Case No. 10-56529

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PALOMAR MEDICAL CENTER,

Appellant,

v.

KATHLEEN SEBELIUS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES

Appellee.

On Appeal from the United States District Court
for the Southern District of California

BRIEF OF AMICI CURIAE AMERICAN MEDICAL ASSOCIATION AND STATE MEDICAL SOCIETIES FOR ALASKA, ARIZONA, CALIFORNIA, HAWAII, IDAHO, MONTANA, NEVADA, OREGON, AND WASHINGTON IN SUPPORT OF APPELLANT

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RULE 26.1 COMPLIANCE

In compliance with Fed. R. App. P. 26.1, amicus the American Medical Association ("AMA") states that it is a nonprofit corporation organized and operating under the laws of the State of Illinois. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

Each state medical society is incorporated as a nonprofit corporation in its respective state and has no parent corporation and no publicly held company owns 10% or more of any of their stock.

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As explained in greater detail in its earlier brief, the American Medical Association (AMA) is the largest professional association of physicians, residents and medical students in the United States. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in every medical specialty area and in every state, including California. The additional amici are nine state medical societies, from each State within the Ninth Circuit,[1] which have a similar purpose in serving their members in their respective states. [2]

Amici seek to protect their physician members and physicians generally who participate in the Medicare program from arbitrary and unreasonable efforts to recover payments for services rendered long prior to the initiation of the recovery action. Such efforts impose severe financial burdens on physicians. Delayed recovery actions also divert physicians from their primary function of providing quality medical care.

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[1] These state societies are: the Alaska State Medical Association, the Arizona Medical Association, the California Medical Association, the Hawaii Medical Association, the Idaho Medical Association, the Montana Medical Association, the Nevada State Medical Association, the Oregon Medical Association and the Washington State Medical Association.

[2] Amici appear herein in their own capacities and as representatives of the Litigation Center of the AMA and the State Medical Societies. The Litigation Center is a coalition of the AMA and state medical societies to represent the views of organized medicine in the courts, in accordance with AMA policies and objectives.

Pursuant to Fed. R. App. P. 29(c)(4), amici state that the source of their authority to file this brief is this panel's invitation, dated March 14, 2012.

ARGUMENT

I. THE ADMINISTRATIVE LAW JUDGE AND MEDICARE APPEALS COUNCIL EACH HAD JURISDICTION TO REVIEW THE QUESTION WHETHER THE DETERMINATION TO REOPEN PALOMAR'S MEDICARE CLAIM WAS WITHIN THE CONTRACTOR'S AUTHORITY

Contrary to the conclusion of the district court, neither Section 405.926(l) nor Section 405.980(a)(5) of the Secretary's regulations bars administrative review of the threshold question whether the decision of a Recovery Audit Contractor ("RAC") to reopen a Medicare claim was legally authorized. There is a strong presumption that when the law establishes limits beyond which an agency actor lacks discretion, that actor's conduct is subject to review to determine whether the actor exceeded the bounds of his or her cabined authority. This presumption is well established in the context of judicial review of final administrative action, *see*, *e.g.*, *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 141 (1967), and has been acknowledged as well with respect to administrative review of agency determinations, *see Dep't of the Navy* v. *Egan*, 484 U.S. 518, 526-27 (1988) (recognizing doctrine in context of administrative review by Merit Systems Protection Board of agency employment actions). The controlling statute, 42 U.S.C. § 1395ff(b)(1)(G), and the regulatory framework at issue here make clear

that the contractor does not have absolute discretion to reopen closed cost reports, but rather is prohibited from reopening a cost report in certain circumstances. The Secretary's regulations do not preclude administrative appellate review of the question whether the decision to reopen was one that fell within a contractor's authority.

The Secretary's reliance on *Your Home Visiting Nurse Servs., Inc.* v. *Shalala*, 525 U.S. 449 (1999), is misplaced. There, the Supreme Court held that the fiscal intermediary's decision *not* to reopen was unreviewable within the agency because that determination was "committed to agency discretion by law." *Id.* at 455, 457 (internal quotation marks omitted). It was, rather, a matter of "grace" afforded "only by regulation" and, moreover, by regulations that "do not require reopening, but merely permit it." *Id.* at 454, 457. Here, by contrast, Congress has directed that any reopening shall occur "under guidelines established by the Secretary in regulations," 42 U.S.C. §1395ff(b)(1)(G), and those regulations, in turn, expressly *restrict* the contractor's authority to reopen. In short, while a Medicare provider may have no affirmative right to have its cost report reopened after the 180-day time for appeal has expired, the provider *does* have a right not to have a closed cost report reopened on grounds that are beyond the limited circumstances in which the contractor is authorized to reopen under the regulations.

Unlike the discretionary decision regarding whether a contractor *should* reopen a claim when one of the authorized bases exists, the question whether the contractor is *authorized* to reopen is subject to very explicit requirements that would be rendered meaningless without any means of enforcement. For example, Section 405.986(b) states in no uncertain terms that "[a] change of legal interpretation or policy by CMS in a regulation" is not grounds for reopening a Medicare claim. 42 C.F.R. § 405.986(b).[3] Likewise, the contractor cannot reopen more than four years from the date of the determination except for fraud, clerical error, or to effectuate an appellate decision, or, between one and four years, except for "good cause." 42 C.F.R. § 405.980(b). And yet, if Sections 405.926(l) and 405.980(a)(5) were read as the Secretary proposes, contractors would be permitted to reopen cost reports based on these specifically prohibited grounds without any opportunity for correction within the agency. Such uncabined discretion on the part of the contractor would violate not only the Secretary's express regulatory prohibitions that specifically circumscribe that discretion, but also Congress's direction to the Secretary that contractor reopenings are to be made only within limits set by the Secretary. *See* 42 U.S.C. § 1395ff(b)(1)(G) ("The Secretary may

[3] A contractor's disregard of Section 405.986(b) would be particularly problematic because that regulatory constraint implements the prohibition against HHS engaging in retroactive rulemaking. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

reopen or revise any initial determination or reconsidered determination . . . *under guidelines established by the Secretary in regulations.*" (emphasis added)).

Such an abdication of administrative oversight is all the more concerning here, where the result would be to irrevocably delegate a legal question to a non-governmental body. "[W]hen an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making." *United States Telecom Ass'n* v. *Fed. Commc'n. Com'n*, 359 F.3d 554, 565 (D.C. Cir. 2004). Likewise, there is also the risk that the delegee may "pursue goals inconsistent with those of the agency and the underlying statutory scheme." *Id.* at 566. Therefore, an agency must show "affirmative evidence" of statutory authority to delegate. *Id.*; *see also Assiniboine & Sioux Tribes of Fort Peck Indian Reservation* v. *The Board of Oil & Gas Conservation of the State of Mo.*, 792 F.2d 782, 795 (9th Cir. 1986) (finding that the Secretary of the Interior's delegation of authority regarding Native American oil and mineral rights to a state board would be unlawful if it was determined to be "without meaningful independent review"). Here, there is no such evidence. Indeed, there is quite the opposite – Congress explicitly mandated that reopening decisions be made pursuant to "guidelines established by the Secretary," 42 U.S.C. § 1395ff(b)(1)(G), not on the whim of a profit-seeking entity.

The absence of review of the discretionary "decision on *whether* to reopen," 42 C.F.R. § 405.980(a)(5) (emphasis added), does not, in other words, shield from review the logically prior question whether the contractor has *authority* to reopen. Indeed, reading the regulation to shield only the *discretionary* determination is the only way to square the Secretary's explanation of the rule at the time of its proposal with the regulatory text. In her notice of proposed rulemaking, the Secretary explained that the prohibition against appeal embodies and implements the policy that the decision whether to reopen is "at the sole discretion of the adjudicator and is not subject to appeal." 67 Fed. Reg. 69,312, 69, 327 (Nov. 15, 2002). Yet the regulation's text demonstrably does *not* commit to the contractor's "sole discretion" the question whether it has *authority* to reopen. To the contrary, the "good cause" standard expressly prohibits the contractor from reopening in certain circumstances, such as to make retroactive application of a new legal interpretation. 42 C.F.R. § 405.986(b). Because the Secretary's present interpretation conflicts with the regulatory language, including her explanation at the time the regulation was proposed, her construction is not entitled to deference. *See Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (explaining that the Secretary's interpretation of a regulation is not entitled to deference where "an alternative reading is compelled by the regulation's plain language or by other

indications of the Secretary's intent at the time of the regulation's promulgation" (internal quotation marks omitted)).

Notably, the Secretary has construed other no-appeal provisions almost identical to Sections 405.926(l) and 405.980(a)(5) to permit appellate review of the legal authority to reopen an earlier decision. See Appellant Br. at 27-34. The Secretary's own contrary construction of nearly identically worded provisions in closely analogous contexts demonstrates that this wording *does* authorize administrative appellate review of the threshold question whether the decision to reopen was one within to the contractor's authority. Given that context, and in light of the strong presumption in favor of such administrative review, there is no ambiguity for which deference to the Secretary would be appropriate. *Cf. I.N.S.* v. *St. Cyr*, 533 U.S. 289, 320 n. 45 (2001) (explaining that courts "only defer . . . to agency interpretations of statutes that, applying the normal 'tools of statutory construction,' [such as the presumption against retroactivity] are ambiguous").

II. EVEN IF THE DECISION TO REOPEN WAS NOT SUBJECT TO FURTHER AGENCY REVIEW, THE DISTRICT COURT COULD REVIEW WHETHER THE REOPENING WAS WITHIN THE SCOPE OF THE CONTRACTOR'S PERMITTED AUTHORITY

Not content simply to shield the RAC from administrative review, the Secretary further seeks to use her own lack of oversight as a means to prevent *judicial* review as well, thereby allowing the private contractors to operate virtually unchecked. Not surprisingly, the Secretary's short page and a half argument on

this point offers no authority that would justify so startling a conclusion. Just as there is a presumption that the regulations here provide administrative review, there is also generally a "strong presumption that Congress intends judicial review of administrative action," *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986), one that "may be overcome only upon a showing of clear and convincing evidence of a contrary legislative intent." *Traynor* v. *Turnage*, 485 U.S. 535, 542 (1988) (internal quotation marks omitted); *see also Pinnacle Armor, Inc.* v. *United States*, 648 F.3d 708, 718 (9th Cir. 2011).

The Secretary has offered no such evidence; nothing in Section 1395ff or any other statute even hints that courts are being stripped of their traditional role of overseeing the agency's compliance with the law. To the contrary, Section 1395ff(b)(1)(G) specifically mandates that reopenings comply with regulations issued by the Secretary. The Secretary is mistaken in arguing that she never issued a "final decision" required for judicial review under Section 1395ff(b)(1)(A) because the MAC never addressed Palmoar's good cause arguments. As described further below, that argument misconceives the nature of the finality requirement and fails to supply the requisite "clear and convincing evidence" that Congress intended to foreclose judicial review.

A. Section 1395ff(b)(1)(A)'s "final decision" requirement merely requires presentment and exhaustion, neither of which depend upon the decision the MAC actually renders

As Palomar correctly described in its prior briefing, a "final decision" under Section1395ff(b)(1)(A) (which incorporates 42 U.S.C. § 405(g) by reference) requires (1) presentment and (2) exhaustion. *Mathews* v. *Eldridge*, 424 U.S. 319, 328 (1976). The Secretary does not contend that Palomar failed to meet either of those requirements. Nor can she; Palomar did all that was required to achieve finality.

First, Palomar indisputably presented its arguments at every level of review. As described its in Reply Brief, Palomar argued that there was a lack of good cause when it went before the ALJ. Furthermore, Palomar pursued all of the "administrative remedies prescribed by the Secretary," thereby satisfying the exhaustion requirement. *Heckler* v. *Ringer*, 466 U.S. 602, 617 (1984). Indeed, the Secretary cannot point to a single administrative mechanism of which Palmoar failed to take advantage, nor can she identify any additional step in the administrative process that remains to be taken. As a result, this matter "is final in any sense of the word. It is not pending, interlocutory, tentative, conditional, doubtful, unsettled, or otherwise indeterminate. It is done." *Auburn Reg'l Med. Ctr*. v. *Sebelius*, 642 F.3d 1145, 1148 (D.C. Cir. 2011) (interpreting a similar "final decision" requirement in 42 U.S.C § 1395oo(f)).

The Secretary's argument that the decision is nonetheless not "final" because the MAC did not address Palomar's good cause arguments on their merits misconceives the finality requirement. The finality requirement is not intended to ensure that every level of administrative review actually reaches every issue – an outcome well beyond the control of any individual litigant. Its goal, rather, at least from an agency's perspective, is to "prevent[] premature interference with agency processes, so that the agency may function efficiently and so that it may have an *opportunity* to correct its own errors." *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975) (emphasis added). Here, Palomar has not prematurely interfered with anything – the Secretary has conceded there is nothing more to be done. The Secretary has had a full opportunity to consider the issues Palomar presented, even if it chose not to do so by restricting the MAC's jurisdiction.

Even where the MAC lacks jurisdiction over a particular question, that does not deprive the agency's action of "finality" with respect to that issue. As the Supreme Court has explained, for purposes of exhaustion under 42 U.S.C. § 405(g), "[t]he fact that [an] agency might not provide a hearing for [a] *particular contention*, or may lack the power to provide one . . . is beside the point." *Shalala* v. *Ill. Council on Long Term Care, Inc*. 529 U.S. 1, 23 (2000). Indeed, Section 405 has been construed to require exhaustion before the agency even when it lacks the power to offer any form of relief. For example, litigants must raise

constitutional challenges before an agency, even though such a challenge may be beyond the scope of its authority. *Id.*; *Salfi*, 422 U.S. at 764. In such cases, as here, an agency might never issue a decision on the merits, but exhaustion is satisfied nonetheless.

B. The Secretary's reading of finality would improperly transform the finality requirement from a rule concerned with timing into a means of *permanently* barring all judicial review.

Underlying the Secretary's argument is a fundamental misunderstanding of the "final decision" requirement. The finality requirement dictates that litigants diligently pursue their claims, as Palomar has, and then wait until the administrative process has reached its conclusion. Where, as here, the Secretary cannot offer anything more "final," then finality has been achieved. See *Aquavella* v. *Richardson*, 437 F.2d 397, 404 (2d Cir. 1971) (finding that the suspension of Medicare payments was a final act under the APA in part because the suspension "occurred over 18 months [prior], and the record show[ed] no further formal action by the Secretary.").

Were "finality" to have the meaning ascribed to it by the Secretary, the statutorily mandated judicial review under Section1395ff(b)(1)(A) could be avoided by the Secretary at her pleasure. By restricting the administrative appeal rights of litigants who come before her, the Secretary could ensure that certain claims would never be "final" and therefore would never be reviewed. The finality

doctrine, however, cannot be so distorted. As the D.C. Circuit recently explained in similar circumstances, a finding by the Provider Reimbursement Review Board ("PRRB") that it lacks jurisdiction must be regarded as a "final decision" of the agency; if it were otherwise, ''the PRRB could effectively preclude any judicial review of its decisions simply by denying jurisdiction of those claims that it deems to be non-meritorious." *Auburn*, 642 F.3d at 1148 (internal quotation marks omitted); *see also In re California Power Exchange Corp.*, 245 F.3d 1110, 1124 (9th Cir. 2001) (explaining, in the context of reviewing a mandamus petition, that "agencies cannot insulate their decisions from Congressionally mandated judicial review simply by failing to take 'final action'").

In other contexts as well, finality is deemed achieved, even when the ultimate decision-maker chose not to review a lower authority's determination. For example, under 28 U.S.C. § 1257, the Supreme Court has appellate jurisdiction over final state court judgments. 28 U.S.C. § 1257(a). While this requires litigants to exhaust their remedies in state court, including seeking review in the highest court in the state, if the state supreme court declines to hear the case and therefore never renders a decision on the merits on the issue, that does not deprive the U.S. Supreme Court of jurisdiction. Rather, it reviews the judgment of the highest state court to have rendered a decision. *See Gonzalez* v. *Thaler*, 132 S. Ct. 641, 656 (2012). The same logic applies here. When the MAC declined to review the issue

whether the contractor had authority to reopen Palomar's claim, the MAC, in effect, adopted the RAC's decision regarding its authority to reopen as the MAC's own.

C. The authority upon which the Secretary relies does not support a bar on judicial review of the agency's action.

The Secretary and the district court relied principally on two decisions of this Court – *Loma Linda University Medical Center* v. *Leavitt*, 492 F.3d 1065 (9th Cir. 2007) and *Anaheim Memorial Hospital* v. *Shalala*, 130 F.3d 845 (9th Cir. 1997) – neither of which supports the Secretary's broad assertion of no judicial review. Both decisions are readily distinguishable because neither involved a final decision in the traditional sense of presentment and exhaustion.

In *Loma Linda*, the court disagreed with and reversed the Administrator of the Health Care Financing Administration's determination that the PRRB lacked jurisdiction to consider a reimbursement dispute. 492 F.3d at 1070-73. In so doing, the Court declined to address the merits of the appellant's substantive argument that it should receive statutory interest. *Id.* at 1074. As the Court explained, the courts "had no jurisdiction to order payment of any portion of the amount in controversy" because the Administrator (due to the erroneous jurisdictional ruling) had never considered the merits of the issue and, as a result of the absence of exhaustion, there was "no final decision . . . that [was] ripe for judicial review." *Id.* The court therefore affirmed the district court's order

reinstating the PRRB's decision "subject to the Secretary reviewing the merits." *Id.* at 1070. There was no suggestion in *Loma Linda* that there could be no judicial review after internal administrative review had been exhausted.

The Secretary is similarly mistaken in her reliance on a passage in *Anaheim*, in which this Court refused to consider in the first instance the provider's argument that it could bring a delayed appeal before the PRRB under the equitable tolling doctrine. 130 F.3d at 853. The court explained that it could not consider this issue because neither the PRRB nor the Administrator had ever addressed it. *Id.* As a result, the court determined that the proper course of action was "remand to the Secretary for a final decision on the merits of [the plaintiff's] equitable tolling claim." *Id.*

In both *Loma Linda* and *Anaheim*, the agency's decisions were not "final" in the traditional sense because there was still an opportunity for further consideration within the agency that might alter the agency's decision on the merits. In *Loma Linda*, the court, having determined that the PRRB had jurisdiction, ordered that the PRRB's decision on the merits be reinstated subject to further agency review. In *Anaheim*, the court ordered the agency to consider in the first instance an equitable tolling claim that had not yet been addressed.

Here, by contrast, there has been no failure to exhaust internal administrative review options. If, as the Secretary contends, the ALJ and MAC lack jurisdiction

to consider Palomar's argument challenging the contractor's authority to reopen under the circumstances of this case, there would be no point to a remand to the agency, as in *Loma Linda* and *Anaheim*. There is nothing more the Secretary can do. Whereas *Loma Lima* and *Anaheim* simply remanded unripe issues which could be reviewed by the court at a later time, Palomar's argument that the contractor exceeded its regulatory authority, if not addressed now, will receive no review, ever. The Secretary cites no authority for that proposition, and the Court should reject it.[4]

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted,

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[4] The unpublished cases to which the Secretary cites, *Steppe v. Sebelius*, 338 F. App'x 680 (9th Cir. 2009) and *Frazier v. Johnson*, 312 F. App'x 879 (9th Cir.), *cert. denied*, 130 S. Ct. 413 (2009), are equally unsupportive of her argument. In *Steppe*, the plaintiff failed to raise the argument he was asserting when he went before the PRRB, thereby failing the presentment requirement. 312 F. App'x at 681. In *Frazier*, the court's abbreviated analysis of a pro se plaintiff's arguments merely stated that "[t]he district court's review of an agency decision . . . is limited in scope and employs a narrow standard of review," without any further elaboration. 312 F. App'x at 881.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 13, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Dated: April 13, 2012

RULE 29(C)(5) STATEMENT

Pursuant to Fed. R. App. P. 29(c)(5), amici state:

- No party's counsel authored this brief in whole or in part.
- No party or party's counsel contributed money that was intended to fund preparing or submitting this brief.
- No person other than amici contributed money that was intended to fund preparing or submitting this brief.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the page limitation of this panel's March 14, 2012 order because it contains fifteen pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman type style.

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