations*, 660  
25 F.3d at 381; *Beno*, 30 F.3d at 1069.

26 71. The fourth hypothesis is: “Will there be an impact on physician  
27 participation, or physician willingness to accept appointments from the adults without  
28 dependent children population.” This hypothesis looks at physician participation and



1 similarly fails to focus on the impact of the copayments on the beneficiaries. *Newton-*  
2 *Nations*, 660 F.3d at 381; *Beno*, 30 F.3d at 1069-1070.

3 72. The Secretary attempts to justify the copayment project by claiming that:  
4 the imposition of these co-payments is only one element of  
5 the Demonstration and is tied to other elements. As a result,  
6 the co-payments are not viewed in isolation, but are  
7 considered in the context of the Demonstration as a whole ...  
8 [www.azahcccs.gov/reporting/Downloads/1115waiver/AZLetter\\_State.pdf](http://www.azahcccs.gov/reporting/Downloads/1115waiver/AZLetter_State.pdf). (page 2). This  
9 claim was rejected by the Ninth Circuit and is not a basis to approve a copayment project.  
10 The copayments must be evaluated on their own and the impact of the copayments on the  
11 participants must be determined. *Newton-Nations*, 660 F.3d at 381.

12 73. Currently, over 123,000 persons are being subjected to the challenged  
13 copayments. [www.azahcccs.gov/reporting/Downloads/PopulatonStatistics/2012/May.pdf](http://www.azahcccs.gov/reporting/Downloads/PopulatonStatistics/2012/May.pdf).

14 74. The heightened and mandatory copayments will remain in effect until  
15 January 1, 2014, when the ACA goes into effect and Plaintiffs and the class members will  
16 become a mandatory Medicaid population. 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII). [www.azahcccs.gov/reporting/Downloads/1115waiver/1115WaiverApprovalPkg.pdf](http://www.azahcccs.gov/reporting/Downloads/1115waiver/1115WaiverApprovalPkg.pdf). (Section  
17 36).  
18

19 75. These heightened and mandatory copayments are precluding and will  
20 preclude Plaintiffs and members of the class from seeking and/or receiving the medical  
21 treatment and services they need. These copayments are causing and will cause Plaintiffs  
22 and members of the class not to seek and/or receive medical treatment and services in a  
23 timely manner.

24 Plaintiff Flint Wood

25 76. Plaintiff Flint Wood is a 48 year-old male living in Apache County,  
26 Arizona with his wife. He and his wife and have been on AHCCCS for about 18 months.  
27 He has several medical conditions: herniated discs, bulging discs, stenosis (narrowing of  
28 spinal column), neuropathy throughout his body, calcium deposits on his spine, arthritis

1 in his back and hips, urinary problems, enlarged prostate, post-traumatic stress disorder  
2 (PTSD), depression and head trauma.

3 77. Plaintiff Wood severely injured his back and head in an ATV accident in  
4 1999. He had bleeding of the brain and his brain ruptured from the lining of his skull.  
5 He also fractured his spine and could not breathe and almost died. Over the years, his  
6 back has gotten worse and now he has a hard time walking because of the arthritis and  
7 spinal impairments. He is in severe and constant pain and falls down at least once a day.  
8 He loses the sensation in his legs. He also has problems remembering as a result of the  
9 head injury. He has a hard time sleeping because of the pain and also has nightmares as  
10 part of his PTSD.

11 78. Plaintiff Wood's doctors have prescribed six medications for him.  
12 Neurontin for his neuropathy, Methadone for his pain, Valium as a muscle relaxer and for  
13 stress, Flomax for urinary problems and enlarged prostate, Zoloft for his depression,  
14 Percocet for increased pain levels and Ibuprofen for pain and inflammation. He is very  
15 depressed about his conditions. Some days his pain is so bad that he cannot get out of  
16 bed. If he does not take all of his pain medications each day he can hardly walk. He was  
17 hospitalized once in the last year because he fell down 5 times in one day. His doctors  
18 have recommended that he use a wheelchair.

19 79. Plaintiff Wood cannot work and tries to collect aluminum cans and scrap  
20 metal to sell. Some weeks he makes no money. Other weeks he may make up to \$20.00.  
21 This is all the money he and his wife have to live on. He estimates that AHCCCS wants  
22 him to pay over \$60.00 per month for his medical care. He has little money so these  
23 copayments are very difficult for him. He has no family or friends who can help him pay  
24 for his medical care. He often cannot afford his medications and has to go days and  
25 sometimes weeks without some of his medications. When he does not take his  
26 medications, he starts to feel like he wants to die. If he does not have his medications, his  
27 medical conditions will be fatal to him. His pain management specialist told him that if  
28 he goes 5 days without all of his medications that he will need to go to the emergency

1 room or otherwise will die. Without any money to pay for my medical care, upon release  
2 from the hospital he thinks he would end up in the hospital again shortly.

3 80. Plaintiff Wood sees a general doctor and a pain specialist. He should see  
4 his doctors every month but because he does not have money for the office copayments,  
5 he often cannot see them.

6 Plaintiff Phonesagnam Silivongxay

7 81. Plaintiff Phonesagnam Silivongxay is a 34 year-old male living in Yuma,  
8 Arizona at Community Bridges, a residential program for persons with mental  
9 impairments. He has been on AHCCCS for approximately one year. He has several  
10 medical conditions: gout in his right big toe, swelling of his hands and feet, severe  
11 depression, insomnia, panic and anxiety disorders, high cholesterol, asthma, fever blisters  
12 and acid reflux disease. He has been hospitalized three times in the past several months  
13 for his medical problems.

14 82. Plaintiff Silivongxay's doctors have prescribed the following medications  
15 for him including: Zantac and Prilosec for acid reflux disease, Seroquel for major  
16 depression and insomnia, Xanax for anxiety disorder, Effexor for major depression,  
17 Vistaril for major depression and panic disorder, Remeron to help his anti-depression  
18 medications work better, Lasix for a diuretic to reduce the swelling in his hands and legs,  
19 Precose for pre-diabetes, Zocor for high cholesterol, Albuterol inhaler and Flovent for  
20 asthma and allergies, Tramadol for pain in his hands and feet, and Allopurinol for gout,  
21 and Valtrex and Zovirax for fever blisters. He also uses diabetic testing supplies (lancets  
22 and testing strips) as he is supposed to test his blood two times a day.

23 83. Plaintiff Silivongxay is supposed to see his primary care doctor and his  
24 psychiatrist each at least once per month. He cannot see his doctors because he does not  
25 have the office copayments. He has not been able to see his doctors for about 5-6 months  
26 because he could not pay the copayments. He estimates that AHCCCS wants him to pay  
27 over \$ 80.00 per month for his medical care. He has no money so these payments are  
28 impossible for him. Sometimes his parents and sister give him money for the

1 copayments. But they are struggling to get by and often cannot help him. He has no  
2 other family or friends who could help me pay for his medical care.

3 84. Plaintiff Silivongxay often has to go 2-3 months without his medications.  
4 If he does not take his medications, his mental condition deteriorates. In January 2012, he  
5 became so ill from not having his medications for two months that he tried to commit  
6 suicide. Within the last 3 weeks, he had to go to the hospital 2 times. One time he did  
7 not have money to buy his gout medication and gout crystals were forming on his toes.  
8 The other time he did not have money for his anti-reflux medication and he started to  
9 cough up blood. Each time the hospital staff examined him and gave me him  
10 medications and he started to feel better and was released.

11 85. Plaintiff Silivongxay needs to fill 5 mental health medications and does not  
12 have the money for the copayments. If he does not get these medications, he thinks he  
13 will need to go to the emergency room. Without any money to pay for his medical care,  
14 upon release from the hospital he thinks he would end up in the hospital again shortly.

15 Plaintiff Cynthia Roberts

16 86. Plaintiff Cynthia Roberts Plaintiff Cynthia Roberts is a 53 year-old female  
17 living in Parker, Arizona. She receives medical assistance through AHCCCS. She has  
18 been on AHCCCS for about five years. She has several medical conditions: a fused spine  
19 and screws in her back, osteoarthritis in her knees, fibromyalgia, bulging discs in her  
20 neck, degenerative bone disease in her spine, hypothyroidism, and nerve damage to her  
21 arms and legs because of her spinal and back conditions.

22 87. Plaintiff Roberts had surgery to repair her back last year and that was when  
23 her spine was fused and the screws were put in her back. She has constant and severe  
24 pain in her back and neck. She is not able to do most activities. She can do no lifting and  
25 it is very difficult for her to walk. Her pain keeps her up all night. Her doctors have  
26 prescribed the following medications for her: Cyclobenzaprine as a muscle relaxer;  
27 Oxycodone for her pain; Amitriptyline to help her sleep at night; Cymbalta for her pain;  
28 Synthroid for her thyroid; Thorazine to help her sleep because of the pain and Meclizine

1 for the nausea and dizziness the pain medications cause. Her orthopedic doctor gives her  
2 cortisone shots in her knees. Her doctors have prescribed physical therapy for her.  
3 Plaintiff Roberts is very depressed about her conditions. Some days her pain is so bad  
4 that she cannot get out of bed. If she does not take all of her pain medications each day  
5 she can hardly walk.

6 88. Plaintiff Roberts estimates that AHCCCS wants her to pay over \$50.00 per  
7 month for her medical care. She has no money so these payments are impossible for her.  
8 Her son tries to help her but he has limited money. When he gives her money, she gets 2-  
9 3 medications. She often cannot afford her medications and has to go days and  
10 sometimes weeks without some of her medications. She skips taking her medications and  
11 splits her pills to make them last longer. This is not good for her health. When she does  
12 not take her medications she feels awful. She is supposed to see her primary care doctor,  
13 neurologist, pain management specialist, orthopedic doctor and thyroid doctor. She  
14 should see her doctors every 1-3 months, except for her thyroid doctor who she should  
15 see every 6 months, but because she does not have money for the office copayments, she  
16 often cannot see them.

17 89. Without all her medications, Plaintiff Roberts is in pain and does not feel  
18 well. Without all her medications, she is not able to enjoy life. There are days when she  
19 needs to see her doctors but cannot afford the office copayments. She feels she is trapped  
20 with no way out. If these copayments continue she worries that she will not be able to  
21 continue to live independently.

22 Plaintiff Flisha Mumaw

23 90. Plaintiff Flisha Mumaw is a 23 year-old female living in San Tan Valley,  
24 Arizona. She receives medical assistance through AHCCCS. She has been on AHCCCS  
25 for about five years. She has several medical conditions: asthma, anemia, ADHD, bi-  
26 polar, endometriosis and reoccurring urinary tract infections. She had surgery in August  
27 2011 because her appendix burst and she had endometriosis. The endometriosis has  
28

1 affected her female organs and the long term effect is infertility. The endometriosis  
2 causes her severe pain and nausea. Her nausea makes it hard for her to hold down food.

3 91. Plaintiff Mumaw's doctors have prescribed the following medications for  
4 her: Vicodin for pain; Percocet for pain; ProAir for her asthma; Albuterol breathing  
5 machine for her asthma; and Zofran for her nausea. She also needs to take antibiotics  
6 whenever she has a urinary tract infection. Some days her pain is so bad that she cannot  
7 get out of bed. If she does not take her pain and Zofran medications each day, she is in  
8 severe pain, vomits often and cannot eat. If she does not take her asthma medications, she  
9 has a hard time breathing. She estimates that AHCCCS wants her to pay over \$80.00 per  
10 month for her medical care. She has no money so these copayments are impossible for  
11 her. She lives with her grandmother and she tries to help Plaintiff her with the  
12 copayments but her grandmother has medical problems and lives on a fixed income.  
13 Sometimes Plaintiff Mumaw's fiancé is able to give her money for the copayments.

14 92. Plaintiff Mumaw often cannot afford her medications and has to go days  
15 and sometimes weeks without some of her medications. She skips taking her medications  
16 and split the pills she can split to make them last longer. This is not good for her health.  
17 When she does not take her medications she feels awful. She stays in bed and is in  
18 excruciating pain. Currently, she has a prescription for antibiotics to treat her urinary  
19 tract infection that she cannot fill because she does not have the copayment.

20 93. Plaintiff Mumaw is supposed to see her primary care doctor and an  
21 OBGYN at least two times each month. Since she does not have the copayments for the  
22 office visits, she often cannot see her doctors. There are days when she knows she needs  
23 to see her doctors but she cannot afford the office copayments. She ends up waiting until  
24 she is so sick that she needs to go to the emergency room. In the last three weeks, she  
25 went to the emergency room three times because of the severe pain and swelling in her  
26 abdomen and a high fever. She was diagnosed with another urinary tract infection and  
27 an inflammatory disease. She was referred to an urologist specialist but she worries that  
28 she will not be able to afford the copayment for the office visit.

1 **CLAIMS FOR RELIEF**

2 **FIRST CLAIM FOR RELIEF**

3 (Federal Defendant’s Violation of the Social Security Act)

4 94. Plaintiffs restate and incorporate by reference each of the allegations  
5 contained in paragraphs 1 through 93, above.

6 95. The Administrative Procedure Act (“APA”) provides for judicial review of  
7 the actions of federal agencies. 5 U.S.C. §§ 701-706. Specifically, the APA provides  
8 that a reviewing court may “hold unlawful and set aside” agency actions that are “in  
9 excess of statutory jurisdiction, authority, or limitations” or that are “arbitrary, capricious,  
10 an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A),  
11 (C).

12 96. Defendant Sebelius’ action authorizing Arizona to implement copayments,  
13 as described herein, exceeded her limited authority, as set forth in 42 U.S.C. §§ 1315 and  
14 1396o-1, and was arbitrary and capricious.

15 97. Plaintiffs are suffering or are in danger of suffering irreparable harm.  
16 Plaintiffs have no adequate remedy at law.

17 **SECOND CLAIM FOR RELIEF**

18 (State Defendant’s Violation of U. S. Constitution, Social Security Act-Medicaid)

19 98. Plaintiffs restate and incorporate by reference each of the allegations  
20 contained in paragraphs 1 through 93, above.

21 99. Defendant Betlach’s written notice, as described herein, violates the Due  
22 Process Clause of the U.S. Constitution, U.S. Const. Amend. XIV, and the Medicaid Act,  
23 42 U.S.C. § 1396a(a)(3), which are enforceable by Plaintiffs in this Court pursuant to 28  
24 U.S.C. § 1331 and pursuant to 42 U.S.C. § 1983.

25 100. Plaintiffs are suffering or are in danger of suffering irreparable harm.  
26 Plaintiffs have no adequate remedy at law.

27  
28

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully ask that this Court:

A. Certify this case as a class action.

B. Issue a declaratory judgment holding that:

1. Defendant Sebelius has violated and continues to violate the Social Security Act, 42 U.S.C. §§ 1315.

2. Defendant Betlach has violated and continues to violate the Due Process Clause of the U.S. Constitution and the federal Medicaid Act, 42 U.S.C. § 1396a(a)(3).

C. Grant preliminary and permanent injunctions that:

1. Prohibit Defendant Sebelius from allowing the State of Arizona to impose copayments in a manner that is not consistent with the Social Security Act, 42 U.S.C. § 1315, and 42 U.S.C. §§ 1396o and 1396o-1;

2. In the absence of a valid waiver under 42 U.S.C. § 1315 to allow Defendant Betlach to impose the heightened and mandatory copayments challenged in this case, prohibit Defendant Betlach from imposing copayments that are not consistent with the Medicaid Act, 42 U.S.C. §§ 1396o and 1396o-1; and

3. Prohibit Defendant Betlach from violating the Due Process Clause of the U.S. Constitution and the federal Medicaid Act, 42 U.S.C. § 1396a(a)(3) in his notices.

D. Award Plaintiffs their reasonable attorneys' fees and costs against the federal Defendant pursuant to 28 U.S.C. §2412 and against the state Defendant pursuant to 42 U.S.C. § 1988.

E. Grant such other and further relief as may be just and proper.

Respectfully submitted this 21<sup>st</sup> day of May 2012.



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