No. 08-564

In the Supreme Court of the United States

COOKEVILLE REGIONAL MEDICAL CENTER, ET AL., PETITIONERS

v.

CHARLES E. JOHNSON, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a court may apply an ambiguous statute in a manner consistent with a later-enacted statute clarifying the earlier statute's meaning consistent with this Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and regulations–Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 531 F.3d 844. The order and memorandum of the district court (Pet. App. 12a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2008. On September 15, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 27, 2008, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the interaction of the Medicaid and Medicare programs.

a. Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.*, is commonly referred to as the Medicaid Act. To participate in the Medicaid program, a State develops a plan that specifies the categories of eligible individuals who will receive medical assistance and the specific kinds of medical care and services that will be covered. See 42 U.S.C. 1396a. The Medicaid statute establishes certain plan limitations (*ibid.*), including limitations on who can be eligible for benefits under a state plan, such as income and resource limits. See, *e.g.*, 42 U.S.C. 1396a(a)(10)(A)(i)(IV), (VI) and (VII).

Section 1115 of the Social Security Act also authorizes demonstration projects to allow States to explore innovative health-care initiatives that the Secretary determines are "likely to assist in promoting [Medicaid] objectives." 42 U.S.C. 1315(a). Individuals who are not eligible for Medicaid, but who are eligible for benefits under a demonstration project approved under Section 1115, are referred to as expansion populations.

b. The Medicare program provides payments for medical services for the elderly and disabled. 42 U.S.C. 1395c *et seq.* The operating costs of inpatient hospital services are paid primarily under the Prospective Payment System (PPS), 42 U.S.C. 1395ww(d), calculated in light of certain hospital-specific factors. This case involves one of those hospital-specific adjustments, the Medicare disproportionate share hospital (Medicare DSH) adjustment. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 9105, 100 Stat. 158.

The Medicare DSH adjustment provides increased PPS payments to hospitals that serve a "significantly disproportionate number of low-income patients." 42 U.S.C. 1395ww(d)(5)(F)(i)(I). The calculation of a DSH adjustment depends in part on what is known as the Medicaid fraction, which is defined as:

> the fraction (expressed as a percentage), the numerator of which is the number of the hospital's patient days for such period which consist of *patients who (for such days) were eligible for medical assistance under a State plan approved under subchapter XIX of this chapter* [*i.e.*, the Medicaid program], but who were not entitled to benefits under part A of this subchapter [*i.e.*, the Medicare program], and the denominator of which is the total number of the hospital's patient days for such period.

42 U.S.C. 1395ww(d)(5)(F)(vi)(II) (emphasis added).

2. Prior to January 2000, the Secretary, in determining the Medicare DSH adjustment, excluded expansion populations in calculating the Medicaid fraction. Those populations were not "patients entitled to Medicaid" but instead received benefits pursuant to a demonstration project under Section 1315. 42 C.F.R. 412.106(b)(4) (1996); 51 Fed. Reg. 16,777 (1986) (including only those patients "entitled to" Medicaid).

In December 1999, the Secretary determined that it was "necessary to clarify the definition of eligible Medicaid days" for purposes of the Medicare DSH because some fiscal intermediaries had made "Medicare DSH adjustment payments * * * attributable to the erroneous inclusion of * * * ineligible * * * demonstration population days in the Medicaid days factor." Cookeville C.A. App. 106, 108 (Program Memorandum

Transmittal No. A-99-62). The Secretary observed that those intermediaries had erred, but held harmless those hospitals that had already received incorrect Medicare DSH payments. *Id.* at 108. On the other hand, where hospitals had not received such incorrect payments or had not previously filed an appeal on the issue, the Secretary declined to make hold-harmless payments. *Ibid.*

On January 20, 2000, the Secretary promulgated a formal rule addressing the issue and changing her policy, but doing so only prospectively. That rule prospectively allowed "hospitals to include the patient days of all populations eligible for Title XIX matching payments in a State's Section 1115 waiver in calculating the hospital's Medicare DSH adjustment." 65 Fed. Reg. 3136 (2000); 42 C.F.R. 412.106(b)(4)(ii) (2000). In issuing the rule, the Secretary explained that prior to the change, "[u]nder current policy * * * expanded eligibility groups [under Medicaid demonstration projects] * * * were not to be included in the Medicare DSH calculation." 65 Fed. Reg. at 3136.

3. In 2002, hospitals in Oregon challenged the Secretary's pre-2000 policy of excluding expansion populations from the calculation of the Medicare DSH. The Ninth Circuit in *Portland Adventist Medical Center* v. *Thompson*, 399 F.3d 1091, 1096 (2005) (*Portland Adventist*), declined to defer to the Secretary's pre-2000 policy and held that excluding expansion populations was inconsistent with the plain language of the DSH statute. In response to *Portland Adventist* and related litigation, Congress enacted Section 5002 of the Deficit Reduction Act of 2005 (DRA), Pub. L. No. 109-171, 120 Stat. 31, which is entitled a "Clarification of Determination of Medicaid Patient Days for DSH Computation."

Section 5002(a) amended the Medicare DSH statutory language to state that the Secretary has discretion to include or exclude demonstration project beneficiaries in the Medicare DSH. See DRA § 5002(a), 120 Stat. 31 (Pet. App. 51a) ("[T]he Secretary may, to the extent and for the period the Secretary determines appropriate, include patient days of patients not so eligible but who are regarded as such because they receive benefits under a demonstration project."). Section 5002(b) also ratified the regulations the Secretary had promulgated in January 2000—expressly "including the policy in such regulations regarding discharges occurring prior to January 20, 2000," under which the Secretary excluded the expansion populations from the Medicare DSH calculation. DRA § 5002(b)(3), 120 Stat. 31 (Pet. App. 52a).

4. Petitioners are hospitals located in Tennessee, each of which seeks to have patient days attributed to expansion populations included in the Medicaid fraction of the Medicare DSH calculation for cost years prior to January 20, 2000. Pet. App. 13a. None of the hospitals qualified for the Secretary's hold-harmless policy, *i.e.*, none of them had sought or received erroneous DSH payments for expansion populations prior to the Secretary's issuance of the October 1999 Program Memorandum. Petitioners' cases were pending when the DRA was enacted in February 2006. *Id.* at 15a.

a. The district court ruled prior to the DRA that the plain language of the Medicare DSH provision included the expansion populations, Pet. App. 30a-47a, but it reconsidered that ruling after the DRA's enactment. *Id.* at 13a-29a. The court held that the DRA applied to this case and required dismissal of petitioners' claims. The court explained that in spite of the DRA's express status as a "clarification" of existing law, the court "remain[ed]

of the view that the DSH formula, as it existed [prior to the enactment of the DRA,] * * * expressly included expansion populations." *Id.* at 23a. The court nonetheless explained that "[t]he DRA's double-barreled approach * * * 'clarifying' the DSH formula while 'ratifying' agency action that, if Congress were right, would not need to be ratified—resolves this problem by giving the court two paths to the same result." *Id.* at 27a.

b. The court of appeals affirmed. Pet. App. 1a-11a. It concluded that the Medicare DSH and demonstration project provisions of the Social Security Act, prior to enactment of the DRA, were "unclear * * * [as to] whether the Secretary had discretion to exclude the expansion waiver population from the disproportionate share hospital adjustment." *Id.* at 10a. The court held that Section 1315 plausibly gave the Secretary "discretion * * * to determine which costs or how much of the costs are to be treated as expenditures," including "discretion to limit a hospital's reimbursement" under the Medicare DSH. Pet. App. 9a. The court further observed that the Secretary had "acted as though the statute granted discretion," because she "chose to issue policies rather than regulations and to base them on practical concerns instead of statutory constraints." *Id.* at 10a. The court concluded that the DRA "did not retroactively alter settled law" but "simply clarified an ambiguity in the existing legislation." *Ibid.* Accordingly, the court held that "[i]t follows that there is no problem of retroactivity." *Ibid.*

ARGUMENT

Petitioners have not identified a conflict in the circuits on the issue actually addressed by the decision below, and the court of appeals correctly held that the DRA raises no retroactivity issues under *Landgraf*.

Moreover, the DRA expressly ratified the Secretary's exercise of discretion under governing regulations during the pre-2000 period at issue here. Accordingly, further review is not warranted, especially because the technical Medicare provisions at issue address a closed time period that ended with the enactment of the DRA in February 2006.

1. The court of appeals correctly concluded that the pre-DRA statute governing the DSH adjustment law was ambiguous as to whether the Secretary had discretion to exclude expansion populations from the Medicare DSH. Pet. App. 9a. That law provided that the DSH adjustment had to reflect patients who "were eligible for medical assistance * * * under a state plan approved under [Medicaid]." 42 U.S.C. 1395ww(d)(5)(F)(vi)(II). The Secretary reasonably construed that language to mean that the DSH adjustment may count only those patients who were Medicaid eligible, and patients included in expansion populations undisputably are not Medicaid eligible. As the court of appeals explained, the demonstration project statute, 42 U.S.C. 1315(a)(2)(A), may be read as "a grant of discretion * * * to limit a hospital's reimbursement for the expansion waiver population, rather than permitting the hospital to seek the [DSH] adjustment." Pet. App. 9a-10a. Given the ambiguity in the prior law, the court of appeals properly held that "it follows that there is no problem of retroactivity" because the DRA "simply clarified an ambiguity in the existing legislation." *Id.* at 10a.

The court of appeals also properly looked to the DRA in construing the earlier legislation. As this Court has held, when Congress passes "[s]ubsequent legislation declaring the intent of an earlier statute," the new enactment should be accorded "great weight in statutory

construction" of the earlier enactment. *Loving* v. *United States*, 517 U.S. 748, 770 (1996) (brackets in original) (quoting *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980)). Accordingly, the court of appeals correctly relied upon the DRA clarification in determining whether the preexisting DSH provision conferred discretion on the Secretary to exclude expansion populations.

2. Petitioners argue that certiorari is warranted because "the circuits have taken different approaches to whether a conclusion that legislation is a 'clarification' avoids [a] retroactivity analysis" under *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). Pet. 14. There is, however, no conflict in the circuits on the specific ruling by the court of appeals, *i.e.* that the DRA raised no retroactivity concerns because it did not alter the prior law giving the Secretary the discretion to exclude expansion populations in calculating the DSH adjustment. A necessary prerequisite to engaging in the *Landgraf* analysis is that there be a "change in the law," *i.e.*, a "new provision [that] attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. If prior law was ambiguous as to the legal consequences of past events, clarification of those consequences—whether by Congress or a court—does not work a change in the law.

Petitioners' retroactivity claims rest on the premise that "the pre-Act law clearly required inclusion of the expansion waiver patients in the [DSH] adjustment." Pet. App. 8a. The court of appeals rejected that premise (*ibid.*), and thus concluded that there was no change in the law that would have otherwise triggered a retroactivity inquiry.

There is similarly no merit to petitioners' contention that this Court's review is warranted to address a pur-

ported circuit conflict "over whether reliance on prior law is a prerequisite for application of the presumption against retroactivity." Pet. 27. The court of appeals did not address that issue, much less hold that reliance is necessary to trigger a retroactivity analysis. Rather, the court of appeals merely noted the absence of reliance concerns in this case because the Secretary's pre-DRA policy was to exclude expansion populations in the DSH calculation. Pet. App. 8a. That factual observation does not purport to *require* that reliance be shown.

3. In any event, review is not warranted for the additional, independent reason that Congress clearly intended the DRA to have retroactive effect. If the language of "the statute in question is unambiguous" with regard to retroactivity, its "potential unfairness * * * is not a sufficient reason for a court to fail to give a statute its intended scope." *Landgraf*, 511 U.S. at 267, 273. Congress must simply "first make its intention clear" to "ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Id.* at 268. In this case, as the district court concluded, to the extent the DRA constituted a change in the law, Congress made it "clear that [it] did intend this change to apply retroactively." Pet. App. 25a. As the court observed, the DRA ratified the Secretary's pre-2000 exclusionary policy, thus unambiguously expressing congressional intent that the Secretary had the authority to apply his pre-DRA policy to pending cases. *Id.* at 26a-27a; see p. 5, *supra*. That conclusion is fatal to petitioners irrespective of the other points argued in their petition. Accordingly, review by this Court is not warranted because Congress clearly and unequivocally intended the law to apply to the past transactions at issue here.

4. The Court's review finally is unwarranted because the court of appeals' decision affects a limited and confined set of cases. The holding of the court of appeals applies only to those DSH determinations made by the Secretary before he changed his policy in 2000. Pet. App. 5a. Since 2000, the Secretary has *included* expansion populations in the DSH formula. *Ibid.* And the DRA now expressly gives the Secretary the discretion to either include or exclude those populations. *Id.* at 6a. Accordingly, the Secretary's pre-DRA authority to exclude expansion populations is not an issue of ongoing and recurring importance that would warrant this Court's plenary review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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