No. 08-818

In the Supreme Court of the United States

ADENA REGIONAL MEDICAL CENTER; ET AL.,
Petitioners,

v.

CHARLES E. JOHNSON, ACTING SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO THE RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

The statement made in the Petition remains accurate.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes, Regulations and Rules

REPLY TO THE RESPONDENT'S BRIEF IN OPPOSITION

ARGUMENT

I. The Opposition Disregards The Words Used By Congress Defining The Medicaid Low Income Proxy—Words That Require The Inclusion Of All Patients Eligible For Medical Assistance Under An Approved State Medicaid Plan.

In calculating the Medicare disproportionate share hospital adjustment, the Medicare statute directs the Secretary of Health and Human Services to count days attributable to patients who are "eligible for medical assistance under a State plan approved under [Title XIX of the Social Security Act which governs Medicaid]." 42 U.S.C. § 1395ww(d)(5)(F)(vi)(II) (the "Medicaid Low Income Proxy").

As explained in the Petition, four circuits have concluded that this statutory language requires the inclusion of *all* days attributable to patients who are "eligible" for medical treatment "under" an approved State plan, regardless of whether the care provided on those days is paid by Medicaid.[1] The D.C. Circuit, however, adopted a far more restrictive

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[1] *See Jewish Hospital, Inc. v. Secretary of Health and Human Services*, 19 F.3d 270, 272 (6th Cir. 1994); *Deaconess Health Services Corp. v. Shalala*, 912 F. Supp. 438, 447 (E.D. Mo. 1995), *aff'd*, 83 F.3d 1041 (8th Cir. 1996); *Legacy Emanuel Hospital and Health Center v. Shalala*, 97 F.3d 1261, 1262 (9th Cir. 1996); *Cabell v. Huntington Hospital, Inc. v. Shalala*, 101 F.3d 984, 986 (4th Cir. 1996).

reading of this language to justify its conclusion that the Secretary was not required to include all days attributable to patients who are "eligible" for medical treatment "under" an approved State plan, but only those days for which Medicaid provides payment.

In attempting to avoid the obvious conflict raised by its restrictive construction, the Opposition resorts to misdirection. It restates and paraphrases the text of 42 U.S.C. § 1395ww(d)(5)(F)(vi)(II) by describing the Medicaid Low Income Proxy as a ratio comparing a hospital's provision of services to patients "*eligible for Medicaid*" but not entitled to Medicare. *E.g.*, Opp. at 2 (emphasis added).

This is not an accurate précis of what the statute says. The statute does not define the numerator of the Medicaid Low Income Proxy in terms of the number of days spent serving patients "*eligible for Medicaid*"; rather, the statute defines the numerator as the number of days spent serving patients who are "*eligible* for *medical assistance* under *a State plan* approved under [Title XIX governing Medicaid], but who were not entitled to benefits under part A of [Title XVIII governing Medicare]. 42 U.S.C. § 1395ww(d)(5)(F)(vi) (II).

The Opposition's subtle revision of the statutory text conflates eligibility for "medical assistance under a State plan" with "eligibility for Medicaid." And in doing so, the Opposition tacitly assumes a restrictive answer to the question presented in the Petition—namely, whether the text of the Medicaid Low Income Proxy requires the inclusion of *all* days attributable to patients who are "eligible" for medical treatment "under" an approved State Medicaid plan

or *only* those days for which the Medicaid program makes payment. Pet. at i.

Relying on the revision, the Opposition repeatedly avoids direct reference to the actual statutory language "eligible for medical assistance under a State plan." Yet, the Opposition's lack of regard for the words actually used by Congress cannot make them go away. Furthermore, the Opposition's recasting of the actual language does nothing to allay the conflict that has arisen among the circuit courts over the construction of the Medicaid Low Income Proxy. Indeed, the Opposition's improper attempt to amend the statute only underscores why this case provides an excellent vehicle for resolving the conflict among circuit courts. That conflict is real, material, and in need of this Court's immediate resolution.

II. The Conflict Described In The Petition Is Real, Material, And In Need Of Immediate Resolution By This Court.

The Opposition argues that review is unwarranted because the D.C. Circuit gave two separate reasons for concluding that the Medicaid Low Income Proxy does not include free medical treatment provided by Petitioners to low-income Ohio residents who are covered by the Ohio Hospital Care Assurance Program (HCAP). The Opposition argues that the D.C. Circuit correctly held, first, that "HCAP is separate from Ohio's Medicaid plan" and, second, that HCAP patients do not receive "medical assistance" as defined by the Medicaid statute. Opp. at 4-6.

The Opposition's summary of the D.C. Circuit's two holdings only begs the question presented in the Petition. Each holding is predicated on a restrictive reading of the statutory phrase "eligible for medical assistance under a State plan"—a reading that conflates "eligibility for medical assistance under a State plan" with eligibility for payments from the Medicaid program itself.

A. There Is No Dispute That The D.C. Circuit Held That The HCAP Provisions Found In Ohio's Approved Medicaid Plan Are Not "Part" Of The Plan Because These Provisions Do Not Provide Hospitals With A Right To Payment From Medicaid.

The Opposition argues that review is unwarranted because the D.C. Circuit correctly held that HCAP is not "part" of Ohio's written plan of medical assistance approved by the Secretary under Medicaid. Opp. at 5. By this description, the Opposition gives the impression that the D.C. Circuit found no provisions in Ohio's Medicaid plan mandating that hospitals provide medical treatment to HCAP patients. That impression is incorrect.[2]

In this case, there is no dispute that Ohio's approved Medicaid plan includes specific provisions

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[2] The Opposition also gives the incorrect impression that the D.C. Circuit panel was unanimous in its conclusion that Ohio's HCAP provisions were not "part" of its approved Medicaid plan. Opp. at 4-5. Judge Brown did not join in, or concur with, this portion of the panel's opinion. App. 1a.

mandating that hospitals provide free medical treatment to low-income Ohio residents who are ineligible for payments from Medicaid but who are covered by HCAP. App. 13a-14a. In that regard, the district court reviewed the physical documents that constitute Ohio's approved written plan and expressly noted that the document includes provisions mandating free treatment to patients and further requiring the inclusion of HCAP patient days in the Petitioners' Medicaid DSH adjustments. App. 13a, 16a.

The D.C. Circuit likewise reviewed the same plan document and was compelled to acknowledge that it: (1) includes provisions mandating that Petitioners provide medical treatment to low-income Ohio residents who meet the HCAP eligibility requirements set forth in the document; and (2) has been approved by the Secretary as an appropriate plan of medical assistance under Title XIX. App. 3a-9a.

Notwithstanding that Ohio's approved plan expressly includes provisions mandating care to HCAP patients, the D.C. Circuit reasoned these HCAP provisions are not "part" of the plan within the meaning of the Medicaid Low Income Proxy because they do not provide Petitioners with a right to receive payments from Medicaid for HCAP patient days. App. 4a-6a.

While the Opposition does not address the specific terms and provisions of Ohio's plan mandating medical assistance for patients who meet HCAP eligibility requirements, it also argues against this Court's review by contending that HCAP provisions included in the Ohio plan cannot be "part"

of the Ohio plan for purposes of the statute because these specific provisions do not provide Petitioners with a right to receive "financial support" from Medicaid for HCAP patient days. Opp. at 5.

The D.C. Circuit's holding and the Opposition's argument are incorrect for all the reasons identified in the Petition. But, for purposes of this Petition, the Court need only recognize that the D.C. Circuit's holding and the Opposition's argument are based on a restrictive revision of the actual statutory language "eligible for medical assistance under a State plan." Thus, the D.C. Circuit's opinion and the Opposition expressly confirm the statutory construction dispute at the heart of the case, the conflict engendered by the D.C. Circuit's opinion on that construction issue, and the need for this Court's intervention to give the statute its intended meaning.

B. There Is No Dispute That The D.C. Circuit Held That HCAP Patients Do Not Receive "Medical Assistance" Under Ohio's Medicaid Plan Because The Plan Does Not Provide Hospitals With A Right To Payment From Medicaid For HCAP Patients.

The Opposition next argues that review is not warranted because the D.C. Circuit correctly held that HCAP patients do not receive "medical assistance" under Ohio's plan. Opp. at 5. Once again, however, the Opposition's argument amounts to nothing more than an assertion that the D.C. Circuit's opinion is correct and that "medical assistance" must be defined restrictively to cover

only a payment made to a hospital from a State Medicaid program.

As the Petition notes, there are a number of problems with this restrictive construction of "medical assistance." Pet. at 23-26. To begin with, nothing in the text of the Medicaid Low Income Proxy or any other part of the Medicare statute dictates that the term "medical assistance" be defined strictly in terms of a payment made to a hospital by a State Medicaid program.

Moreover, a court cannot simply borrow the statutory definition of "medical assistance" set forth in the Medicaid statute and impose that definition on the text of the Medicare DSH adjustment, as the D.C. Circuit and the Opposition assume. Medicare and Medicaid are separate programs with different goals and different standards governed by different statutes. Pet. 23-25. Congress's decision to enact the Medicaid Low Income Proxy without defining "medical assistance" or cross-referencing the definition provided in the Medicaid statute strongly suggests that Congress did not intend for the term to be construed in a narrow or technical fashion using a definition borrowed from another statute.

Finally, case law likewise recognizes that the Medicare and Medicaid statutory schemes should not be conflated. Pet. 23 & n.3 (citing cases). In particular, the narrow construction of "medical assistance" advanced by the Secretary and embraced by the D.C. Circuit conflicts with cases such as *Jewish Hospital*, which have held that a patient could be eligible for "medical assistance" under an approved State Medicaid plan even when the patient's treatment was not eligible for "payment"

from the Medicaid program. *See* Pet. at 25-26 & n.4 (discussing the relevant case law and noting that certain Medicare regulations belie the D.C. Circuit's narrow construction of "medical assistance" as covering only those patient days when payments are made by Medicaid to hospitals).

The Opposition does not respond in any meaningful way to the relevant judicial decisions or agency pronouncements. It simply asserts, based on a *different* line of cases (including *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)), that the Medicaid Low Income Proxy's reference to medical assistance *must* be construed to carry the same meaning as the definition included in the Medicaid statute and that that construction can only cover payments from Medicaid itself. Opp. at 5-6.

Yet, *Stroop* and the other authorities referenced do not dictate that the Medicaid Low Income Proxy's reference to "medical assistance" must be construed so narrowly. And, even if these authorities could be invoked to support the D.C. Circuit's restrictive construction, the Opposition's reliance on these cases only underscores the need for this Court to reconcile the dramatically different approaches taken by the federal courts when construing the Medicare and Medicaid statutes.

C. There Is No Dispute That Four Other Circuits Have Construed The Same Statutory Text As Requiring The Inclusion Of All Days Attributable To Patients Who Receive Medical Assistance Under An Approved State Plan, Regardless Of Whether Payment Is Made For That Care By Medicaid.

The Opposition lastly argues that "the decision below does not conflict" with any of the four decisions cited [in the Petition]" because there was "no dispute" in those cases that the hospitals were providing services to patients who were eligible for medical treatment under an approved State Medicaid plan. Opp. at 7-8. This argument is demonstrably wrong.

The four cases cited in the Petition each turned on the construction of the same statutory phrase at issue here—"eligible for medical assistance under a State plan"; they each involved issues and arguments that are indistinguishable from those raised here; and they each reached conclusions concerning the meaning of the statute that conflict with the D.C. Circuit's restrictive construction of the statute.

The Opposition acknowledges that *Jewish Hospital*, *Deaconess*, *Legacy Emanuel Hospital*, and *Cabell*, each involved plaintiff hospitals that, like Petitioners, had provided care to patients pursuant to State Medicaid plans that imposed "limits on payments" that hospitals could receive for providing services. Opp. at 7-8. And, the Opposition further admits that, as in this case, the plaintiff hospitals sued the Secretary, arguing that the Medicaid Low

Income Proxy unambiguously required the Secretary to count *all* days spent providing medical treatment to patients who were eligible to receive that treatment "under" the terms of an approved State Medicaid plan, regardless of whether the plan provided for a payment from Medicaid. *Id.*

In each case, the Secretary also argued, as here, that: (1) the statutory phrase "eligible for medical assistance under a State plan" should be construed restrictively and (2) patients were "eligible" for medical assistance "under" the State plan if and only if the patient's medical treatment was eligible for payment from Medicaid itself under the terms of the plan. And, in each case, the Secretary's restrictive reading was rejected. *E.g., Jewish Hospital*, 19 F.3d at 273-76.

Moreover, in this case, the district court also rejected the Secretary's argument based on the same reading of the statute adopted in *Jewish Hospital* and the other cases cited in the Petition. And like these courts, the district court recognized that this reading was consistent not only with the statutory language, but also the overarching intent of Congress in enacting a statutory formula for Medicare DSH adjustments including the Medicaid Low Income Proxy—namely, to measure all low income patients served by a hospital and provide an adjustment to Medicare payments based on that service.

The significant and material difference now—the one that warrants this Court's attention—is that the D.C. Circuit did not join the other courts, but instead rejected their reasoning in a way that is irreconcilable with their construction of the

statutory language "eligible for medical assistance under a State plan." Given the D.C. Circuit's restrictive reading of the statutory phrase, it is clear that the circuit courts are in conflict over how to construe the Medicaid Low Income Proxy and calculate the Medicare DSH adjustment. They also conflict directly in their recitations of the policies Congress intended to further when enacting the Medicaid Low Income Proxy. The conflict among the circuit courts, therefore, is real, material, and will be outcome determinative in a particular case—just as it was here. This Court's review, accordingly, is needed so that benefit payment decisions will be resolved in the same way for similarly situated providers under various State Medicaid plans.

CONCLUSION

The Circuits have adopted conflicting constructions of the statutory phrase "eligible for medical assistance under a State plan" and thus disagree on how the Medicaid Low Income Proxy should be calculated. This case provides an ideal vehicle for resolving that conflict and ensuring that the Medicaid Low Income Proxy is calculated in a manner that is uniform and consistent with the words and policies adopted by Congress. Accordingly, Petitioners urge this Court to grant the Petition.

Respectfully submitted,

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