No. 01-1495

In the Supreme Court of the United States

JORDAN HOSPITAL, INC., PETITIONER

v.

TOMMY G. THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the dismissal of petitioner's complaint because it did not allege a colorable due process claim.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 276 F.3d 72. The opinion of the district court (Pet. App. 14a-19a) in unreported.

JURISDICTION

The judgment of the court of appeals was entered January 10, 2002. The petition for a writ of certiorari was filed on April 10, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Medicare Act, Tit. XVIII, 42 U.S.C. 1395 *et seq.*, provides health insurance for the nation's aged and

disabled. Hospitals that choose to participate in the Program are reimbursed for medical services they provide, limited to rates established in advance under the Prospective Payment System (PPS). Under the PPS, payment levels for each diagnostic related group are determined on the basis of the standardized rate and the wage index, which are based on the hospital's geographic location. 42 U.S.C. 1395ww(d).

Congress recognized that certain hospitals pay higher wages, comparable to those prevailing in adjacent wage index areas, in order to attract qualified employees. Congress accordingly directed the Secretary of Health and Human Services to allow hospitals, on an annual basis, to apply for reclassification for wage index purposes to adjacent wage index areas. 42 U.S.C. 1395ww(d)(10). A hospital qualifies for reclassification if its average hourly wage (AHW) is at least 108% of the AHW of hospitals in the area in which it is actually located, and at least 84% of the AHW of the hospitals in the area to which it seeks reclassification. 42 C.F.R. 412.230-412.280.

A hospital seeking reclassification for a fiscal year is required to submit its application to the Medicare Geographic Classification Review Board (Board) in the Department of Health and Human Services "not later than the first day of the 13-month period ending on September 30 of the preceding fiscal year." 42 U.S.C. 1395ww(d)(10)(C)(ii). If dissatisfied with the Board's decision, the hospital may seek administrative review by the Secretary, whose final decision "shall not be subject to judicial review." 42 U.S.C. 1395ww(d)(10)(C)(iii)(II).

2. Petitioner is a provider located in Plymouth, Massachusetts. For fiscal years 1998 and 1999, petitioner timely, and successfully, applied to the Board for

reclassification, for wage index purposes, to the Cape Cod, Massachusetts, Metropolitan Statistical Area. The statutory deadline for an application for reclassification for fiscal year 2000 was September 1, 1998. Petitioner did not file a timely application for reclassification for fiscal year 2000, however, because the hourly wage rate data published in the *Federal Register* indicated that petitioner would not have qualified. Those wage data were inaccurate because a participating hospital in the Cape Cod, Massachusetts, Metropolitan Statistical Area, the Cape Cod Hospital, had submitted erroneous wage data to the Health Care Finance Administration (HCFA). Pet. App. 2a-5a.[1]

On August 17, 1999, petitioner filed an untimely application for reclassification. Pet. App. 58a. The Board dismissed the application. *Id.* at 71a. HCFA affirmed the dismissal. *Id.* at 111a.

3. Petitioner thereafter brought the instant lawsuit, invoking the district court's federal question jurisdiction under 28 U.S.C. 1331. Pet. App. 46a. Petitioner alleged, inter alia, that HHS's "general policies and procedures for geographic reclassification determinations related to wage data" violated its due process rights. *Id.* at 54a. Petitioner sought declaratory and injunctive relief that would require the Board to reopen the proceedings and reconsider petitioner's reclassification application for fiscal year 2000. *Id.* at 55a-56a.

The district court granted the government's motion to dismiss, holding that the relief sought by petitioner "falls within the statutory ban on judicial review" under 42 U.S.C. 1395ww(d)(10)(C)(iii)(II). Pet. App. 19a.

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[1] HCFA has been renamed the Centers for Medicare and Medicaid Services. In keeping with the court of appeals' opinion and the petition, we continue to refer to HCFA in this brief.

4. The court of appeals affirmed. Pet. App. 1a-13a. The court held that Section 1395ww(d)(10)(C)(iii)(II) precluded petitioner's challenge to the agency's dismissal of its reclassification application. *Id.* at 8a. The court also rejected petitioner's attempt to avoid the statutory preclusion of judicial review by raising a constitutional challenge to HCFA's publication of erroneous information. The court concluded that petitioner's due process claim was not colorable and for that reason could not defeat the preclusion of judicial review under Section 1395ww(d)(10)(C)(iii)(II). *Ibid.* The court found that "HCFA's regulatory scheme provides hospitals with a meaningful opportunity to be heard on reclassification, and accords them sufficient procedural protections. *Id.* at 9a.

ARGUMENT

1. The Secretary's decision denying a reclassification application "shall be final and shall not be subject to judicial review." 42 U.S.C. 1395ww(d)(10)(C)(iii)(II). The court of appeals accepted the proposition that Section 1395ww(d)(10)(C)(iii)(II) does not foreclose "colorable" constitutional claims but held that petitioner's claim was not colorable. Pet. App. 8a-9a. Petitioner urges (Pet. 8-16) the Court to grant certiorari because, in considering whether petitioner's claim was colorable, the court of appeals measured the sufficiency of petitioner's allegations under the failure-to-state-a-claim standard of Rule 12(b)(6) of the Federal Rules of Civil Procedure when it should have considered whether the claim was "so insubstantial, implausible, * * * or otherwise completely devoid of merit as to not invoke a federal controversy." See Pet. App. 9a (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)).

That contention lacks merit. The court of appeals nowhere indicated that it was reviewing the sufficiency of petitioner's complaint under Rule 12(b)(6), and petitioner offers no basis for inferring any appreciable difference between an inquiry whether a claim is "colorable" and an inquiry whether a claim is "insubstantial," "implausible," or "completely devoid of merit." Indeed, the court of appeals can hardly be faulted for using the particular terminology of "colorable," since petitioner argued to the court of appeals that its complaint was not subject to Section 1395ww(d)(10)(C)(iii)(II) because the complaint raised "a *colorable* constitutional claim." Pet. C.A. Br. 34 (emphasis added); accord *id.* at 35 ("A colorable constitutional claim exists where the plaintiff alleges a violation of constitutional rights."); see also Pet. C.A. Reply Br. 10 n.6 ("[T]he standard applied [under Federal Rule of Civil Procedure 12(b)(6)] is the same as that used in a motion filed under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.").

2. In any event, petitioner's due process argument is not sufficiently plausible, under any test, to survive dismissal. Petitioner has no property interest in any particular level of prospective payments offered under the Medicare program. Although a hospital may have a judicially protected interest in receiving payments as set forth in the schedules published by HCFA, "there is nothing in the Medicare Act which would have led a reasonable [provider] to believe [that it] might be entitled to a greater payment * * * than was outlined in the Secretary's fee schedule. Nor is there anything in the Medicare Act that would have led a reasonable [provider] to believe [the fee schedule element] for a given year would be recalculated at a later date to correct for errors * * * or that * * * payments

would be recalculated and supplemented if necessary." *Painter* v. *Shalala*, 97 F.3d 1351, 1358 (10th Cir. 1996).

Moreover, the court of appeals correctly found that "HCFA's publication of erroneous data, while unfortunate, did not deprive [petitioner] of its rights." Pet. App. 9a. As the court explained, "HCFA takes significant steps to insure that the wage data obtained from hospitals subject to PPS are reasonably accurate. [Petitioner] could not realistically have assumed that the wage index information would always be accurate, and that if an error were found, it would be remedied in time to permit a reclassification request." *Id.* At 9a-10a (citation omitted). Further review of that holding, which does not conflict with any other decision, does not warrant this Court's review.[2]

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[2] The questions presented also set forth issues with respect to whether Section 1395ww(d)(10)(C)(iii)(II) permits equitable tolling or permits judicial review of a dismissal of a reclassification application that was not based on the merits of the application. See Pet. i (questions 3 and 4). The body of the petition, however, fails to develop any argument on those questions or otherwise present a basis for further review by this Court. In any event, the court of appeals properly rejected petitioner's arguments because they would defeat the fundamental purpose of Section 1395ww(d)(10)(C)(iii)(II) to permit the agency to publish final payment rates in a timely manner. See Pet. App. 8a, 13a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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