SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-225

TITLE OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., Petitioners V. MICHIGAN ACADEMY OF FAMILY PHYSICIANS, ET AL.

PLACE Washington, D. C.

DATE January 22, 1986

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -:

3 OTIS R. BOWEN, SECRETARY OF :

4 HEALTH AND HUMAN SERVICES, :

5 ET AL., :

6 Petitioners, :

7 v. : No. 85-225

8 MICHIGAN ACADEMY OF FAMILY :

9 PHYSICIANS, ET AL. :

10 -:

11 Washington, D.C.

12 Wednesday, January 22, 1986

13 The above entitled matter came on for oral

14 argument before the Supreme Court of the United States at

15 12:59 o'clock p.m.

16 APPEARANCES:

17 EDWIN S. KNEEDLER, Esq., Assistant to the Solicitor

18 General, Department of Justice, Washington, D.C.; on

19 behalf of the Petitioners

20 ALAN G. GILCHRIST, Esq., Detroit, Michigan; on behalf of

21 the Respondents

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Kneedler, I think

3 you may proceed whenever you are ready.

4 ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.

5 ON BEHALF OF THE PETITIONERS

6 MR. KNEEDLER: Thank you, Mr. Chief Justice,

7 and may it please the Court:

8 The question presented in this case is whether

9 respondents have a right to judicial review of matters

10 concerning the amount of benefits under Part B of the

11 Medicare program. Part B establishes a voluntary program

12 of supplementary medical insurance that pays in general

13 80 percent of the reasonable charge of physician services

14 and other services.

15 Part A of the program, which establishes the

16 basic hospital insurance program, is not directly

17 involved in this case. The principal relevance of Part A

18 here, however, is that under Part A Congress has

19 expressly provided for judicial review of benefit

20 determinations where the amount in controversy exceeds

21 $1,000, and this demonstrates that where Congress intends

22 to provide for judicial review under the Medicaid

23 program, it expressly does so.

24 Under Part B, however, Congress has not

25 affirmatively authorized judicial review. Four terms

1 ago, in United States versus Erika, this Court
2 unanimously held that by this omission Congress had
3 deliberately foreclosed judicial review.
4 The Court there relied on what Congress
5 perceived to be the relatively insubstantial amount of
6 money involved in the typical Part B claim. The Court
7 adhered to this view of reviewability under Part B just
8 two terms ago in Heckler versus Ringer.
9 Although Congress has extensively revised the
10 Part B program in a number of respects since Erika was
11 decided, it has not enacted legislation to overrule that
12 decision. Bills have been introduced to accomplish that
13 result, however, and as we point out in our reply brief
14 the committee reports on those bills demonstrate
15 Congress's understanding that under existing law judicial
16 review is entirely foreclosed under Part B.
17 In these circumstances we believe it would be
18 especially prudent for the Court to adhere to its rulings
19 in Erika and Ringer and leave to Congress, which is
20 studying the matter, the question of whether exceptions
21 should be carved out to that preclusion.
22 QUESTION: Mr. Kneedler, do you think that
23 constitutional challenges to the application of the
24 Secretary's guidelines concerning Part B can be
25 challenged in court?

1 MR. KNEEDLER: Well, as we pointed out in our
2 brief, of course we think that issue is not presented
3 here because the particular ---
4 QUESTION: Well, they've certainly made a
5 constitutional claim.
6 MR. KNEEDLER: They have made a constitutional
7 claim, but it is our submission, for the reasons we have
8 stated in the brief, that it is so insubstantial as not
9 to vest the Court with subject matter jurisdiction under
10 the rationale that the Court disposed of the
11 constitutional claim in Ringer itself.
12 We think that's so because the regulation
13 that's being challenged simply authorizes the
14 establishment of separate charge screens, or prevailing
15 charge screens, based on the charging patterns that exist
16 in the community, and where a carrier implements that
17 principle and adopts separate prevailing charge screens
18 that are simply based on the charging patterns in the
19 community, we think that that can in no way be thought to
20 be so utterly lacking in rational justification under
21 Flemming versus Nestor as to --
22 QUESTION: Well, it did -- it did appear to me,
23 anyway, that the plaintiffs below made three different
24 kinds of challenges. One was to the carrier's
25 utilization and application of the Secretary's rules on

1 Part B, and second was a challenge to the Secretary's
2 regulations themselves, and an allegation that the
3 Secretary's regulations did not meet the statutory
4 requirements that Congress had laid down, and third, a
5 constitutional challenge.

6 Now, do you think that Erika precludes the
7 constitutional challenge? I guess you think not, but you
8 think it's insubstantial?

9 MR. KNEEDLER: Well, yes. Erika, we think,
10 didn't address it because there was not a constitutional
11 question raised.

12 QUESTION: What about an allegation that the
13 regulations of the Secretary simply don't conform to the
14 statute?

15 MR. KNEEDLER: On that question, we think tha
16 judicial review is plainly foreclosed. In Erika -- Erika
17 itself involved a challenge to instructions from the
18 Secretary that is, insofar as the carrier is concerned,
19 there is binding regulations, and the Court --

20 QUESTION: The language in Erika doesn't make
21 too clear that that was intended.

22 MR. KNEEDLER: But the Court of Claims decision
23 in Erika, however, at pages 590 to 591 of 634 F. 2d do
24 discuss the carrier's challenge to the intermediary
25 letter upon which the carrier relied and also several

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1 additional letters implementing that, and the Court of
2 Claims did review the carrier's -- the question of the
3 carrier's reliance on those letters and held that they
4 were not avalid basis for the carrier to deny claims.

5 QUESTION: Well, why would a challenge to the
6 regulation as not meeting the statutory requirement be a
7 burden to the Court such as review of the typical Part B
8 benefit claim?

9 MR. KNEEDLER: Well, the typical Part B benefit
10 claim might well often include a challenge to a
11 regulation or instructions or legal principles upon which
12 the carrier relied, and it would not be difficult for a
13 claimant to allege that. And I would point out that
14 there are now over 300 million claims a year filed under
15 the Part B program and more than 30 million enrollees, so
16 the potential for bringing these questions into court is
17 rather substantial, in our view.

18 Also, the premise of Erika that Congress has
19 precluded judicial review of matters concerning the
20 amount of benefits extends not simply to the factual
21 determinations but to the legal ones as well, because a
22 decision on a claim for benefits is really analogous to a
23 court's judgment which includes not simply findings of
24 fact but the application of law to it, and so where
25 Congress has precluded review of a decision concerning

1 the amount of benefits, that necessarily includes the
2 legal rules that the carrier has applied in arriving at
3 that determination.
4 As we have pointed out in our brief from the
5 beginning, the regulations governing the carrier hearing
6 program have provided that the carrier's decision on a
7 claim for benefits is final and binding and it is not
8 subject to further review, and that the carrier is to
9 adhere to the Secretary's view of the meaning of the
10 statute and regulations.
11 Putting these together, we think it's quite
12 clear that the preclusion of review of amount of benefits
13 under Part B includes questions of law or regulations.
14 One other point I'd like to make in this regard
15 is if the Secretary had never issued the regulation
16 involved in this case, and the carrier had simply relied
17 on its own interpretation of the statute, that it's clear
18 that judicial review would be precluded under the
19 rationale of Erika because there in Erika as here, there
20 was a statutory challenge to the prevailing fee
21 limitation that the carrier was using.
22 In fact, it was a challenge based on the very
23 same sentence of the Act upon which respondents rely in
24 this case. All that has happened here is that the
25 Secretary has given some interpretive guidance to the

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1 carriers explaining what he understands the Act to mean,
2 but the issuance of a regulation should not in our view
3 provide a vehicle for judicial review.
4 QUESTION: What if the Secretary promulgated a
5 regulation abolishing carrier review entirely? Would
6 that be reviewable, do you suppose -- just said it cost
7 too much money?
8 MR. KNEEDLER: Well, I guess at some point the
9 Secretary's actions would be so far removed from the
10 administration of the program and --
11 QUESTION: Do you think that would be -
12 reviewable?
13 MR. KNEEDLER: I would hesitate to give a
14 definitive answer, but I would think it might well be
15 because for one thing it doesn't really concern the
16 amount of benefits or --
17 QUESTION: Well, let's say he just abolished
18 carrier reviews for certain kinds of injuries, broken
19 legs or something, no carrier review in certain kinds of
20 injuries. Would that be reviewable?
21 MR. KNEEDLER: Well, it may well be, but
22 because the Secretary would not be giving directions on
23 how to adjudicate particular claims --
24 QUESTION: The argument would be, he's not
25 complying with the statute?

1 MR. KNEEDLER: No, it would be beyond that.
2 That would be, among other things, collateral to the
3 substantive determination of the claim and the amount of
4 the claim.
5 QUESTION: But the particular claimant wouldn't
6 get his broken leg paid for. I mean, whatever category
7 of review you take out, you know, it would affect some
8 claims.
9 MR. KNEEDLER: It will effect the claim, but
10 what we have here is something that goes directly to the
11 amount of benefits which is at the core of what Congress
12 has precluded. It's what 1395 FF affirmatively
13 authorizes review of under Part A and hence precludes
14 review of under Part B.
15 The prevailing fee limitation is an essential
16 element in the calculation of the reasonable charge, and
17 claimant cannot separate out that particular issue, legal
18 issue of the prevailing charge.
19 QUESTION: In other words, the scope of your
20 position is that whatever is authorized under A is
21 necessarily forbidden under B, but something that's
22 forbidden under both, you could review under B?
23 MR. KNEEDLER: Well, that is essentially our
24 position. The abolishment of the claims adjudication
25 process is not an issue that arises in the adjudication

1 process itself. It's wholly external to it. And once
2 you get out of the claims adjudication process, then the
3 argument for judicial review might be stronger.
4 But the principle that we're relying on, and
5 it's not just in the Medicare program but it's reflected
6 more broadly in Section 405-H of the Act, is that in the
7 Social Security Act Congress has carefully considered
8 when it wants to have judicial review. It affirmatively
9 authorizes it typically by incorporating Section 405-G,
10 the provision for judicial review in District Court.
11 QUESTION: Mr. Kneedler, Erika said it didn't
12 rely on 405-H.
13 MR. KNEEDLER: That's correct.
14 QUESTION: Does that mean it's open to us to
15 hold that 405-H just precludes review of claims for which
16 review is available under 405-G?
17 MR. KNEEDLER: No, I think not. I think Ringer
18 forecloses that argument. In Ringer the argument was
19 made that because the one claimant, Ringer, had not
20 submitted a claim for benefits and therefore could not
21 get into the claims adjudication process that culminates
22 in 405-G, that he should have a right of action under the
23 general type of question jurisdiction, 1331, the argument
24 being that 405-H shouldn't preclude review where it's not
25 available under the Act.

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1 And the Court rejected that proposition, saying
2 that the scope of 405-H does not expand or contract
3 depending upon whether review is otherwise available. In
4 fact, the whole purpose of 405-H is to preclude review
5 except where Congress has provided for judicial review.
6 This, we have shown in our brief particularly
7 by reference to the legislative history of the enactment
8 of 405-H. The second sentence of that provision says
9 that no findings or decisions of the Secretary shall be
10 reviewed by any tribunal except as herein provided,
11 referring to Section 405-G, and under the Part B program
12 the carrier acts as the Secretary's agent and as the
13 Court recognized in Erika, the Secretary is the real
14 party in interest on an issue arising under Part B.
15 QUESTION: Mr. Kneedler, in Ringer it seemed to
16 me the claimants could obtain judicial review as provided
17 under 405-G, and that just isn't the case here so I
18 suppose we haven't technically answered that.
19 MR. KNEEDLER: Well, the one claimant had not
20 filed a claim and therefore was not within the judicial
21 review -- the administrative review process that would
22 culminate in Section 405-G, and he was saying that
23 because 405-G was not available, that federal question
24 jurisdiction should be available.
25 QUESTION: Well, he hadn't had the operation,

1 either.

2 MR. KNEEDLER: He hadn't had the operation, but

3 that was simply --

4 QUESTION: All he had to do was get the

5 operation, file a claim, and he would have review. He

6 just couldn't afford it, but that's --

7 MR. KNEEDLER: Well, that's right, but the

8 Court made the point that a court cannot essentially

9 issue a declaratory judgment under the 1331 jurisdiction

10 to expound on a legal issue arising under the Medicare

11 program.

12 The legal issues have to be taken to court, if

13 at all, under 405-G and that's -- the same principle

14 applies here. Congress has not permitted the courts to

15 grant declaratory judgments or injunctive relief under

16 the general grant of federal question jurisdiction.

17 It has provided a review mechanism, but unlike,

18 under the Part A program involved in Ringer, Congress has

19 withheld judicial review. And the third sentence --

20 QUESTION: Excuse me. You say they have

21 provided a review mechanism for the claim, the doctors --

22 MR. KNEEDLER: Before the carrier.

23 QUESTION: But how can these doctors assert

24 that claim?

25 MR. KNEEDLER: A doctor can assert a claim

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1 before the carrier if he accepts assignment from the Part
2 B beneficiary. The doctor's rights are then entirely
3 derivative of those of the patient and he can submit a
4 Part B claim to the carrier.
5 QUESTION: Mr. Kneedler, will you clarify for
6 me why the difference between Part A and Part B review is
7 so significant? Part A provides very substantial review.
8 MR. KNEEDLER: It does.
9 QUESTION: Judicial review, and my
10 understanding is, Part A provides for reimbursement of
11 hospitals.
12 MR. KNEEDLER: That's correct.
13 QUESTION: Why the difference?
14 MR. KNEEDLER: Well, it was Congress's judgment
15 in enacting the Medicare program that Part A was
16 typically going to involve much greater amounts of money
17 in a typical claim.
18 QUESTION: Part B would involve greater amounts
19 of money?
20 MR. KNEEDLER: No, Part A. I'm sorry. Part B,
21 a claim can consist of nothing more than a claim for a
22 doctor's visit which can be $10 or $15, and Congress was
23 concerned about flooding the courts with these relatively
24 insignificant claims, whereas a hospital visit is likely
25 to give rise to a substantial medical bill.

1 And Congress did provide for judicial review,
2 but significantly it limited it to situations in which
3 there's $1,000 or more in controversy. In this case, the
4 district court allowed review apparently without regard
5 to any amount of controversy.
6 Indeed, the one beneficiary who is a plaintiff
7 in this case, the practical difference, the difference in
8 reimbursement levels that's at issue here is about $1.60
9 an office visit. It seems to us that this is precisely
10 the sort of minor reimbursement dispute that Congress
11 wanted to keep out of the courts.
12 As we point out in our brief, also the bills
13 that are pending before Congress now would make the Part
14 B review provisions parallel to those under Part A and
15 allow for judicial review only where there is that $1,000
16 in controversy.
17 QUESTION: Do you think it's open for the
18 Secretary to provide by regulation for administrative
19 review of claims like this under Part B?
20 MR. KNEEDLER: It may well be. There are
21 existing mechanisms for the Secretary to review, not in
22 every case but the Secretary has a quality review
23 mechanism whereby a sample of the carrier's cases are
24 reviewed periodically.
25 QUESTION: What is the mechanism in place now

1 to review a carrier's development of guidelines or rules
2 to govern how physicians' services are going to be
3 compensated?

4 MR. KNEEDLER: There are several. There is an
5 annual evaluation of the carrier's performance that is
6 conducted by the -- that is conducted by HCFA, the Health
7 Care Financing Administration, which is an assessment of
8 the carrier's overall performance.

9 This is discussed at some length in our briefs
10 in McClure four terms ago. One aspect of that, and it's
11 discussed in the testimony in the record in this case,
12 was that there was an evaluation of the prevailing charge
13 levels that the carrier uses, not necessarily poring over
14 the statistical data but just making sure that the
15 carrier is using the right approach in evaluating that
16 question.

17 The other form of oversight is, as I mentioned,
18 quarterly quality reviews of the carrier's performance by
19 individual hearing officers. Another mechanism available
20 to a person affected by the Part B program would be to
21 file, and particularly in this case where there's a
22 regulation of the Secretary, would be to file a
23 rule-making petition with the Secretary. If the
24 respondents in this case believe that in fact the data
25 now supports elimination of any differential in charging

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1 patterns based on specialty, that a petition for
2 rulemaking could be submitted to the Secretary along with
3 relevant supporting data.

4 So, there are mechanisms that can be resorted
5 to, and along these same lines Congress had last year
6 commissioned a study by the Office of Technology
7 Assessment which we also point out in our brief under the
8 Deficit Reduction Act of 1984, to study the differences
9 in charge levels for physicians' services according not
10 only to specialty differences but the locality and the
11 type of service.

12 So, there's also rather extensive congressional
13 oversight of the way in which the Part B program is
14 administered.

15 QUESTION: But the question here is so basic.
16 It's an allegation that the statute says if the services
17 provided by the physicians are identical, that no
18 different level of compensation is permitted, based on
19 specialization, and that's a pretty basic question, isn't
20 it?a

21 MR. KNEEDLER: Well, what the statute says is
22 that the reasonable charge cannot exceed 75 percent of
23 the customary charges for similar services. It certainly
24 seems to us to be a reasonable construction of the
25 phrase, "similar services," to take into account

1 differences in specialty, and in fact this regulation was
2 promulgated at the very time the Medicare program was
3 being implemented.

4 So, we don't have here any aberrational or
5 startling implementation of the Act. In 45 states the
6 carriers are using this.

7 I would point out again that in Erika the
8 statutory challenge to the prevailing charge ceiling was
9 under the very same statutory provision. That sentence
10 requires that the similar charges be accumulated and
11 evaluated as made during the preceding calendar year, and
12 the provider there argued that during the calendar year
13 means over the course of the calendar year. It doesn't
14 permit the carrier to select just one date in the middle
15 of the year.

16 And, I submit that that is every bit as, in one
17 sense, basic to the way the program is being
18 administered, but the Court unanimously held that
19 judicial review is foreclosed. And this is essential in
20 a program of this magnitude with 300 million claims
21 annually, to have the oversight be conducted by an expert
22 agency, by the Secretary, in reviewing the manner in
23 which the carriers perform.

24 And this is done, as I have said, through the
25 oversight function, and to have judicial review of these

1 matters without regard to the amount in controversy as
2 permitted here would substantially undermine the
3 efficiency of the program.
4 One other point I wanted to make about
5 reviewing the regulation is that not only did Erika
6 involve instructions analogous to a regulation but so did
7 Ringer itself. In fact, that was the principal challenge
8 of Ringer, was a testing of an instruction that
9 prohibited a carrier from paying any amount of benefits
10 for a particular service.
11 What we have here is not a prohibition of the
12 payment of any amounts, but just concerns the amount of
13 benefits which is something that the carrier is
14 particularly expert in addressing.
15 Several other ways in which the respondents and
16 the court of appeals have attempted to avoid the force of
17 Erika and Ringer in this case, I think also should be
18 addressed. One is that the Court of Appeals suggested,
19 is that the preclusion of review under Erika and Ringer
20 doesn't apply to someone other than the claimant for
21 benefits.
22 The Court of Appeals didn't explain what it
23 meant by that, but it apparently meant positions rather
24 than the Part B beneficiary. Respondents don't defend
25 that argument here, and I don't see how it could be

1 defended, because in Erika itself it wasn't the
2 beneficiary. It was the assignee, the provider of the
3 services who brought the action, and judicial review was
4 foreclosed.

5 By the same token, respondents argue that they
6 aren't really bringing a claim for benefits in the sense
7 that they want monetary relief directly from the court.
8 They are just challenging the methodology for the
9 calculation of the prevailing charge. Again, this was
10 exactly what was at issue in Erika.

11 The Court of Claims, whose judgment was
12 reviewed here, did not get into the question of
13 adjudicating individual claims. They remanded to the
14 carrier to reply what it viewed as the correct standards,
15 and had the carrier process the claims.

16 So, again that furnishes no basis for
17 distinguishing Erika or Ringer.

18 QUESTION: May I just ask, Erika was a suit for
19 monetary judgment though, was it not?

20 MR. KNEEDLER: It was brought in the Court of
21 Claims.

22 QUESTION: Whereas this is a suit for an
23 injunction against enforcement of regulation?

24 MR. KNEEDLER: That's correct, but the --

25 QUESTION: The Court of Claims could not have

1 granted injunctive relief, could it?

2 MR. KNEEDLER: It could not have, although in a

3 sense it granted the equivalent by a remand to the

4 carrier. It didn't award a money judgment. It remanded

5 the matter to the carrier to compute the benefits under

6 what the Court of Claims viewed as being the proper legal

7 standard, which is exactly what -- exactly the relief

8 that the respondents ask for in this case, as to how the

9 prevailing charge screens were formulated.

10 QUESTION: Well, but they might conceivably be

11 reformulated without their getting any more money.

12 Couldn't they be uniform at the lower level, for example?

13 MR. KNEEDLER: Well, that would be unlikely to

14 happen because if there appears to be on average -- the

15 nonspecialists are reimbursed at a lower level, so if

16 they're put in one screen presumably --

17 QUESTION: Well, presumably but not necessarily?

18 MR. KNEEDLER: In individual cases it --

19 QUESTION: It would be possible, would it not,

20 to grant all the relief that they're entitled to,

21 claiming this uniformity principle, without giving them

22 any money?

23 MR. KNEEDLER: Well, this lawsuit wouldn't give

24 them money, but the consequence of the judgment would in

25 most cases, particularly --

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1 QUESTION: Not if you reduced to the lowest
2 level, would it?
3 MR. KNEEDLER: But the Secretary isn't
4 authorized to reduce it to the lowest level. The
5 calculation has to be based on 75 percent, what would
6 cover 75 percent of charges in the area. So, if the
7 Secretary says, or if the Court said that you had to
8 combine the lowest prevailing charge level with the
9 highest, bring them together, then the consequence is
10 going to bring up the lowest and bring down the highest.
11 So, it will have the consequence of raising the
12 amount of benefits payable in most cases to the people
13 treated by family physicians. There may be some
14 situations, and the record suggests there are a few
15 situations, in which general practitioners or
16 nonspecialists actually receive more, but in the typical
17 case they receive less, or the beneficiary receives less,
18 and so it would have the effect of raising the benefits.
19 Of course, in Ringer you had much the same
20 situation. You had a regulation that absolutely
21 precluded recovery. The consequence of that, even though
22 not what the Ninth Circuit would have ordered, but the
23 consequence of saying that the Secretary could not rule
24 it out would be to --
25 QUESTION: Yes, and I of course thought that

1 argument was persuasive there, but the holding of the
2 Court still is, there is another avenue of review. The
3 thing that's novel about this case, and you correct me if
4 I'm wrong, but is there any other case, any other time
5 the Court has held that any government official can issue
6 a nationwide regulation that is not subject to judicial
7 review of any kind, for failure to comply with the
8 statutory mandate?
9 I don't think this is ever -- it's ever
10 contended disposition before, has it?
11 MR. KNEEDLER: I'm not aware of the situation
12 but analytically it's no different from precluding
13 judicial review of any administrative action, because in
14 administering a program an executive agency relies on
15 law, statute, and implementing regulations, and if
16 Congress can preclude judicial review even where
17 someone's alleging that there's a statutory violation, as
18 was true in Erika.
19 QUESTION: Yes, that's true, but in the vast
20 majority of the cases that come up through the Social
21 Security system, and their particular factual
22 controversies, and you've got findings and the normal
23 things that --
24 MR. KNEEDLER: Well, there are quite a few of
25 them that involve -- quite a few of the cases that

1 involve challenges to regulations.

2 QUESTION: Well, sure, and I think your

3 position would be, then, in Ringer there could have been

4 a challenge to the regulation if you followed the statute?

5 MR. KNEEDLER: That's exactly right. In fact,

6 as we point out in our brief, Section 405-G contemplates

7 review of regulations as part of review of the final

8 decision.

9 QUESTION: Right.

10 MR. KNEEDLER: And that seems to us to be

11 clear, that Congress views 405-G as the avenue not only

12 for review of factual issues but review of regulations

13 and the legislative history expressly says that a court

14 can review questions of law on review.

15 So, when Congress makes 405-G applicable, it is

16 saying, we are authorizing judicial review not only of

17 facts but of regulations and law. Where Congress has

18 withheld it, it has withheld those same issues from

19 judicial review.

20 If there are no more questions now, I would

21 like to reserve the balance of my time.

22 CHIEF JUSTICE BURGER: Mr. Gilchrist.

23 ORAL ARGUMENT OF ALAN G. GILCHRIST, ESQ.

24 ON BEHALF OF THE RESPONDENTS

25 MR. GILCHRIST: Thank you, Mr. Chief Justice,

1 and may it please the Court:

2 There are two basic issues on the merits of

3 this case where petitioners state the respondents have no

4 relief whatsoever. The first issue pertains to the equal

5 protection claim, and the placement of family physicians,

6 and those patients who choose family physicians, separate

7 from all other physicians and essentially equating the

8 selection of a family physician with that of a

9 chiropractor or a podiatrist.

10 Now, the government states today that that

11 equal protection count had no merit. The fact of the

12 matter is, the government filed a motion for summary

13 judgment on that issue. It was heard. It was denied.

14 And the government did not appeal that decision.

15 It is also a fact that the lower court in this

16 case stated that the government's action utterly lacked

17 merit, utterly lacked reason, rather. The Sixth Circuit

18 pertained to the government's action as ducational. But

19 perhaps most important, as to the government's position

20 today, as the government conceded at trial it had no

21 rationale for the placement of board eligible family

22 physicians who all, by definition, have completed

23 residency programs along with chiropractors and

24 podiatrists and separate from their peers.

25 The statutory question is basically the other

1 major issue. It's important to bear in mind that the
2 Medicare statute repeatedly uses the word "similar
3 services" in determining reasonable charges under Part B
4 of the Medicare program.
5 The regulation in question doesn't even contain
6 the words "similar services." Nobody testified at trial
7 in this case that the Secretary attempted to define
8 "similar service," or that the Secretary even considered
9 similarity of service in implementing this regulation.
10 Basically, it is the respondent's position that
11 a reasonable and consistent interpretation of the
12 Medicare statute is that there is 1331 jurisdiction for
13 both these issues. We've also addressed the issue of due
14 process and separation of powers, but I think it is
15 essentially not important for purposes of a statutory
16 interpretation because we firmly believe that a
17 consistent reading of the statute supports the
18 respondent's position.
19 And we have tried to set forth in detail the
20 types of issues for which there is no judicial review and
21 the types of issues for which there is judicial review.
22 One of the problems I have with the petitioner's position
23 before this Court is, they have never explained in any
24 detail what types of issues there may be judicial review
25 of.

1 Let me give you an example. Do the petitioners
2 maintain today that when a lawsuit is filed on the basis
3 of equal protection, and the government concedes no
4 rationale for its actions, that there is no federal court
5 judicial review or no forum anywhere to address the issue?
6 The government makes that concession, at least
7 to the portion of the claim in this case, and then ignore
8 it, and essentially they refuse to grant any relief
9 voluntarily and they maintain no jurisdiction in the
10 district court, and apparently by making that concession
11 all they want to accomplish is to have the respondents
12 quit talking about it.
13 To give another example, let's assume that the
14 Secretary, by regulation, decided not to pay family
15 physicians at all, or the patients that choose family
16 physicians. But those services aren't similar to anybody
17 else's services, so they just won't pay them at all. Is
18 that subject to review anywhere?
19 Or, the Secretary is satisfied that the office
20 visits performed by family physicians -- and
21 incidentally, their point of $1.50 an office visit, that
22 was one type of office visit. As a matter of fact, for
23 comprehensive office visits for Carol Diedrich, they cut
24 it in half from $50 to $25.
25 But if the Secretary is prepared and satisfied

1 that the office visits performed by family physicians are
2 similar to office visits performed by chiropractors, I
3 suppose the Secretary might take one -- just one step
4 further and decide that they were only covered for office
5 visits and spinal manipulations on the part of family
6 physicians.

7 Is that subject to no review? If the Secretary
8 promulgates the regulation of sickle cell anemia,
9 services will not be paid. Is that subject to review?
10 Perhaps that's a suspect classification.

11 Well, let me give another example. A
12 terminally ill patient, they die too soon. We won't pay
13 for those services. Clearly in conflict with the
14 statute, does the government state there is no review for
15 those types of issues?

16 MR. GILCHRIST: Now, I've conceded under the
17 Erika case, there is no judicial review of an amount of
18 benefit determination made by a clearing officer after a
19 hearing, and that is an issue in the Erika case, not
20 whether there is judicial review of any issue concerning
21 the amount of benefits for which there may be no other
22 determination available.

23 It says a mouthful, that concession, and the
24 case law tells us the types of issues the carrier
25 routinely conducts hearings on. In the McClure case, for

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1 example, whether a sex change operation is medically
2 necessary, whether an ambulance should have taken a
3 patient to the nearest hospital or to a hospital 30 miles
4 away, whether an appendectomy performed on the same
5 patient on the same day can be billed along with other
6 major abdominal surgery or if it is incidental to and
7 included as part of the bill for the appendectomy, from
8 the Herzog case from the Sixth Circuit, or the Rainer
9 case, whether a medical procedure is a recognized and
10 bona fide medical procedure that the Medicare program
11 should pay.

12 QUESTION: Are these hypotheticals of yours
13 based on a decision without a hearing of any kind?

14 MR. GILCHRIST: That's precisely the point,
15 Your Honor, that this issue in this case, several issues
16 of statutory construction, but the reality of this case
17 is, there is no hearing. The carrier has expertise and
18 authority, expertise and experiencer, rather, as well a
19 authority to make the decision on issues such as the
20 issues that I've set forth.

21 They make those types of determinations every
22 day in their private insurance business, and Congress
23 delegated to a private insurance company under 1395-U the
24 authority to make the same types of determinations and to
25 conduct hearings to make those types of determinations

1 under Part B.

2 That's in substantial contrast to this case.
3 This case involves a constitutional claim and a claim
4 that a regulation promulgated by the Secretary violates
5 the Medicare statute. Certainly the carrier, non-lawyer
6 hearing officer, has no great expertise and experience to
7 address this type of issue, but perhaps more importantly
8 the Secretary recognizes that fact when the Secretary
9 implemented the statute, because the Secretary
10 specifically barred the carrier hearing officer from
11 making any comment on it, never mind making a
12 determination on the legality of a regulation promulgated
13 by the Secretary.

14 Here we asked for a hearing and the government
15 quite correctly stated we're not entitled to a hearing on
16 these issues, and then they turn around in the same
17 breath state, well, if there's any mechanism at all it's
18 the carrier hearing mechanism.

19 Congress simply did not intend to delegate
20 those types of issues. The legislative history makes
21 that clear.

22 Let me point out just very briefly, on the
23 separation of powers and the due process issue that I've
24 pressed from the briefs -- I don't want to get into
25 detail as to Northern Pipeline, the Mathews versus

1 Eldridge, and the McClure case which is a Medicare Part B
2 case, but I concede that there is a great deal of
3 flexibility in the amount of due process that must be
4 afforded in social welfare cases to balance the private
5 interest involved and the risk of erroneous deprivation
6 versus the public interest in avoiding the burden of
7 having to provide additional hearings.
8 By the way, both the Mathews case and the
9 McClure case were allegations of entitlement to
10 additional hearings. Here there can be no meaningful
11 hearing at any time on the issues that have been raised,
12 and I think this Court has steadfastly maintained the
13 position, they certainly did in the Mathews versus
14 Eldridge case, that if due process means anything it
15 means a meaningful hearing at a meaningful time.
16 Here there is no hearing before the carrier.
17 There is no hearing before a federal agency. And if you
18 accept the petitioner's position in this case, there's no
19 hearing before any court.
20 Erika, according to petitioners today, stands
21 for the proposition that there is no judicial review of
22 any issue that may affect the amount of benefits under
23 Part B of the Medicare program, whether there's a
24 determination available anywhere else.
25 I've gone back and looked at the Erika case.

I've looked at the decision of the carrier in that case. I've looked at the Court of Appeals decision in that case. And I simply don't agree that the carrier is bound by any instructions in that case.

The issue was, during the last preceding year, the statutory issue, the regulation used the same words, during the last preceding year. There was a small issue, basically a side issue concerning retroactive adjustment in that case, that may or may not have involved a carrier following instructions from the Secretary in the form of letters, I guess.

But I couldn't find in the opinion where the carrier stated that they were bound and could not make such determination. But I think more important than that, if the government wants to take the position that Erika stands for the proposition that there's no hearing on any issue that may involve the amount of benefits, whether another available mechanism is available, even through a carrier hearing, they should have disclosed that to the Court at that time.

I note that Justice Powell's opinion in the Erika case paraphrases in essence what the position of the petitioners was at that time. There it is stated that the petitioner argues that Congress specifically precluded review in the Court of Claims of adverse

1 hearing officer determinations of the amount of Part B
2 benefit payments.
3 The position of the respondents today is that a
4 consistent reading of the Medicare statute -- and
5 incidentally, the Erika case was based upon not a
6 specific statement from Congress because -- from the
7 statute, because 1395 double-F does not explicitly bar
8 judicial review of anything. Rather, it relied upon the
9 grant of judicial review of determination for the amount
10 of benefits under Part A of the Medicare program and
11 silenced the Part B, coupled with the legislative history
12 to reach the conclusion that there's no review of hearing
13 officer determinations after hearing the amount of
14 benefits under Part B of the program.
15 But the legislative history, and a logical and
16 a consistent reading of that statute, is that the
17 congressional intent to bar jurisdiction under Part B
18 ties in directly and is related to the issues where
19 Congress gave authority to the carrier to make those
20 types of determinations under 1395-U.
21 And the issues that Congress intended to bar
22 are those issues such as the types I've already raised
23 where the carrier has expertise and has authority, and
24 the legislative history supports not petitioner's
25 interpretation about that, but rather respondent's.

1 The Senate committee report which petitioners
2 cite as authority for their position at the inception of
3 the passage of the Medicare statute simply stated that
4 there was a hearing on the amount of benefits under Part
5 B of the Medicare program by the carrier and there is no
6 judicial review of such determinations.
7 Or when the statute was amended in 1972, again
8 petitioners rely upon this language, the conference
9 committee report also cited in Erika opinion, states
10 there is no authorization for judicial review under Part
11 B for matters involving solely -- and that's Congress's
12 word, not mine -- the amount of benefits.
13 It's simply the logical and consistent reading
14 of the statute, taken in proper context, is Congress
15 intended that some issues certainly be conducted through
16 a carrier hearing, and there is no judicial review of
17 that carrier determination. But there is nothing in the
18 legislative history that Congress intended to preclude
19 any issues under Part B of the Medicare program.
20 Let me talk about Weiner and Salfi for a
21 moment, as well as 405-A.
22 QUESTION: Before you do, Mr. Gilchrist, I'm
23 not sure you've completely answered Mr. Kneedler's
24 argument that the doctor, if he takes an assignment of a
25 claim and he doesn't like the two tier or three tiers,

1 whatever it is, is really asking for recovery that
2 relates solely to the amount of benefit that he can get.
3 Why isn't solely the amount of benefit involved
4 here?
5 MR. GILCHRIST: First of all, there's a serious
6 question here as to whether this could be an amount of
7 benefit case at all, and let me give you some examples.
8 The board certified family physicians,
9 respondents in this case, are asking for a reduction in
10 benefits, in essence, if you accept the government's
11 position about equalizing the amount of payments because
12 they are in the specialist screen. The context of amount
13 of benefits, the language of the legislative history that
14 pertains to determinations on amount of benefits, and
15 even within Part A where they grant judicial review of
16 determinations on amount of benefits, has to be tied in
17 together with the grant of authority to the carrier to
18 make determinations on amount of benefits.
19 We could dance all day in terms of what those
20 three words mean, amount of benefits. But the fact of
21 the matter is, when we read the legislative history we
22 know what Congress meant by those words. It meant those
23 issues for which the carrier has expertise and experience
24 and for which a hearing can be conducted at the carrier
25 level.

1 Does that help clarify it at all? Okay, thank
2 you. As to 405-A in Salfi and Weiner, the interesting
3 part about the petitioner's brief is, they don't cite a
4 single case for the proposition that the last sentence of
5 405-H which states that there is -- no action may be
6 taken under 1331 against the Secretary, U.S. Government
7 officer and employee thereof to recover on any claims.
8 They don't cite a single case where that last
9 sentence was taken out of context with the balance of
10 405-H which is clearly precluding 1331 jurisdiction of
11 findings and decisions of the Secretary after a hearing,
12 and precluding judicial review by any tribunal of
13 findings and decisions of the Secretary after a hearing.
14 I don't want to get into a dispute as to
15 whether or not Ringer had a sufficient reason for
16 attempting to bypass, and that's clearly what that was, a
17 bypass of the review mechanism under Part A. He
18 attempted to bypass 405-B and 405G.
19 I think the strongest statement that may be
20 made from the Weiner decision is where Congress has
21 provided for a federal administrative hearing such as
22 they did under 405-B and where Congress has provided for
23 judicial review of that federal administrative hearing
24 such as they did in Weiner under 405-G, that mechanism
25 must be followed and there is no reason that may justify

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1 a bypass.

2 I think that's about as we can go in the Weiner

3 decision, and that states it very strongly. Justice

4 Rehnquist in that decision stated that the last sentence

5 of 405-H cannot change meaning based upon whether or not

6 a party has followed the mechanism available within

7 405-G, whether they've satisfied prerequisites, I think

8 were the exact words.

9 But here that's an absolute, irrelevant issue.

10 There are no prerequisites under 405-G for the

11 respondents to follow because 405-G simply doesn't apply,

12 and the proper context, the last sentence of 1331, simply

13 states that one may not bring 1331 jurisdiction to review

14 a decision by the Secretary through an administrative

15 hearing process where 405-G provides the judicial

16 review. That's in essence, also, the finding in Salfi.

17 As I stumble through the interpretation of the

18 Medicare statute I'm reminded by a statement Justice

19 Powell made in the Gray Panther lawsuit. He quoted from

20 a lower court decision that characterized the Social

21 Security Act a an aggravated assault on the English

22 language, and I certainly agree with that statement.

23 The fact of the matter is, a single sentence

24 from the statute or even worse, a single sentence from

25 the legislative history can be taken out of context to

1 support virtually any position anybody wants to take, and
2 I think that's in essence what the government has done
3 here. They've taken the last sentence of 405-H and
4 they've ignored the balance of that section which is
5 clearly in the context of no 1331 jurisdiction, where
6 Congress has provided for federal administrative hearings
7 for judicial review, and they are attempting to take that
8 sentence outside of that context and say that clearly and
9 convincingly, Congress intended to bar 1331 jurisdiction
10 for any claims under Part B.

11 QUESTION: Has anyone, authoritatively or
12 otherwise, made any guess or estimate as to how many such
13 claims for judicial review are in the offing?

14 MR. GILCHRIST: I find that very -- I'm glad
15 you asked that question because I meant to talk about the
16 court case. I handle a great number of Part B cases.
17 Ithink I'm familiar with a number of Part B cases for
18 which one goes into federal court in the State of
19 Michigan, at least, and I would wager -- I'm not positive
20 -- that this Court has been asked to hear more Part B
21 cases involving jurisdiction, and there's been Part B
22 cases filed in the State of Michigan, in Federal District
23 Court on the merits, and as a matter of fact Michigan is
24 -- Michigan is the tenth largest carrier in the country.

25 But what the government does is to keep raising

1 this floodgate issue, but as a matter of fact circuits
2 prior to Erika found jurisdiction even on the types of
3 issues we now concede there's not jurisdiction, and
4 they've never supplied this Court with the data as to the
5 number of cases that have been filed, the number of
6 Federal District Court or Court of Claims cases. And to
7 date they haven't.

8 I simply don't feel that there ever was a
9 floodgate. I don't want to rehash the Erika case, but
10 the fact of the matter is today they raise the issue of
11 floodgates but they don't -- they don't provide this
12 Court with any data that would indicate that in fact
13 there would be such result.

14 I think that this is a very unusual case, as a
15 matter of fact, a case that first of all the government
16 sees no rationale in the equal protection issue, and also
17 as Justice O'Connor indicated, it's quite a very basic
18 statutory point, and furthermore --

19 QUESTION: Do you agree with Mr. Kneedler's
20 statistics of 300 million claims and 30 million are in
21 Part B?

22 MR. GILCHRIST: I don't quarrel with that.
23 Those are claims submitted in Part B of the Medicare
24 program. The question I'm raising is a number of cases
25 filed in the Federal District Court. That's the issue of

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1 raising the floodgates.

2 QUESTION: My question is not as to how many
3 have been filed. How many potentially could be filed if
4 you prevail?

5 MR. GILCHRIST: I'm sorry. I misunderstood.
6 On this precise issue, very, very few. I mean, I suppose
7 even if I don't prevail, the courts are open from nine to
8 five. Anybody can file a lawsuit.

9 But on the limited construction that I am
10 stating, where there is judicial review on those issues
11 where the carrier cannot and has been stripped of
12 authority to make a determination, I'm not sure if there
13 is another case like this to be honest with you, and
14 there have been other cases filed in federal court.

15 I'm not sure if there's been a case in the
16 country where the government when finally pushed to the
17 wall stated that they had no rationale whatsoever for its
18 actions in the face of an equal protection -- so I simply
19 don't feel there would be many. I obviously can't give a
20 precise number, but it certainly would be few.

21 The lower court stated this issue, and not the
22 trial judge but the judge who heard the motion for
23 summary judgment, better than I can state it. He stated
24 that he finds it improbable that Congress would delegate
25 to a private insurance company the authority to violate

1 the United States Constitution or the Medicare statute in
2 Congress's name with impunity.
3 And that's the issue of this case. I submit
4 that --
5 QUESTION: When it's put in those terms it's
6 pretty difficult to argue with it.
7 MR. GILCHRIST: That's right, but that is --
8 those are the terms. That is the issue in this case.
9 But what I submit is that if Congress intended this,
10 Congress would have said so.
11 The section 1395 that the petitioners rely upon
12 on their 405-H argument simply says that 405-H shall
13 apply to Medicare to the extent applicable to Title 2
14 cases. Is that a clear statement by Congress that they
15 intended this result?
16 And the result, I think, should be made even
17 more clear. What petitioners are alleging today is that
18 Congress, while it's provided a forum for insignificant
19 disputes, albeit without judicial review, performed
20 before the carrier to decide issues such as whether an
21 ambulance should have taken a patient to the nearest
22 hospital or to a hospital 30 miles away, Congress
23 intended no forum and no authority for anybody to address
24 constitutional issues and statutory issues.
25 Stated another way, the more significant the

1 issue the less likely that Congress afforded any remedy
2 whatsoever or intended to afford any remedy whatsoever
3 for those affected by the violation of the statute or the
4 U.S. Constitution to obtain any relief.
5 If Congress intended this, somewhere but not
6 within the statute at least within the legislative
7 history, I submit petitioners should find a statement
8 where Congress says this, and they simply haven't.
9 If there's no questions, I basically have no
10 more to add. Thank you.
11 CHIEF JUSTICE BURGER: Do you have anything
12 further, Mr. Kneedler?
13 MR. KNEEDLER: Yes, several points, Mr. Chief
14 Justice.
15 ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.
16 ON BEHALF OF PETITIONERS -- REBUTTAL
17 MR. KNEEDLER: First, the government did not
18 concede in District Court that the exclusion of board
19 eligible family physicians from the one charge screen was
20 unconstitutional or irrational. We simply said that by
21 virtue of the changing of the eligibility requirements
22 for family physicians, they should now be included.
23 So, this is not a case that ever, I would
24 argue, raised a substantial constitutional question. The
25 other point --

1 QUESTION: May I ask for clarification, are you
2 simply stating that the equal protection question is not
3 the before us at all?
4 MR. KNEEDLER: Well, there's several points.
5 Neither court below decided that question. We also think
6 that in any event, that is so insubstantial on the merits
7 that it does not vest this Court with subject matter
8 jurisdiction the same way that the claim in Ringer itself
9 did not.
10 QUESTION: Did the lower court say that the
11 equal protection issue was so insubstantial?
12 MR. KNEEDLER: No, the lower courts did not
13 resolve the equal protection question.
14 QUESTION: What is the AG's position?
15 MR. KNEEDLER: Our position is that the equal
16 protection argument is insubstantial, so insubstantial as
17 to not vest the Court with --
18 QUESTION: Is it your position that the
19 construction of the statute is not here either?
20 MR. KNEEDLER: The construction of the statute
21 is noit here because we believe Congress has precluded
22 judicial review of the question of the construction of
23 the statute.
24 The Court of Appeals did address the question
25 of the construction.

1 QUESTION: So, you would leave the construction
2 of the statute to somebody engaged by Blue Cross-Blue
3 Shield who may not be a lawyer at all?
4 MR. KNEEDLER: No. The issue of statutory
5 construction involved here is embodied in the regulation
6 issued by the Secretary, and in fact issued by the
7 Secretary in 1967 when the Medicare program was --
8 QUESTION: But you're still going to leave the
9 construction of the regulation to someone -- to Blue
10 Cross-Blue Shield to make that decision with no appeal?
11 MR. KNEEDLER: Well, there's oversight by the
12 Secretary, as I pointed out earlier, annually.
13 QUESTION: What kind of oversight?
14 MR. KNEEDLER: There's an annual review of the
15 carrier's performance by the Secretary's agents to make
16 sure that the regulation is being properly implemented.
17 We would also like to point out that this --
18 QUESTION: Has that sort of annual oversight
19 ever been accepted as satisfactory in terms of providing
20 some sort of appropriate administrative or judicial
21 review of a major issue?
22 MR. KNEEDLER: Well, the Congress has
23 frequently foreclosed judicial review of questions of
24 law. Last year the Court held that judicial review was
25 foreclosed in the Chaney case. In Erika, in fact,

1 Congress held that a question relating to what the
2 carrier did was lawful under the statute was foreclosed
3 by Congress.

4 QUESTION: Basically, Erika simply involved the
5 question of whether or not individual claimants could
6 argue about the amount of benefits?

7 MR. KNEEDLER: But the basis for their claim
8 was that the approach the carrier took to computing the
9 prevailing charge was inconsistent with the statute,
10 inconsistent with the same sentence of the statute upon
11 which the respondents in this case relied, and similarly
12 in Ringer there was a regulation issued by the Secretary,
13 of nationwide scope, that could not be appealed to the
14 Secretary.

15 QUESTION: Mr. Kneedler, in the other cases the
16 Court has had, wasn't at least review by the carrier of
17 the issue available?

18 MR. KNEEDLER: Not in Ringer. Ringer involved
19 Part B as well as Part A, and one of the claims in Ringer
20 was that the Secretary's instructions that barred the
21 carrier from awarding any benefits for the particular
22 service was invalid, and the Court held in footnote 4 of
23 its opinion that judicial review is entirely foreclosed
24 even as to that statutory challenge to the regulations at
25 issue in Ringer.

1 So, it was not a situation involving another
2 avenue of judicial review.
3 Thank you.
4 CHIEF JUSTICE BURGER: Thank you, gentlemen.
5 The case is submitted.
6 (Whereupon, at 1:51 o'clock p.m., the case in
7 the above-entitled matter was submitted.)
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#85-225 - OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., Petitioners V. MICHIGAN ACADEMY OF FAMILY PHYSICIANS, ET AL.

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