

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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XAVIER BECERRA, SECRETARY OF )  
HEALTH AND HUMAN SERVICES, )  
Petitioner, )  
v. ) No. 20-1312  
EMPIRE HEALTH FOUNDATION, )  
FOR VALLEY HOSPITAL MEDICAL CENTER, )  
Respondent. )  
- - - - -

Pages: 1 through 76  
Place: Washington, D.C.  
Date: November 29, 2021

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4   HEALTH AND HUMAN SERVICES,            )

5                            Petitioner,            )

6                            v.                            ) No. 20-1312

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9                            Respondent.            )

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12                            Washington, D.C.

13                            Monday, November 29, 2021

14

15                            The above-entitled matter came on for  
16 oral argument before the Supreme Court of the  
17 United States at 10:00 a.m.

18

19   APPEARANCES:

20   JONATHAN C. BOND, Assistant to the Solicitor General,  
21       Department of Justice, Washington, D.C.; on behalf  
22       of the Petitioner.

23   DANIEL J. HETTICH, ESQUIRE, Washington, D.C.; on  
24       behalf of the Respondent.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 20-1312, *Becerra versus Empire Health Fund*.

Mr. Bond.

ORAL ARGUMENT OF JONATHAN C. BOND

ON BEHALF OF THE PETITIONER

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

The Medicare fraction directs HHS to count patient days of patients who, for such days, were entitled to benefits under Part A of Medicare. The question here is which patients are entitled to Part A benefits.

Section 426 states that every individual who satisfies certain requirements shall be eligible -- or shall -- shall be entitled to Part A benefits, and that provision and others make clear that the entitlement is not absolute but subject to conditions, and it is not negated merely because Medicare does not pay for particular units of care.

That is the best reading of the statute's text, context, and its

1 population-focused design, and, at a minimum, a  
2 reasonable reading that deserves deference.

3           The court of appeals and Respondent's  
4 contrary reading rests on two inferences based  
5 on other language concerning other programs.  
6 The court of appeals inferred from Congress's  
7 references to "persons eligible for Medicaid"  
8 that in the Medicare fraction Congress must have  
9 meant "entitled to Part A" to mean something  
10 different than it means throughout the statute.

11           But Congress's use of "entitled" and  
12 "eligible" is fully explained by its usage of  
13 those terms in the underlying Medicare and  
14 Medicaid programs governed by separate statutory  
15 frameworks. Congress simply took those terms as  
16 it found them.

17           Respondent contends that the agency's  
18 approach to SSI benefits conflicts with its  
19 position here. That is not correct, as the  
20 agency explained in the 2010 regulation and as  
21 the Sixth Circuit explained in Metro Hospital.

22           But even if there were a conflict, the  
23 solution is not to skew the meaning of "entitled  
24 to benefits under Part A." The Court should  
25 give that phrase the meaning that Congress did

1 in the statute and reserve the SSI benefits  
2 issue for a future case.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: Mr. Bond, before we  
5 get bogged down in this indecipherable language,  
6 what does -- what's the difference between  
7 "entitled to" and "eligible for"?

8 MR. BOND: So, in the context of these  
9 programs, they --

10 JUSTICE THOMAS: No, no, no. Just in  
11 ordinary meaning.

12 MR. BOND: So, in ordinary language, I  
13 think "entitled" refers to having a right to  
14 something, but that something may itself be  
15 subject to conditions. It does not signify an  
16 absolute right.

17 The district court, at Petition  
18 Appendix 42a, pointed to dictionary definitions  
19 that go in both directions, and I think that's  
20 consistent with ordinary usage, as our season  
21 ticket holder example explains.

22 Now, in ordinary usage, "eligible"  
23 more naturally means that someone qualifies for  
24 something, which is one of the definitions of  
25 "entitled" in the dictionaries the district

1 court identified.

2 But whatever the ordinary meanings of  
3 those terms, I think it's clear how Congress  
4 used them in this particular setting with  
5 respect to "entitled" in Part A. You know who  
6 is entitled from Section 426 --

7 JUSTICE THOMAS: So how far can we go  
8 with that if there's no definition of "entitled"  
9 in the statute? Can we redefine it simply by  
10 looking at how it's used throughout the statute?

11 MR. BOND: So, to be clear, our  
12 argument is not how it's used. We think there  
13 is what functions as a definition both of who is  
14 entitled and what that entitlement means.

15 Now those provisions are at 426(a) and  
16 (b), which answers the question who is entitled.  
17 It says every individual in these categories  
18 shall be entitled. And then it says in  
19 426(c)(1) and 1395d what that entitlement  
20 consists of, and it says that that entitlement  
21 is a right to have payment made for certain  
22 services but subject to conditions set forth in  
23 the statute.

24 So the statute is telling you that  
25 entitlement here does not mean an absolute

1 right. And I think that's clarified further by  
2 Section 1395l, which refers in two places to a  
3 person who is entitled to benefits under Part A  
4 but has exhausted them, showing that exhaustion  
5 and entitlement can coexist and further  
6 distinguishes that person from one who is not  
7 entitled to Part A benefits at all.

8 JUSTICE KAVANAUGH: But, Mr. Bond, you  
9 are interpreting the word "entitled" to mean  
10 something different in the same sentence,  
11 different with respect to Medicare and SSI. So  
12 that's problem one.

13 Then you're interpreting the word  
14 "entitled" actually to mean the same thing as  
15 "eligible," Justice Thomas's question, even  
16 though they are different words and should,  
17 therefore, convey different meanings. So that's  
18 problem two. And then the phrase "for such  
19 days," as I analyze this, becomes surplusage.

20 Then we look at the history of this,  
21 and for the first 20 years, you interpreted  
22 "eligible for Medicaid" to mean entitled, and  
23 the courts all said, well, you can't do that;  
24 "eligible" is something different from  
25 "entitled." So you correct that by saying: Oh,



1 we can't interpret "eligible" to mean  
2 "entitled," so we're going to interpret  
3 "entitled" to mean "eligible" in the Medicare  
4 fraction. Okay? So that's problem four.

5           And then, in the -- in the  
6 administrative process -- and I know you're just  
7 the lawyer. In the administrative process, HHS  
8 mis-describes the existing rule and the  
9 proposal, corrects it a week before the comment  
10 period closes, and finally changes the -- the --  
11 the final rule from what it had -- what it had  
12 been. So that's problem five.

13           We've -- we've whacked agency rules  
14 for much less than that. I know that's not the  
15 issue presented, but it is an atmospheric here.  
16 So there's just kind of a panoply of problems  
17 here. And that's -- that's -- you know, that's  
18 more of a comment for you to figure out how to  
19 respond to. That's a lot of problems.

20           MR. BOND: Sure. If I may respond to  
21 those in turn, starting with the use of  
22 "entitled" in the Medicare fraction referring  
23 both to entitled to SSI benefits and Part A  
24 benefits. Our interpretation of that term is  
25 consistent in that we read it to mean a person

1 who is entitled by the statute that's being  
2 referenced.

3 Those statutes, as the Sixth Circuit  
4 and the 2010 regulation explained, use  
5 "entitled" differently. In the Medicare  
6 statute, a person who satisfies these criteria  
7 is entitled by operation of law, as the D.C.  
8 Circuit in Hall versus Sebelius explained.  
9 That's not how it works under SSI. The  
10 entitlement does not arise automatically. There  
11 must also be an application and a determination.

12 JUSTICE KAVANAUGH: I don't see why  
13 that matters, but keep going.

14 MR. BOND: Sure. Our -- our -- our  
15 point is that we are interpreting the phrase  
16 consistently, and that fits with both the nature  
17 of the benefits under those two programs and  
18 with how Congress is using the terms here.

19 SSI is a cash benefit program, so to  
20 say that someone is entitled to that cash  
21 benefit more naturally signifies a person who is  
22 able to get that benefit.

23 Medicare Part A is hospital insurance  
24 coverage, and it is perfectly natural to say  
25 that a person is entitled to that coverage even

1     though their insurer won't pay for particular  
2     units of care, including because a third party  
3     was responsible for the injury, and so the  
4     third-party insurance must pay for it. And  
5     that's one of the issues here.

6             Respondent's theory would say, if the  
7     person's injury was caused by a third party  
8     whose insurer must pay, that person moves from  
9     the Medicare fraction and that population that  
10    Congress separately addressed, for at least that  
11    patient stay, to the other fraction, and we  
12    don't think that's consonant with the statute.

13            CHIEF JUSTICE ROBERTS: Mr. Bond, I  
14    think Justice Kavanaugh left out problem six,  
15    which is that there's a backstory to all this,  
16    and that was that Congress was, I would say,  
17    extremely frustrated with what the agency was  
18    doing over time. Several times they tried to  
19    tighten the statutory language to push it, I  
20    would say, fairly, say, in a direction contrary  
21    to what the agency wanted.

22            So it strikes me as a situation where  
23    I think we ought to be particularly precise in  
24    interpreting the language Congress used without  
25    any gloss added by the agency.

1           MR. BOND: So, if I can address that  
2 history in turn before returning to the rest of  
3 Justice Kavanaugh's question, I think the  
4 history is more complicated and nuanced than is  
5 sometimes described, and I'd like to walk  
6 through it in a bit of detail, but I think the  
7 through line is that the agency is not flouting  
8 Congress but responding in good faith under the  
9 circumstances to actions by Congress and  
10 judicial decisions.

11           I think that the relevant history  
12 starts in 1983 in the statute that created the  
13 prospective payment program. In that statute,  
14 Congress did tell HHS to adopt adjustments,  
15 including for low-income patients, but what it  
16 said was as the Secretary deems appropriate.

17           And the agency determined after  
18 looking at the data that it didn't think an  
19 adjustment was appropriate. That's reflected in  
20 a series of Federal Register rulemakings that  
21 are cited collectively at JA 39 to 40. So the  
22 agency made that initial determination.

23           Now, at that point, you're right,  
24 Congress disagreed and said, no, you really must  
25 adopt a definition, and it gave the agency a

1 very short deadline that the agency didn't meet.  
2 But, when a court ordered the agency to meet  
3 another deadline, the agency complied. All of  
4 that was overtaken by the 1986 definition that  
5 Congress adopted.

6 Now the agency did interpret that for  
7 the first decade or so not to include patient  
8 days that were not paid for, i.e., covered by  
9 the Medicaid or Medicare programs, and Congress  
10 did not step in to correct that.

11 But four courts of appeals did reject  
12 that interpretation in the context of the  
13 Medicaid fraction, and the agency responded by  
14 acquiescing to those courts' decisions, and it  
15 then carried over that interpretation to the  
16 Medicare context.

17 JUSTICE GORSUCH: Mr. Bond, in -- in  
18 that history, what -- what's helpful to the  
19 government?

20 MR. BOND: What's helpful is --

21 JUSTICE GORSUCH: I mean, I've heard a  
22 lot -- a lot of detail, but the through line  
23 doesn't seem to be an effort to fully vindicate  
24 the -- the terms of the statute. It seems like  
25 at each step of the way there's some -- some

1 foot-dragging that's at issue.

2 MR. BOND: There -- there may have  
3 been inefficiency or misunderstanding of  
4 Congress's direction, but I think that's  
5 fundamentally different than the agency trying  
6 to flout the directive.

7 JUSTICE GORSUCH: No, fair enough. I  
8 -- I -- I don't mean to cast aspersions on  
9 intentions, just -- just the facts on the ground  
10 are mistakes and -- and -- and mistaking  
11 Congress's intention repeatedly. Is that -- is  
12 that a fair through line of this?

13 MR. BOND: I think there are several  
14 occasions of mistaking what Congress clarified  
15 was its intention. And I think what Congress --  
16 or what the agency did in 2004 was carry over  
17 the approach that it understood from the courts  
18 of appeals was appropriate in approaching --

19 JUSTICE SOTOMAYOR: Counsel --

20 MR. BOND: -- the Medicaid fraction to  
21 the Medicare fraction to focus not on which  
22 patient days are paid for by a program but  
23 whether a person satisfies the definition of the  
24 term Congress used, "eligible" as opposed to  
25 "entitled."

1 JUSTICE SOTOMAYOR: Counsel, how do  
2 you -- or do we give you any Chevron deference  
3 for this interpretation? Are you relying on  
4 that at all, or are you taking the position that  
5 this is what the statute plainly says even  
6 though, as Justice Kavanaugh pointed out, that's  
7 subject to a great deal of dispute?

8 MR. BOND: What we're saying is two  
9 things. We think we have the better reading  
10 writing on a clean slate and, at a minimum, a  
11 reasonable reading. I think what we're saying  
12 is what the --

13 JUSTICE SOTOMAYOR: Answer my  
14 question. Do you think you're entitled to  
15 Chevron deference?

16 MR. BOND: We do think we are entitled  
17 to Chevron deference.

18 JUSTICE SOTOMAYOR: So how do you get  
19 past Encino Motorcars given the odd  
20 flip-flopping in the administrative process? It  
21 first misstated its existing policy in 2003.  
22 You correct the misstatement at the end of the  
23 rulemaking process in 2004. But what's most  
24 significant to me, the final rule did the  
25 opposite of what the agency initially proposed

1 to do.

2 So there's sort of three steps, all of  
3 them at the end of an agency process. I don't  
4 see how we give you Chevron deference under  
5 those circumstances.

6 MR. BOND: I would say several things,  
7 first about Encino and then about the particular  
8 rulemaking history here.

9 Encino does not hold that a procedural  
10 error of any kind results in a lack of Chevron  
11 deference. I think that the error at issue  
12 there was fundamental. The agency had  
13 engendered substantial reliance interests that  
14 it did not address. That's not at issue here.

15 Moreover, the procedural error that --  
16 that is asserted was rejected by the Ninth  
17 Circuit, and this Court declined to review that  
18 determination.

19 JUSTICE SOTOMAYOR: What does that  
20 have to do with anything? Whether there's an  
21 administrative failing under the APA is a  
22 different question than are you entitled to  
23 deference for an interpretation that it took you  
24 until the end of the process to fix and then,  
25 when you fix it, you do the opposite of what you



1 said you were going to do?

2 MR. BOND: So, on those points,  
3 deference goes to the final rule, the final  
4 decision-making made by the agency, not to its  
5 earlier statement. So deference hinges on what  
6 the final rule said.

7 Now, to your point about the gap  
8 between the final rule and the proposal, the  
9 proposed rule put a binary choice to commenters  
10 -- and these are sophisticated providers --  
11 between counting these days in the Medicaid  
12 fraction, as the agency proposed and as  
13 Respondent now argues, and including them in the  
14 Medicare fraction, which the agency mistakenly  
15 described as its existing policy, but those two  
16 options were on the table for commenters.

17 JUSTICE SOTOMAYOR: Can you point to  
18 any other statute -- you said you have the  
19 better reading -- where Congress uses words that  
20 have three meanings, the same words that have  
21 three meanings?

22 MR. BOND: I don't --

23 JUSTICE SOTOMAYOR: Because that's  
24 what basically you're saying, which is "entitled  
25 to" is different in -- from "eligible for," and

1 it's different for what we're going to do to  
2 SSI.

3 MR. BOND: So we -- we don't have a  
4 statute that gives the same terms three  
5 meanings, and that's not what we're saying here.  
6 We are saying that "entitled" and "eligible"  
7 have similar meanings in practice because the  
8 underlying statutes use those two different  
9 terms to refer to similar ideas.

10 JUSTICE SOTOMAYOR: Is it fatal for  
11 your argument if they don't use similar terms  
12 throughout?

13 MR. BOND: No, it's not fatal to our  
14 argument, but --

15 JUSTICE SOTOMAYOR: Meaning that the  
16 statutes don't use "eligible" or "entitled" --

17 MR. BOND: Well --

18 JUSTICE SOTOMAYOR: -- consistently  
19 throughout.

20 MR. BOND: -- the Medicaid statute  
21 does consistently use "entitled or "eligible"  
22 for Medicaid assistance to describe the category  
23 of individuals that are covered.

24 JUSTICE SOTOMAYOR: But the Medicare  
25 statute doesn't?

1           MR. BOND: The Medicare statute refers  
2 to "entitled to Part A benefits" to describe  
3 this category of persons.

4           JUSTICE SOTOMAYOR: Only because  
5 you're saying it does, but the Act itself  
6 doesn't use "entitled" throughout. It uses  
7 "entitled" sometimes and "eligible" other times.

8           MR. BOND: When it uses "eligible,"  
9 however, Your Honor, I think it's referring to  
10 something different. In Parts B, C, and D --  
11 and these provisions are cited in our brief --  
12 Congress refers to a person who is eligible to  
13 enroll in those programs if they are entitled to  
14 benefits under Part A, and when that person  
15 enrolls in that program, they then become  
16 entitled to that opt-in program.

17           JUSTICE ALITO: Mr. Bond, could you  
18 say something about what the Medicare fraction  
19 is designed to do? Which of the two  
20 interpretations fits that best? I assume you  
21 will say yours, and, if that is so, why?

22           MR. BOND: The Medicare fraction and  
23 the -- combined with the Medicaid fraction are  
24 designed as proxies for the percentage of  
25 low-income patients a patient has because

1 Congress, as this Court has explained, thought  
2 that hospitals that serve a greater number of  
3 low-income patients will necessarily have higher  
4 costs.

5 Now these are --

6 JUSTICE KAGAN: Well, I think  
7 everybody agrees with that, Mr. Bond. I -- I  
8 had the same question as Justice Alito. I mean,  
9 each of your formulas excludes certain  
10 categories of people who would generally be  
11 thought to be low-income, and the question is,  
12 how is it that your formula better reflects that  
13 purpose from Congress than -- than the  
14 Respondent's formula?

15 MR. BOND: So two points.

16 The first is that Congress went about  
17 this in a bifurcated way looking at two  
18 different populations.

19 Now, if you take that premise, which I  
20 think is clear from the face of the statute, our  
21 approach is much more sensible because it  
22 divides those populations based on their status  
23 as a Medicare beneficiary. That's why it's in  
24 the numerator and the denominator of the  
25 Medicare fraction.

1           Whereas, on Respondent's view, which  
2 population you're in turns on the happenstance  
3 of who ultimately paid for your care.

4           Now, to the point of persons excluded  
5 versus not excluded under the different  
6 readings, I think that illustrates the same  
7 illogic of Respondent's approach. So it's true  
8 that on our view, a person who is entitled to  
9 SSI and -- or, I'm sorry, a person who is not  
10 entitled to SSI but is entitled to Medicaid and  
11 is a Medicare patient doesn't count in either  
12 fraction.

13           We think that follows directly from  
14 Congress's choice to make for Medicare  
15 participants SSI the exclusive proxy. But  
16 Respondent's reading doesn't add back that  
17 category of dual eligible patients who don't  
18 qualify for SSI unless they happen not to have  
19 had Medicare pay for their care.

20           So you could have two beneficiaries  
21 who are equally low-income, and, on Respondent's  
22 view, one is added to the Medicaid fraction and  
23 one is not based on the fact that one was hit by  
24 a third party in a car accident, and, for that  
25 reason, Medicare did not cover their care.

1 JUSTICE KAGAN: Why is it that the  
2 denominators of the two parts are different?  
3 You know, if I understand your theory, it's  
4 essentially that the Medicare fraction is meant  
5 to deal with one population, the senior  
6 population, and the Medicaid formula is meant to  
7 deal with non-seniors, and that makes some  
8 sense. But then why wouldn't the Congress have  
9 used the same denominator in both?

10 MR. BOND: So Congress didn't explain  
11 its use of those different denominators. We  
12 know from the conference report that it's a  
13 compromise between approaches that did those  
14 different things.

15 Medicare patients are low-income  
16 Medicare patients among all Medicare patients  
17 and low-income measured by Medicaid against all.  
18 Congress fused those two different measures not  
19 in a way that you add together the patients but  
20 that you effectively average out those two proxy  
21 measures that examine different parts of the  
22 population.

23 And Congress may have determined that  
24 both of these approaches have some value and  
25 some merit and we should combine them, and the

1 one adjustment that it made was taking Medicare  
2 patients out of the numerator of the Medicaid  
3 fraction to avoid double-counting them.

4 JUSTICE BARRETT: Mr. Bond, I have a  
5 question about the difference between SSI and  
6 Medicare Part A and the use of the word  
7 "entitled." If I understand your argument, you  
8 said in response to Justice Kavanaugh that the  
9 distinction was that, for Medicare, eligibility  
10 or entitlement arises directly by operation of  
11 law, whereas, for SSI, it occurs after a  
12 determination, correct?

13 MR. BOND: That's right.

14 JUSTICE BARRETT: Is that always true  
15 for Medicare Part A, however? I mean, I see why  
16 it's true for seniors, for people who are over  
17 65. But it's my understanding that for people  
18 who are entitled to it based on disability,  
19 there did have to be a determination because  
20 somebody has to say that, in fact, you're  
21 disabled and you qualify.

22 MR. BOND: There's a determination of  
23 that predicate qualification, but, once you  
24 possess that qualification, you are entitled to  
25 Medicare Part A benefits.

1           You must -- in certain circumstances,  
2           you must enroll to access those benefits, but  
3           you have a legal entitlement that, as the D.C.  
4           Circuit recognized, cannot even be disclaimed.

5           There's a determination of that  
6           underlying disability, and it's --

7           JUSTICE BARRETT: But why is that  
8           different? It doesn't arise magically by  
9           operation of law if someone is disabled and it's  
10          unclear whether the disability qualifies, just  
11          in the same way that it doesn't arise magically  
12          by operation of law that someone's entitled to  
13          SSI. Both depend on a predicate determination.

14          MR. BOND: I think the point is not  
15          that one is dependent exclusively on a predicate  
16          determination and the other is not but that  
17          Congress specified which individuals fall into  
18          these categories.

19          We understand "entitled to SSI" to  
20          mean those persons whom SSA has determined are  
21          entitled to SSI benefits, which requires the  
22          application and determination. If we are wrong  
23          about that and we're undercounting SSI, however,  
24          the correct answer is not to skew the meaning of  
25          "entitled to benefits under Part A," which



1 Congress has said encompasses everyone who  
2 satisfies this definition and is not the same as  
3 persons who still have benefits that are  
4 unexhausted.

5           You should reserve the SSI issue for a  
6 case in which it is presented. That issue is  
7 being litigated in lower courts right now,  
8 including in a case in the District of Columbia.

9           JUSTICE ALITO: Well, if I think that  
10 you both have reasonable interpretations, what  
11 should we do with the Encino issue? Should we  
12 decide it? Do we have to decide it? Should it  
13 be just --

14           MR. BOND: So, with respect to the  
15 Encino issue, if you mean should we accord  
16 Chevron deference --

17           JUSTICE ALITO: Right. Right, right.

18           MR. BOND: -- to the agency's view, I  
19 think you should because the agency did not  
20 disrupt reliance interests. And if I can  
21 return, you know, to the -- the rulemaking  
22 process, the agency put those two options in  
23 front of commenters. Commenters did weigh in on  
24 those issues. Commenters overwhelmingly favored  
25 the substance of the approach that the agency

1 ultimately adopted. And so I don't think  
2 there's a procedural error of that kind.

3 JUSTICE KAGAN: But wasn't it unclear  
4 what the commenters thought they were being  
5 asked to comment on? In other words, a  
6 commenter who said I approve of the status quo,  
7 it was unclear whether that was the real status  
8 quo or the status quo as mis-described by the  
9 agency?

10 MR. BOND: By and large, the substance  
11 of their comments are not about what the agency  
12 was already doing. They refer to the agency's  
13 proposal as a change because that's how the  
14 agency had framed it.

15 JUSTICE BREYER: So --

16 MR. BOND: But their arguments went to  
17 the substance of the two proposals. The  
18 Federation of American Hospitals, one of  
19 Respondent's own amici, said that the agency  
20 lacked statutory authority to do what Respondent  
21 is now urging. That would not turn on which  
22 approach the agency was already adopting.

23 JUSTICE BREYER: So you had to really  
24 read all those comments in 2003.

25 MR. BOND: That's right, and --

1                   JUSTICE BREYER: Well, that's quite a  
2 job. I mean, do I understand this correctly?  
3 And the chances I understand it correctly are  
4 near zero, okay? Now just follow this and see  
5 if I understand it.

6                   There are two fractions, call them  
7 Fraction 1 and Fraction 2, Medicare and the  
8 Medicaid, okay, or the Medicare and -- and  
9 Medicaid over Medicare and SSI over Medicare.  
10 Okay. Fraction 1, Fraction 2. And there are a  
11 few people who have Medicare. There are some  
12 people who have Medicare, but there are benefits  
13 Medicare won't pay, and it might not pay  
14 because, in fact, there's somebody else to pay  
15 or it might not pay because they used up all  
16 they had on Medicare, okay, so they won't pay.

17                   Now what do we do with those people?  
18 Do we put them in 1, or do we put them in the  
19 denominator of 2 somehow? Okay? That's the  
20 issue. And so let's call them people who've  
21 exhausted their benefits. So these people are  
22 exhausted, just like me after reading this case,  
23 okay?

24                   (Laughter.)

25                   JUSTICE BREYER: We're exhausted. And

1 now what do we do with the exhausted people?  
2 And the fact is, in 2003, not even the agency  
3 knew what they were doing with the people. They  
4 wrote down that we are -- put all these people,  
5 I think, in 1, but they hadn't. They actually  
6 put them in 2. Or maybe it's vice versa. But I  
7 think I got it right.

8           So now they say, what shall we do?  
9 They say let's put them in 2. By now, it's  
10 2008. And after they read the comments, they  
11 say: No, we're going to put them in 2000 --  
12 we're going to put them in 1.

13           Now, if I'm right so far, the  
14 exhausted people are now in this rule over in 1.  
15 And that's where I am, exhausted, okay? So  
16 that's where they are. Do you know how many  
17 people understood this from 2003 on? Two. Two  
18 commenters out of God knows how many actually  
19 understood it.

20           So, if I were in Congress and I had  
21 this issue in front of me, you know what I would  
22 say? Let the agency do what it wants as long as  
23 it's reasonable because I have no idea. And so  
24 my question is, how are we expected, nine  
25 people, when only two people in the United

1 States in 2003 understood it in the way of  
2 comments, how are we supposed to decide who's  
3 right? I mean, if it were so obvious, it  
4 wouldn't have taken 27 years -- or 17 years to  
5 get to this point.

6 MR. BOND: To pick up on that last  
7 point, the fact that Congress has not intervened  
8 in the 17 years since the final rulemaking, I  
9 think, tells you that Congress did not think the  
10 agency had strayed and did not disagree with the  
11 agency's approach.

12 And it's not because Congress wasn't  
13 watching. As we note in the reply, Congress  
14 specifically intervened to approve the agency's  
15 Medicaid regulations relating to demonstration  
16 projects and yet left its approach to this issue  
17 unaltered.

18 Now, to the substance of your  
19 question, the exhausted patients belong in  
20 Fraction 1 because their exhaustion of certain  
21 items of care does not transform them into  
22 non-Medicare patients, and they can still get  
23 other Medicaid -- Medicare Part A benefits even  
24 if they've exhausted their inpatient care.

25 But, to the extent that the Court

1 thinks that question is unclear, that's a  
2 quintessential question for the agency.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Justice Thomas, anything further?

6 JUSTICE THOMAS: I have nothing  
7 further, Chief.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Breyer? Exhausted?

10 (Laughter.)

11 JUSTICE BREYER: Yes.

12 CHIEF JUSTICE ROBERTS: Justice Alito?  
13 Justice Gorsuch, anything further?

14 JUSTICE GORSUCH: What do we do about  
15 the fact that, as in this case, Chevron is very  
16 often asserted by the government to defend an  
17 interpretation that not only few people were  
18 given any advance notice of or understood, or  
19 maybe they were too exhausted to understand by  
20 the time it all was adopted, but also it tends  
21 to favor the government's own pecuniary  
22 interests? Should we be granting deference in  
23 those circumstances?

24 MR. BOND: I don't think a carveout to  
25 deference based on which way the needle goes in

1 terms of the federal government's expenditures  
2 are not --

3 JUSTICE GORSUCH: We normally -- you  
4 know, you -- you normally take into account when  
5 you're interpreting a document who writes it and  
6 their pecuniary interests.

7 Why would this be different?

8 MR. BOND: Well, I think, in this  
9 particular instance, the fact that the  
10 overwhelming majority of commenters said that  
11 counting these patients in Fraction 1, the  
12 Medicare fraction, was better for them than  
13 counting them in the other and that the agency  
14 said it's going to depend on the hospital, we  
15 are not making a decision either way, but even  
16 adopted the -- the approach that the commenters,  
17 the sophisticated providers, preferred, I think,  
18 undercuts any inference that the agency here was  
19 trying to undermine payments.

20 Everyone agrees the goal is to  
21 increase payments. The question here is by  
22 precisely how much for precisely which providers  
23 the agency provides billions of dollars a year,  
24 and the question is exactly how much more it  
25 must provide to certain providers.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Kavanaugh?

3 JUSTICE KAVANAUGH: To pick up on the  
4 Chief Justice's earlier question and Justice  
5 Gorsuch's question about the through line, it  
6 seems from a 30,000-foot level that the through  
7 line is the agency wanting to spend as little as  
8 possible on this program because entitlement  
9 spending, mandatory spending, is a huge part of  
10 the federal budget, and the agency, especially  
11 in 2003, '4, '5, the new prescription drug  
12 benefit had just come in, which was going to be  
13 a huge new expenditure for the government, and  
14 so the government, the administration at that  
15 time, was looking for places to restrain the  
16 growth or cut, in government speak, spending.

17 And that's the through line going all  
18 the way back, as the Chief Justice says, to the  
19 -- the beginning. And you -- you do it by  
20 interpreting "eligible" to mean "entitled" to  
21 begin with and then interpreting "entitled" to  
22 mean "eligible."

23 So why, when we look at the whole  
24 picture, is that wrong to see? And it's not --  
25 it's a laudatory motive, but the question, is



1 the statutory language getting in the way? Why  
2 shouldn't we see the through line as the  
3 government wanting to be stingy in its payout of  
4 these benefits?

5 MR. BOND: Because I don't think that  
6 tracks what the agency said at each of those  
7 times. In 1984, it said we looked at the data  
8 and don't think an adjustment is warranted.

9 Subsequently, after the 1986 statute,  
10 it looked at the statute and thought based on  
11 the legislative history and the language that  
12 Congress didn't intend to -- to include  
13 non-covered persons. But four courts of appeals  
14 rejected that. So the agency is responding as  
15 those events unfold.

16 But I think, at a broader level, the  
17 -- the answer to the question which  
18 interpretation is best can't be answered by  
19 broad-brush statements of congressional purpose  
20 to increase payments, especially given the  
21 highly reticulated calculation set forth at 18a  
22 to 25 of our appendix, where Congress laid out  
23 all these detailed things.

24 So it's not the agency trying to skew  
25 the calculus one way any more than it's Congress

1 trying to maximize payments. Indeed, the -- in  
2 the Affordable Care Act, Congress reduced the  
3 amount of these payments.

4 JUSTICE KAVANAUGH: One final  
5 question. Do you agree, though, that the  
6 agency's approach from the mid-'80s through  
7 those four courts of appeals was to lower  
8 payments beyond -- compared to what it would  
9 have otherwise been, and then its approach,  
10 starting in '03, '04, '05, similarly was to  
11 lower payments compared to what it otherwise  
12 would have been?

13 MR. BOND: So we're not in a position  
14 to dispute that it generally had that effect.  
15 We don't in the ordinary course calculate the --  
16 the effects on individual hospitals because the  
17 agency calculates the Medicare fraction, but the  
18 remainder of the equation is calculated by the  
19 contractors.

20 JUSTICE KAVANAUGH: You say you're not  
21 in a position to dispute. It's -- it's almost  
22 impossible to dispute, isn't it? I mean, your  
23 -- the letter you sent in and the -- and the  
24 stats in your brief, I just --

25 MR. BOND: And what that letter

1 reflects is that for hospitals in the Ninth  
2 Circuit, for most, but not all, the Medicare  
3 fraction would go up. Now the numbers that we  
4 provided do not translate directly into  
5 payments. But, yes, the general tendency is, if  
6 you have a higher Medicare fraction, there may  
7 be a higher payment at the end of the process.

8 That amount is probably going to be  
9 small. The median and mean, as we note in the  
10 letter, are really quite modest, and it still  
11 depends on the hospital's population. And that,  
12 I think, is the Agency's approach.

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Barrett?

16 Thank you, counsel.

17 Mr. Hettich.

18 ORAL ARGUMENT DANIEL J. HETTICH

19 ON BEHALF OF THE RESPONDENT

20 MR. HETTICH: Mr. Chief Justice, and  
21 may it please the Court:

22 In the face of HHS's recalcitrance,  
23 Congress gave HHS detailed instructions to  
24 ensure that hospitals that treat a  
25 disproportionate share of indigent patients are

1 properly reimbursed.

2 HHS has repeatedly violated those  
3 clear instructions and has done so again here.

4 In this case, HHS has concluded that  
5 inpatients are entitled to benefits under Part A  
6 for days on which they're entitled to no Part A  
7 benefits, no inpatient benefits because those  
8 benefits have been exhausted, and no other  
9 benefits because all other Part A benefits are  
10 incompatible with being a hospital inpatient who  
11 requires discharge.

12 That interpretation is impermissible.  
13 First, the agency's position violates the plain  
14 meaning of the statute. As Justice Kavanaugh  
15 pointed out, the agency reads the statutory  
16 terms "entitled" and "eligible" to mean the same  
17 thing. That is both inconsistent with the  
18 ordinary meaning of "entitled" and contrary to  
19 how the agency interprets "entitled" in the same  
20 sentence of the statute.

21 The agency claims that the ordinary  
22 meaning of "entitled" doesn't matter because  
23 426, according to the agency, controls and --  
24 and explains what Congress mean -- means by  
25 "entitled to benefits under Part A." But that's

1 wrong. 426 is not a definitional provision,  
2 and, in any event, it addresses a different  
3 issue.

4 Second, the agency's interpretation is  
5 unreasonable. HHS's rule provided almost no  
6 justification for its repudiation of an  
7 interpretation that it held for over two  
8 decades.

9 Most fundamentally, despite  
10 interpreting a statute governing DSH payments,  
11 it didn't even assess what impact its  
12 interpretation would have on DSH payments. We  
13 now know 15 years later that the effect is to  
14 reduce the Medicare fraction over 80 percent of  
15 the time.

16 Since the agency's own interpretation  
17 can only also reduce the Medicaid fraction, it  
18 can never increase it, this means that the  
19 agency has once again categorically excluded  
20 indigent patients, in violation of Congress --  
21 Congress's clear instructions.

22 Unless there are questions from this  
23 Court, I'll begin with the statute's plain  
24 language.

25 JUSTICE THOMAS: Just one quick

1 question. The -- there are other provisions  
2 that are hinge -- that hinge on whether or not  
3 someone is entitled to benefits under A. But,  
4 if you limit it as you -- entitlement -- as you  
5 want, as you suggest, what do you do with those  
6 entitled -- with the enrolling under C or D, or  
7 -- or what do you do also with the conflict the  
8 government pointed out with 13951 that seems to  
9 suggest that you can both exhaust and still be  
10 entitled to benefits?

11 MR. HETTICH: Your Honor, the -- we  
12 think it's possible for statutes to ask  
13 different questions, and -- and there is a  
14 distinction between asking whether a patient is  
15 generally entitled to Medicare benefits or are  
16 they a Medicare beneficiary generally, and we  
17 think those other statutes ask that question.

18 But that's not the question the DSH  
19 statute asks. And the proof is that the DSH  
20 statute specifically qualifies "entitled to  
21 benefits for such days." So the question the  
22 DSH statute --

23 JUSTICE KAGAN: Well, but then you are  
24 suggesting that the interpretation of this  
25 provision would be out of kilter with other

1 provisions in the Medicare statute, and you  
2 would be relying just on the parenthetical "for  
3 such days."

4 So, as much as we can, you know, say  
5 to the government, well, you're saying  
6 "entitled" means two different things, I mean,  
7 you have an equal or greater problem, which is  
8 that you are interpreting this phrase in a way  
9 that's very much not the way we would interpret  
10 this phrase in the rest of the Medicare statute.

11 MR. HETTICH: Your Honor, I -- I think  
12 the key distinction is -- is the "for such  
13 days." And, tellingly, that language does not  
14 appear in any of these other provisions that the  
15 Secretary cites, right? It doesn't say, if  
16 you're entitled to Medicare for such days or for  
17 any particular days, then you can enroll in Part  
18 B. It says, if you're generally entitled to  
19 benefits under Part A, full stop, or if you're a  
20 Medicare beneficiary generally.

21 And we agree, Your Honor, that these  
22 patients are still Medicare beneficiaries  
23 generally. As the Secretary points out, there  
24 are benefits they could access once they are  
25 discharged, not as hospital inpatients. They

1 can't get skilled nursing benefits while they're  
2 an inpatient or home health benefits at a  
3 hospital. So they're still Medicare  
4 beneficiaries generally. But, again, that's not  
5 the question that the DSH statute asks because  
6 it has language that's not found anywhere else,  
7 and that --

8 JUSTICE KAGAN: Well, but that  
9 language might mean what you think it means, or  
10 it might mean something entirely different. I  
11 mean, you say that the government's reading  
12 turns that language into a superfluity, but it's  
13 not. That language continues to perform a very  
14 important function and a function that Congress  
15 might well have thought about when it was  
16 drafting this statute, which was, oh, we have to  
17 deal with the people who turn 65 during their  
18 hospital stays.

19 I mean, that's not an inconsiderable  
20 number of people. This is a gigantic program.  
21 People turn 65 every day. It would make  
22 complete sense for the drafters of the statute  
23 to say: You know, we have to put in something  
24 about, like, prorating it for the people who  
25 turn 65 in the middle.



1           MR. HETTICH: Your Honor, it's -- it's  
2 not just that "for such days" would do very  
3 little work and this Court has rejected --

4           JUSTICE KAGAN: I mean, that's a lot  
5 of work. A lot of people turn 65 during, you  
6 know, every day in this country.

7           MR. HETTICH: Right. I -- I don't  
8 know how many do it while they're hospital  
9 inpatients, but -- but -- but there's a more  
10 fundamental point in that that language would be  
11 completely unnecessary because, remember, the  
12 unit of measurement here is days.

13           And so, according to the Secretary,  
14 what "for such days" does is tell HHS you cannot  
15 treat a day as being entitled -- a specific day  
16 as being entitled to benefits under Part A until  
17 the patient has met the bare minimum for  
18 Medicare eligibility requirements.

19           Well, no rational person would treat  
20 days as being entitled to benefits under Part A  
21 before the beneficiary had met the Medicare  
22 eligibility requirements.

23           And, in fact, Your Honor, the same  
24 thing holds true for the Part B enrollment and  
25 the Part C enrollment and the Part D, right,

1 where no one would allow a person that had not  
2 yet met the basic Medicare eligibility  
3 requirements to enroll in Part B.

4 And yet "for such days" doesn't appear  
5 in any of those languages, and HHS isn't  
6 allowing folks to enroll in Part B before  
7 they've met the general Medicare eligibility  
8 requirements because it's obvious.

9 So it's not just that it would have  
10 very little work, but the work it does, the "for  
11 such days" under the Secretary's interpretation,  
12 is completely unnecessary.

13 CHIEF JUSTICE ROBERTS: You will  
14 agree, won't you, that in the abstract, in  
15 particular contexts, that "entitled" and  
16 "eligible" -- "entitled to" and "eligible for"  
17 can be used as synonyms?

18 It's basically Mr. Bond's point that  
19 "entitled to" does mean, conceding it, I guess,  
20 for purposes of argument, that you have a right  
21 to something, but the question is a right to  
22 what?

23 If I say that, okay, I'm 65, I'm  
24 entitled to Medicare benefits, that's true. I'm  
25 entitled to Medicare benefits if this, this, and

1 this are satisfied, which would be the same  
2 thing as saying I'm eligible for those benefits  
3 if I meet those criteria.

4 MR. HETTICH: Your Honor, I -- I  
5 think, in some cases and -- and speaking  
6 loosely, occasionally those terms could be used  
7 synonymously. I think, when they're juxtaposed  
8 as they are here, two different words in the  
9 same sentence, because it talks about folks that  
10 are entitled to benefits under Part A and  
11 eligible for -- for Medicaid, when those words  
12 are juxtaposed in the same sentence, then we  
13 have to actually look at what's the distinction  
14 between those two words. We're not looking for  
15 the commonality because Congress chose two  
16 different words.

17 JUSTICE KAGAN: Well, but the  
18 distinction is that the statutes are different  
19 and that the statutes use those two words  
20 differently. And the government essentially  
21 picked up the "entitled to" from the Medicare  
22 statute, where it consistently functions in the  
23 way the government suggests, and the Medicaid  
24 statute uses a different vocabulary.

25 And the Medicare statute uses a

1       vocabulary that, as the Chief Justice says, is  
2       very consistent with ordinary meaning. Ask any  
3       65-year-old are you entitled to Medicare, and  
4       the answer is going to be yes. And it's really  
5       not going to matter whether they've exhausted  
6       their 90 days of coverage.

7                 MR. HETTICH: Your Honor, I think, if  
8       you ask any ordinary person that has exhausted  
9       their Medicare benefits and that Medicare is not  
10      paying a penny for and that, if they're lucky,  
11      Medicaid maybe is picking up the tab, if you ask  
12      them are you entitled to Medicare benefits for  
13      these days, for these days after you've  
14      exhausted, I think most folks would say no, I'm  
15      entitled to no benefits now --

16                JUSTICE BREYER: Yeah, but -- but --

17                MR. HETTICH: -- I've exhausted them.

18                JUSTICE BREYER: -- but that isn't  
19      what the statute says. The statute says  
20      "entitled to benefits under Part A of Medicare."

21                MR. HETTICH: Uh-huh.

22                JUSTICE BREYER: Let's try it out,  
23      ordinary language. Math class, high school  
24      teacher has a list of special rewards. Part A  
25      says ice cream, ice cream but no more than two a

1 week. So the kids use two a week. Huh? Yeah,  
2 but he fits -- he needs the reward, he deserves  
3 the reward. He's entitled -- he's entitled to  
4 ice cream under Part A. He fits within it.  
5 Ahh, but he's not eligible for ice cream now  
6 because he's already had his two for the week.

7 So I read that and try and put it in  
8 my ordinary English ice cream high school mind,  
9 and there we are. And -- and I have a ordinary  
10 meaning that seems to me closer by that much to  
11 what the government says than what you say. So  
12 suppose I believe that.

13 Next question: Chevron. Okay? Gee,  
14 do you really apply Chevron where they're so  
15 mixed up that there are only two people in the  
16 United States when they -- when they put out the  
17 -- the notice and comment and nobody understands  
18 what it means and they don't even know what  
19 their own program is? Hmm. Huh, I'm stuck.

20 All right. What do I do?

21 MR. HETTICH: So two quick points,  
22 Your Honor. On the ice cream example, I think,  
23 if you asked that student that had used up his  
24 two ice cream cones on Wednesday, and you ask  
25 him on Friday are you entitled to ice cream

1 today for -- for such day, for this Friday, he'd  
2 say no, I used it up, I wasn't --

3 JUSTICE BREYER: But it doesn't say --

4 MR. HETTICH: -- I was that day --

5 JUSTICE BREYER: -- for this Friday.

6 It says "under Part A." And if you ask him are  
7 you entitled to ice cream under Reward  
8 Announcement Part A, he would say, well, yeah, I  
9 just don't get it now because I used them up.

10 MR. HETTICH: Okay. Well, I --

11 JUSTICE BREYER: No, not so far.

12 MR. HETTICH: -- I respectfully  
13 disagree, Your Honor, but -- but to -- to your  
14 Chevron question, I think there are actually two  
15 problems. The Chief Justice pointed out one of  
16 them, which is that the premises for Chevron  
17 deference simply -- the primary one, which is  
18 that there was an implicit delegation from  
19 Congress, which was what Mead and Epic said,  
20 simply does not exist here.

21 Congress may have started off giving  
22 the agency broad discretion in -- in 1983 where  
23 it said go make an adjustment. After the agency  
24 refused and refused, as Mr. Chief Justice  
25 pointed out, the Congress got more and more

1 prescriptive, until it came up with a very  
2 detailed, you know, unusually detailed,  
3 provision that was meant to cabin -- that was  
4 meant to tie the agency's hands and force the  
5 agency to act. And so we think, in this  
6 context, presuming that there was an implicit  
7 delegation of -- of authority is -- is  
8 unfound -- is belied by the record.

9           And it turns out Congress had good  
10 reason to be wary of giving the agency  
11 discretion because, even under those clear  
12 instructions, the agency repeatedly violated the  
13 clear instructions, as the amici for certain  
14 hospitals and health systems pointed out.

15           But, as a second problem --

16           JUSTICE ALITO: Well, you -- you and  
17 Mr. Bond have both said a lot about what  
18 Congress intended, but do you really think that  
19 a majority of the Senate and a majority of the  
20 House thought through the particular question  
21 that faces us in this case and they all said,  
22 yes, your interpretation is the right  
23 interpretation, that's what we want? Do you  
24 seriously want to make that argument?

25           MR. HETTICH: Your Honor, I -- we

1 think the language speaks for itself, and -- and  
2 it's quite -- quite prescriptive, and Congress  
3 went out of its way in the statutory language --  
4 you can just focus there -- to -- to define what  
5 universe of patients would be subject to that  
6 stricter "entitled to SSI" standard, and that  
7 universe of patients were hospital patients who,  
8 for such days, were entitled to benefits under  
9 Part A.

10 JUSTICE ALITO: Well, could you -- I  
11 -- I -- I understand your argument, and -- and  
12 there's a lot of force to it, but could you  
13 compare what a person has to do upon turning 65  
14 in order to get Medicare Part A with what a  
15 person has to do in order to get Medicaid -- I'm  
16 sorry, in order to get SSI?

17 MR. HETTICH: Your Honor, so I think  
18 there's a fundamental point that I want to make  
19 on the SSI that, both in its briefing and in  
20 oral argument today, I think there could be a  
21 misimpression that the Secretary only excludes  
22 SSI-eligible folks who haven't applied for SSI.  
23 And that's the distinction, what you need to  
24 apply.

25 On the contrary, though, HHS excludes



1 large numbers of patients that have applied for  
2 SSI, been determined eligible for SSI, and  
3 simply did not receive their SSI benefits --

4 JUSTICE ALITO: Well, the point is --

5 MR. HETTICH: -- for a determined --

6 JUSTICE ALITO: -- how many -- how  
7 many hurdles do you have to clear upon turning  
8 65 in order to get Medicare Part A and how many  
9 hurdles do you have to clear in order to get  
10 SSI? My impression is that you don't have to do  
11 very much to get Medicare Part A, and you have  
12 to do more to get SSI. Is that wrong?

13 MR. HETTICH: It -- it -- it's not  
14 complete, Your Honor, I think, for two reasons.  
15 As Justice Barrett pointed out, there are  
16 categories of Medicare beneficiaries that need  
17 to apply if -- if they -- based on age, if  
18 they're disabled, et cetera. Even for those who  
19 are 65, it's if they also get their Social  
20 Security retirement benefits, which requires an  
21 application, you have to ask, and you can  
22 determine when you ask for the Social Security.  
23 So the difference isn't that great between the  
24 two.

25 But -- but -- but, more -- more

1 fundamentally, Your Honor, again, going back to  
2 -- to my point a moment ago, even if -- even if  
3 folks -- even if patients have applied and been  
4 determined eligible for SSI, the Secretary will  
5 still exclude them even though they've applied  
6 and have met all the statutory -- simply because  
7 they don't receive the benefit.

8 We cite in our briefs patients that  
9 refuse direct deposit or whose checks were  
10 returned as undeliverable. Those folks are  
11 excluded. Clearly, they applied for SSI.  
12 They're trying to send them their SSI checks.

13 JUSTICE KAVANAUGH: Can I -- keep  
14 going.

15 MR. HETTICH: Well, I was just -- I  
16 was just going to conclude, Your Honor, these  
17 folks are being excluded not because they didn't  
18 apply but because they simply did not receive  
19 their SSI cash for some reason.

20 JUSTICE KAVANAUGH: I want to go back  
21 to Justice Alito's question about Congress in  
22 the 1980s, and my understanding -- correct me if  
23 I'm wrong -- is that these -- the two committees  
24 involved were House Ways and Means and Senate  
25 Finance, which were deeply involved in the

1     particulars of these programs, two of the most  
2     expert staffs in the Congress then and now, and  
3     were deeply involved. And then, secondly --  
4     correct me if I'm wrong -- I mean, there's  
5     hospitals in most districts.

6                 Congress -- members of Congress, at  
7     least in my experience, are pretty attuned to  
8     payments to hospitals. But maybe you have a  
9     better understanding of this than I do.

10                MR. HETTICH: That -- that's  
11     completely correct, Your Honor. I mean, I was  
12     focused on the statutory text, but if you look  
13     at the legislative -- legislative history, it's  
14     remarkably robust. These terms were debated.  
15     They -- they evolved, et cetera.

16                And the agency's overall point is that  
17     -- is to focus on this concept that Congress  
18     meant these fractions to be hermetically sealed,  
19     that no patient should move -- no indigent  
20     patient should move from one fraction to the  
21     other.

22                And, first, there's very little basis  
23     for that because, even under the Secretary's  
24     interpretation, a patient could move from one to  
25     the other. The -- the legislation evolved. At

1 some points, the Senate was considering  
2 including Medicaid beneficiaries and vice versa.

3 But more to the point, what's clear is  
4 that what's important in the legislative history  
5 isn't whether an indigent patient might move  
6 from one fraction to the other; it's that the  
7 indigent patient be counted in the first place.

8 Under the Secretary's interpretation,  
9 Justice Kagan, to your question, the practical  
10 impact, instead of increasing reimbursement,  
11 instead of -- instead of giving hospitals  
12 increased DSH payments for treating clearly  
13 indigent patients that have exhausted benefits,  
14 80 percent of the time the Secretary's  
15 interpretation decreases the hospital's --

16 JUSTICE KAGAN: Yeah, but the purpose  
17 here can't be thought to be -- you know, over  
18 and over, you say in your brief, well, you know,  
19 the -- the purpose is satisfied if hospitals get  
20 more money.

21 But that's not right. I mean,  
22 Congress put together a formula, and it was a  
23 formula for counting low-income patients, and  
24 the question is, who has the best reading of  
25 that formula?

1                   And I guess, you know, going back to  
2 Justice Alito's question, it does strike me as  
3 -- I mean, this -- this formula, there are good  
4 arguments on both sides about what this formula  
5 means. And, similarly, if you look at the  
6 actual populations that are covered or not  
7 covered in these two formulas, it's just not  
8 clear which one is more reflective of a desire  
9 to subsidize hospitals with low-income patients.  
10 You know, the question is, you know, how and  
11 which low-income patients?

12                   So I guess this goes back to Justice  
13 Breyer's question, you know, assuming that to --  
14 to us or to me, it doesn't leap off the page  
15 which formula -- you know, what this formula  
16 means, you know, what should we do about that?

17                   MR. HETTICH: Yeah, I -- I -- Your  
18 Honor, I -- I don't think you should accord it  
19 Chevron deference, and since it's not the best  
20 meaning of the statute, I think this Court  
21 should -- should overturn it, should say the  
22 better reading is -- is giving words their  
23 ordinary meaning, distinguishing between  
24 "entitled" and "eligible," not a -- not --  
25 rather, equating "entitled" and "entitled" as it

1 appears in the SSI and the Medicare fraction.

2           And -- and it's -- it's a good -- I  
3 didn't finish my answer to -- I forget which  
4 Justice -- about the deference, that there's  
5 kind of a second reason why deference isn't  
6 warranted, right, not just the lack of implicit  
7 delegation under these circumstances but the  
8 Encino point, which is that the final rule, you  
9 could -- there's a lot to be said about the  
10 proposed rule, but we don't even need to go  
11 there. If you just look at the final rule  
12 itself, there was almost no reasoning given for  
13 a change of 20 years of practice affecting many  
14 millions of dollars for indigent patients.

15           That's almost exactly what happened in  
16 Encino, right? The agency engaged in  
17 notice-and-comment rulemaking in Encino, but it  
18 had a summary statement that it thought its  
19 policy was, you know, a reasonable  
20 interpretation of the statute. And this Court  
21 said that's not good enough, particularly when  
22 you're repudiating prior practice, and that's  
23 exactly what -- what -- what went on here.

24           JUSTICE KAGAN: One thing that seems  
25 to me attractive about the government's proposal

1 is that the government has a sort of simple  
2 theory of the -- the two formulas and how  
3 they're supposed to work together, in other  
4 words, that the two formulas are really meant to  
5 address two different populations. One is  
6 supposed to address the senior population, and  
7 the other is supposed to address the non-senior  
8 population.

9           And the formulas were in -- you know,  
10 if that's true, that the dual eligible patients  
11 are supposed to be reflected in the Medicare  
12 formula because they're seniors, and we're not  
13 supposed to be doing this in such a way that  
14 people are bopping back and forth between the  
15 two formulas in -- in both a-hard-to-administer  
16 way but also a kind of, like,  
17 why-would-that-have-happened way.

18           So the -- the government's theory of  
19 what these formulas were meant to do seems a lot  
20 more sort of simple and straightforward than  
21 yours does to me.

22           MR. HETTICH: Your -- Your Honor, I --  
23 I suppose one fundamental point. By Congress  
24 using the term "for such days," again, in -- in  
25 its wisdom, it kind of eschewed the idea of

1 simple, right, because, I mean, it specifically  
2 required an analysis, a day-by-day analysis,  
3 precisely what the Secretary --

4 JUSTICE KAGAN: Well, on your theory  
5 of --

6 MR. HETTICH: -- said shouldn't --

7 JUSTICE KAGAN: -- what that means, it  
8 does, but not on the government's theory of what  
9 that means. On the government's theory of what  
10 that means, it was just meant to kick out people  
11 who pick out -- kick out the days that people  
12 were in hospitals before they were 65.

13 MR. HETTICH: Yeah, I -- I -- I think  
14 another theory requires a day-by-day analysis.  
15 In one case, you know, according to the  
16 government's theory, which, as I discussed,  
17 makes no sense because there's no reason to tell  
18 HHS don't -- don't treat people as entitled to  
19 benefits under Part A before they've met the  
20 Medicare eligibility criteria.

21 JUSTICE KAGAN: Can you make --

22 JUSTICE GORSUCH: But, counsel --

23 JUSTICE KAGAN: -- your argument  
24 without relying on that parenthetical?

25 MR. HETTICH: Yes, we can, Your Honor,



1 because, in either case, even without that paren  
2 -- parenthetical, the agency is still equating  
3 "entitled" and "eligible," even -- even  
4 assigning the same reason, and that's kind of  
5 beyond dispute.

6 In the Ninth Circuit, the government  
7 contended --

8 JUSTICE KAGAN: Yeah, I guess I would  
9 say can you make your argument, back to my  
10 question about what these formulas are supposed  
11 to do, without relying on that parenthetical?  
12 The government, you know, is like this is the  
13 senior formula, this is the non-senior formula.  
14 That makes a lot of sense.

15 MR. HETTICH: Yeah. Your -- Your  
16 Honor, I -- I mean, there -- there's at least  
17 one other answer, and I think there's probably  
18 more, but it makes sense for Congress to focus  
19 on who -- who pays because the payment is  
20 different. Medicare generally is going to pay  
21 more generously than Medicaid.

22 So it makes some sense for Congress to  
23 have said, if Medicare is paying for this  
24 patient and you're getting, you know, generally  
25 reasonable payment, the more stringent entitled

1 to SSI criteria apply. That's where you're  
2 actually entitled, not just eligible, for SSI.

3 But, if Medicare isn't paying and  
4 you're relying on Medicaid payments, which are  
5 generally pretty -- pretty poor, then, in that  
6 case, we need a more generous standard to -- to  
7 apply, and so you go into the -- the Medicaid  
8 fraction.

9 JUSTICE GORSUCH: Counsel, if I might  
10 circle us back to Justice Breyer's question a  
11 moment ago, if we -- if we thought this were  
12 ambiguous, the statute ambiguous, and -- and you  
13 -- your first argument against deference to the  
14 government is that this matter wasn't assigned  
15 to it because Congress became so prescriptive.  
16 Got it.

17 Your second argument, which you call  
18 your Encino argument, I think, I might think of  
19 it as a Chenery argument if -- if you want to  
20 put it in those terms, is, is the government is  
21 now relying on different sets of arguments than  
22 were in the rulemaking and that -- that -- that  
23 should be taken into account before we grant it  
24 any kind of deference.

25 I think the government's argument --

1 response to that one, though, was that -- that  
2 the deference belongs to the substance  
3 regardless of what procedure was used to adopt  
4 the rule.

5           What -- what do you say to that,  
6 number one? And, number two, moving beyond  
7 those two arguments -- you can think of it as  
8 Mead and Chenery or Mead and Encino -- do you  
9 have a third, or is that it?

10           MR. HETTICH: On -- on the first  
11 question, Your Honor, it's -- and it's actually  
12 very similar. So there were problems in the  
13 procedure itself. And, again, we're willing to  
14 put that aside. It's in our brief. I think --  
15 I think it speaks for itself.

16           But, if you look then at -- at the  
17 outcome of -- of the rulemaking, so -- so the  
18 substance of it, what the agency said to justify  
19 its policy, in that case, it's exact -- again,  
20 it's on all fours with Encino, where, again, in  
21 Encino, I don't think there was an allegation  
22 that, you know, as -- as there could be here,  
23 that the agency misstated its policy, et cetera.

24           But it was simply the fact that the  
25 rationale given was insufficient, was

1 unreasonable, to support particularly a radical  
2 change in policy. And that applies here too.

3 I -- I agree on the Chenery point.  
4 426 never came up in the rulemaking. The phrase  
5 "for such days," which the Secretary says was  
6 the whole thing that changed, is interpreting  
7 "for such days," doesn't appear anywhere in --  
8 in the rulemaking. The legislative history  
9 isn't, you know, cited in the rulemaking. The  
10 agency didn't even do an impact analysis on a  
11 rule that's --

12 JUSTICE KAVANAUGH: That --

13 MR. HETTICH: -- about payments.

14 JUSTICE KAVANAUGH: That's a third  
15 then -- if I'm understanding your answer  
16 correctly, that's a third problem, a lack of  
17 reasoned explanation. They didn't address  
18 particular aspects of the problem.

19 MR. HETTICH: Correct, Your Honor.

20 JUSTICE KAVANAUGH: State Farm maybe.

21 MR. HETTICH: Exactly. Didn't even  
22 consider --

23 JUSTICE KAGAN: Counsel --

24 JUSTICE BREYER: I'm still stuck on  
25 what we -- well, what we do. Actually, it's a

1 rather pretty difficult case for me. I mean, I  
2 think what Justice Gorsuch said is probably  
3 right. I mean, I have an awful qualm about  
4 using Chevron here because the point of it is  
5 supposed to be that a reasonable member of  
6 Congress would have wanted the agency to figure  
7 this out, and where it figures it out, doesn't  
8 figure it out, gets everything mixed up, it's a  
9 pretty tough case to use Chevron. Okay.

10 So then what do we do? I mean, if the  
11 language slightly goes in their direction, and  
12 now we have Justice Kagan's argument, which is  
13 probably all created in 2020, 2021, to justify  
14 something that was done who knows why in 2008 or  
15 2003, at that point, I am actually baffled.

16 I know you're just going to say decide  
17 for us, but that isn't going to help me when you  
18 just say that. Can you think of anything else  
19 to say?

20 MR. HETTICH: I can, Your Honor. I --  
21 I think, in some ways, this is an -- an easy  
22 case, with -- with all due respect, because the  
23 Secretary's interpretation, admittedly, the  
24 Secretary admits, requires departure from the  
25 ordinary meaning of "entitled," requires the

1 violation of all sorts of statutory canons,  
2 requires equating "entitled" to "eligible,"  
3 departing from the ordinary meaning of  
4 "entitled," rendering "for such days"  
5 superfluous. We can -- but -- but we think it  
6 clearly does.

7           And all of that is based on its view  
8 that 426 controls. But 426 is not a  
9 definitional provision. Title II has  
10 definitional provisions, and 426 is not among  
11 them. The Medicare statute has a definitional  
12 provision, and "entitled" isn't -- isn't defined  
13 there.

14           JUSTICE SOTOMAYOR: Counsel?

15           MR. HETTICH: And that's --

16           JUSTICE SOTOMAYOR: Counsel, doesn't  
17 426(c) help you? I thought 426(a) and (b),  
18 which the government is relying on, to equate  
19 entitlement with eligibility, I read (c) and  
20 it's clearly saying, which is made subject to  
21 (a) and (b), (a) and (b) are made subject to  
22 (c), it says entitlement of an individual to  
23 hospital insurance benefits for a month shall  
24 consist of entitlement to have payment made  
25 under and subject to limitations in Part A.

1           I mean, it's taking away exactly what  
2 they claim, that eligibility and entitlement are  
3 equated, isn't it?

4           MR. HETTICH: Your -- Your Honor, we  
5 agree. And -- and the second point, besides not  
6 being a definitional provision, is -- and  
7 perhaps more importantly, is the point that, as  
8 you just said, 426(c), far from departing from  
9 the ordinary meaning of "entitled," specifically  
10 links entitlement to payment, as does 1395d, a  
11 provision that actually appears in the Medicare  
12 statute, that says almost the exact same thing.

13           Entitlement is not -- it's not a badge  
14 of honor in Medicare beneficiary. What it is is  
15 payment for services. And these patients were  
16 entitled to no payment of services for the days  
17 that they were hospital patients.

18           JUSTICE SOTOMAYOR: So is our bottom  
19 line, do we reach the better reading? Do -- I'm  
20 assuming you're saying Chevron doesn't apply for  
21 four or five different reasons. We have to give  
22 it the better reading, and the better reading is  
23 yours because of all of the reasons Justice  
24 Kavanaugh set forth earlier and the additional  
25 ones developed, correct?

1 MR. HETTICH: Correct.

2 JUSTICE SOTOMAYOR: Have we left out  
3 any other reason why yours is the better reason  
4 or the better reading, I'm sorry?

5 MR. HETTICH: Your Honor, I -- I think  
6 we covered the bases. Justice Kavanaugh listed  
7 the five points. We would agree with those.  
8 Chief Justice added -- added the sixth. I think  
9 -- I think, among those six, I think we've  
10 covered the bases of -- of the reasons.

11 JUSTICE KAVANAUGH: Can I ask how the  
12 "for such days" worked in practice in the first  
13 two decades? You would go -- someone would go  
14 through and say this patient on November 10  
15 received Medicare benefits for that hospital  
16 stay. On November 11, they've received  
17 Medicare. On November 12, they did not. Is  
18 that -- it was done at that granular level,  
19 correct?

20 MR. HETTICH: It -- it -- it -- it  
21 was, Your Honor. And -- and it was even more  
22 simple because, once a patient had exhausted  
23 their Part A benefits, they -- they simply were  
24 no longer counted. Medicare didn't care. They  
25 weren't paying for those -- for those days, so



1 they couldn't possibly -- the agency had to  
2 create a whole mechanism for tracking these  
3 patients after they've exhausted their benefits  
4 so that they could begin to add them to the  
5 Medicare fraction, because, before that, there  
6 wasn't a mechanism because they weren't -- they  
7 weren't being paid. Medicare didn't -- didn't  
8 care.

9 JUSTICE KAVANAUGH: And one thing --  
10 this is now back to a big-picture question.  
11 What -- what's the practical impact of the  
12 difference between your two arguments here? I  
13 mean, we're sitting here removed from how it's  
14 going to affect hospitals that serve poor  
15 patients, but is there -- you know, what's --  
16 what's the impact?

17 MR. HETTICH: Yeah, the -- the impact  
18 is very significant, Your Honor, particularly on  
19 these hospitals, our safety net hospitals. As  
20 amici point out, safety net hospitals have much  
21 thinner margins than hospitals in general, where  
22 a couple of percent -- I know my friend on the  
23 other side said, oh, you know, it's just  
24 a percent or two. For these hospitals, that can  
25 be the difference between keeping their doors

1 open or closed.

2 And the study we cite in our brief and  
3 amici cite shows that the average impact -- the  
4 total impact of this policy is about \$150,000.  
5 This is back in '05, so updated for inflation  
6 and with inflation being what it is, who knows  
7 what that number would be today?

8 But even at 150,000 times about a  
9 thousand DSH hospitals over 10 years, we're  
10 talking about a lot of money for hospitals that  
11 -- that really need it.

12 And -- and, Your Honor, it raises a  
13 question -- again, I just want to make this  
14 clear -- that these hospitals are losing money.  
15 It's not -- if you ask -- if you ask the  
16 question would their DSH payments increase or  
17 decrease by treating these indigent exhausted  
18 day patients or stay the same -- three parts --  
19 do their DSH payments increase, decrease, or  
20 stay the same, the answer is their DSH payments  
21 decrease. They get less DSH payments for  
22 treating these patients.

23 And the proof is that it decreases the  
24 Medicare fraction, right? By treating these  
25 patients, it has no effect on the Medicaid

1 fraction. They're already excluded under the  
2 Secretary's policy. What does it do to the  
3 Medicare fraction? It decreases it. So it  
4 leads to a net loss in DSH payments.

5 It's not that they stay the same or  
6 they go up and not -- but don't go up as much as  
7 we'd like. It's that they actually go down.  
8 The agency has turned it on its head. It turned  
9 what's supposed to be an incentive, as this  
10 Court held in Allina, to treat inpatients and  
11 turned it into a disincentive. You'll get less  
12 money. We'll reduce your DSH payments for  
13 treating these clearly indigent patients. I  
14 just wanted to make sure that that was clear.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Thomas, anything further?

17 JUSTICE THOMAS: Just one question.  
18 Are there -- are inpatient services the only  
19 benefits under Part A? Because we've spent -- I  
20 think so much of your argument is premised on  
21 that being the only benefit and that that  
22 benefit would be exhausted.

23 MR. HETTICH: It -- it's the only  
24 benefit a hospital -- I mean, a patient can  
25 receive while an inpatient. There are other

1 benefits that are categorically incompatible  
2 with being an inpatient. So, upon discharge, if  
3 they met the other criteria, many of these  
4 patients aren't discharged, they -- they die in  
5 the hospital, unfortunately, but if they were  
6 discharged and they -- and they met the other  
7 requirements for skilled nursing benefits, Part  
8 A would cover that. They might be able to get  
9 home health.

10 But, as the name suggests, all of  
11 those additional possible potential benefits at  
12 another time under different circumstances can  
13 -- do not apply while the -- while the patient  
14 is an inpatient in the hospital, Your Honor.

15 JUSTICE THOMAS: Well, I understand  
16 that, but if we're going to premise, you know,  
17 our analysis on exhaustion, it doesn't seem as  
18 though the benefits under Part A are exhausted  
19 if those benefits are still available.

20 MR. HETTICH: Again, Your Honor -- and  
21 because of what the -- the way the DSH statute  
22 is structured, right, it says are you entitled  
23 to benefits for -- for these days, for these  
24 hospital patient days, for such days, and that's  
25 clearly focused on while the -- while the

1 patient is an inpatient. And while the patient  
2 is an inpatient, they are entitled to no Part A  
3 benefits. The -- they -- they might be upon  
4 discharge, again, in a different time, different  
5 circumstance, but, at that moment, for those  
6 days, they are entitled to no benefits and  
7 receive no benefits under Part A.

8 JUSTICE THOMAS: Well, but if you read  
9 "entitled" broadly, they're still entitled to  
10 the other benefits whether or not they have  
11 applied for them. So, technically, they're  
12 still entitled for some -- entitled to some  
13 benefits.

14 MR. HETTICH: Your -- Your Honor, we  
15 -- I -- I agree, and -- and I think that's the  
16 question -- like the Part B enrollment and the  
17 Part C enrollment, that's the question those  
18 statutes are asking, and they don't include the  
19 proviso for such days. They're saying, are you  
20 generally a Medicare beneficiary, yes or no?

21 In the DSH statute, unlike all those  
22 other provisions, it specifically -- it has a  
23 restrictive qualifier that takes a snapshot in  
24 time and says right now, on this day, are you  
25 entitled to -- to benefits under Part A, and the

1 answer is no. Tomorrow, upon discharge, I might  
2 be. Today, I'm not. Yesterday, maybe I was.

3 JUSTICE THOMAS: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Breyer?

6 Justice Alito?

7 JUSTICE ALITO: Well, let me add one  
8 -- one more question. Which interpretation best  
9 fits the design of what this -- these provisions  
10 are supposed to do? And could you just explain  
11 why you think yours best fits the -- better fits  
12 the design in the simplest possible terms? Why  
13 does yours fit better?

14 MR. HETTICH: Your Honor, obviously,  
15 the Secretary was for our policy before it was  
16 against it for -- so, for 20 years, it held --

17 JUSTICE ALITO: Okay. Well --

18 MR. HETTICH: -- it held the same  
19 policy.

20 JUSTICE ALITO: Just the design.

21 MR. HETTICH: Yeah.

22 JUSTICE ALITO: Why does yours better  
23 fit the design?

24 MR. HETTICH: I -- I think, Your  
25 Honor, I mean, the statutory language, but --

1 but I think, then, if by design you mean, like,  
2 what the stated intent, I mean, what the  
3 purpose, the purpose of the DSH fraction, right?  
4 As a patient -- as a hospital's DSH fraction  
5 goes up, its DSH payment is supposed to go up.  
6 That's the way it's -- it's designed. The --  
7 the two work in tandem, higher DSH percentage,  
8 higher -- higher payment.

9 In this case, as I was explaining a  
10 moment ago, the Secretary turns that on -- on  
11 its head, and by treating exhausted indigent  
12 patients, the more of those patients you treat,  
13 the lower your DSH payment goes. It's not just  
14 that it stays the same or doesn't go up as much;  
15 it -- it marches downwards. That is completely  
16 inconsistent with, I think, what -- what this  
17 Court recognized was the purpose and the design  
18 --

19 JUSTICE ALITO: But I just mean -- are  
20 you saying anything more than the purpose is to  
21 give you money and your provision gives us --  
22 your interpretation gives you more money? Are  
23 you saying anything more than that?

24 MR. HETTICH: I -- I am saying  
25 something more than that, Your Honor. I'm

1 saying that the -- the purpose, as this Court  
2 held in Allina, was to -- and this Court used  
3 the word "incentivize" -- to provide the  
4 resources and incentive to treat indigent  
5 patients. And by turning it on its head, it's  
6 not just more money, but if you start taking  
7 money away for treating indigent patients,  
8 which, as I was explaining, that's the  
9 phenomenon, 80 percent -- over 80 percent of the  
10 time, they're actually losing money, that it  
11 turns the whole -- you know, the whole DSH  
12 payment into -- into a penalty, and that's  
13 inconsistent with the design.

14 And -- and it gets to that place by  
15 violating multiple canons of statutory  
16 interpretation on top of it, right?

17 JUSTICE ALITO: Well, I know about all  
18 the --

19 MR. HETTICH: Yeah.

20 JUSTICE ALITO: -- canons of statutory  
21 interpretation. All right. Thank you.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Sotomayor?

24 Justice Kagan?

25 Justice Gorsuch, anything further?



1 Justice Kavanaugh?

2 JUSTICE KAVANAUGH: Just so I  
3 understand that, I -- I -- your answer there, I  
4 mean, the two things are supposed to track  
5 because the formula is supposed to track the  
6 number roughly --

7 MR. HETTICH: Uh-huh.

8 JUSTICE KAVANAUGH: -- of poor  
9 patients a hospital serves, and the more they  
10 serve, the payments are supposed to correspond?

11 MR. HETTICH: Uh-huh.

12 JUSTICE KAVANAUGH: And this -- you  
13 say yours more accurately tracks that, right?

14 MR. HETTICH: Correct.

15 JUSTICE KAVANAUGH: All right.

16 MR. HETTICH: That's right, yes.

17 JUSTICE KAVANAUGH: Just so I  
18 understand. Okay.

19 CHIEF JUSTICE ROBERTS: Anything?

20 Thank you, counsel.

21 Mr. Bond, rebuttal?

22 REBUTTAL ARGUMENT OF JONATHAN C. BOND

23 ON BEHALF OF THE PETITIONER

24 MR. BOND: Thank you, Mr. Chief  
25 Justice. Four points.

1           First, I understand Respondent to have  
2 confirmed that his reading requires making the  
3 Medicare fraction an island within the Medicare  
4 statute, and the basis for that in their view is  
5 the phrase "for such days," a reading of that  
6 phrase that four circuits rejected in the  
7 Medicaid fraction context. As I think the  
8 colloquy illustrated, our reading does not  
9 render that phrase superfluous because it tells  
10 you at what point in time do you measure a  
11 person's entitlement.

12           But, beyond that, that phrase can't  
13 change what "entitled" means or what it takes to  
14 be entitled, which the statute sets forth, and  
15 the phrase doesn't give you a reason to think  
16 that a person who -- whose care Medicare doesn't  
17 pay for is any more low-income than another. So  
18 it doesn't fit with the basic statutory design.

19           And, finally, it disregards the  
20 additional benefits that Justice Thomas pointed  
21 out are still available under Part A.

22           Second, Respondent referred to the SSI  
23 benefit calculation and what codes are included.  
24 The -- the agency specifically addressed this in  
25 the 2010 regulation cited in our reply at page

1 10. The key part is at JA 179 to 83 and, on the  
2 codes, at 181 to 83.

3 The agency explained that it got the  
4 codes from the Social Security Administration to  
5 confirm that it had the right codes to track  
6 entitlement. The agency's view is not that  
7 unless the check lands in your mailbox, you're  
8 not entitled. It's, rather, if you meet the  
9 criteria as determined by SSA, then you are  
10 entitled.

11 But, if we're wrong about that, the  
12 answer is not to skew the meaning of the  
13 provision that is in front of you. Neither  
14 court below addressed this -- the SSI fraction.  
15 The district court concluded it lacked  
16 jurisdiction to do so. And that is pending in  
17 another case. So I would leave that to one side  
18 and decide the question that is in front of you.

19 Third, on the question of the agency  
20 reasoning and the explanation that it provided,  
21 at a general level, I don't think the agency is  
22 required in a rulemaking to provide all of its  
23 legal arguments and rebut every possible legal  
24 challenge to get Chevron deference. That would  
25 read *Chenery* to require putting appellate briefs

1 into preambles.

2 But, in any event, here, the agency  
3 has provided authoritative statements of its  
4 reasoning in a variety of places, not just the  
5 2004 rule that's directly at issue. Those  
6 include CMS Ruling 1498-R, discussed in our  
7 opening brief, which addresses Section 426 and  
8 the other Part A benefits, the 2010 regulation  
9 that I mentioned that addresses SSI benefits,  
10 and going all the way back to its decision in  
11 Edgewater, where it explained the overall design  
12 and population focus drove its approach to drop  
13 non-covered -- non-covered Medicare Part A  
14 patients from the Medicaid fraction.

15 And fourth and finally, to the extent  
16 the Court is struggling to ascertain exactly  
17 what Congress is driving at in this very  
18 complicated statute, I think the answer is,  
19 regardless of whether there is any unambiguous  
20 answer, to go with the one that makes the most  
21 sense of the words Congress used and the overall  
22 -- overall architecture.

23 Our approach does provide simplicity  
24 by saying you interpret who is entitled by  
25 looking at the provision that answers that

1 question and says who is entitled, and you  
2 reject a reading that requires an exhausted  
3 patient not to be entitled because the statute  
4 says that.

5 Our reading fits together at least  
6 better with the overwhelming majority of the  
7 Act's provisions and has a plausible  
8 straightforward theory of the congressional  
9 design that fits with a population focus. And  
10 at a minimum, that's a reasonable reading on  
11 which Congress would want the agency's view to  
12 get deference.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel, counsel. The case is submitted.

15 (Whereupon, at 11:09 a.m., the case  
16 was submitted.)

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<p align="center"><b>\$</b></p> <hr/> <p><b>\$150,000</b> [1] 65:4</p> <hr/> <p align="center"><b>0</b></p> <hr/> <p><b>03</b> [1] 33:10  <b>04</b> [1] 33:10  <b>05</b> [2] 33:10 65:5</p> <hr/> <p align="center"><b>1</b></p> <hr/> <p><b>1</b> [8] 26:7,10,18 27:5,12,14 28:20 30:11  <b>10</b> [3] 63:14 65:9 74:1  <b>10:00</b> [2] 1:17 3:2  <b>11</b> [1] 63:16  <b>11:09</b> [1] 76:15  <b>12</b> [1] 63:17  <b>1395d</b> [2] 6:19 62:10  <b>1395l</b> [2] 7:2 37:8  <b>1498-R</b> [1] 75:6  <b>15</b> [1] 36:13  <b>150,000</b> [1] 65:8  <b>17</b> [2] 28:4,8  <b>179</b> [1] 74:1  <b>181</b> [1] 74:2  <b>18a</b> [1] 32:21  <b>1980s</b> [1] 49:22  <b>1983</b> [2] 11:12 45:22  <b>1984</b> [1] 32:7  <b>1986</b> [2] 12:4 32:9</p> <hr/> <p align="center"><b>2</b></p> <hr/> <p><b>2</b> [5] 26:7,10,19 27:6,9  <b>20</b> [3] 7:21 53:13 69:16  <b>20-1312</b> [1] 3:4  <b>2000</b> [1] 27:11  <b>2003</b> [7] 14:21 25:24 27:2, 17 28:1 31:11 60:15  <b>2004</b> [3] 13:16 14:23 75:5  <b>2008</b> [2] 27:10 60:14  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