ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES	)	
	)	No. 86-863
Petitioner	)	
v.	)	
	)	
KENNETH KIZER, DIRECTOR OF CALIFORNIA DEPARTMENT OF HEALTH SERVICES, ET AL.	)	

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IN THE SUPREME COURT OF THE UNITED STATES

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

v. No.86-863

KENNETH KIZER, DIRECTOR OF CALIFORNIA DEPARTMENT OF HEALTH SERVICES, ET AL.

Washington, D.C.

Wednesday, April 1, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

THOMAS W. MERRILL, ESQ., Department of the Solicitor-General, Department of Justice, Washington, D.C.; on behalf of Petitioner.

RALPH M. JOHNSON, ESQ. Deputy Attorney General of California, San Francisco, California; on behalf of Respondents.

C O N T E N T S

PROCEEDINGS

CHIEF JUSTICE REHNQUIST: Mr. Merrill, you may proceed whenever you are ready.

ORAL ARGUMENT BY THOMAS W. MERRILL, ESQ.

ON BEHALF OF PETITIONER

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

At issue in this case is a decision in the Health Care Financing Administration, a unit in the Department of Health and Human Services disapproving a proposed amendment to California's state Medicaid plan. The question is ultimately one of statutory construction: did the Administrator properly conclude that the California amendment violate the plain and unequivocal language of Section 1903(f) of the Medicaid Act, or is there some escape route from this conclusion, as the Court of Appeals found, and as the Respondents maintain?

Section 1903(f) provides that when a state elects to participate in a Medicaid program, the federal government will reimburse the state only for families whose income after medical expenses falls below a certain cap. Section 1903(f) sets that cap at 4/3rds the highest amount ordinarily paid by the state under the AFDC program to a family of the same size having no income or resources.

In other words, if the highest amount ordinarily paid to an AFDC family of two, without any income and resources is

$300 a month, then the cap on federal financial participation for a family of two would be $400 a month.

In September 1983 California submitted an amendment to its Medicaid plan to the Administrator of the Health Care Financing Administration. The amendment provided that for adult couples and only for adult couples, that the medically needy income level would be 4/3rds the highest amount ordinarily paid to an AFDC family of three.

In its application, which we have reproduced at page 24 of the Joint Appendix, California admitted that the new standard for adult couples exceeded the federal cap by $142 a month. The State also indicated by crossing out a notation at the bottom of the page that it did ont have a method of excluding these excess payments from future requests for federal reimbursement.

The Administrator promptly rejected the proposed amendment as violating both section 1903(f) and the Secretary's implementing regulations. This, we submit, was clearly correct: Section 1903(f) imposes a limit on financial participation based on a fixed numerical relationship on a level of benefits ordinarily paid to an AFDC family of the same size. The Secretary's regulations expressly provide that this limit applies to couples.

California, however, proposed to set its medically needy income level for couples based on the amount paid to a

family of three. An adult couple is a family of two; a family of two is not the same size as a family of three. Thus, the California amendment, as the Administrator properly found, violated the plain terms of the statute and the regulations.

The fact that the statute gives the Secretary authority to prescribe standards does not change this conclusion. The Secretary is empowered only to set standards for determining the amount of benefits ordinarily paid to a family of a given size. He is not empowered to set standards for determining what "same size" means.

In any event, the Secretary has exercised the delegated authority given by Section 1903(f). The Secretary's regulations, which remained unchanged in this respect since 1971, state that the cap on federal financial participation is to be determined for any given family, including adult couples, by looking to the amount ordinarily received by an AFDC family of the same size.

Thus, if there were any doubt about the meaning of the statute created by the delegation to set standards to the Secretary, it is in Judge Kozinski's phrase, "neatly excised by the regulations.

Three arguments have been advanced in this case in an effort to defeat the plain import of this statute and the regulations. First the Ninth Circuit held that the California Amendment was authorized by a provision contained in a 1979

internal agency manual. And that this manual was a legislative regulation binding on the Agency.

Second, the respondents maintain that, even if the manual was not a legislative regulation, it was at least a valid guideline and as such is entitled to deference by the courts.

Third, both the courts of appeals and the Respondent claim that Congress, when it enacted the Deficit Reduction Act in 1984, intended to permit the California amendment. I would address each of these three contentions in turn:

The primary theory of the court of appeals was that a certain manual provision, the so-called ROM 2572-D, was a legislative regulation. No one seeks to defend this theory in this Court and with good reason. The manual provision in question is part of a loose-leaf manual intended by use by Agency employees only. It was not approved by the Secretary of Health and Human Services, the only person in the Agency who has the authority to issue substantive regulations; it was not issued after public notice and comment procedures as is required by the APA and longstanding Agency policy; it was not published in the Code of Federal Regulations; indeed, it was not even published in the Federal Register, the requisite for all substantive regulations under the APA. The Court of Appeals Rationale simply cannot be squared with fundamental tenets of administrative law.

As Judge Kozinski put it, "it would create uncertainty; breed litigation; and invite judicial intrusion into the affairs of administrative agencies."

Although they disclaim any reliance on the court of appeals theory, Respondents nevertheless argue that the manual provision is a valid guideline, and as such, is entitled to deference by the courts. We agree that Agency manuals can be important sources for resolving legal disputes that arise under the Social Security Act.

QUESTION: Did the Secretary ever direct any -- anyone to use it?

MR. MERRILL: No, Justice White. There is no indication that the so-called "ROM provision" was in fact ever applied in any particular case involving any state, let alone this State. When the provision was drawn to the attention of the Administrator in this State it was promptly disavowed and the Administrator consistently held that it violated the State statute and regulations.

There is a reference in the ROM to the State of Montana, but there is no evidence that we can locate that Montana in fact ever attempted to set its medically need income level based on a family of three for couples rather than two.

The contention that somehow the courts should give deference to the ROM provision in this case, even if it is not a legislatively binding regulation, we do not think bears any

scrutiny.

The decision in this case was not one to enforce the ROM. The decision was one to repudiate the manual. In this context, if the manual is not a legislatively-binding regulation, then the only questions it presented are whether the Agency adopted a rational construction of its own statute and regulations, and in light of that interpretation, whether its decision to repudiate the manual is arbitrary, capricious, or an abuse of discretion.

We do not think there can be any serious dispute about the answers to these inquiries. Even if one somehow imagines that Section 1903(f) creates an ambiguity and allows the Secretary to determine that "same size" means that a couple is different from a family of two, the Administrator did not interpret this statute that way. The Administrator in this case found that the same size family means what it says, that a "couple" is a "family of two," and not a "family of three."

This was clearly a rational construction of the statute and once that construction was made it followed as a matter of course that the Agency manual had to be repudiated. An Agency manual simply cannot trump a duly-enacted statute of Congress or a duly-promulgated Agency regulation.

Nor do we think there can be any contention in this case that California relied to its detriment on the Agency manual. In April 1983, the California Department of Health

Services prepared an analysis of proposed legislation that ultimately led to the State plan amendment at issue in this case. That analysis noted that, "regional office manual provisions have no regulatory authority," and it cautioned that, "federal approval would very likely not be granted."

Later in August 1983, the same California Department again concluded that the California Amendment was in violation of the federal cap.

To make doubly sure, the California department wrote to the Administrator and asked for a formal Opinion about whether or not the proposed plan would be acceptable under federal law. The Administrator wrote back in September of 1983 and unequivocally informed the Department that its proposed plan would violate Section 1903(f) and the implementing regulations.

Notwithstanding these repeated warnings, that the manual provision was unlawful and that the proposed plan amendment would be disapproved, California filed its amendment anyway.

We would submit that this history demonstrates that, although California was no doubt attempting to exploit the manual, it was not in any sense relying on it.

The final argument that has been advanced for avoiding the plain language of Section 1903(f) in the regulations is based on the so-called "DEFRA moratorium."

Section 2373 of the Deficit Reduction Act, or "DEFRA," directs the Secretary not to take any compliance action against a state by reason of the state's medicaid plan being in violation of a certain provision of the medicaid statute.

The section that is referred to in the moratorium is the subsection of Section 1902(a) of the medicaid statute, a provision that had been added by the Tax Equity and Fiscal Responsibility Act of 1982 or TEFRA. The moratorium does not mention Section 1903(f), the 4/3rds cap on federal financial participation which was relied upon by the Administrator in this case. So the short answer to the DEFRA moratorium argument, and we think the complete answer, is that the moratorium concerns a different statutory requirement not relied upon by the Administrator and is simply irrelevant.

The legislative history confirms this analysis. The primary purpose of the DEFRA moratorium, as the legislative history makes clear, was to give the states greater flexibility in measuring income and resources in determining eligibility. As this Court explained in its Opinion in Adkins v Rivera, TEFRA required the states to use the same methodology in measuring and resources for all goods of medicaid recipients. DEFRA imposed a moratorium on this provision. This case does not present any issue about measurement of income and resources. It concerns only the cap on federal financial participation that applies after the measurement process is

complete.

TEFRA also required the states to use a single standard of eligibility requirements for all groups of medicaid recipients. After TEFRA was enacted, some agency employees, although not the Administrator, interpreted the single standard to mean, among other things, that the states had to set the same eligibility requirements for families consisting of one adult and a child and families consisting of two adults.

If this were the correct interpretation, then the DEFRA moratorium would mean that states could now set different eligibility standards for adult couples and families consisting of one adult and a child. But just because the states can set different relative standards for families consisting of two adults and families consisting of an adult and a child does not mean that either standard can correlate the cap set by section 1403(f) -- 1903(f), excuse me, of the Act.

To return to my earlier example, if the amount ordinarily paid to an AFDC family of two is $300, and the Section 1903(f) cap for a family of two is therefore $400, DEFRA would permit a state to set the medically needy income level for an adult couple at $400, and to set the medically needy income level for a family consisting of one adult and a child at something lower, such as $350.

But there is nothing in DEFRA that permits states to violate the federal cap either for adult couples or for any

other type of family. If there were any doubt at all about this it has been resolved by a recent amendment to the DEFRA moratorium enacted just this past August designed to clarify which provisions of the Medicaid Act are covered by the moratorium. This enactment is not simply a post-enactment legislative history because Congress specifically made the effective date of the clarification retroactive back to the date of the enactment of DEFRA.

QUESTION: May I ask about that Act? That actually adopted after we took jurisdiction in this case, was it not?

MR. MERRILL: That is correct, Justice Stevens. It was in August.

QUESTION: Is that an appropriate -- can Congress enact a statute that tells us how to decide a case?

MR. MERRILL: Well, there is nothing in the clarification that was passed in August that suggests that Congress was aiming at this particular case. There is a bill --

QUESTION: What other is -- no other state does this, does it, or does Nebraska do it, too?

MR. MERRILL: Well, no. The clarification that was passed in August was intended to clarify that the moratorium on TEFRA extended to certain issues under TEFRA that were not absolutely clear under the initial moratorium. The August clarification does not mention 1903(f) and we suggest that the

failure to mention 1903(f) in the clarification establishes what we said in the initial moratorium intended, which was not to cover 1903(f) either. So the main purpose of Congress was to broaden the moratorium with respect to some other issues and they clearly did not include 1903(f) in these other issues that were being clarified. The Senate report has a sentence that expressly says "1903(f) is not covered."

Now, what you may be referring to is a recent enactment by the House, the so-called, "Waxman Bill," which does specifically state that the State of California will be permitted to set its medically needy income level based -- for adult couples based on the AFDC level for a family of three.

So the Waxman Bill seems to be in a sense an attempt by Congress to determine the outcome of this particular litigation. But that has not yet passed the Senate. It would be entirely a matter of speculation as to what happened --

QUESTION: But as to the first of the two pieces of legislation you mentioned in substance said that the moratorium was intended to be broader than its language would indicate?

MR. MERRILL: Yes, and --

QUESTION: How does that -- I am not quite sure how that enters the case. I found it a little hard to follow the moratorium all the way to the end.

MR. MERRILL: Well, everyone finds it hard to follow the Moratorium, Justice Stevens. What August did, this last

August, what Congress did this last August was it clarified the 1984 moratorium by saying that, "in addition to the subsection of 1902(a) that we initially mentioned, the following three subsections were also governed by the moratorium." They did not mention 1903(f), as the original moratorium did not mention 1903(f). We just say that, we just cite this as confirmation of the proposition of the original moratorium did not have any application to this case.

QUESTION: No, but at least it establishes the proposition that the moratorium in the 1984 DEFRA statute is broader than the one applicable just to 1902(a).

MR. MERRILL: Yes, it does do that. But the fact that --

QUESTION: If you just knew that much, you might think, "well, maybe it also should apply to 1903(f)?" But your point is that they broadened it with three specifics without adding the fourth?

MR. MERRILL: That is correct. I mean, I do not think -- there is clearly a dispute going on between California and HHS over whether or not the original DEFRA moratorium applies to 1903(f). Presumably some people in Congress, at least, were made aware of this dispute. In August 1987, Congress clarified the DEFRA moratorium and in doing that it did not state that the 1903(f) was covered by the moratorium.

We think that that is fairly conclusive evidence that

neither the original moratorium nor the new moratorium were intended to have anything to do with Section 1903(f).

QUESTION: Or at least this Congress' interpretation of the original moratorium, which is really not which governs what the original moratorium meant.

MR. MERRILL: Well, I think you can argue that in this case it does, Justice Scalia, because as I mentioned, Congress made the effective date of the clarification retroactive to the date of the original moratorium. Now, if that is permissible, and we do not take any position on that, the new legislation is in effect the governing law that would apply throughout the period in controversy in this case.

QUESTION: May I ask one other question about the moratorium? I may have my notes mixed up, but as I understood it, it lasted only until something like January 1986, or whatever the date, but a date that has already passed.

MR. MERRILL: No. The moratorium was to last for 18 months after the Secretary filed a report with Congress.

QUESTION: Oh.

MR. MERRILL: About the effect of having different methodologies for measuring different income between medically needy medicaid families and other types of medicaid families under the categorical programs. The Secretary missed the initial deadline for filing that initial report. It has now been filed, and so the moratorium expires 18 months from this

past August.

QUESTION: So it is still in effect, whatever it is, all right.

MR. MERRILL: It is still in effect, that is correct.

In concluding, I would just like to emphasize what is not at issue in this case: this case does not concern the power of states like California to afford a greater medicaid benefits to adult couples. The issue is who to pay for such benefits once they had been made available. Congress had given the states broad discretion to set eligibility standards.

But Congress has also set a cap on federal financial participation equal to 4/3rds of the highest level of benefits paid to an AFDC family of the same size. If California wants more federal dollars for the medically needy, it can increase the size of its AFDC benefits, which would automatically, through application of the statutory formula increase the size of the federal cap.

Alternatively, it can increase medicaid benefits for adult couples and can arrange to pay for the excess benefits above the federal cap itself.

What it cannot do under existing law is to file an amended plan that violates the federal cap and insists that the federal government reimburse it for amounts in excess of the cap.

If there are no further questions, I would like to

reserve four minutes of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you again, Mr. Merrill. Whatever time you have left will be reserved.

We will hear now from you, Mr. Jones.

ORAL ARGUMENT BY RALPH W. JOHNSON, ESQ.

ON BEHALF OF RESPONDENTS

MR. JOHNSON: Mr. Chief Justice, may it please the Court:

The judgment of the Ninth Circuit was based on two separate and independent determinations. It is that second determination that I would like to discuss with you. That is the moratorium, because in our view, the moratorium should be the dispositive issue in this case. In June 1984, Congress enacted the Deficit Reduction Act, DEFRA. And Section 2373(c) of that Act provides the 18-month moratorium that the Solicitor-General was just discussing with you in his opening argument.

We believe that Congress meant in enacting that moratorium to authorize on a time-limited basis, states' use of medically-needy income levels for adult couples set at 133.33 percent of the AFDC grant for three. And we believe that is so for two reasons:

First, the issue that was before Congress as it enacted the DEFRA moratorium, was the reversal by HHF -- HHS, of its policy embodied in ROM-2572.

QUESTION: Mr. Johnson, let me ask you just a minute: you are taking a somewhat different position than the Ninth Circuit took, because it seemed to rest most of its opinion on the ROM? I do not think we are at difference with the Ninth Circuit's Opinion. It is a matter of emphasis, I realize, but yet I thought they devoted most of their Opinion on the ROM. I gather that they thought that that was the best part of your argument.

But now in effect you are saying you think that the DEFRA point, I presume, is superior to the ROM?

MR. JOHNSON: The principal holding I think that you are referring to, Justice Rehnquist, was the Ninth Circuit giving legal force and effect to the ROM in the same status as one would in a duly-promulgated regulation and/or statute.

Yes, we are taking a different view, as we indicated in our briefs. We have not taken that position in defending that determination in this Court. Our view is that ROM-2572, as our view was, incidently, before the Ninth Circuit, and before the Secretary in the administrative process, that this ROM was an interpretive guideline.

However, in the medicaid program that -- it is a joint federal and state program, and that under Section 201.3, particularly subsection D, the Secretary's own regulation provides that when state plans are evaluated or approved by the Secretary or whomever she has delegated -- or he, has delegated

to that task, that guidelines are referred to in determining what the regulations that the Secretary has promulgated, really mean. So that when we look at the regulation that exist with respect to the amount of cap on the federal financial participation, it is indeed under the Secretary's regulations for purposes of approving state plans altogether appropriate to look at what their policy interpretation has been of what that regulation means.

And that is what ROM-2572 was and that is what it is. It interprets the Secretary's own regulation to say that in the case of adult couples, you could have a medically-needy income level set at an AFDC level of three.

And the reason that that ROM determined that that was appropriate was that one could determine that in the case of two adults, particularly elderly adults, it simply costs more for them to live. That is what a maintenance need income level really is. And you could reasonably determine, and the State has the flexibility to reasonably determine that it costs an elderly couple more to live per month than it does for a parent and one child.

QUESTION: But that is not the question that is up for determination. The question that is up for determination was whether a family of three is the same size as a family for two? It was not left up to the state to decide how much money to provide reasonably, and the federal government will

subsidize all of it.

Was the question before the state not whether a family of two was, can be, interpreted to be the same size as a family of three, or vice-versa? Which come to the same thing.

MR. JOHNSON: You mean before the Ninth Circuit, Justice Scalia?

QUESTION: No. The State, when it was interpreting the ROM, or the ROM when it was interpreting the regulation --

MR. JOHNSON: Yes sir?

QUESTION: -- the issue to be decided in that interpretation is not "what is a reasonable amount to give to a family of three as opposed to a family of two;" but the issue is "what does 'same size' mean?"

MR. JOHNSON: Yes, that is true. But I think that it is another way of saying the same thing, Mr. Justice. That, as -- bear in mind that the ROM was a policy interpretation that came from HHS. This is not a state interpretation, Sir. That is a federal interpretation. It is a federal interpretation of a federal regulation. We simply, rather than trying to exploit it, we tried to rely on it.

QUESTION: You are saying it is a reasonable interpretation?

MR. JOHNSON: Yes, we felt so. Indeed, we think Congress specifically reaffirmed that regulation, or that

policy interpretation, when it adopted the DEFRA moratorium, because the issue that was before the Conference Committee was made clear in the Conference Committee Report, and in -- before we refer to that Report we have to have -- in April 1983, HHS had promulgated a policy letter to all regions, and that is at Appendix B to our Brief in Opposition to the Petition.

In that letter, for the first time, HHS takes the view that, in light of Congress' enactment of TEFRA and the "single standard" requirement in TEFRA, that states could no longer set adult couple income levels at 133.33 percent of the grant for three, as provided in ROM-2572, and that letter specifically states ROM-2572 because of the enactment of TEFRA and the "single standard" requirement in TEFRA.

That "single standard" requirement is Section 1902(a)(10)(C)(i)(3). That is the same section that is referred to in the DEFRA moratorium.

And then when you refer to the Conference Committee Report to determine what was the issue, what was the problem that they thought they were addressing in adopting the moratorium, the language that the Conference Committee used is almost identical in addressing -- in articulating, the issue that is addressed in that 1983 all-regions letter.

When the Conference Committee says, "similarly, the Department has taken the position," it is exactly that letter that was sent out to all of the policy regions some few months

before that Congress was referring to and that Conference Committee Report reiterates what the Secretary's position was as it was stated, or I should say, the Department's position, as it was stated in that all-regions policy letter, that in light of Congress' enactment of the "single standard" requirement in TEFRA, states could no longer set maintenance need income levels for adult couples because that would result in a different medically needy income level among groups of the same family size, depending upon the relative numbers of adults and children.

So it is almost the same language that was used by the Department in their all-regions policy letter in April 1983. Congress then criticizes the Secretary's overly-restrictive interpretation of the TEFRA amendment and prohibited denying the state plan amendments -- state plans, and more recently, state plan amendments, making it clear based on that overly-restrictive reading.

QUESTION: Mr. Johnson, what did they intend the states to be able to do?

MR. JOHNSON: They intended, Mr. Justice, we believe, by that very language referring right to the Secretary's ruling of ROM -- or reversing ROM-2572, to reaffirm the Department's policy set out in ROM-2572.

QUESTION: Were there some actual states that were involved?

MR. JOHNSON: There were two states, Justice White, at that point in time, who were proposing to utilize the criteria of ROM-2572: ourselves and Nebraska.

Now, if there is any ambiguity -- I am sorry?

QUESTION: Well, did Congress know that? That there were two states doing it?

MR. JOHNSON: We would have to make it as an assumption, Mr. Justice, because I could say that the legislative history does not specifically say they were aware that California and that Nebraska was. I can say, however, that it is almost certain from the legislative history, because the letter, the all-regions policy letter, that was sent out in April 1983, which indeed there is no question that that is what they were referring to, is in fact in response to an inquiry concerning California's state plan amendment and that inquiry --

QUESTION: Somebody must have gotten to the Conference Committee or to Congress.

MR. JOHNSON: That is right. The policy letter itself is referring back to California's state plan amendment, because the inquiry had come in from the Region Nine San Francisco office.

But if there is any ambiguity in the Conference -- the Conferees' Report itself, that ambiguity it seems to me, is completely resolved when you refer over to the House report in

support of the House bill that came in to Conference. Because the House report in support of that bill specifically says, "HHS has reversed itself on the policy that it had contained in 2572." It severely criticized HHS for making that policy reversal; it made clear that it is entirely logical that the state could determine that it could cost an elderly couple more to live per month than it would a single -- a parent and one child; and it said that the purpose of the House bill was, indeed, to reinstate that policy.

QUESTION: Well, and it specifically provided for reinstatement of that policy. Did that House bill not contain a specific provision that reinstated that policy in so many words?

MR. JOHNSON: Mr. Justice, what the House bill proposed, the remedy that it proposed, was to amend Section 1903(f). The Conferees --

QUESTION: So, and that was rejected: the Conferees did not adopt that.

MR. JOHNSON: The Conferees did not amend 1903(f). Indeed, the moratorium --

QUESTION: So the language in the House history proves nothing except that the House proposed an amendment to (f) which was not adopted. It does not necessarily prove anything beyond that.

MR. JOHNSON: With respect, Mr. Justice, I would

disagree, because I think it is very important and entirely appropriate to refer to when you are looking to see what was the issue that was before the Conference Committee. Because the Senate bill had no provisions in it concerning adult couple income levels. That issue was framed by the House bill. And since that issue was framed by the House bill, it seems that it is entirely appropriate to look at what the House report was as to what that issue was.

QUESTION: So instead of amending, they did the moratorium?

MR. JOHNSON: That is correct, Mr. Justice.

Bear in mind that the moratorium amends no statute; provides no permanent solutions; what it does --

QUESTION: Well, do you -- is the inference not, though, that the Conference Committee -- thought that the statute, that the Secretary was properly construing the statute?

MR. JOHNSON: Absolutely. Yes, sir.

QUESTION: Well, in revoking ROM, the Secretary was properly construing the statute?

MR. JOHNSON: No, Mr. Justice, I think it is the other way around.

QUESTION: You do?

MR. JOHNSON: I think that in reaffirming the policy set out in ROM, they were determining that the Secretary, or I

should say HHS, had made a proper policy interpretation under 1903(f), and that that policy should be reinstated: 1903(f) says that "the Secretary will prescribe standards for -- prescribe the standards that are equivalent to 133.33 percent." It is not a flat -- it gives the Secretary a great deal of discretion in determining what is equivalent and in the manner in prescribing what those standards are.

We think that that policy interpretation was entirely proper.

QUESTION: When would the moratorium end?

MR. JOHNSON: If in fact the Report was filed in September, it would end 18 months after.

QUESTION: What report?

MR. JOHNSON: The moratorium required HHS, or the Secretary, to file a report with Congress in which it would discuss the entire broad range of medicaid eligibility --

QUESTION: If the Conference Committee thought the Secretary was properly construing the statute, under -- when he had the issue drawn -- and not properly construing it when he had revoked it, why would the moratorium ever end?

MR. JOHNSON: But for the fact that Congress has in fact said it will end, Mr. Justice, I think you would be absolutely right. Once you -- the whole purpose behind TEFRA, when they enacted that in 1982, was to re-establish all the medicaid eligibility rules that existed prior to 1981, when the

Omnibus Budget Reconciliation Act was enacted. Had not Congress decided in the moratorium to only have those more-flexible rules that applied before OBRA, in effect for 18 months -- indeed they would have -- that would have continued to be extant law in light of TEFRA.

QUESTION: I took Justice White's question to suggest that if Congress had really agreed with ROM it would not have said "you cannot do anything for eight months, or 18 months." It would have said, "you cannot ever do anything."

QUESTION: Which is what the House proposed.

QUESTION: Yes.

MR. JOHNSON: In enacting the moratorium by virtue of having -- well, I think what the Congress is doing -- as it said in the Conference Committee report, that they wanted these more flexible rules re-established as they existed prior to 1981, and they were going to be studying the matter further during that period of 18 months. I think that Congress was well within its powers of putting on that 18-month limitation, but by virtue of saying that, "we are at the end of 18 months, either we are going to legislate further," that in fact they did not mean to re-establish the medicaid eligibility policies that existed prior to OBRA would require us to disregard what they had said when they enacted TEFRA.

QUESTION: It sounds like Congress was saying, "we want to get a report from the Secretary," and it sounds like

they are indicating that the statute, the Secretary could construe the statute either way.

MR. JOHNSON: Mr. Justice, I think what Congress is really telling us in the moratorium --

QUESTION: At least they are saying that.

MR. JOHNSON: They are saying that. But I do not know that they are saying they can construe it either way. I think they are saying they want a report from the Secretary.

But when you look at the Conference Committee Report and when you look at the House Report in support of the recent clarification of the moratorium, it becomes clear, and in fact the House even says that "the legislative history of this moratorium," and grant you it is a subject even broader than adult couple income levels, "the legislative history of this moratorium dates back to the enactment by Congress of OBRA in 1981." Because it was after that statute that on its face purported to give states greater flexibility in its medicaid eligibility rules, that the Department has been misinterpreting what Congress' intents were in enacting first OBRA and, as a result of the Secretary's proposed regulations to implement OBRA, as this Court recognized last Term in Adkins v. Rivera, that interpretation was immediately rejected and that led to the single-standard requirement in TEFRA.

I think that DEFRA is further indication -- as it says -- is the Secretary's misinterpretation of the

requirements under TEFRA. So, Justice White, when we say that they have now -- this moratorium must be viewed in light of that history. And I think what Congress is saying is that, "for the next 18 months, Mr. Secretary, get it right. And we are going to make sure you get it right because we are going to have this moratorium clearly and specifically having all the pre-OBRA eligibility standards in effect, and at the end of that 18 months, we may very well change our minds and rewrite it all, but for the next 18 months we want to make sure you get it right."

And in our view, this concerns the income --- the adult couple income level.

QUESTION: Do you think this was really an 18 -- it was an amendment of the statute that would last for 18 months?

MR. JOHNSON: Mr. Justice, this does not amend any statute.

QUESTION: I do not know, but it has that effect.

MR. JOHNSON: The effect that it is intended to have, as Congress said when it enacted TEFRA, and what is essentially be reiterated here, is to re-establish the eligibility rules that existed prior to OBRA. And that is the purpose they had wanted to be accomplishing when they enacted TEFRA and again when they were enacting DEFRA.

These are the issues, the subject of the moratorium are not just income levels for adult couples --

QUESTION: Suppose it were perfectly clear that the Secretary's construction when he revoked ROM, that his construction of what TEFRA you recall him saying -- his construction of what TEFRA -- was exactly right. And there was a big flap -- arose about it, and so the House said, "let us amend that silly law," and -- but the Conference Committee said, "no, let us just have a moratorium on the Secretary applying that law." You could still win on that basis, could you not?

MR. JOHNSON: Yes, I do not think that that is at odds with what our position is, Mr. Justice. I am just saying that the fact --

QUESTION: You can win on that, but you cannot use to support that argument the legislative history that you are trying to use in the House which showed that what the House thought of the interpretation was wrong. That is the only disadvantage of going that way.

QUESTION: They thought it was right and you want to change it.

MR. JOHNSON: Well, it is additional legislative history, Mr. Justice, but it seems it would be appropriate when you have no provision coming from the Senate on this adult couple income levels, and that issue was framed by a bill that comes from House and from Conference Committee.

We think the Conference Committee's statements itself

are abundantly clear as to what it wanted done. But it seems, it is given additional clarity by reference over to the House Report, because the House Report only dealt with this one specific issue and was longer and more explanatory.

But we think standing on its own the Conference Committee Report itself makes clear that they wanted -- they were reversing the Department's reversal of its policy set out in ROM-2572.

Now, the second reason that we think that the moratorium authorizes California to set its income levels at 133.33 percent of the grant for three is that the Secretary's interpretation would require not only disregarding the intent of the Conference Committee as it is set out in the Conference Committee Report issue now -- yes, Sir?

QUESTION: Now, before you -- I take it -- well, you go ahead, you go ahead.

MR. JOHNSON: It would not only require the Court, then, to disregard what we think is the very clear intent of the Conference Committee as set out in their Report, but would also require you to disregard congressional rejection of just the interpretation that they are urging upon you. Because it is the Secretary's view that all of the moratorium, as concerns adult couple income levels authorizes, is the setting of an adult couple income level at 133.33 percent of the grant -- the AFDC grant, for two. All other income levels would be set

below that. It is just that interpretation and giving states that kind of flexibility that Congress specifically rejected in TEFRA.

In September 1981, in reaction to the adoption of OBRA, the Secretary promulgated -- HHS promulgated, proposed regulations that would have authorized states, given states, the flexibility of setting a separate income level for each medically needy group. Those that were SSI related, the aged, blind and disabled, could be set in relation to the SSI cash grants. Those that were AFDC length, could have been set at the AFDC level, Because AFDC cash grants are traditionally lower than an SSI grant, the income level that could have resulted under that proposed regulation would have been for an AFDC-linked family to have a lower medically-needy income level than the SSI-linked groups. That is specifically what Congress rejected. And it says specifically so in the House Report on TEFRA when it enacted the single-standard requirement.

It is that interpretation that led to the enactment of the single-standard requirement of TEFRA. And that, it seems to me that if that is what it had been to accomplish by this moratorium, and Congress, would have said, "we are reversing our own selves of what we had said just less than two years before when we enacted TEFRA."

To the contrary, Congress is saying in its enacting the moratorium, "states are to be given the flexibility of

using less restrictive eligibility criteria, and in the case of adult couple income levels, to set that medically-needy income level at 133.33 percent of the AFDC grant for three," because that is what was authorized in ROM-2572 and we believe they reaffirmed that policy in the moratorium.

Had they meant to reject their own determination in TEFRA, they certainly would have said so, particularly in a moratorium, which I think we can all agree, is at least abundantly clear in the fact that it wants to give the states greater and more flexibility to use less restrictive -- which means higher -- income standards.

We think, in conclusion, that looking at the issue that was before the Conference Committee, that issue was HHS's rejection -- or reversal, of its own policy set out in ROM-2572, and in looking at the ramifications of what the Secretary's position is, that we think it is quite clear that the Congress meant to provide first the reaffirmation of ROM-2572: states can use 133.33 percent of the AFDC grant for three, and certainly the Secretary's interpretation would be unreasonable in light of Congress' rejection of just that interpretation when it enacted DEFRA.

QUESTION: Would you be here if there had not been a -- I suppose you would still be here -- if there had not been a Deficit Act at all? If there had not been a moratorium?

MR. JOHNSON: The case would have been extremely

different, Mr. Justice. Very,very different. Without a moratorium, the only issue, then, would be what effect, if any, would you bring to --

QUESTION: Whether the Secretary was correctly construing the statute?

MR. JOHNSON: It could have been articulated, "why that even given the Ninth Circuit's Decision that we have, the only issue left in the case would then be, 'what deference one should pay to the ROM independent of the moratorium?'" That is why I said at the outset, I believe the moratorium is really the dispositive issue of the case, because we believe that the moratorium specifically meant to authorize to give states that flexibility.

QUESTION: Well, if you think you have a tough case absent the moratorium, you mean that you probably would lose your case if you were just attacking the Secretary's construction of the law.

MR. JOHNSON: With all respect, I would rather say that it was a tough case.

QUESTION: Well, in any event then, to rely on the Deficit Act, you really think that Congress meant to, for 18 months, have the law be different.

MR. JOHNSON: They have the law different than what the Secretary was interpreting it as, yes Sir. They want the law back to the way the SecrEtary had interpreted it prior to

Congress' enactment of OBRA. Yes, sir, that is our position.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Johnson.

Mr. Merrill, you have 12 minutes remaining.

ORAL ARGUMENT BY THOMAS W. MERRILL, ESQ.

ON BEHALF OF PETITIONER -- REBUTTAL

MR. MERRILL: Thank you, Mr. Chief Justice. I promise not to take 12 minutes:

The Secretary's position in this case is clear and straightforward. Section 1903(f) of the Social Security Act specifically sets a cap on federal financial participation based on the AFDC benefits levels of families of the same size as those in the medically-needy group. The Secretary has construed the language, "same size" to mean that "adult couples" is a "family of two," and that a "family of two" cannot be the same size as a AFDC family of "three."

QUESTION: May I interrupt you there?

MR. MERRILL: Sure.

QUESTION: Would you agree that, If ROM-whatever the number there is, were a correct statement of the law, and I know you disagree, that it would be permissible to treat an adult and two children as equal to two adults? Or vice-versa, I should say, that two adults is equal to -- the language "between" is what you argued about before. I do not think you are still arguing that, are you?

MR. MERRILL: Justice Stevens, we hope that this case

does not come down to the issue of whether the language of ROM says, "between one and three," can be stretched to include "three." That we did make the point in the court below that ROM itself did not permit what California was doing because "between one and three" means "one dollar less than three."

QUESTION: Everybody else seems to have rejected that argument. I do not understand you to still be pursuing it. That is all I want to check on.

MR. MERRILL: No, Justice Stevens, we think that the case should be -- can be, decided on other grounds.

Our position, I think, is relatively straightforward; the position that the Respondents take is very hard to follow. Essentially California has put forward three statements of fact in its presentation. None of these are by themselves are inaccurate. But they are radically incomplete.

First, California stated that, in 1983 an official of the HHS sent a letter to California and to other regional offices stating that the ROM violated TEFRA.

Second, that it --

QUESTION: Did it send that letter?

MR. MERRILL: Yes, there is such a letter.

QUESTION: Saying that?

MR. MERRILL: Saying that. That ROM violates TEFRA.

Second, California points out that the House in the bill that was passed in 1983 specifically disapproved the

Secretary' repudiation of the ROM.

Third, California states that the Conference Committee opposed a moratorium on TEFRA.

Now, there are tremendous gaps in this presentation, and when the gaps are filled in, the persuasiveness of the argument completely disappears. First of all, the Administrator of the Health Care Financing Administration consistently stated that the California proposal violated Section 1903(f) and the Secretary's implementing regulations. It is true that there were certain expressions of opinion that the California plan also violated TEFRA, but the Secretary -- the Administrator, ultimately did not rely on the violation of TEFRA; the Administrator relied on the violation of Section 1903(f).

Secondly, although the House passed a bill which disapproved the Secretary's repudiation of the ROM, the House bill was never enacted into law. The relevant passage in the Conference Report, which is reproduced in our brief on pages 44 and 45, is quite explicit: it describes the present law as being the cap set by Section 1903(f); it states that the House bill permits the states to establish medically-needy levels for families of two adults up to the 133.33 percent of the three-person AFDC standard; it says that the Senate had no provision, and describes the Conference Agreement as follows: "the Conference Agreement does not include the House provision."

So the Conference disapproved the House bill specifically in passing the DEFRA moratorium.

Finally, it is true that the DEFRA moratorium placed a moratorium on TEFRA, but this has nothing to do with the grounds on which the Secretary relied in disapproving the California plan, which is 1903(f). The text of the DEFRA moratorium does not mention 1903(f). The legislative history, as we stated, is quite clear that no intent -- there was no intent to put in a moratorium in --

QUESTION: Let me interrupt you once more, Mr. Merrill. It is just kind of hard to get all -- to digest it all. But just confining ourselves for a moment, to plain language of the moratorium section: does not that issue turn on the reason why the Secretary rejected the ROM? And you are saying the reason was that it did not comply with 1903 -- the reason was not that it did not comply with 1902?

MR. MERRILL: To be absolutely precise, Justice Stevens, the Administrator found that the California plan violated Section 1903(f), and for that reason the plan was in violation of Section 1902(a)(4) and (a)(19).

The TEFRA provision, which was moratoriumed by DEFRA, is 1902(a)(10)

QUESTION: (10)(C)(i)(3). Yes. But if, in fact, the Secretary thought it violated both the provisions, and I would suppose that the Secretary did think it violated both

provisions, then does not the language of the moratorium, at least arguably, read on that?

MR. MERRILL: Some Agency employees offered the opinion that --

QUESTION: Would not the government's position today be that it violated the "single-standard" requirement of (a)(10)(C)(i)(3)?

MR. MERRILL: If there were no moratorium on the Secretary disapproving state plans for that reason, yes, it would be our position that it violates that, quite clearly.

But DEFRA had been enacted by the time the Administrator had reached her final decision in this case, and in the final decision of the Administrator there was no reliance whatsoever on TEFRA or the "single-standard" provision. The sole reliance was based on 1903(f).

The other argument that is put forward in several different versions by California is that, somehow, what the Secretary is doing in this case violates the provision of TEFRA, which stated that the Secretary was to go back to pre-OBRA regulations. The logic of this completely escapes me. Because, the DEFRA moratorium as it has been discussed, puts a moratorium on TEFRA, and I do not understand how a statute that puts a moratorium on TEFRA can then be transposed into a statement that somehow, a provision of TEFRA has to be governing in this particular case?

In any event, even if we do go back to the pre-OBRA regulations, the pre-OBRA regulations are 42 C.F.R. 435.1007, which has been in effect in the current form since 1971, and which is the regulation which the Secretary relied upon in this case in disapproving California's state plan.

The ROM is not a regulation. The ROM is a statement that appears in an internal Agency manual; it has none of the indicia of a valid regulation, and has never been regarded as a regulation.

If there are no further questions, the Solicitor-General rests.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Merrill. The case is submitted.

[Whereupon, at 11:51, the case in the above-entitled matter was submitted.]

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-863

CASE TITLE: OTIS R. BROWN, SECRETARY OF HEALTH & HUMAN SERVICE
v. KENNETH KIZER, DIRECTOR OF CALIFORNIA DEPT. OF HEALTH
HEARING DATE: November 10, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the UNITED STATES SUPREME COURT, and that this is a true and accurate transcript of the case.

Date: November 17, 1987

Margaret Daley
Official Reporter

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