No. 23-715

In The Supreme Court of the United States

ADVOCATE CHRIST MEDICAL CENTER, et al.,

Petitioners,

v.

XAVIER BECERRA, Secretary of Health and Human Services,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the D.C. Circuit

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

If the D.C. Circuit's decision is left unreviewed, the government doesn't dispute the billion-dollar-plus financial consequences for hospitals, patients, and broader communities.

The government also ignores: that some patients entitled to receive benefit checks are not counted; that review now would short circuit otherwise endless litigation about methodological details; and that rural and safety net hospitals are most harmed by the agency's heads-I-win-tails-you-lose interpretation of "entitled." Only this Court can conclusively establish that "entitled to benefits" should mean the same thing when used twice in the same sentence—satisfying program eligibility.

Regulations and practice reveal that the agency follows an actual-receipt test—counting patients as entitled to Supplemental Security Income (SSI) benefits only if they actually received a cash payment. This indefensible rule—which the government does not attempt to justify—urgently warrants the Court's intervention.

The test the government defends—entitled to receive a cash payment—fares no better. The government insists that because Medicare part A and SSI are irreconcilably different, "entitled" must mean something different. But each purported difference fades under examination. SSI benefits are several, not a single cash payment benefit. SSI operates as an income insurance program, with a single application conferring annual income-support coverage with cash payments fluctuating as needed. The word "income"

does not mean that only cash counts. The SSI program itself considers in-kind benefits to be income.

The government offers no upside to further percolation (besides continuing to renege on payments Congress promised). And the harsh downsides of waiting would be borne by the most vulnerable communities. The Court should grant review now.

ARGUMENT

I. The D.C. Circuit's Decision Conflicts with *Empire*'s Reasoning and the Governing Statutes.

Empire's rationale for holding that "entitled to [Medicare part A] benefits" means "qualif[ying] for the Medicare program," 597 U.S. 424, 428 (2022), applies equally to "entitled to [SSI] benefits." Part A entitlement is "an entitlement to *payment under specified conditions*." *Id.* at 436 (emphasis in original). The same goes for SSI. Pet. 30-31. And like SSI, Part A provides multiple benefits, meaning "the stoppage of payment for any given service cannot be thought to affect the broader statutory entitlement," *Empire*, 597 U.S. at 43. Pet. 33-35. The phrase "entitled to benefits" thus means the same thing both times it is used in the same sentence: a person is "entitled to [SSI] benefits" if they meet the statutory eligibility criteria for the SSI program.

A. To avoid review, the government offers a three-layer merits defense. First, the government contends that the SSI benefit is a cash payment, not insurance coverage, so a person is "entitled" to it only in months they are due a greater-than-zero check. BIO 14-16. Second, the government insists that the

only benefit under the SSI program is a month-specific cash payment under 42 U.S.C. § 1382. BIO 12-13. Third, the government argues that non-cash benefits are irrelevant because only "*income* benefits" count. BIO 17-19. Each contention collapses under scrutiny.

1. For both SSI benefits and Medicare part A benefits, entitlement "coexists with limitations on payment." *Empire*, 597 U.S. at 437. "[B]asic entitlement to benefits" for SSI means an individual "eligible on the basis of his income and resources shall … be paid benefits" under certain conditions—*i.e.*, "subject to the provisions of [title XVI]." 42 U.S.C. § 1381a. For Medicare part A, the government maintains (and this Court agreed) that such payment limitations do not negate entitlement. *Empire*, 597 U.S. at 436. Yet the government argues (BIO 14-16) that payment limitations *do* negate entitlement for SSI benefits on the theory that SSI is not "insurance," but a cash payment benefit, so for any month when no payment is owed, the patient is not entitled. BIO 16. The government is wrong.[1]

SSI operates as an income insurance program by statutory design and in practical effect. The "[b]asic entitlement to benefits" accrues to "[e]very aged, blind, or disabled individual who is determined under part A [of title XVI] to be eligible on the basis of his income and resources." 42 U.S.C. § 1381a. Part A of title XVI, in turn, defines "eligible individual" by

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[1] As discussed in Part II, the agency's actual test excludes even patients for whom title XVI *requires* a payment, if payment was not timely received. Pet. 20.

reference to a person's annual income (and resources). *Id.* § 1382(a).

Once a person has been determined to be an "eligible individual," their precise payment amount is determined monthly. *Id.* § 1382(c). Among other scenarios, payment may be $0 when a beneficiary has higher earnings. *See id.* § 1382a(b)(4); Soc. Security Admin., *Understanding Supplemental Security Income (SSI) Work Incentives* (2024), (explaining that "we reduce your SSI benefit only $1 for every $2 you earn over $65"). It also may be $0 when in a nursing home for an extended stay (on the theory that the institution provides for basic needs). 42 U.S.C. § 1382(e)(1)(B) (stays funded by Medicaid). But SSI beneficiaries need not re-apply and receive a re-determination from month to month. C.A.J.A. 104-05. Instead, the payment amount fluctuates with an individual's circumstances unless and until their income exceeds income eligibility standards for a full year (or they are terminated for other reasons). 20 C.F.R. § 416.1335.

The upshot is annual insurance coverage that confers income stability. The SSI program supplements income in months when it is needed, while limiting payments (and sometimes reducing them to $0) in months when need is less, for "eligible individuals," 42 U.S.C. § 1382(a). That coverage continues until a year's worth of income demonstrates that it is no longer needed, under a host of statutory provisions enacted by Congress to preserve stability for SSI beneficiaries rather than whipsaw their status back and forth based on less stable monthly income measures. Pet. 27-28.

Because the program is designed so that beneficiaries may be due payment one month but not the next, the statute expressly recognizes that some individuals who are due $0 for a particular month remain "eligible individual[s]." *E.g.*, 42 U.S.C. § 1382(e)(1)(B). Social Security guidance likewise recognizes that a person may remain eligible yet have no cash benefit payment due. *See* C.A.J.A. 151 (describing category of individuals who are "eligib[le] for … benefits based on the eligibility computation, but no payment is due"). The agency excludes such patients, notwithstanding their continued SSI eligibility. 75 Fed. Reg. 50,042, 50,280 (Aug. 16, 2010).

All told, the SSI program is not so different from hospital insurance—and not different enough to justify giving "entitled" two diametrically opposed meanings in the same sentence. Nor is there any justification for interpreting the phrase "for such days"—used just *once* in the sentence—to mean two different things depending on what program is at issue. Pet. 26-27. In *Empire*, the government successfully argued that "for such days" meant "count[ing] the days after [a patient] qualifies for" the Medicare program, not just the days he is "actually receiving Medicare payments." 597 U.S. at 440-41. Yet for SSI, the government insists (BIO 13-14) that "for such days" means precisely what it rejected for Medicare part A—counting not the days an individual qualifies for the SSI program, but only days he is "entitled to … cash payments." Any purported differences in the nature of the benefit—which fade on comparison—cannot justify such linguistic gymnastics.

2. In parsing entitlement month-by-month, the government also insists, based on a single isolated phrase, that only cash counts. In an anodyne provision setting an annual payment amount, 42 U.S.C. § 1382(b)(1) describes the "amount of benefits" for the basic monthly payment: "[t]he benefit under [title XVI] for an individual … [is] $1752" (per year, adjusted for inflation). Ignoring the rest of the statute, the government leaps to the conclusion that the § 1382 payment is "*the* benefit" under title XVI, BIO 12 (government's emphasis), *i.e.,* the *only* SSI benefit.

But title XVI confers numerous other benefits, including other cash payments, some of which go to beneficiaries who don't receive the § 1382 payment. Such other benefits include vocational rehabilitation services under § 1382d; state supplementation payments under § 1382e; benefits under § 1382h (including cash payments) for certain individuals "who perform substantial gainful activity despite severe medical impairment"; and payments under § 1383(a)(6) for those whose disability has ceased but who are receiving vocational rehabilitation services.

The Disproportionate Share Hospital (DSH) statute recognizes this multitude of SSI benefits, excluding only one of them—state supplementation—from counting as "entitled to [SSI] benefits." 42 U.S.C. § 1395ww(d)(5)(F)(vi)(I). If "entitled to [SSI] benefits" meant, by definition, only entitled to receive a check under § 1382, then the "State supplementation" exclusion would do no work. Congress's exclusion of only one of many SSI benefits confirms that "entitled to [SSI] benefits"—consistent with its purpose to "measure … a hospital's senior (or disabled) low-income population," *Empire*, 597 U.S. at 430—is

designed to capture all patients who "qualif[y] for the [SSI] program," *id.* at 428. This definition includes all those eligible for any SSI benefit, not merely those due a § 1382 cash payment for a given month (much less those who actually received a check, which is the agency's actual test).

3. Finally, the government defends the D.C. Circuit's reasoning that because the DSH statute refers to "'income' benefits," non-cash benefits are irrelevant. BIO 17 (quoting Pet. App. 11). But even if non-cash SSI benefits are ignored, there is no justification for the government's exclusion of patients who meet all eligibility criteria for a cash payment in a given month but—for various non-eligibility related reasons—do not receive a payment, or have a zero-dollar payment computed. Pet. 31; Br. for Am. Hosp. Ass'n et al. as *Amici Curiae* 8-9 ("Amici Br.").

What's more, the government is textually wrong. The word "income" does not mean cash, ordinarily and especially in this statutory context. Federal law routinely counts in-kind benefits as "income." For SSI itself, Congress defined income to include "support and maintenance furnished in cash or kind." 42 U.S.C. § 1382a(a)(2)(A). And the many in-kind benefits that SSI provides would count as "income" if provided to an employee, including a transit pass, job-related courses, and job placement services. *See* 26 U.S.C. § 61(a)(1); Internal Rev. Serv., Pub. 15-B, *Employer's Tax Guide to Fringe Benefits* (2024), https://tinyurl.com/ymph8j4p; *cf.* Pet. 8 (describing vocational rehabilitation benefits).

In any event, the DSH statute does not count patients "entitled to supplementary security income," it counts patients entitled to "supplementary security

income benefits … under [title] XVI." 42 U.S.C. § 1395ww(d)(5)(F)(vi)(I). "Benefits" is a broad term. *Fischer v. United States*, 529 U.S. 667, 677-78 (2000). Given that breadth, as well as use of the plural, the phrase is most naturally read to include any benefit provided under the SSI program.

Like the D.C. Circuit, the government discounts one of the non-cash SSI benefits—vocational rehabilitation services—as not provided under title XVI. BIO 18-19. Yet as the Petition explained (Pet. 34-35), and the government does not dispute, vocational rehabilitation benefits were housed entirely within title XVI when the DSH statute was enacted; SSI beneficiaries' eligibility for them continues to be governed by title XVI; and when States elect the "traditional" program (as most do), the regulations implementing 42 U.S.C. § 1382d (within title XVI) apply.

Ultimately, the SSI program offers a mutually reinforcing set of cash and non-cash benefits designed to provide income insurance to those deemed eligible. The amount of cash payments may fluctuate month-to-month, but entitlement to SSI benefits does not.

B. The agency's payment-based test causes the same problems the Court held warranted rejection of a payment-based standard for Medicare part A. Pet. 25-28. Some low-income patients will not get counted as low-income simply because their payment was computed as $0—for example, because they are admitted to a long Medicaid-funded nursing home stay—even though "that person remains just as low income as he ever was, imposing just as high costs on the hospital treating him." *Empire*, 597 U.S. at 444. And the agency's approach "result[s] in patients ping-

ponging" in and out of the Medicare fraction numerator "based on the happenstance of actual [SSI] payments"—which often "has no relationship to a patient's financial status." *Id.* at 443.

The government makes little effort to answer either concern. The contention (BIO 17, 19-20) that the DSH statute does not require a perfect low-income proxy does not justify an atextual rule that excludes patients that the SSI statute itself classifies as eligible for cash payments, despite being due $0 in a particular month.

The government does not contest that the agency's rule causes extra ping-ponging in and out of the Medicare fraction numerator. It simply asserts (BIO 20) that *Empire*'s concern was limited to ping-ponging between the two fractions. But concerns about a "scheme [that] is … harder to administer," 597 U.S. at 443, apply equally to intra-fraction ping-ponging. The government has no defense for unnecessary payment-based ping-ponging here, and the resulting administrative nightmares. Pet. 19-21.

II. The Agency's Actual-Receipt Test, Which the Government Does Not Defend, Is Even Farther Afield of the Statute.

Although the government now disclaims a link between entitlement and payment receipt, insisting here that entitlement turns only on whether a cash SSI payment is due, the agency's operative interpretation of "entitled to [SSI] benefits" counts a patient as "entitled" only if she actually received a cash SSI payment from Social Security for the month of her hospital stay. Pet. 10-11, 25-26. This blinkered

interpretation of "entitled" excludes (among others) patients who are due payments for a given month but for whom Social Security has delayed making payment for a variety of mostly agency-created administrative reasons, including an incorrect mailing address or the need to find a representative payee. *See* Pet. 7; 20 C.F.R. § 416.1320(a); C.A.J.A. 153.

The government offers no justification for this rule, instead insisting (BIO 16) that the agency uses no such actual-receipt test. Yet the agency itself—as distinct from its litigation posture—repeatedly reiterates the necessity of actual receipt. *See* Pet. App. 81 ("[O]nly a person who is actually paid these benefits can be considered 'entitled.'"); *id.* at 82 (A person who "is eligible for SSI but is not actually receiving SSI payments … is not 'entitled' to SSI benefits."). The agency expressly rejected commenters' suggestion that it should count patients as "entitled" where Social Security recognizes a payment is owed but has delayed making the payment for administrative reasons. *See, e.g.*, 75 Fed. Reg. at 50,280 (rejecting commenter's suggestion to count, *inter alia*, patients whose payments are suspended pending search for a representative payee (code S08, *see* C.A.J.A. 153)). Because actual receipt is the agency's test, it is also what the D.C. Circuit endorsed: The agency "understands this ['entitled'] population to

include only patients receiving cash payments during [*i.e.*, for] the month in question." Pet. App. 2.[2]

Because it makes no attempt to justify the agency's actual receipt test, the government ignores Petitioners' argument (Pet. 32-33) that interpreting "entitled" to mean receipt of a cash payment for a specific month flies in the face of other statutes turning expressly on receipt of SSI benefits. The government has no answer to the agency's inconsistent interpretation of the term SSI "recipient" elsewhere in the Medicare Act to mean SSI-eligible (regardless of payment receipt in any given month). Pet. 31-32. Also undisputed are the huge negative financial consequences for the Nation's hospitals and the communities they serve. Pet. 16-18; Amici Br. 15-22. Review is warranted to correct an actual-receipt test that the government does not try to justify and that causes real harm, especially to financially stressed rural and safety net hospitals.

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[2] As sole support for the argument that the test doesn't hinge on actual receipt, the government cites two pages of its brief below, which explain that the payment need not be received during the hospital stay. Gov't C.A. Br. 41-42. But payment still *must be* received for a patient to count as "entitled"; the agency merely allows for delayed receipt (up to the point the agency calculates the SSI fraction). 75 Fed. Reg. at 50,282; Pet. 11 n.2. Social Security is often not so timely. Pet. 20. Regardless, actual receipt of a cash payment remains the *sine qua non* of "entitled to [SSI] benefits" under the agency's rule.

III. Review Is Warranted Now on this Cleanly Presented, Recurring, and Exceptionally Important Question.

The government has no response to the urgent need for review: The question presented has billion-dollar-plus financial impact. Pet. 18; Amici Br. 16-17. Dire consequences of leaving the current regime uncorrected include hospital closures and service cuts affecting patients who are least able to access alternatives (especially in rural areas). Pet. 16-18; Amici Br. 19-22. The question is cleanly presented and recurring. Pet. 36-37. And although the arbitrariness of the agency's Medicare fraction methodology is not before the Court, BIO 17 n.2, Pet. 21, the government does not dispute that resolving the question presented now could avoid otherwise endless litigation over methodological details that matter only because the agency has substituted an actual-receipt-of-payment test for the eligible-for-program-benefits test that Congress mandated—and that this Court endorsed in *Empire*. Pet. 19-24.

The government suggests only that the Court should wait for a circuit split, because hospitals will be able to redress their financial harms by seeking judicial review in other circuits. BIO 21-22. Such percolation serves no useful purpose. Pet. 36. More fundamentally, waiting doesn't help the hospitals that close in the meantime, the patients who lose access to local emergency services or other care, or the communities that lose jobs. Amici Br. 19-22. Nor does it help patients who are deprived of discount drug programs and charity care that is funded through other federal programs relying on the wrongly

calculated DSH formula. Amici Br. 17-18. A (rightly decided) conflicting decision from another court of appeals at some point in the distant future cannot unwind years of such harm.

Review is urgently needed now.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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