# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-632

TITLE CHARLES ATKINS, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE, Petitioner v. SANTOS RIVERA, ET AL.

PLACE Washington, D. C.

DATE April 21, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES ATKINS, COMMISSIONER, :
MASSACHUSETTS DEPARTMENT OF :
PUBLIC WELFARE, :
Petitioner :
v. : No. 85-632
SANTOS RIVERA, ET AL. :

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Washington, D.C.

Monday, April 21, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:51 o'clock a.m.

APPEARANCES:

H. REED WITHERBY, ESQ., Assistant Attorney General of Massachusetts, Boston, Mass.; on behalf of Petitioner.

JEROLD J. GANZFRIED, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, in support of Petitioner.

RENE H. REIXACH, JR., ESQ., Rochester, N.Y.; on behalf of Respondents.

# C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Witherby, I think you may begin whenever you're ready.

ORAL ARGUMENT OF

H. REED WITHERBY, ESQ.

ON BEHALF OF PETITIONER

MR. WITHERBY: Thank you, Mr. Chief Justice, and may it please the Court.

The issue is this case is whether a 1982 amendment to the Medicaid statute makes it unlawful for states to use a six month spenddown for determining Medicaid eligibility for the medically needy. The spenddown is the mechanism by which applicants who have more income than is necessary to provide their basic subsistence needs may still become eligible for Medicaid after applying their excess income to medical costs. It operates essentially like the deductible in a health insurance policy.

Since 1966, the Secretary of Health, Education and Welfare, and after him the Secretary of Health and Human Services, have authorized states to use a period of six months for determining the amount of the spenddown, and most states which have chosen to extend their Medicaid coverage to the medically needy have done so on that basis.

The Massachusetts Supreme Judicial Court, however, ruled below that a 1982 amendment to the Medicaid statute requires states to use a one month spenddown. The Supreme Judicial Court based its decision upon interpretation of the federal Medicaid statute which has since been explicitly rejected by the United States Court of Appeals for the First Circuit and the United States Court of Appeals for the Second Circuit.

The decision below is wrong because it ignores the language and legislative history of the 1982 amendment and the Secretary's regulation which was adopted and is maintained under an express delegation of authority which has never been amended.

This case presents a pure issue of federal statutory construction, and the most important facts relate to the structure of the Medicaid program. Medicaid provides federal financial assistance to states which choose to pay for medical care for certain groups of needy individuals.

States that elect to participate in the program must provide Medicaid coverage to the categorically needy, that is those individuals who are receiving cash assistance under either of the two major federal categorical welfare programs, the AFDC program

for families with dependent children, or the supplemental security income program for the aged, blind, or disabled.

Individuals who are receiving cash assistance under either of these programs have only enough income to meet their basic maintenance needs for food, clothing, and shelter, and have nothing left over to pay for medical care. They are automatically eligible for Medicaid without a spenddown.

Participating states are not required as a general matter to provide Medicaid benefits to any other group of individuals. However, states may choose to provide benefits to one or more optional categories, the most significant of which is known as the medically needy.

In order to qualify as medically needy, it is necessary first to meet the categorical requirements for either AFDC or SSI, in this case AFDC. Need for medical assistance under the medically needy program may be established in one of two ways.

First, since the medically needy income standard, the means test established under the medically needy program, is often higher than the means test for AFDC, eligibility may be established on the basis of income.

Alternatively, an applicant who has income in excess of the medically needy income standard may still qualify as medically needy on the basis of his or her medical costs. This process, which applies only to Medicaid applicants who have already been determined to be ineligible on the basis of their income, is known as the spenddown.

For example, the first named plaintiff in this case, Ms. Rivera, had net income of about $100 a month more than the medically needy income standard for a month. Her spenddown liability, in the nature of a deductible, was six times that amount or about $600, and applied for a six month period.

If she had incurred $600 of medical costs at any point during the six month period, Medicaid would have paid for any further medical costs during the period. However, Ms. Rivera incurred medical costs of only $314 and therefore Medicaid paid for none of those costs.

It happened that the entire $314 was incurred during one month. Under a one-month spenddown, Ms. Rivera would have been liable only for the first $100 and Medicaid would have paid the remainder.

The amount of the spenddown deductible is what is at issue in this case. Although the Secretary since

1966 has permitted states to use a six-month period to measure available excess income for this determination, the court below held that a one month period must be used.

For this ruling it relied upon a 1982 amendment, part of the Tax Equity and Fiscal Responsibility Act of 1982, TEFRA, which requires states to use the same methodology which would be employed in the applicable cash assistance programs, in this case AFDC, for determining the income and resource eligibility of the medically needy.

The court below asserted that the length of the spenddown period is part of the methodology for determining income eligibility, and concluded that the amount of the spenddown must be calculated using one month's excess income, since AFDC eligibility is determined on a monthly basis.

This ruling is simply incorrect. The length of the spenddown is not part of the methodology for determining income eligibility under the AFDC program. That methodology does not include taking into account medical costs at all.

If Ms. Rivera had applied for AFDC, her income eligibility would have been determined without regard to her medical costs, and in fact when she applied for

Medicaid as medically needy her income was determined by that same methodology and she was determined to be ineligible on the basis of her income.

The spenldown is an extra step, unique to the medically needy, which is not part of the determination of income eligibility. It cannot be determined under the same methodology, because eligibility on the basis of medical costs through the spenddown is the most funiamental iifferance between the categorically needy and the medically needy. It is what distinguishes these two groups from each other.

The scope of the same methodology which would be employed language is made very clear by a consideration of the dynamic which generated it. The term methodology had its genesis in new regulations which the Secretary issued on September 30, 1981, to implement the Omnibus Budget Reconciliation Act of 1981, OBRA.

Prior to OBRA, the Secretary had required states to use the same rules for evaluating items of income in the medically needy program as would be used in the underlying categorical program, in this case AFDC.

At the same time, the Secretary since 1966 had authorized the use of a six month period for determining

the spenddown, a period which was not tied to the budget period of the underlying programs. OBRA included a provision aimed at giving states greater latitude in defining the scope of their medically needy programs.

The Secretary interpreted this provision broadly, explaining in the Federal Register that states are no longer required to apply a uniform methodology for treating income and resources. The new regulations required simply that the methodologies to be used be reasonable. The six month authorization was not changed.

The TEFRA amendment was clearly a direct response to these changes. The amendment was part of a section headed "Technical corrections from the Omnibus Budget Reconciliation Act of 1981." And after reviewing the enactment of OBRA and criticizing the Secretary's response to it, the House Commitee report stated: "This amendment makes clear that the Department has no authority to alter the rules that applied before September 30, 1981, with respect to medically needy income levels, medically needy resource standards, and the methodology for treating medically needy income and resources. The Committee bill reaffirms the financial requirements previously in effect for the medically needy."

And at that point, the House report cites specifically the Secretary's regulations which were in effect prior to OBRA, including the six month authorization.

CHIEF JUSTICE BURGER: We'll resume there at 1:00 o'clock.

(Whereupon, at 12:00 noon, oral argument in the above-entitled case was recessed, to reconvene at 1:00 p.m. the same day.)

AFTERNOON SESSION

(12:59 p.m.)

CHIEF JUSTICE BURGER: Mr. Witherby, you may continue.

RESUMED ORAL ARGUMENT OF

H. REED WITHERBY, ESQ.

ON BEHALF OF PETITIONER

MR. WITHERBY: Thank you, Mr. Chief Justice.

Now that I've reviewed the context of the 1982 TEFRA amendment and its legislative history, the question is what lessons there are to be learned from that history.

The first lesson is that Congress' use of the term "methodology" was employed in TEFRA in direct response to the Secretary's use of the term in the new 1981 regulations implementing OBRA. That use of the term clearly did not encompass the spendiown or the length of the budget period.

This is a strong indication that Congress' use of the term "methodology" also did not include or encompass those subjects. More broadly, the dynamic of the TEFRA amendment was one of continuity, not of change. The clearly stated Congressional purpose was to correct, to undo the Secretary's 1981 changes, and to reinstate the pre-OBRA regulatory scheme. In that

scheme, the Secretary expressly authorized the six month spenddown.

Indeed, Congress expressly reaffirmed the financial eligibility regulations which were in effect prior to OBRA, including specific listing of those regulations, among them the six month spenddown authorization.

This is totally inconsistent with the Respondent's argument that it was Congress' intention to render that regulation unlawful. TEFRA itself describes this amendment as a technical correction. The imposition of a one month spenddown could not have been fairly described as a technical correction. It would have been a dramatic expansion in the midst of a cost-cutting statute of the scope of the medically needy program in 25 out of the 32 jurisdictions that participated in that program.

The six month spenddown serves an important role in the medically needy program in the state's choice to focus its resources in the medically needy program upon those applicants who are most in need. Congress in 1982 had no intention to, and did not, prohibit this widespread and important practice.

If the Court has no further questions, I'd like to reserve the balance of my time.

CHIEF JUSTICE BURGER: Very well.

Mr. Ganzfried.

ORAL ARGUMENT OF JERROLD J. GANZFRIED, ESQ.

FOR THE UNITED STATES AS AMICUS CURIAE

IN SUPPORT OF PETITIONERS

MR. GANZFRIED: Thank you, Mr. Chief Justice, and may it please the Court:

I'd like to explain: first, why the Secretary's regulation is reasonable and should be upheld; and second, why this Court should reject Respondents' efforts to change the Medicaid program in a way that Congress has expressly rejected.

This case presents a classic situation where the manner in which the Secretary has implemented the statute should prevail. Congress delegated broad authority to the Secretary in this complex area, so his regulations are entitled to legislative effect.

In addition, this case presents every factor pointing to the conclusion that the agency's view should be upheld. The subject matter is technical and complex. The agency has longstanding expertise and was intimately involved in the drafting and consideration of the Medicaid Act. Following enactment of the statute, the agency immediately interpreted it in the way that is now being challenged.

And the provision containing the six month spenddown appeared in the very first handbook issued under Secretary Gardener in 1966 and in the first Medicaid regulations issued by Secretary Cohen in 1969.

QUESTION: Yes, but isn't it true that the "same methodology" language wasn't in the statute at that time?

MR. GANZFRIED: It was not. But as Mr. Witherby has explained and we explain in the brief, the "same methodology" language has no bearing on the spenddown. It's quite clear that Congress had no intention for it to affect it.

QUESTION: Of course, that's really the issue, isn't it, whether the "same methodology" language has bearing on the spenddown? Isn't that really what we're supposed to decide?

MR. GANZFRIED: That's ultimately an issue that we get to, that's right. Now, in getting to that issue, let me point out that the Respondents acknowledge that for the period up to 1981 at least, and possibly up to 1982, it was perfectly lawful for the Secretary to permit states to have a six month spenddown, and therefore in effect they concede that they would have been ineligible for Medicaid prior to CBRA.

Their argument, in addition to running into

all of the problems that Mr. Witherby has addressed, also runs directly into a brick wall in the legislative history of OBRA itself. The House conference report, in describing the changes in 1981, said that nothing would allow the states to cover individuals not covered under current law.

That's at page 970 of the conference report. It's not cited in our brief, but it is in the state's brief.

And that I submit is really the end of the argument on the "same methodology" which would be required under the appropriate state program language. Now, it also indicates, as does the legislative history of the technical corrections in TEFRA, that Congress has specifically and expressly indicated its approval of the Secretary's longstanding regulations.

Equally as important, the regulation is perfectly reasonably and consistent with the statutory objectives. The Medicaid program is premised on Congress's desire to assure that the most needy receive assistance in paying for medical care.

Under the Secretary's regulation as implemented in Massachusetts, Respondent Rivera had to incur $601.80 in medical expenses during a six month period in order to qualify for Medicaid for the

remainder of the period. She claims instead that she should have qualified after her medical expenses reached $100.30.

But it cannot seriously be questioned that with the same two people, identical in all relevant respects and with the same income, the one who has medical bills of $600 is more needy than the one who has medical bills of only $100. The statute's aim is to provide benefits to those with the greatest need, and the regulation at issue here serves that purpose.

Now, I've addressed some of the legislative history that indicates why the Respondents' argument is incorrect with respect to the 1981 and 1982 amendments. I would also like to mention briefly, as we discuss in greater detail in our brief, why Respondents' view makes no sense even on the face of those amendments.

The basic distinction between the medically needy and the categorically needy is that the medically needy have excess income, income above the state's level of need. Since spenddown refers exclusively to excess income, it has no application whatever to the categorically needy and no counterpart in the cash assistance programs.

Why? Because the categorically needy by definition have no excess income. To put it another

way, insofar as this case is concerned, categorically needy eligibility is based solely on income. After failing to qualify on that basis, the medically needy are given a second chance based on their medical expenses.

Spenddown refers to expenses, and it therefore has no counterpart in the cash programs, where medical expenses play no role in eligibility. In short, there is nothing comparable in the cash program that can be transported into this context as the "same methodology" which would be employed to the Medicaid methodology program.

In light of the difficulties that the Respondents have with the language in the statute as amended, and in light of the fact that the legislative history demonstrates that Congress had no intent to do what the Respondents argue and the court below held, and in fact specifically reaffirmed the regulation that had been in existence for at that point 17 years, now about 20 years, it is our position that you can't ask for a clearer indication that Congress agrees with the spenddown approach taken by every Secretary since Medicaid began.

Congress delegated to the Secretary the difficult and complex task of deciding how the limited

resources available for medical assistance can most effectively reach those most in need. The spenddown regulation accomplishes that purpose in a way that Congress has never changed, and indeed has expressly approved.

Accordingly, we submit that the judgment of the Supreme Judicial Court of Massachusetts should be reversed. Thank you.

CHIEF JUSTICE BURGER: Mr. Reixach.

ORAL ARGUMENT OF

RENE H. REIXACH, JR., ESQ.

ON BEHALF OF RESPONDENTS

MR. REIXACH: Mr. Chief Justice and may it please the Court:

The courts below correctly construed Section (a)(10) of the Medicaid statute as invalidating the six month income budgeting policy by relying on its clear statutory language and also by giving some secondary meaning to the legislative history and the events surrounding its enactment.

Both the trial court and the Supreme Judicial Court in fact in doing that followed the three-part analytical framework for statutory interpretation set forth by this Court two years ago in the Chevron case. That framework, of course, is first to look at the

language of the statute; next, if the language is not clear, to look at the legislative history; and finally, as a third step and only if the first two steps are not determinative, to look at the views of the agency and to give them some degree of deference.

The problem, we submit, with the argument of the state and the United States is that they ignore that sequential approach and in fact attempt to give deference to the views of the Secretary at stages one and two of that analysis, where no such deference is due.

Moreover, in the unique circumstances of this case, where the Secretary once had a delegation of legislative authority and was under that old version due considerably greater deference and Congress withdrew that in the context of a dispute about eligibility for Medicaid, the views of the Secretary are in this unique situation entitled to no deference.

Let's look first at the plain language of the statute. It is not simply about a methodology in some sort of a vacuum, but rather about determining income eligibility. And it is undisputed that income eligibility both for the SSI cash program and for the aid to families with dependent children program is determined monthly.

That change was made in 1981 and in many ways is the real change that was made in the programs here. What the state and the Secretary are arguing is essentially what was argued unsuccessfully by the Respondents in the case of Schweiker versus Hogan several terms ago, that Congress didn't understand what it was doing when it enacted the plain language of the statute.

And here, as in that case, that simply demeans the intelligence of Congress, and the Court should not interpret a statute on the assumption that Congress didn't know what it was doing. Let's look at a concrete example.

Under the cash welfare program, somebody can apply and be eligible for benefits for a single month. If their financial circumstances improve, they will be ineligible in the next month. But they're still eligible for that one initial month of application.

Medicaid for the medically needy is different. Eligibility for a single month in Massachusetts under the six month regulation is impossible. It's six months or nothing.

This we submit really demonstrates the problem with the state's whole argument, which is that it ignores the fact that income always has a time

component. The statute is about determining eligibility based on income, and you can't talk about that without reference to time.

To say that the Respondent Ms. McKenna had $531.66 of income says nothing unless you know whether that was daily, weekly, monthly, or whatever.

Now, of course, at this stage of the statutory analysis the Secretary is not entitled to any particular deference. This makes sense, of course, because otherwise there would be a serious separation of powers problem. In almost any case, a clever attorney would be able to find some ambiguity and the executive branch would have the final say about what the statute means.

Most recently that policy has been reiterated in the American Citation Society case which this Court is going to hear on the last day of the term on other grounds.

And it's in this respect that we submit that the Second Circuit in its De Jesus versus Perales case, on which the Petitioners rely, erred. In that case the court, Judge Friendly, agreed with the Respondents here that a "literal reading" of the statute supported the view of the plaintiffs.

But then it went on to say, we are nonetheless going to defer to the views of the agency. That simply

we submit is incorrect. The longstanding nature of an agency policy has never been enough to justify its violating the plain language of the statute, particularly where there's been no showing that Congress was specifically aware of the policy and did not in any way affirm it.

Now, the state argues at some length that the statute doesn't apply because there is no spenddown in the cash programs and therefore they say it can't apply in the medically needy program. The state's argument about the medically needy program, and it was reiterated by the Solicitor General, says the principal difference, in fact, they say, between the categorically needy and the plaintiffs here, Respondents, the medically needy, is the existence of the spenddown.

But as the Massachusetts example given by Mr. Witherby indicates, that's simply not true. As he pointed out, there are many medically needy individuals who in Massachusetts have no spenddown at all.

What we submit this case is about and what the statute is about is the determination of income, and under all of the programs, cash as well as Medicaid, income is determined ultimately by making certain deductions from gross income, coming up with a net income figure.

How do you then determine eligibility? Well, you compare that net income figure to the eligibility level. The incurred medical expenses that are deducted in the medically needy program are simply another deduction, and that deduction, unique to the medically needy, in no way justifies any other variance from the way that the cash assistance programs otherwise determine eligibility.

The basic premise of the Medicaid program as set forth clearly in Section (a)(10) is that working poor people, like the Respondents, should not be treated worse than their counterparts who are receiving cash welfare benefits. That's what the state is doing under this policy.

And we submit that eligibility for the medically needy should therefore be determined in all other respects, including the length of time that you determine their income, the same way as it is in the cash welfare program.

Now, the state and the Secretary make much, or attempt to make much, of the legislative history behind this enactment. We submit that the legislative history in fact does not support their interpretation and indeed supports the judgment below.

What happened -- and it's important to

understand the scenario of events. What happened was that in 1981 the Congress repealed the delegation of legislative authority and also enacted monthly income eligibility budgeting for the cash welfare programs. And it appears now to be conceded, albeit sub silentio, by the Petitioner that prior to 1981 in the AFDC program there never had been any federally mandated budgeting period. States could have used whatever period they wanted to determine eligibility.

And we know that in SSI they used a three month period. So prior to those 1981 changes, this regulation of the Secretary made some sense. It accommodated in the medically needy program something that was equivalent, comparable, if you will, to what existed in the cash program, that was three months eligibility under SSI, and also took into account the special three month retroactive eligibility that was available under Medicaid.

After the 1981 changes, the Secretary changed his regulations, changed many of them, but did not change the six month regulation. In fact, if you look that's the only one that was not changed.

Subsequently in 1982, Congress, after having told the Secretary repeatedly, as quickly in fact as six days after the regulations came out in 1981, Congress

enacted the current version of Section (a)(10). Now, in so doing they made a statement on which the Petitioner relies, which has to be read, we submit, very closely, because it does not stand for the proposition that they would like it to.

I'm referring to the statement in which they indicated that, in a one-house report -- and of course, being a report of only one hous, it's not entitled to any particular degree of deference. But in that report --

QUESTION: You say it's not entitled to any particular degree of deference. Presumably it isn't entitled to as much ieference as the report of a joint committee would be, but it's certainly entitled to some.

MR. REIXACH: It's entitled to some weight, but certainly not the degree of controlling weight that would be given to a conference report, Justice Rehnquist.

The language, as I point out, does not say that they're reaffirming the regulation, as the state would have it. Rather, what it says is that they are reaffirming the financial requirements, whatever those might be, previously in effect.

And then in a parenthetical it gives a listing

of regulations. Now, if you recall back to the history of events in 1981 leading up to this, the six month regulation at issue is not a regulation that was previously in effect. It had always been in effect, and it's in distinct contrast to every other regulation in that listing in that regard.

So it didn't need to be reaffirmed because it had never been changed. Further --

QUESTION: Let me just stop you there. I don't understand that argument. It is listed in the things that they say are -- I guess, could you give me the part of your argument again?

MR. REIXACH: There's a parenthetical listing, which we say simply --

QUESTION: Which includes this provision.

MR. REIXACH: It includes this provision. But we say what that does is really give you boundary markers to say, this is the area in which to look to find the particular regulations we're talking about.

But for example, Justice Stevens, there are other regulations in that same listing which are subcaptioned "Financial responsibility of relatives." These are regulations number 821 through 823. Those were not even issued under Section (a)(10), the section that Congress was amending.

Those are the medically needy counterparts to the regulations which this Court construed in the Gray Panthers case. Those were relative responsibility regulations that were issued under an entirely different section, (a)(17).

Now, it wouldn't have made any sense for Congress in amending Section (a)(10) to reaffirm regulations that had been issued under an entirely different section. So what we're saying is --

QUESTION: Maybe they shouldn't have referred to that statute. But isn't it a fair reading of that parenthetical that they intended, at least in a general way, to approve everything listed in the parenthetical?

MR. REIXACH: Well, we submit that it's not, because, number one, they didn't say they were approving the regulations. They were talking about the requirements that had been changed.

This requirement quite singularly had not been changed. And if, as I just indicated, if they were intending to reaffirm all of the regulations, it was kind of a funny way to go about it, insofar as they were reaffirming regulations issued under an entirely different statute.

We suggest that means they were simply trying to show you where the regulations could be found, but

they weren't encompassing all of them in that group.

QUESTION: But couldn't one also make the contrary argument, that if they generally thought everything should be done on a one month basis and they listed a regulation that authorized a six month period for determining, how can you say they're disapproving the six month rule?

I mean, somehow that doesn't fit either.

MR. REIXACH: Well, I think that the example of their attempted reaffirmation of regulations issued under another statute indicates that it was perhaps just sloppy wording.

QUESTION: See, because your view, if I understand it correctly, is that one month should apply to everything. And this is a very unique, kind of flagrant exception. And you would think that if they thought this was wrong, when it's that dramatic, they might have made just the contrary comment.

MR. REIXACH: Well, Your Honor --

QUESTION: Maybe I missed something.

MR. REIXACH: -- of course, what happened here, recall, is that the OBRA changes, the changes for example from quarterly budgeting in SSI to monthly budgeting, had not gone into effect -- that particular change had not gone into effect until April 1, 1982.

The amendment to Section (a)(10) which contains the disputed language was enacted in July and August, only three or four months later.

There clearly had not been a focusing on this issue by the Congress. But if anything, we submit that this simply demonstrates the problem with their argument. They really argue two things in their brief.

On the one hand, they say that Congress wasn't aware of this regulation and obviously didn't intend to change it. Then they take precisely the opposite point of view and say that in fact Congress intended to expressly reaffirm it.

We submit that the best that the legislative history teaches in this regard at all is that Congress wanted to not give the Secretary the room to have flexibility as she previously had had. They took the prior delegation of authority and withdrew it, and they also used considerably more specific language.

Rather than talking about comparable standards, which is a somewhat vague phrase, they used the much more specific phrase "same." What Congress was doing, we submit, in 1981 was making the whole eligibility process for all of the Congresss much more reality specific, if you will.

Let's look at the SSI program, for example,

which previously had had quarterly budgeting. Under that program, if you had to income in January or February, but came into income in March, you would be ineligible because of that March income. Of course, that didn't help you pay your bills in January of February, just as the state's policy didn't help Ms. Rivera pay her bills in February of 1983.

What Congress did when it changed from quarterly budgeting in SSI, when in mandated one month budgeting for eligibility in AFDC, was to pin those programs down to time periods that in fact that relevance to the lives of the people who were affected by them.

People pay their rent and their utilities on a monthly basis, and that's what all of these monthly maintenance allowances, be they the AFDC level or the medically needy income level, are supposed to do. So it's quite congruent, we think, with what Congress was doing in the cash welfare programs, what they did here in the medically needy program. It really is the same sort of underlying policy, and can result in some of the same results.

Now, the state and the Secretary also argue that TEFRA and OBRA were cost cutting bills, this just doesn't make any sense. I think the example I just gave

points out that there were situations where, even in the SSI program, eligibility was going to be increased somewhat.

The only actual data that we have from any of the states, other than just sheer speculation, is from the state of Illinois, which did make a change from six month to one month budgeting for the same group of working poor people as are involved in this case. And over a two year period where there was about a 10, 15 percent increase in the consumer price index for medical expenditures, they had only a 2.5 percent increase in their Medicaid program.

Also, the notion that OBRA was solely cost cutting and nothing else we think is demonstrable incorrect. For example, in Section 955 of the Budget Reconciliation Act, there is a whole new program initiative for adolescent family life. It hadn't existed before and it was funded at $30 million of federal money, to be matched by other sources.

So there were in fact some considerable changes that were made, and we think that this is simply one of them. But the plain language of the statute we submit supports our interpretation, and we don't think that the Secretary's and the state's version of the legislative history really supports their view and

undercuts the plain language.

QUESTION: Let me ask you one other question about the legislative history. I think Mr. Ganzfried referred to something in the conference report that said in so many words that this would not put anybody on the roles who was not already eligible. Is that correct?

MR. REIXACH: Well, that was his statement, Your Honor. I think the example that I gave demonstrates that, if that's what Congress said, it demonstrably was incorrect, because the fact is that under the old SSI program, as I indicated, if you had income in the last month of the quarter, it would render you ineligible for --

QUESTION: I understand you've given me a hypothetical that that wouldn't fit. Do you agree that that's a correct statement of what the conference report says? I had missed that, frankly, in the briefs.

MR. REIXACH: I'm not familiar with that page of it, Your Honor.

QUESTION: I didn't find it in his brief, either.

MR. REIXACH: So I really can't speak to that.

But we do believe that in fact the changes had already been made. And in fact, since one month

budgeting, as I indicated earlier, had gone into effect April 1 of 1982, so I suppose as a technical matter the report to which Mr. Ganzfried referred is in fact possibly correct, because that report was presumably issued in July or August, when Congress was considering TEFRA.

The changes, the change to one month budgeting, had been completely implemented in the cash programs by April of 1982. So as a technical matter, I suppose that there might not have been any perceived programmatic change at that point, because one month budgeting was already part of the cash program by then.

QUESTION: But it wasn't part of it for your clients. For the cash programs, yes --

MR. REIXACH: Yes.

QUESTION: But not for the medically needy people.

MR. REIXACH: That is true. But I don't think we can impute to Congress a knowledge of what each of the 50 states is doing. Nor, I might point out --

QUESTION: But Congress must have known that there were states that did use the six month period for medically needy eligibility, didn't they? A lot of states did this, as I understand.

MR. REIXACH: There were a lot of states that

did it. As the amicus brief of the Gray Panthers points out, there are many major states that did not. It was decidedly a mixture.

One old problem in this area of what one is to make of the Secretary's regulations is that, quite frankly, in this whole area the Secretary has been somewhat less than forthcoming. After the 1982 enactments, the Secretary promulgated regulations purporting to implement those 1982 changes. And with reference to this particular section, Section (a)(10), the Secretary said, rather cryptically, that the statute was self-implementing, and so therefore the Secretary made no changes in the regulations which even the United States and the state would concede the Secretary was aiming at.

These regulations have now remained on the books unchanged for three and a half years. So it is no particular surprise that Congress, unless they were particular cognoscenti of the Medicaid program, would be somewhat left in the dark as to precisely which of those regulations were in effect, which weren't, how they had been changed, because the Secretary has just said, well, it's self-implementing and we won't tell you anything more.

We think that that action by the Secretary and

the actions taken by Congress indicate really why in this particular case the Secretary is not entitled to any deference at all in construing this statute. Normally, if the statute were clear and the legislative history were clear, of course, you wouldn't go to that third step of the analysis and look to the views of the agency at all.

QUESTION: Let me interrupt once more. I must confess I detect a little tension in your argument. I'm not clear on whether you're saying that Congress was clearly aware of the six month regulation and wanted to change it by adopting the "same methodology" language, or they weren's aware of it and it's just kind of an inevitable consequence of this language.

MR. REIXACH: I think that they were aware that they were changing the -- they were certainly aware that they were changing the cash programs in 1981.

QUESTION: Yes, no question.

MR. REIXACH: There were certainly aware in 1982, and based on the legislative history, that they were linking, re-linking, if you will, the Medicaid program to the eligibility determination process for the cash programs. So we think that --

QUESTION: But you still haven't told me whether you think they're aware of the issue in this

case.

MR. REIXACH: Whether they were aware of this precise issue, I can't say that they were, Justice Stevens. But we think that the statutory enactments over that short span of time demonstrate that that was the inevitable result, and Congress surely must have known that, or should have known it.

We also submit that in this particular case that the views of the Secretary are not due any deference. The reason in our view is the withdrawal of the legislative delegation that the Secretary once had had.

Under the prior version of the statute as it existed prior to 1981, the Secretary had that extraordinary deference. That was withdrawn, and then there was this dispute between Congress and the Secretary over the Secretary's attempts to allow Medicaid eligibility to be computed more restrictively than eligibility for the cash welfare program.

Now, just the year before, or really in that very same time frame, in the Gray Panthers case this Court in 1981 had reiterated what the effect of a delegation of legislative authority was. And we submit that, taken in that entire context, where the delegation was withdrawn, where there was this ongoing dispute,

that the Secretary is not entitled to any deference at all, because otherwise, if you follow through the --

QUESTION: Counsel, I must have missed something. What exactly is it that Congress did? What change did it make to withdraw the delegation to the Secretary?

MR. REINACH: Prior to 1981, Justice O'Connor, the statute had language in it in Section (a)(10) referring to eligibility according to standards promulgated by the Secretary. And we know that that reference to standards promulgated by the Secretary is a delegation of legislative authority to the Secretary to a wide range of issue, to issue regulations which are going to be virtually unassailable in a court.

In 1981 when it enacted OBRA, that language was withdrawn from the statute. Then in 1982, when the current version of the statute was enacted, the one that talks about the same methodology for determining eligibility, that language was not reinstated. And the scenario leading up to that, we submit, makes it quite clear why it wasn't, because Congress had been feuding with the Secretary over precisely these sorts of things and did not want to give the Secretary that power.

It didn't use the old language of comparability, which left some room for Secretarial

interpretation, but rather was much more specific, referring to doing things the same.

The so-called spenddown, as I indicated at the outset of my argument, is we submit really simply another of many deductions from income, and the fact that that deduction does not exist in the cash program in no way undermines the argument.

In fact, if you look at the language of the statute on which the Secretary relies, Section (a)(17), and look at it closely, it's apparent that it doesn't have anything to do with eligibility at all. What it has to do with is defining, allowing the Secretary to define, what are the kinds of expenses people can count.

Can they count a bill from a podiatrist if that particular state doesn't cover podiatry? The Secretary has issued a regulation about that. You're supposed to consider all bills except as prescribed by the Secretary.

And the problem of the Respondents here and in the other cases that are referred to on this issue, De Jesus and Hogan, was not a problem of not having enough bills. In the case of De Jesus versus Pelales, on which the Petitioner relies and on which a petition for certiorari is pending in this Court, Ms. De Jesus had

thousands of dollars of hospital bills, $750 of income each month, and the question was, was she going to have to pay $150 toward those bills or $900, six times that amount?

QUESTION: May I interrupt you just long enough to ask this question. You rely, as I understand it, on the change in the statute in 1982, is that correct?

MR. REIXACH: We rely on changes in the statutes in 1981 and in 1982.

QUESTION: Right.

MR. REIXACH: The change to monthly eligibility in 1981.

QUESTION: Let me just follow up. Both the Courts of Appeals for the First and Second Circuits decided cases in 1985, after those changes were made, and they decided cases that seem on the face of them against your position.

MR. REIXACH: They are, Your Honor.

QUESTION: And I wondered what your argument is.

MR. REIXACH: Well, Your Honor, our argument is that the Hogan case in the First Circuit and the De Jesus case in the Second Circuit are incorrect, that they applied the wrong analysis. They fell into the

trap of the state and the Secretary, as I indicated earlier, in the De Jesus case, for example, of giving deference to the Secretary, although Judge Friendly agreed with the Respondents here that a "literal reading of the statute" supported the view of the Respondents here.

And we submit that under the Chevron test, if there is a literal reading of the statute that supports the Respondents that should be the end of the matter, and that these inquiries into somewhat murky legislative history and certainly into giving deference to the Secretary simply are not supportable under the analytical framework that's required to determine this; and that in fact the position of the Supreme Judicial Court reflects the true intent of Congress in making all of the programs reality specific, applying them on a monthly basis, because that's when individuals need that income to live on, to pay their other bills, their non-medical bills.

And that's what the judgment below does. So in summary, we submit that the Supreme Judicial Court was correct, the statute is clear on its face, the Secretary is not entitled to any deference because the statute is clear, and because the delegation of legislative authority which the Secretary had previously

had was withdrawn.

QUESTION: In order to rule with you, do we have to say that Judge Friendly was wrong?

MR. REIXACH: In order to rule with me, I'm afraid you might have to do that. But I think that it was simply due to a misplacement of -- a mis-deference to the Secretary, without any reference to the analytical framework set out by this Court.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Witherby?

REBUTTAL ARGUMENT OF

H. REED WITHERBY, ESQ.,

ON BEHALF OF PETITIONER

MR. WITHERBY: First, the delegation of authority to which Mr. Reixach referred in his argument, which was withdrawn, referred to an entirely different determination. And the legislative history of the 1965 Act which makes that clear is set forth in my reply brief starting at page 8.

The delegation of authority under which the spenddown regulation was issued was part of subsection 17 of the statute, not subsection 10, which is where the delegation Mr. Reixach referred to used to exist. It is this last clause of section 17, and not the 1982

amendment, which is specifically addressed to the spenddcwn determinaticn.

With respect to Mr. Reixach's suggestion that we concede that prior to 1981 states had leeway to use any period they wished for the AFDC budget periods, that is incorrect. We do not concede that, and the House -- cr, excuse me, both the House and the Senate repcrts cn the OBRA legislation which contains the one month requirement recognized that this was the universal practice of the states in 1981.

The purpose of the OBRA legislation regarding AFDC was a ccst cutting purpcse tc impose retrospective budgeting. It was not a purpose to change the length cf the budget period for AFDC, and it certainly was not a purpose to expand the medically needy program by requiring a similar budget period there.

Congress was clearly aware of the six month regulation, which they expressly referred to in the TEFRA report, and they were clearly paying close attention to the financial eligibility regulations cf the Secretary.

This case boils dcwn to a simple point: When Congress wants a one month period, it knows how to say sc. It did nct do so here.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:42 p.m., the oral argument in the above entitled case was submitted.)

# CERTIFICATION

lderson Reporting Company, Inc., hereby certifies that the ttached pages represents an accurate transcription of lectronic sound recording of the oral argument before the upreme Cour.: of The United States in the Matter of:

#85-632 - CHARLES ATKINS, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE, Petitioner v. SANTOS RIVERA, ET AL.

nd that these attached pages constitutes the original anscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)