

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 MARIETTA MEMORIAL HOSPITAL)
4 EMPLOYEE HEALTH BENEFIT PLAN,)
5 ET AL.,)
6 Petitioners,)
7 v.) No. 20-1641
8 DAVITA INC., ET AL.,)
9 Respondents.)
10 - - - - -

11
12 Washington, D.C.
13 Tuesday, March 1, 2022

14
15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 11:38 a.m.

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P R O C E E D I N G S

(11:38 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 20-1641, Marietta Memorial Hospital Employee Health Benefit Plan versus DaVita, Incorporated.

Mr. Kulewicz.

ORAL ARGUMENT OF JOHN J. KULEWICZ
ON BEHALF OF THE PETITIONERS

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

For four decades, the Medicare Secondary Payer Act has been a coordination of benefits statute. It establishes that a group health plan must pay its benefits first during a 30-month coordination period when the plan and Medicare both cover an individual who must contend with end-stage renal disease.

The plan must not take into account the Medicare entitlement or eligibility of an individual during that time or differentiate in the benefits that it provides between individuals with end-stage renal disease and other individuals covered by the plan on a basis that relates to that diagnosis.

1 The Sixth Circuit has determined that
2 there also is an implied mandate that dialysis
3 providers occupy a specific position to be
4 determined relative to providers who serve other
5 vital healthcare needs of the 157 million
6 American people who depend upon group health
7 plans to defray the costs of their healthcare.

8 When Congress requires a specific
9 benefit or parity between benefits, it does so
10 directly. It did not do that here. The
11 Medicare Secondary Payer Act coordinates
12 benefits. It does not prescribe them. The plan
13 at issue in this case provides the same benefits
14 uniformly to all participants and as primary
15 payer during the 30-month coordination period.

16 Respondents fail to state a claim
17 under the Medicare Secondary Payer Act. Because
18 the alleged violations of the Medicare Secondary
19 Payer Act are the express and only basis of
20 their ERISA claims, Respondents also fail to
21 state a claim under ERISA.

22 The Court should reverse the Sixth
23 Circuit and enter final judgment in favor of
24 Petitioners on all remaining claims.

25 I welcome the questions of the Court.

1 JUSTICE THOMAS: Doesn't your approach
2 permit the differentiation or some
3 differentiation between sort of high-cost
4 services that are used by a certain segment of
5 the population? I think that's the argument
6 here, that you have a lot of people who are not
7 in a good position to pay who are being charged
8 at an amount that they're high usage, they're
9 poor, and they can't pay the costs, and it seems
10 as though your approach target that group.

11 MR. KULEWICZ: Your Honor, the -- the
12 approach that this plan takes is actually to
13 minimize the actual out-of-pocket payment that
14 the participants in any situation who are
15 receiving dialysis will make.

16 What this plan does by -- by tying the
17 benefit -- by making the allowable charge the
18 Medicare base rate and paying at 125 percent of
19 that, that means that the plan pays 70 percent
20 and the individual pays 30 percent.

21 So paying --

22 JUSTICE THOMAS: So what's the
23 disagreement? The Respondent does not agree
24 with that assessment --

25 MR. KULEWICZ: That's --

1 JUSTICE THOMAS: -- of your approach.

2 MR. KULEWICZ: Yes, Your Honor, that's
3 correct. The -- what the Respondent seeks, in
4 paragraph 67 of its complaint and amended
5 complaint on pages 32 and 322 of the respective
6 appendices, is -- is that they have a right to
7 be paid under the Medicare Secondary Payer Act
8 their full undiscounted charges because that is
9 the only way to eliminate the -- the specter
10 that they hang out there of balance billing.

11 But what that would mean for the
12 participant is a participant who's been paying
13 30 percent of 125 percent of the Medicare rate,
14 which is \$257 this year, so the participant will
15 be paying roughly \$96 per treatment, but, if the
16 Court grants the relief ultimately that DaVita
17 seeks, that same individual will be paying
18 30 percent of -- according to the Pacific Health
19 Coalition amicus brief, the dialysis charges
20 range from \$1,041 to \$6,000 per treatment. So
21 that same participant, instead of paying \$96 per
22 treatment, would be paying up to -- up to \$1800
23 per treatment.

24 JUSTICE THOMAS: Thank you.

25 MR. KULEWICZ: Thank you, Your Honor.

1 JUSTICE BREYER: Just a factual
2 question. Is Marietta Memorial Hospital one
3 hospital, like one big set of buildings?

4 MR. KULEWICZ: Yes, Your Honor, it is
5 a -- a --

6 JUSTICE BREYER: Just one. So Tier I
7 applies to people who go to that set of
8 buildings?

9 MR. KULEWICZ: That's right. The
10 Marietta --

11 JUSTICE BREYER: And does that set of
12 buildings, or Marietta Memorial, provide the
13 service of outpatient dialysis?

14 MR. KULEWICZ: No, it does not,
15 Justice Breyer. There are -- there are --

16 JUSTICE BREYER: There is -- you know,
17 it says an exception in the thing where it
18 says --

19 MR. KULEWICZ: Right.

20 JUSTICE BREYER: -- Tier II will --
21 we'll charge -- we'll charge Tier II even if you
22 get outpatient dialysis in the Marietta
23 Hospital, but there -- that exception has no
24 application, I take it?

25 MR. KULEWICZ: Well, if -- if a

1 patient with ESRD is hospitalized for some
2 reason --

3 JUSTICE BREYER: Yeah.

4 MR. KULEWICZ: -- and receives
5 dialysis at the hospital, at a Marietta --

6 JUSTICE BREYER: But that's inpatient.

7 MR. KULEWICZ: That's inpatient.

8 That's reimbursed at the -- at the Tier I rate,
9 Your Honor, yes.

10 JUSTICE BREYER: That's reimbursed at
11 the Tier I rate. So --

12 MR. KULEWICZ: If the --

13 JUSTICE BREYER: -- so the Tier II
14 rate, right now, anybody, okay, good. I'll ask
15 the other side.

16 MR. KULEWICZ: Thank you, Your Honor.

17 JUSTICE SOTOMAYOR: Counsel, does this
18 plan as designed encourage people to get on
19 Medicare?

20 MR. KULEWICZ: Your Honor, this plan
21 is decision neutral as -- as it pertains to --

22 JUSTICE SOTOMAYOR: Well, it's not
23 really decision neutral. Those people who don't
24 have Medicare can be balance billed, correct?
25 And so they really aren't encouraged, I put the

1 words, to join Medicare?

2 MR. KULEWICZ: Yeah. If they join --
3 if they enroll in Medicare for -- for Part B,
4 Your Honor, there is -- there is a prohibition
5 against balance billing. But --

6 JUSTICE SOTOMAYOR: Right. So, if
7 they're not, then you can balance bill?

8 MR. KULEWICZ: That's for an
9 individual --

10 JUSTICE SOTOMAYOR: So the --

11 MR. KULEWICZ: -- who's just covered
12 by --

13 JUSTICE SOTOMAYOR: I -- I ask that
14 question only because it's a very complex area.
15 You're going against the Medicare purpose of
16 ensuring that the public fisc is not dipped into
17 until necessary, but this process is forcing
18 those non-Medicare people to jump into Medicare
19 as soon as they can.

20 MR. KULEWICZ: Well, Your Honor, CMS
21 itself unequivocally encourages people in this
22 sort of a situation to enroll in Medicare for --
23 for the reasons that Your Honor has pointed out.

24 And -- and, secondly, the Medicare
25 Secondary Payer Act, by definition, contemplates

1 that -- that plans will pay a rate that -- plans
2 may pay a rate below the Medicare base rate
3 and --

4 JUSTICE SOTOMAYOR: Now there is one
5 big difference in benefits here, and for me, it
6 is it seems like the Tier I/Tier II -- and I
7 could be wrong, you can correct me -- for
8 everything else besides this condition says that
9 it will pay a certain percentage of the
10 reasonable and necessary costs of a service.

11 Am I correct?

12 MR. KULEWICZ: Well, Your Honor,
13 technically, the plan says it will pay the
14 reasonable -- reimburse at the reasonable and
15 necessary cost of all services. It's just, with
16 respect to Medicare and 10 other services, by
17 the way, there are -- there are reference-based
18 prices.

19 JUSTICE SOTOMAYOR: So why isn't the
20 fact that this is a differentiation of the
21 general standard of paying benefits -- the
22 general standard is a percentage of the
23 reasonable and necessary costs, but, with
24 respect to ESRD, you limit it to a cap?

25 MR. KULEWICZ: We pay the --

1 JUSTICE SOTOMAYOR: Why isn't that cap
2 --
3 MR. KULEWICZ: We pay the same --
4 JUSTICE SOTOMAYOR: -- back at --
5 MR. KULEWICZ: I'm sorry, Your Honor.
6 JUSTICE SOTOMAYOR: Yes.
7 MR. KULEWICZ: We pay the same
8 percentage of reimbursement for Tier II -- for
9 Tier II, it is treated as a virtual Tier II
10 benefit. The only difference is that rather
11 than accept what the Respondents say is a
12 reasonable and customary rate because they are
13 operating in a dysfunctional monopolistic
14 market, so we -- we base the reimbursement on
15 the Medicare rate.
16 JUSTICE SOTOMAYOR: But that's still a
17 different way --
18 MR. KULEWICZ: Well --
19 JUSTICE SOTOMAYOR: -- of treating
20 people. So why isn't that on the face of the
21 statute --
22 MR. KULEWICZ: Your Honor --
23 JUSTICE SOTOMAYOR: -- not legal?
24 MR. KULEWICZ: -- because every --
25 every -- what the statute -- what the Medicare

1 Secondary Payer Act requires is that a plan not
2 differentiate in the benefits that it provides
3 between individuals with end-stage renal disease
4 and others covered by the plan.

5 The -- the benefits here are -- the
6 dialysis benefits are available to every
7 individual covered by the plan for any -- for
8 any purpose.

9 JUSTICE KAGAN: Can I -- can I ask
10 you, I mean, maybe just state the question at a
11 completely abstract level first. If there's a
12 law that says you can't differentiate between
13 Group X and Group Y, right, and you don't
14 differentiate quite between Group X and Group Y,
15 you just find a perfect proxy, a perfect proxy
16 that ends up distinguishing between Group X and
17 Group Y. So you change the words, but a hundred
18 percent of the people with this proxy
19 characteristic are Group X, and a hundred
20 percent of the people with this proxy
21 characteristic are Group Y.

22 Are you in violation of the
23 differentiation provision or not?

24 MR. KULEWICZ: What you would do in
25 that situation, Your Honor, under the auspices

1 of the Medicare Secondary Payer Act, is you
2 would look at the -- at the first group in Your
3 Honor's hypothesis. If -- if they all are --
4 and bearing in mind the statute says individuals
5 with end-stage renal disease.

6 If -- if that is -- if that is a -- a
7 common denominator among that class, then you go
8 to the next element of the statute. Is that
9 differentiation on -- on account of the
10 existence of end-stage renal disease? Is it on
11 account of that individual's need for renal
12 dialysis as opposed to the other treatment
13 there?

14 JUSTICE KAGAN: I guess I'm not really
15 quite understanding what you're getting at, so
16 now we'll just go to the case. I mean, let's --
17 I mean, it doesn't take much of a change in the
18 numbers to be a perfect proxy. I mean, these
19 are like 99 percent to 97 percent.

20 But let's say you had a hundred
21 percent and a hundred percent, meaning that a
22 hundred percent of people with end-state renal
23 disease need dialysis and a hundred percent of
24 the people who need outpatient dialysis have end
25 -- end-stage renal disease.

1 Suppose it were a hundred percent, a
2 hundred percent, as opposed to what it is, which
3 is 99.5 percent and 97 percent, all right, but
4 let's just -- let's -- let's just round up and
5 say it's a hundred.

6 Now, when you differentiate between
7 people on the basis of end-state renal disease,
8 you say, well, we can't do that, we'll just
9 differentiate on the basis of the treatment that
10 they all need and that only they need.

11 MR. KULEWICZ: That would be a -- a
12 different situation, of course. And proximity
13 makes per --

14 JUSTICE KAGAN: Well, in -- in that --
15 before you tell me why it's different, in that
16 situation, have you violated the provision?

17 MR. KULEWICZ: If there was -- Your
18 Honor, if there was a 100 percent complete
19 identical overlap, then -- then we are back in
20 the situation that the statute proscribes. So
21 -- so then -- then you would ask --

22 JUSTICE KAGAN: Back in the situation
23 that the statute proscribes, prohibits.

24 MR. KULEWICZ: Well, there --

25 JUSTICE KAGAN: You would be in

1 violation of the statute, is that what you're
2 saying?

3 MR. KULEWICZ: Well, if -- if --

4 JUSTICE KAGAN: I'm just asking. I'm
5 just trying to get it clear. If my hypothetical
6 is right, you're in violation of the statute?

7 MR. KULEWICZ: Not necessarily, Your
8 Honor, because then -- then -- then you go --
9 then you go to the next --

10 JUSTICE KAGAN: You were just in
11 violation of the statute 10 seconds ago.

12 MR. KULEWICZ: No, no, because, Your
13 Honor, there's more to it than that. That --
14 that's the first question that you ask.

15 JUSTICE KAGAN: I -- I just want to
16 know the answer to that first question.

17 MR. KULEWICZ: Well, just --

18 JUSTICE KAGAN: A hundred percent, a
19 hundred percent, are you in violation of the
20 statute?

21 MR. KULEWICZ: No. No, Your Honor,
22 because there's more to it than that be -- what
23 -- what the Medicare Secondary -- Secondary
24 Payer Act says is that if that -- if that
25 situation exists, if you have -- whether it's a

1 hundred percent overlap or -- or straight out
2 end-stage renal disease, if they are all on one
3 side -- if the benefits that they have under the
4 package are different and it's 100 percent on
5 that side, then you go to the -- to the "on the
6 basis of" qualifying phrases.

7 Are they on there because -- on the
8 basis of their end-stage renal disease or the
9 need for renal dialysis or in a -- a related
10 matter, bearing in mind there are a number of --
11 of utterly lawful and reasonable classifications
12 of -- of plans. A plan can differentiate the
13 benefits made available based upon seniority,
14 collective bargaining status, geography --

15 JUSTICE KAGAN: I mean, we could go
16 down a list of these kinds of diseases with
17 these kinds of treatments that are always
18 necessary for that disease and only used for
19 people with that disease. You know, we can --
20 we can do diabetes Type I and insulin, or we
21 could do antiretrovirals and AIDS. And these
22 are -- you know, you understand why people don't
23 want to pay for these things. They're
24 expensive.

25 But isn't that exactly what Congress

1 was trying to do? It's saying stop trying to
2 get out of paying for the only treatment that is
3 appropriate for a particular disease.

4 MR. KULEWICZ: Well --

5 JUSTICE KAGAN: And now you say, well,
6 we can do that. We just don't have to use the
7 words end-state -- end-stage renal disease.

8 MR. KULEWICZ: Your Honor, Congress
9 legislated both an objective and a means. The
10 objective plainly was to protect the Medicare
11 fisc after the usage of the Medicare benefit
12 had -- had grown exponentially over original
13 projections.

14 So -- but then the means by which it
15 said it required the plans to do that are not
16 take into account during the coordination period
17 and not -- but not differentiate in the benefits
18 that it provides between individuals with
19 end-stage renal disease and others covered by
20 the plan.

21 So you could use --

22 JUSTICE KAGAN: So I -- I -- I take
23 the -- that answer to be something along the
24 lines of -- and this is, you know, possibly
25 right -- we have found a perfect end run around

1 the statute, but, you know, sometimes statutes
2 have perfect end runs and, if the statute
3 doesn't proscribe it, too bad.

4 MR. KULEWICZ: What the text of this
5 statute pertains to, Your Honor, though, is
6 distinctions between individuals, not
7 distinctions between services. If -- if we look
8 to the clear text of the statute, it says what
9 it says and does not say what it does not say.

10 The -- what the statute says is --

11 JUSTICE KAGAN: I mean, you -- we
12 could go through a whole host of these. Mr.
13 Waxman has a lot of them in his brief. You
14 know, if you say you can't differentiate between
15 Orthodox Jews and everybody else and then you
16 have a tax on yamakas and kosher food, are you
17 doing that differentiation or not?

18 MR. KULEWICZ: Well, that -- of
19 course, in the Bray case, what the Court did was
20 to reject that sort of a classification as a
21 basis for ipso facto invidious discrimination.

22 Here, what -- what we are -- what this
23 plan does, Your Honor, it's -- it's essential,
24 it's vitally important to the case, this plan
25 provides exactly the same benefit to every

1 individual in the plan. There is no --

2 CHIEF JUSTICE ROBERTS: Well, I --

3 MR. KULEWICZ: -- differentiation in
4 the benefits made available. What the Medicare
5 Secondary Payer Act measures is, is there a
6 difference between the benefits provided to the
7 individuals.

8 CHIEF JUSTICE ROBERTS: I -- I want to
9 make sure I understand your answer because,
10 obviously, Justice Kagan's line of questioning
11 is very important. And I want to know if you
12 rely on the statutory language in -- in your
13 answer to her and whether that's how the
14 statutory language should be read, because the
15 practical result, obviously, is not one that I
16 think the people writing the statute would want
17 to sanction if it's the exact same result.

18 But the statute says whether -- it
19 turns on whether or not the health plan takes no
20 notice whatsoever of whether the claimants are
21 eligible. So even if, for example, it's a
22 hundred percent proxy between people who are
23 over six feet tall and, you know, people who
24 have blue eyes or whatever and you cannot take
25 account of how tall they are, is it really the

1 case that you would be fine so long as you just
2 asked -- asked if they had blue eyes or not?

3 MR. KULEWICZ: Well, Your Honor, we're
4 --

5 CHIEF JUSTICE ROBERTS: That's an
6 odd -- medically an odd suggestion,
7 hypothetical, but my -- my point is you could
8 have -- there could be a hundred percent proxy,
9 but you only take account of the one -- one
10 feature. Does that give you an out?

11 MR. KULEWICZ: Well, in -- in response
12 to Your Honor's first question, we rely
13 specifically on the text of this statute. And
14 what Congress did here is it, when it wrote the
15 text of the statute, it used classifications
16 that are laser-focused on the congressional
17 purpose.

18 The congressional purpose was to --
19 was to temper the overruns from estimates of
20 what the Medicare eligibility was going to cost,
21 and that's people who are eligible -- entitled
22 to or eligible for Medicare and that -- on the
23 basis of an ESRD diagnosis. So that's exactly
24 the classification that it used in the statute.

25 It -- it is -- it is the one perfect

1 overlap here because it -- it -- it overlaps
2 directly with the objective of the stat -- the
3 Medicare Secondary Payer Act.

4 JUSTICE SOTOMAYOR: So you're
5 disagreeing with both circuits, the Ninth and
6 the Sixth here. Both said, if you differentiate
7 and pay less for a drug that's used only for
8 ESRD patients, that's okay -- they said that's
9 not okay, that's a proxy, basically, but both
10 circuits agreed that would not be okay.

11 MR. KULEWICZ: We -- Your Honor,
12 ultimately, we --

13 JUSTICE SOTOMAYOR: And the Ninth
14 Circuit also accepted the proposition that this
15 wasn't a proxy because there were some non-ERSD
16 patients who had acute kidney conditions that
17 were receiving the same benefits. But, if the
18 other side is right, that all those people are
19 treated in hospital, so that we go to Justice
20 Kagan's hypothetical, that this really is a
21 hundred percent --

22 MR. KULEWICZ: Well --

23 JUSTICE SOTOMAYOR: -- E -- ERSD
24 patients, you're saying you're not violating.

25 MR. KULEWICZ: Of course -- of course,

1 Your Honor, the other side is not correct in
2 saying that there is a -- a correlation there.
3 Ever since the Trade Preferences Extension Act
4 of 2015, there is no correlation. Now people
5 with acute kidney injury who go to outpatient
6 dialysis, people with end-stage renal disease
7 can get inpatient dialysis when they're -- when
8 they're in a hospital.

9 The -- the -- the Ninth Circuit and
10 the Sixth Circuit, the -- the difference between
11 the Ninth Circuit and the Sixth Circuit is the
12 Ninth Circuit stuck with the statutory text,
13 honored the statutory text, read it verbatim and
14 -- and literally.

15 The Sixth Circuit has -- has expanded
16 upon that in a way that -- that goes far beyond
17 the -- the -- what the text would allow.

18 JUSTICE BREYER: Why -- why does this
19 not violate the statute from your point of view?
20 I think it obviously doesn't, what I'm about to
21 say, but I want to know why.

22 Every single ESRD patient gets
23 outpatient dialysis, all right? So the
24 insurance plan says you're going to get
25 90 percent of the cost back. If you have a

1 heart attack, however, you get 95 percent of the
2 cost back, okay?

3 Why doesn't that violate this statute?

4 MR. KULEWICZ: So long as that -- so
5 long as that benefit package was available, Your
6 Honor, to everybody covered by the plan, it
7 would not violate the statute. The plan --

8 JUSTICE BREYER: Because it did --
9 look, it -- it's only the ESRD patients that get
10 90 percent, and the heart attack patients --

11 MR. KULEWICZ: Well --

12 JUSTICE BREYER: -- get 95.

13 MR. KULEWICZ: Oh, I'm sorry.

14 JUSTICE BREYER: Why -- why doesn't
15 that violate the statute?

16 MR. KULEWICZ: I -- I -- I
17 misunderstood Your Honor's hypothetical. If
18 there were -- if there were a -- if there were a
19 condition that singled out patients with ESRD
20 and differentiated in the benefits to ESRD, if
21 there was some distinction between the benefits
22 available to a patient with ESRD and others
23 covered by the plan, then the issue would arise
24 under the differentiation clause.

25 JUSTICE BREYER: It would, but it

1 seems to me there are 10,000 different diseases,
2 and I can't believe that -- that insurance plans
3 cover them all the same.

4 MR. KULEWICZ: Right.

5 JUSTICE BREYER: Do they?

6 MR. KULEWICZ: Which is exactly one of
7 the problems with the --

8 JUSTICE BREYER: Yeah, yeah, okay. So
9 -- so then my question. My question was, if you
10 give ESRD patients 90 percent, but you give
11 people with a common cold 99 percent, you give
12 people with heart attacks 83 percent, why
13 doesn't all that violate the statute?

14 MR. KULEWICZ: Your Honor, because the
15 statute contains no requirement of any
16 particular benefit. The Medicare Secondary
17 Payer Act does not prescribe any particular
18 benefit for --

19 JUSTICE BREYER: So your answer to
20 Justice Kagan then is, even if there are --
21 everybody that gets outpatient renal dialysis
22 has ESRD, everybody, and we give everybody
23 62 percent of the charge, all those ESRD, and we
24 give some other person with a heart attack more,
25 that doesn't violate the statute because

1 everybody getting ESRD is getting the same?

2 MR. KULEWICZ: That's correct, Your
3 Honor. If you get --

4 JUSTICE BREYER: Are you sure that's
5 correct?

6 MR. KULEWICZ: Well, Your Honor, that
7 -- that package of benefits, if I understand
8 Your Honor's hypothetical correctly, is one that
9 would be applied uniform -- the same package of
10 benefits applied uniformly across a plan in a
11 context -- in the context of a statute that has
12 no requirement of any specific benefit.

13 JUSTICE BREYER: I need to understand
14 it from your point of view, and then I want to
15 see if the other people -- what Mr. Waxman
16 thinks of it.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Thomas, anything further?

20 JUSTICE THOMAS: Nothing for me,
21 Chief.

22 CHIEF JUSTICE ROBERTS: Justice
23 Breyer, anything further?

24 Justice Alito?

25 JUSTICE ALITO: Well, I'm somewhat

1 baffled by this -- the statutory language. And
2 1395y(b)(1)(C), I start out sort of
3 understanding it. The plan may not
4 differentiate in the benefits it provides
5 between individuals having ESRD and other
6 individuals covered by such plan on the basis of
7 the existence of ESRD. All right. I can -- I
8 can understand that.

9 But, after that point, a group health
10 plan may not differentiate in the benefits it
11 provides between individuals having ESRD and
12 other individuals covered by such plan on the
13 need for renal dialysis.

14 What does that mean? In what sense is
15 it different from what I just read?

16 MR. KULEWICZ: Because what -- what
17 that means is, if a plan -- if the reason that
18 the different package of benefits goes to the
19 patients with ESRD, if the reason for that is
20 because of their need for renal dialysis, then
21 that would -- that would constitute a -- that
22 would state a claim under the Medicare Secondary
23 Payer Act.

24 JUSTICE ALITO: What does that add to
25 the language that came before it?

1 MR. KULEWICZ: Because it -- well,
2 Your Honor, it adds several things. The -- a
3 plan -- if a plan were to say that it would
4 cover individuals who need kidney transplants,
5 but it was not -- but it was going to -- it was
6 going to be a separate package of benefits for
7 individuals who needed renal disease -- I'm
8 sorry, renal dialysis, that -- that, of course,
9 would be one of the distinctions it would
10 address.

11 But, overall, what it addresses is, if
12 the plan -- if the plan differentiates in the
13 benefits between individuals with end-stage
14 renal disease and others on the basis of the
15 need of the individual for -- with end-stage
16 renal disease for renal dialysis, then that
17 would constitute a violation of the statute.

18 JUSTICE ALITO: I mean, I thought the
19 first clause meant that if you -- you have
20 people with end -- end-state renal disease and
21 you have to treat them the same way, give them
22 the same benefits as other people who are
23 identical, except for the -- except for having
24 ESRD, that's right?

25 MR. KULEWICZ: Well, let me give you

1 -- yeah. I -- I think I can address Your
2 Honor's concern. So the -- the first qualifying
3 phrase, "differentiate on the basis of the
4 existence of end-stage renal disease," that
5 would be a plan that said benefits are different
6 just by virtue of having end-stage renal
7 disease.

8 JUSTICE ALITO: Right.

9 MR. KULEWICZ: The second -- the
10 second scenario is it would be different based
11 upon the -- the need of somebody with end-stage
12 renal disease for renal dialysis as opposed to a
13 -- a -- a kidney --

14 JUSTICE ALITO: Okay. So you have
15 somebody with end-state renal disease who needs
16 dialysis and you're comparing that person to
17 whom?

18 MR. KULEWICZ: To -- to other
19 individuals covered by the plan.

20 JUSTICE ALITO: Who don't need -- who
21 --

22 MR. KULEWICZ: No. So they're --
23 they're a -- a person with acute kidney injury
24 would need renal dialysis, Your Honor.

25 JUSTICE ALITO: Well, that's what --

1 that's what was addressed by the first language.

2 MR. KULEWICZ: But -- so -- so, if
3 you're -- you can -- it -- it's two separate
4 scenarios, Your Honor. What the first clause
5 would identify or what it addresses a package of
6 benefits is different simply because the
7 individual has end-stage renal disease. That --
8 that would not -- that would not include persons
9 with acute kidney injury.

10 So then the second -- because that's
11 -- that's not an end-stage situation. The
12 second qualifying phrase would address people
13 with end-stage renal disease who need renal
14 dialysis. If -- if that were the basis for
15 differentiation of the package, there would be
16 issues under the Medicare Secondary Payer Act.

17 JUSTICE ALITO: And then we get to the
18 third part, may not differentiate in the
19 benefits it provides between individuals having
20 ESRD and other individuals covered by such plan
21 in any other manner.

22 What does that mean?

23 MR. KULEWICZ: Your Honor, what that
24 means is -- is any other manner related to the
25 ESRD diagnosis. Under the ejusdem generis canon

1 of statutory construction, when we have a -- a
2 general -- when a general word or words follow a
3 -- a series of specific words, they necessarily
4 relate to the condition that the -- that the
5 limiting words address.

6 So, in any other manner, in any other
7 related manner, you know, for example, if the --
8 if a plan said that -- that benefits would be
9 differentiated for those who need manual removal
10 of waste products and excess fluid from the
11 blood, I mean, that would be a -- a --
12 synonymous, related to the end-stage renal
13 disease, and that would constitute a violation.

14 They each -- each serve a separate
15 purpose. So the first -- the first relates to
16 the condition. The second relates to one of the
17 therapies. The third relates to differentiation
18 on the basis of the diagnosis in general.

19 JUSTICE ALITO: Okay. Well, I will
20 ponder all that.

21 There are various categories of
22 entities and people who might be financially
23 affected by the outcome here. There are the
24 group health plans. There are the two companies
25 that provide dialysis or basically two companies

1 that provide dialysis. There's Medicare. And
2 there are the people with ESRD.

3 To what extent are people in the
4 latter category going to be affected by the
5 outcome?

6 MR. KULEWICZ: Your Honor, if the
7 Court were to affirm the Sixth Circuit and --
8 and it goes back and a judgment is entered for
9 what DaVita seeks here, which is the right to be
10 paid its undiscounted charges, it would be
11 disastrous for people who have end-stage renal
12 disease and are -- are covered simply by plans
13 because that would be a situation where right
14 now they're paying 30 percent of 125 percent of
15 the Medicare rate, which is -- which would be in
16 the \$90 range, \$96 range. Paying 30 percent of
17 the undiscounted charges could be up to \$1800
18 per treatment, and that would very quickly
19 exhaust their -- exhaust resources and -- and
20 reach their out-of-pocket maximum within the
21 space of -- of two to three treatments here.

22 So -- and it would be equally
23 catastrophic for plans because it would -- it
24 would absorb plan resources that are needed for
25 other -- to cover other vitally important health

1 conditions as well.

2 JUSTICE SOTOMAYOR: I'm sorry, but to
3 --

4 JUSTICE ALITO: Okay. So it would be
5 -- just one -- one more follow-up. So, if you
6 were to lose, it would be bad for your client,
7 bad for other group plans, bad for the people
8 with end-stage renal disease, but good for Mr.
9 Waxman's client and for Medicare?

10 MR. KULEWICZ: Your Honor, I don't
11 think I heard the -- the end phrase.

12 JUSTICE ALITO: And Medicare.

13 MR. KULEWICZ: No, I don't think it
14 would be good for Medicare either, Your Honor,
15 because what would happen in that situation, if
16 -- people that would be on -- one can easily
17 imagine a mass migration out of group health
18 plans straight into Medicare, which is exactly
19 the situation that we're trying to avoid.

20 Patients right now who are -- who are
21 paying on a -- on a allowable cost basis with a
22 reference-based price to in particular the
23 Medicare price here, they're paying a much lower
24 rate, their actual out-of-pocket.

25 There's a specter of balance billing,

1 but the important thing to remember about that
2 is that that's a function -- the only thing that
3 we can do in my -- that the Petitioners can do
4 to avoid balance billing is to pay the full
5 undiscounted charge because then, at that point,
6 there -- there's no bill left over.

7 We could pay -- we could pay
8 750 percent of the Medicare rate and there --
9 there would still be a balance billing, but
10 it's -- it's -- that is something that is
11 exclusively within the control of Respondents.

12 And unless the Medicare Secondary
13 Payer Act is going to be construed as something
14 that -- that makes it -- gives a compulsory duty
15 to group health plans to do everything they can
16 to stop dialysis providers from inflicting the
17 harm they can inflict through balance billing,
18 which I don't think is a result that Congress
19 ever contemplated or would bring us here,
20 they're going to be -- they're going to be in
21 a -- in a very precarious position --

22 CHIEF JUSTICE ROBERTS: Thank you.

23 MR. KULEWICZ: -- the individuals.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Sotomayor?

2 JUSTICE SOTOMAYOR: What forces the
3 dialysis companies to limit what they're
4 charging the patients? You're limiting what
5 you're paying the patient, but what limits them
6 -- Medicare limits them. Medicare, if you
7 accept Medicare, which they have to, basically,
8 for this, they can't charge more than Medicare
9 permits and they can't balance. But what stops
10 the companies from charging patients whatever
11 they want?

12 MR. KULEWICZ: Nothing, Your Honor.

13 JUSTICE SOTOMAYOR: Exactly.

14 MR. KULEWICZ: The -- the only
15 situation in which they cannot charge -- in
16 which they're bound by the Medicare rate is when
17 the individual -- or affected by the Medicare
18 rate is when the individual has enrolled in
19 Medicare.

20 JUSTICE SOTOMAYOR: So why -- why --
21 why does your system help patients? Meaning
22 your system stops them from paying -- for you
23 giving them that little extra money, but it
24 doesn't stop them from being charged for the
25 real cost of the treatment and not getting

1 anything for it.

2 MR. KULEWICZ: Well, the real cost of
3 the treatment, of course, is -- is \$242, and --

4 JUSTICE SOTOMAYOR: No. That's what
5 you're paying.

6 MR. KULEWICZ: Well, no, we're --
7 we're paying -- we're paying based on \$332,
8 which is 125 percent of the Medicare rate. We
9 pay 70 --

10 JUSTICE SOTOMAYOR: No, no, no. My
11 point is --

12 MR. KULEWICZ: I'm sorry.

13 JUSTICE SOTOMAYOR: -- if they are --
14 if they charge 5,000 per treatment, you're
15 limiting it to \$200. The patient does not save.
16 They still have to pay the 5,000 minus the \$200
17 you're paying.

18 MR. KULEWICZ: If -- they -- they
19 would have to pay the balance of the 5,000, Your
20 Honor, only if DaVita exercised it -- its -- its
21 right to balance bill there. It -- it does not
22 and notably in this case --

23 JUSTICE SOTOMAYOR: Yeah, but what --
24 but the point is that you're not helping the
25 patient in those situations.

1 MR. KULEWICZ: The only way that we
2 can avoid balance billing, Your Honor, in a
3 situation where -- where DaVita will not come in
4 network -- and, notably, there's no allegation
5 in this case that DaVita has ever sought to come
6 in network or wants to come in network and has
7 been denied the opportunity to come in network.
8 The only way that we can avoid balance billing
9 would be to pay the full -- pay on the basis of
10 the full undiscounted charge --

11 JUSTICE SOTOMAYOR: All right. Thank
12 you.

13 MR. KULEWICZ: -- which would put the
14 patient in a much worse position because then --
15 right now, they're paying 30 percent of
16 125 percent of the Medicare rate. Then they
17 would be paying 30 percent of up to \$6,000 per
18 treatment.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Kagan, anything further?

22 JUSTICE KAGAN: Yeah. I'd like to go
23 back to where Justice Alito was taking you about
24 the exact language of this statute, and it is a
25 confusingly written statute, but here's a theory

1 of it.

2 So the first, it says you're not to
3 differentiate between individuals having
4 end-stage renal disease and other individuals in
5 the plan, all right? Right?

6 MR. KULEWICZ: In -- in the benefits
7 provided.

8 JUSTICE KAGAN: Yeah, yeah, yeah, in
9 the benefits provided.

10 Now, when it says on the basis of the
11 existence of end-stage renal disease, that's
12 completely redundant because, if I tell you not
13 to differentiate between people with end-stage
14 renal disease and those without end-stage renal
15 disease, I'm obviously telling you not to
16 distinguish based on the fact that some have
17 end-stage, but, you know, that they have
18 end-stage renal disease and they don't. Right?
19 That's just redundant?

20 MR. KULEWICZ: Well, Your Honor, may
21 I -- may I push back with an alternative
22 hypothetical?

23 JUSTICE KAGAN: No, definitely not.

24 MR. KULEWICZ: Okay. All right.

25 (Laughter.)

1 JUSTICE KAGAN: I mean, you can push
2 back -- you know, I'm not saying you can't push
3 back at some point, but -- but I -- I think what
4 I just said is pretty obviously true.

5 All right. Now it goes on. You also
6 can't distinguish on the basis of the need for
7 renal dialysis. All right. Now what does
8 Congress mean when it says that? And it's not
9 particularly precise and it's not particularly
10 grammatical, but why is that there?

11 It's there because they know you're
12 going to do exactly what you're doing. It's
13 there because they're saying don't try to
14 distinguish between those with end-stage renal
15 disease and those without end-stage renal
16 disease by finding the perfect proxy, which is
17 the therapy rather than the condition. So
18 that's why that's there.

19 And then the "in any other manner," in
20 case there's a proxy that we haven't thought of,
21 don't try that one either. So all together this
22 is basically saying you can't distinguish
23 between people with end-stage renal disease and
24 those without. You can't do it directly. You
25 can't do it by means of the fact that this group

1 needs dialysis and this group doesn't. And you
2 can't do it by finding any other proxy that
3 perfectly separates these two groups.

4 MR. KULEWICZ: Well, Your Honor, we
5 respectfully disagree, and maybe if I can give a
6 hypothetical that might cast it in a different
7 light.

8 Say that a plan said that there would
9 be one set of benefits for people in North
10 Dakota and another set of benefits for people in
11 South Dakota, and it just -- just so it turns
12 out that the people in South Dakota, some of the
13 covered individuals, the -- the only individuals
14 covered by the plan who have end-stage renal
15 disease are in South Dakota.

16 So they -- they would -- they would
17 raise -- understandably, they would raise an
18 issue saying, hey, I've got end-stage renal
19 disease, my benefits are not the same as -- as
20 the people in North Dakota. Why is that?

21 And -- and -- and so then -- then we
22 go to the -- that's when we go to the first,
23 second, and third elements of the clause. If it
24 -- you know, they would say, is it because I
25 have end-stage renal disease? The plan may say

1 no, it -- it's because -- because this is on the
2 basis of -- of geography, the laws in North
3 Dakota are different from the laws in South
4 Dakota or no, it's on the basis of -- of -- of
5 collective bargaining, the people in -- in North
6 Dakota are -- are in a bargaining unit, the
7 people in South Dakota are not in a bargaining
8 unit. It may be on the basis of -- of
9 full-time/part-time, current employee/former
10 employee.

11 So those -- it -- it -- it's not --
12 it's not a redundant appellation there in
13 that -- in that case, Your Honor. If -- if --
14 it's not -- just because there is a --

15 JUSTICE KAGAN: Is -- is there some
16 relevance to this case?

17 MR. KULEWICZ: Well, no. Actually --

18 JUSTICE KAGAN: I mean, what -- how do
19 you -- how --

20 MR. KULEWICZ: Because the benefits in
21 this case are -- are applied -- the same
22 benefits are applied uniformly across the board
23 to every participant in the plan. There is no
24 differentiation --

25 JUSTICE KAGAN: Yeah, I mean, that's

1 like Anatole France is sleeping under the bridge
2 and the poor and the rich alike, right?

3 MR. KULEWICZ: No, Your Honor, it's --
4 I mean, it's -- it's a --

5 JUSTICE KAGAN: It's applied to
6 everybody.

7 MR. KULEWICZ: Well --

8 JUSTICE KAGAN: Even those people who
9 don't have any use for end-stage -- for
10 dialysis.

11 MR. KULEWICZ: What the law that
12 Congress gave us says is -- is that a plan may
13 not differentiate in the benefits that it
14 provides between individuals with end-stage
15 renal disease and others covered by the plan.

16 So the -- the threshold inquiry --

17 JUSTICE KAGAN: Based on the need for
18 renal dialysis.

19 MR. KULEWICZ: Well, and you -- you --
20 you get to that if there's a differentiation,
21 but there has to be -- your threshold question,
22 Your Honor, is, is there a -- is there a
23 differentiation in benefits here? And if -- if
24 there's no differentiation in benefits, if
25 everybody in the plan has the same benefits,

1 then -- then the dependent, the qualifying
2 client, would be no different.

3 JUSTICE KAGAN: Yeah. I'll just say
4 it again maybe, you know, more briefly than I
5 said it before just in case it's a problem of
6 communication on my end.

7 MR. KULEWICZ: All right.

8 JUSTICE KAGAN: But this "based on"
9 thing -- this "based on" thing is supposed to
10 tell you not to do exactly what you're doing.
11 This "based on" thing is saying don't do it
12 based on the condition itself, don't do it based
13 on the therapy, and don't do it based on
14 anything else that is a proxy for the condition.

15 MR. KULEWICZ: But what it is saying
16 not to do, Your Honor, is to differentiate the
17 benefits between individuals here. It is -- it
18 is not -- it does not prescribe any benefits.
19 It does not prescribe parity of benefits.

20 JUSTICE BREYER: Okay. Is this your
21 point? I -- I mean, I -- I promise I'm almost
22 certainly wrong, but I've had a really hard time
23 grasping it.

24 You're saying that if there is a human
25 being in this plan, whether he has end-state or

1 not, and if that individual should he get
2 end-state would be treated worse, that is
3 covered by this language?

4 MR. KULEWICZ: If -- if the -- if the
5 end-stage renal disease diagnosis operates into
6 a different plan --

7 JUSTICE BREYER: Let me say it again
8 if you didn't get it. Did you get it or not?

9 MR. KULEWICZ: I -- I believe I do,
10 Your Honor, yes.

11 JUSTICE BREYER: Okay. Then am I
12 right or wrong?

13 MR. KULEWICZ: If -- if the diagnosis
14 ends up with a differentiation of benefits, then
15 there would be a state -- it would state a claim
16 under the Medicare Secondary Payer Act.

17 JUSTICE BREYER: I'm trying to figure
18 out what other -- is Justice Kagan correct,
19 that's one possible reading, and I'm trying to
20 see you think she's not, so I'm trying to figure
21 out what your reading is, okay?

22 Mr. Smith who has a heart attack or
23 Mr. Smith who has your plan, should he, Mr.
24 Smith, get end-state renal disease, under the
25 plan, he won't be treated as well as all the

1 other 98,000 people who have interstate --
2 end-state, that would violate it?

3 MR. KULEWICZ: Yes, Your Honor, if
4 that diagnosis changed his -- operated to change
5 the plan benefits available to him, that would
6 --

7 JUSTICE BREYER: Change it? It would
8 change -- you're saying your plan doesn't do
9 that, but if we had the imaginary plan that did
10 do it, should Mr. Smith get end-state renal
11 disease next year, he will be paid by your
12 insurance company at a lower rate than the
13 980,000 people -- or the 300,000 people who now
14 have end-state renal disease?

15 MR. KULEWICZ: Well, that -- that
16 would -- that sounds to me like it would be a
17 differentiation, Your Honor.

18 JUSTICE BREYER: Okay.

19 MR. KULEWICZ: And -- and -- and we
20 would go to --

21 JUSTICE BREYER: So now I see what
22 you're saying. Maybe I was the only one who
23 didn't understand what you were saying, but now
24 I think I do. Thank you.

25 MR. KULEWICZ: Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Justice

2 Gorsuch, anything further?

3 Justice Kavanaugh?

4 Justice Barrett?

5 Thank you, counsel.

6 MR. KULEWICZ: Thank you, Your Honor.

7 CHIEF JUSTICE ROBERTS: Mr. Guarnieri,

8 I understand you're with us remotely.

9 MR. GUARNIERI: I am, Your Honor.

10 CHIEF JUSTICE ROBERTS: You may

11 proceed.

12 ORAL ARGUMENT OF MATTHEW GUARNIERI

13 FOR THE UNITED STATES, AS AMICUS CURIAE,

14 SUPPORTING REVERSAL

15 MR. GUARNIERI: Thank you. Mr. Chief

16 Justice, and may it please the Court:

17 The Medicare secondary payer statute

18 does not forbid group health plans from adopting

19 uniform limits on coverage for renal dialysis.

20 Fundamentally, the non-differentiation provision

21 forbids only arrangements under which a group

22 health plan provides different benefits to

23 individuals with end-stage renal disease and

24 other individuals covered by the plan.

25 Petitioners' plan does not do that.

1 Respondents' proxy theory is therefore
2 irrelevant. Its plan is not providing a
3 different package of benefits in the first
4 place, by proxy or otherwise.

5 Now it's true that uniform limits on
6 dialysis principally affect those who need
7 dialysis the most, but this statute also does
8 not impose disparate impact liability.
9 Respondents' contrary view is inconsistent with
10 the text, purpose, and history of the statute
11 and would be unworkable in practice.

12 This statute serves an important but
13 limited function in coordinating benefits
14 between Medicare and group health plans. It
15 does not entitle dialysis providers to any
16 particular level of reimbursement.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: Counsel, there's been
19 some discussion about the effects of the
20 different positions that have been taken on
21 this, interpreting this statute and this payment
22 differentiation problem. What do you think the
23 effects would be?

24 MR. GUARNIERI: Justice Thomas, we are
25 concerned, frankly, about the effects that this

1 decision may have. The provisions in this
2 statute have been in substantially the same form
3 since 1989, and CMS's implementing regulations,
4 including a regulation that expressly permits
5 plans to impose uniform limits on coverage for
6 dialysis, those regulations have been on the
7 books since 1995.

8 And we haven't seen the sky falling.
9 We haven't seen examples -- many examples in
10 which there is -- plans have engaged in creative
11 ways to try to circumvent the statute, but,
12 certainly, a decision from this Court could
13 bring renewed prominence to this issue, so we
14 don't -- we don't sort of take those policy
15 concerns lightly.

16 Of course, Medicare itself is
17 available as a backstop here. The whole design
18 of this statutory scheme is that individuals who
19 develop end-stage renal disease after three
20 months of dialysis, they are eligible to enroll
21 in Medicare. And during the 30-month
22 coordination of benefits period, Medicare is
23 there, if they would like to enroll in Medicare
24 and pay for Part B, Medicare is there to cover
25 any potential gaps in the coverage that the

1 group health plan provides.

2 JUSTICE THOMAS: Thank you.

3 CHIEF JUSTICE ROBERTS: Counsel, what
4 is your response to Justice Kagan's line of
5 questioning about proxies? If you have somebody
6 that's -- you know, it's a hundred percent
7 proxy, it does not take whatever it is you're
8 not supposed to take, Medicare eligibility, into
9 account at all, but it just turns out that the
10 group is the same as it would be if it did take
11 the Medicare in -- into account?

12 MR. GUARNIERI: Sure. You know,
13 again, as I said at the outset, I don't think
14 the proxy theory is really sufficient for
15 Respondents to prevail in this case, and that's
16 just a result of the plain text of the statute.

17 1395y(b)(1)(C)(ii) states that group
18 health plans "may not differentiate in the
19 benefits it provides" -- a group health plan
20 "may not differentiate in the benefits it
21 provides between individuals with end-stage
22 renal disease and others covered by the plan."

23 And if a plan is providing the same
24 package of benefits to all individuals who are
25 covered by the plan, which is what Petitioners'

1 plan does, then it is not differentiating in the
2 benefits it has provided, and, therefore, it is
3 not violating this specific provision.

4 And so there's no -- no occasion
5 arises to -- to inquire into whether the plan is
6 drawing a -- a line among plan participants on
7 an impermissible basis or on a -- as a matter of
8 a proxy for an impermissible basis because
9 there's no improper line drawing in the first
10 instance.

11 JUSTICE KAGAN: And -- and -- and how
12 about my view of the statutory language, which
13 does suggest that the statutory language itself
14 indicates a concern that proxies will be found
15 and attempting to really cut that off at the
16 pass?

17 In other words, you know, don't
18 distinguish between these two groups, people
19 with ESRD and those without, based on the fact
20 that they have the disease or based on the fact
21 that they need renal dialysis or based on some
22 other proxy you can come up with. Just don't do
23 it at all.

24 MR. GUARNIERI: I take the point,
25 Justice Kagan, and -- and, in some ways, that's

1 another reason -- I mean, the statutory text
2 itself here furnishes an additional basis that
3 you don't need to kind of import into this
4 coordination of benefits statute the concept of
5 proxy discrimination drawn -- drawn from an
6 opposite body of federal civil rights law.

7 JUSTICE KAGAN: No, I was suggesting
8 that that --

9 MR. GUARNIERI: But, of course --

10 JUSTICE KAGAN: -- that back language,
11 Mr. Guarnieri, is the kind of don't think you
12 can end run this language. That's what that
13 language is -- is there for.

14 MR. GUARNIERI: Well, but, Justice
15 Kagan, that language all follows after the
16 actual prohibition in the statute, and it is a
17 prohibition against differentiating in the
18 benefits that are being provided.

19 And so, if a plan is not doing that,
20 if a plan is providing all individuals covered
21 by the plan, regardless of whether or not they
22 have end-stage renal disease and regardless of
23 their need for renal dialysis, with the same
24 package of benefits, meaning the same items and
25 services are covered at the same premiums and

1 any other sort of cost-sharing of individuals,
2 then the plan is not violating this specific
3 provision.

4 JUSTICE KAGAN: Yeah, I think what
5 most --

6 MR. GUARNIERI: This is a statute in
7 which --

8 JUSTICE KAGAN: -- confuses me about
9 this case, Mr. Guarnieri, is why you're on this
10 side of it. I mean, it just -- I mean, you
11 know, I hate to say the obvious, but usually the
12 government is concerned about the state of
13 government finances. And aren't you clearly
14 going to end up paying more if the Petitioner
15 wins than if the Respondent wins?

16 MR. GUARNIERI: That -- that -- that
17 may well be the case, Justice Kagan. And,
18 again, as I tried to say, as I tried to stress,
19 in response to Justice Thomas's question, I
20 mean, we don't -- we take these policy concerns
21 lightly. We don't think the policy -- I'm
22 sorry, we don't -- we don't take them lightly.
23 We just don't think in this instance that those
24 policy concerns are sufficient to overcome the
25 best reading of the statutory text.

1 JUSTICE KAGAN: I'm -- I'm moved --

2 MR. GUARNIERI: And, of course --

3 JUSTICE KAGAN: -- by your adherence

4 --

5 MR. GUARNIERI: -- the principle that

6 we --

7 JUSTICE KAGAN: -- to -- I'm sorry.

8 It's so -- it's so hard to do this with you not

9 up here, Mr. Guarnieri.

10 But, you know, I'm sort of moved by
11 your adherence to principles of statutory
12 interpretation, but, you know, usually, I mean,
13 the government, you know, fights for the
14 government's interests, especially when there's
15 sort of such an obvious counterargument to your
16 statutory argument. I mean, I --

17 MR. GUARNIERI: Justice Kagan --

18 JUSTICE KAGAN: -- I keep on thinking
19 surely they --

20 MR. GUARNIERI: -- the principle that
21 we are here to vindicate --

22 JUSTICE KAGAN: Sorry. Sorry, Mr.
23 Guarnieri, if I could just -- sorry about that.

24 MR. GUARNIERI: Certainly.

25 JUSTICE KAGAN: I just keep on

1 thinking, if I could just understand why they're
2 on this side, maybe I would understand this
3 whole case better. So I'm giving you, like,
4 please, help me. Is there a policy reason
5 you're on this side?

6 MR. GUARNIERI: Sure. Let -- let me
7 see what I can do there.

8 The principle that we are here to
9 vindicate, which is that uniform limitations on
10 coverage for renal dialysis do not themselves
11 constitute impermissible differentiation, is a
12 principle that is reflected in the regulations
13 that CMS, the expert agency charged with
14 administering this statute, has enacted, and
15 that's Section 161(c) in Part 411. And the
16 position that we are taking here is the one that
17 is most consistent with the agency's
18 longstanding regulation.

19 Now, as to the broader question about,
20 you know, wouldn't it be in the government's
21 best financial interests for there to be, you
22 know, circumstances in which group health plans
23 could be compelled to pay higher rates to
24 dialysis providers, you know, I don't -- I think
25 part -- part of the story there is that Congress

1 has, in general, in this statute chosen not to
2 create an entitlement to dialysis coverage.
3 That's consistent with Congress's overall
4 choices in this area. In particular, ERISA,
5 which is the preeminent federal law regulating
6 the design of health benefits plans, does not
7 mandate that plans cover particular services,
8 and that's -- that's true even with respect to
9 ERISA's non-discrimination provision.

10 And we think this statute
11 fundamentally operates in the same way as that.
12 It does not forbid uniform limitations on
13 particular services. That is the policy
14 decision that Congress made here. It's the
15 decision -- it's a policy that is reflected in
16 the Secretary's regulations, and -- and that --
17 that's why we have chosen to support the
18 Petitioners in this case.

19 Now, you know, again, we -- we have
20 filed in support of reversal, not actually in
21 support of Petitioners' brief, because we have
22 policy concerns that plan practices like this
23 could ultimately lead to greater costs for the
24 Medicare program and -- and potentially worse
25 coverage or worse options for individuals with

1 end-stage renal disease. We just don't think
2 the statute in its current form prohibits the --
3 the particular plan provisions that are under
4 scrutiny here.

5 JUSTICE ALITO: Could I ask you the
6 question that I asked Petitioner about whose
7 financial interests are at stake here? And I'm
8 particularly concerned about the patients with
9 end-stage renal disease.

10 He said that an affirmance here would
11 work against their financial interests. Is that
12 correct?

13 MR. GUARNIERI: It's hard to predict
14 with certainty how -- how that would play out,
15 Justice Alito. I take Petitioners' point to be
16 that an affirmance, meaning that this plan was
17 obligated to reimburse Respondents at
18 Respondents' undiscounted rates, would mean that
19 the -- an individual's coinsurance obligation,
20 which under this plan is 30 percent of whatever
21 the plan reimbursement rate is, would -- would
22 skyrocket because they would be required to pay
23 30 percent of the undiscounted rate.

24 The -- the other point that
25 Petitioners and their amici have made is that

1 because the Medicare secondary payer statute
2 itself does not require that group health plans
3 provide coverage for renal dialysis, a decision
4 in Respondents' favor might mean that more group
5 health plans choose not to cover dialysis at all
6 if -- if, you know, the result of covering it
7 would be exposing them to liability under the
8 statute.

9 I just -- it's really -- it's
10 difficult to -- to predict with any certainty
11 what -- what would happen there. Certainly, as
12 I -- as I said before, Medicare is a backstop
13 here. The Medicare Part B monthly premium is
14 \$170. That's a pretty reasonable amount.

15 Individuals who are concerned that
16 their group health plans may provide
17 insufficient coverage for their dialysis needs
18 during the coordination period can enroll in
19 Medicare as the secondary payer.

20 And -- and -- and even in that
21 circumstance, that's going to save Medicare
22 money in the sense that, you know, if -- if you
23 take a circumstance -- if you take a situation
24 in which the group health plan provides a
25 relatively parsimonious coverage for outpatient

1 dialysis and an individual makes a decision to
2 enroll in Medicare as the secondary payer during
3 the coordination period, the group health plan
4 is still covering all of that individual's other
5 medical expenses, and that's going to save
6 Medicare money. Medicare only steps in as the
7 secondary payer with respect to items or
8 services that the group health plan does not
9 fully cover.

10 And, you know, that -- that's sort of
11 -- that's another cost-saving feature of the
12 statute irrespective of the dialysis issue.

13 JUSTICE ALITO: Could I ask you to
14 follow up a bit on what you said about
15 workability? This is basically sort of a -- a
16 discrimination -- an anti-discrimination
17 statute, and in an anti-discrimination statute,
18 you have to compare people in one group with
19 people in another group.

20 I understand how it works under your
21 theory. It is a bit strange that the two groups
22 are almost identical. But, if it's interpreted
23 the way the Sixth Circuit interpreted it and the
24 way Respondent interpreted it, you have the
25 people who have end-stage renal disease and they

1 need kidney dialysis, and the plan pays a
2 certain amount of money to them for that
3 service. What do you compare that to?

4 MR. GUARNIERI: I entirely agree with
5 you, Justice Alito. I don't think Respondents
6 have very clearly answered that question. And
7 as Judge Murphy explained in his partial dissent
8 in the Sixth Circuit, it's -- the Medicare
9 secondary payer statute itself does not provide
10 guideposts for making that kind of judgment.

11 There is no kind of obvious comparator
12 in terms of -- you know, if -- if it were a
13 viable theory under the statute to say that you
14 can't treat dialysis itself differently than
15 some other services, what are those other
16 services? Respondents have never said.

17 And so I do think that their view
18 would -- would -- would give rise to substantial
19 practical problems.

20 JUSTICE ALITO: All right. Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Thomas, anything further?

23 Justice Breyer?

24 Justice Alito, anything further?

25 Thank you, Mr. Guarnieri.

1 MR. GUARNIERI: Thank you, Mr. Chief
2 Justice.

3 CHIEF JUSTICE ROBERTS: Mr. Waxman.

4 ORAL ARGUMENT OF SETH P. WAXMAN

5 ON BEHALF OF THE RESPONDENTS

6 MR. WAXMAN: Mr. Chief Justice, and
7 may it please the Court:

8 Differential treatment of outpatient
9 renal dialysis is most certainly differential
10 treatment of individuals with ESRD. Congress
11 determined that, and it determined it because
12 Congress understood in 1972 and in 1981 and
13 thereafter that ESRD patients uniquely and
14 utterly need outpatient dialysis for the rest of
15 their lives.

16 And a plan whose purpose as alleged
17 here and effect is to move primary coverage of
18 ESRD patients to Medicare is one that most
19 certainly "takes into effect those patients'
20 eligibility for Medicare."

21 The reading urged by the Petitioners
22 and the solicitor general by which the
23 anti-discrimination provision bars only plans
24 that single out ESRD patients by name and the
25 take-into-account provision only applies to

1 plans that reference Medicare eligibility
2 expressly, renders both of these statutory
3 protections utterly toothless.

4 And in each respect, their reading
5 violates the text of the statute. Take the
6 anti-discrimination -- the anti-differentiation
7 provision, which has occupied, I think,
8 virtually all of the argument so far.

9 That provision protects ESRD patients
10 by prohibiting differential treatment either by
11 express reference to ESRD patients or by proxy.
12 The particular proxy codified in the statute and
13 the one that is relevant here expressly
14 prohibits differential treatment "on the basis
15 of the need for renal diagnosis," a treatment
16 that Congress has long understood to be
17 completely inseparable from ESRD itself.

18 Ninety-nine and a half percent of all
19 of DaVita's outpatient patients, outpatient
20 dialysis patients, have ESRD. There is simply
21 no reasonable argument for singling out ES --
22 outpatient dialysis as anything but differential
23 treatment of individuals with ESRD.

24 And as was noted, I think by Justice
25 Sotomayor, even the Ninth Circuit in Amy's

1 Kitchen agreed, and I'm quoting from the
2 opinion, "a plan would violate the MSP if it
3 provided differential coverage for routine
4 maintenance dialysis," that is, dialysis
5 received only by persons with ESRD, than for all
6 other -- all other dialysis. That is exactly
7 what this plan does.

8 Now, as -- I know that I'm trenching
9 on my two minutes, but I -- please interrupt me,
10 but I just wanted to reference the fact that as
11 has been mentioned by several members of the
12 Court, there is another provision that is on the
13 basis of either ESRD, calling it out by name, or
14 the need for renal dialysis or any other manner.

15 And that's because, as -- as I think
16 Justice Kagan's question suggested, Congress
17 understood at the time that other proxies for
18 ESRD might exist or more likely might come to
19 exist with medical advances.

20 And so the statute also prohibits
21 differentiation on any other manner, which, in
22 context, should be understood to mean in any
23 other manner that in effect singles out a
24 treatment for ESRD.

25 I want to clarify just a couple of, I

1 think, errors that my friend on the other side
2 made. The notion that they are actually helping
3 beneficiaries because they are limiting the
4 amount of balance billing available is -- is
5 utterly wrong.

6 This -- one of the main reasons that
7 -- that renal dialysis is disadvantaged here is
8 that the plan says unilaterally there is no
9 in-network service for this. If there were
10 in-network service, as there is for virtually
11 all employment group plans in the United
12 States -- this is an extreme outlier. There's
13 no balance billing at all.

14 If there was an in-network option --
15 and this goes to -- to, I think, Justice Alito's
16 questions about who's harmed. If there was an
17 in-network option, there would be no balance
18 billing and there -- and patients would have a
19 right to treatment. They would have a right to
20 treatment by somebody who was in network. Right
21 now, they don't.

22 And as the -- there -- there are some
23 really terrific and very knowledgeable amicus
24 briefs filed in this case. It is completely
25 clear and Congress has understood that if this

1 Court accepts the other side's ruling, there is
2 no reason on God's green earth that UnitedHealth
3 and AETna and all the -- all the big plans that
4 -- that -- health plans and big, big employer
5 health plans, all of whom do not differentiate
6 in any basis on the need for renal dialysis, I
7 mean, they --

8 JUSTICE ALITO: Well --

9 MR. WAXMAN: -- have shareholders --

10 JUSTICE ALITO: -- I -- I don't --

11 MR. WAXMAN: -- of course, they're
12 going to do it.

13 JUSTICE ALITO: -- understand how your
14 approach would work, but I assume you'll be able
15 to explain it to me. So --

16 MR. WAXMAN: I hope.

17 JUSTICE ALITO: -- suppose a plan says
18 that we will pay a maximum of X dollars, let's
19 say a thousand dollars, per year for renal
20 dialysis, period.

21 Is that vulnerable?

22 MR. WAXMAN: I'm sorry, is that what?

23 JUSTICE ALITO: Is that vulnerable?

24 Is that illegal in your view?

25 MR. WAXMAN: So the -- the answer is

1 it depends. If what the plan says is, for all
2 other forms of, you name it, treatment, medical
3 treatment, chronic medical treatment, we will
4 pay the ordinary and -- customary, ordinary, and
5 reasonable cost except for renal dialysis,
6 that's a differentiation that's prohibited by
7 the statute.

8 If you have what's called a skinny
9 plan, which is a plan that says, you know, we're
10 going to provide for regular checkups, et
11 cetera, et cetera, but we provide no benefits
12 for chronic healthcare --

13 JUSTICE ALITO: Well, what if --

14 MR. WAXMAN: -- whether it's heart
15 disease or --

16 JUSTICE ALITO: -- they do something
17 like -- like I understand Medicare does? So
18 they have a certain amount for different
19 conditions. They go by the Medicare code. They
20 -- they provide a certain amount for different
21 conditions. So they -- they distinguish among,
22 discriminate among, different medical
23 conditions, and they pay different amounts for
24 different medical conditions.

25 MR. WAXMAN: So, Justice Alito,

1 there's no doubt that different medical
2 treatments require different amounts.

3 JUSTICE ALITO: Yeah. So how do you
4 compare what is -- maybe they're being very
5 stingy with renal dialysis as compared to other
6 -- I just don't know what the standard is for
7 making the comparison.

8 MR. WAXMAN: So the -- I think you've
9 just identified the standard, which is, if there
10 is a differentiation on the basis of the need
11 for renal dialysis, a differentiation with --
12 and we can talk about what the relevant
13 comparators --

14 JUSTICE ALITO: Right.

15 MR. WAXMAN: -- are -- there is a
16 violation.

17 Now, in this case, there's no dispute
18 about the relevant character -- comparators.
19 This plan, as is plausibly alleged in the
20 complaint, and I don't think there's really any
21 dispute, but if there were, it would be
22 developed when -- when, and I hope, the -- the
23 order dismissing the complaint is reversed,
24 there -- I've lost my thought for a minute.

25 JUSTICE BREYER: Who -- who are you

1 going to compare it with?

2 MR. WAXMAN: Yeah. So, here, there's
3 no doubt whatsoever that outpatient renal
4 dialysis, that is, maintenance dialysis, the
5 dialysis that ESRD patients alone need to
6 survive to the next day for the entire rest of
7 their lives, is treated worse in a number of
8 respects than any other --

9 JUSTICE KAGAN: So this might be --

10 MR. WAXMAN: -- treatment.

11 JUSTICE KAGAN: -- an easy case, but I
12 think what Justice Alito --

13 MR. WAXMAN: I --

14 JUSTICE KAGAN: -- was sort of
15 suggesting to you is let's take a case where
16 there are five different chronic health
17 conditions and the plan sets up a payment scheme
18 for each of the five. And it's like, well, you
19 know, it's not as though four of them, they say
20 we'll -- we'll pay the reasonable costs, and the
21 fifth, we'll pay \$500. You know, they put --
22 they put different --

23 MR. WAXMAN: Yep.

24 JUSTICE KAGAN: -- price tags on each.
25 What are you supposed to do?

1 MR. WAXMAN: So I think what are you
2 supposed to do is the same thing under our
3 reading of the statute or the other side's
4 reading of the statute. What if the statute
5 said instead -- let's take an example. We're
6 going to pay everybody -- we're going to pay the
7 ordinary reasonable costs for everything except
8 heart disease -- you know, congestive heart
9 failure and ESRD, congestive heart failure and
10 renal dialysis -- no, the -- the treatments that
11 are needed for congestive heart failure and the
12 treatment that is needed for ESRD.

13 And you can say, well, does that
14 differentiate or doesn't it differentiate? I
15 mean, I would say, in that -- in that situation,
16 it probably doesn't differentiate, but the
17 salient point, to your question and Justice
18 Alito's question, is that they have the same
19 problem in their reading of the statute.

20 In their reading of the statute, they
21 say, well, look, you can forget the last 18
22 words of the statute. All you have to know is
23 whether it differentiates on the basis of people
24 who have ESRD. So what if the statute -- what
25 if the plan said, okay, people who have ESRD and

1 people who have congestive heart failure or
2 people who have cancer get a lower level. It's
3 the same comparator probably.

4 JUSTICE BREYER: No, it isn't. The --
5 the -- look, what they're saying, I think now, I
6 -- I hope, because I've had a hard time with
7 this, okay, I think they're saying imagine -- or
8 at least this is close -- there are 5,000
9 members of a plan. They each have a piece of
10 paper which describes the whole plan. In this
11 piece of paper, it says ESRD outpatient and it
12 is identical whether you have the disease,
13 whether you don't have the disease, you might
14 get the disease, maybe you had it and it wasn't
15 paid for, but anybody who has it or gets it or
16 whatever it is will be paid identically. That's
17 the end of the case.

18 MR. WAXMAN: Yeah, I agree.

19 JUSTICE BREYER: What you are saying
20 --

21 MR. WAXMAN: That's their position.

22 JUSTICE BREYER: Good. At least I've
23 got that right.

24 But then what you are saying, it seems
25 to me, is we look at that piece of paper and we

1 see everybody's getting the same. Bah, people
2 with heart conditions, something different.
3 People with colds, something different.
4 Inpatient people, where you add to the bill,
5 normally, about \$2,000 a day for hospital
6 overhead, are paid something different.

7 And, lo and behold, that's what you
8 want us to look at. And what the hell is, if
9 that's so, what goes off in my head is you are
10 substituting for people who make decisions as to
11 costs several thousand judges who know far less
12 about it than --

13 MR. WAXMAN: I --

14 JUSTICE BREYER: -- HHS, than -- than
15 anyone else in the medical world. And -- and it
16 covers all the diseases and it seems to me
17 nightmare. Now that's what I'm worried about.

18 MR. WAXMAN: Okay.

19 JUSTICE BREYER: And I ask it so I can
20 see your answer.

21 MR. WAXMAN: And this is -- in no way
22 does applying this statute as we read it -- and
23 I do want to -- I -- I want to continue on the
24 comparator issue because I -- I gather that's
25 something that you also are concerned about, but

1 I do want to go back and underscore why their
2 reading of the statute renders exactly one half
3 of the words of the statute complete surplusage
4 and renders this statute utterly toothless
5 because --

6 JUSTICE BREYER: Now I'm not
7 interested at the moment --

8 MR. WAXMAN: I -- I under- --

9 JUSTICE BREYER: -- in the toothless.

10 MR. WAXMAN: -- I under- -- I
11 understand. The point --

12 JUSTICE BREYER: I'm interested in the
13 chaotic teeth.

14 MR. WAXMAN: -- the point about the
15 comparator is in a case like this, where we
16 allege -- and our complaint was dismissed --
17 that out -- that renal dialysis and outpatient
18 renal dialysis are treated uniquely
19 disadvantageously and --

20 JUSTICE BREYER: Compared to?

21 MR. WAXMAN: Compared to any other
22 treatment.

23 JUSTICE BREYER: All right. Does it
24 compare -- does -- are you going to introduce
25 evidence, whether it's this one, compared to

1 heart attack patients?

2 MR. WAXMAN: Yeah, absolutely.

3 There's not -- there's not going to be --

4 JUSTICE BREYER: All right. Then how
5 do you --

6 MR. WAXMAN: -- any dispute about
7 this.

8 JUSTICE BREYER: -- avoid, if not this
9 case, in the mine-run of cases, of people
10 bringing nonstop cases where the judge has to
11 look at heart attacks, inpatient diagnostic
12 facilities -- you know, we could go on for about
13 10 months listing all the other things.

14 MR. WAXMAN: Justice Breyer, I would
15 do it in any number -- the first way I would do
16 it is to say, is this an -- does the allegation
17 here represent a differentiation of ESRD
18 patients on the basis of their need for renal
19 dialysis?

20 There are a lot of other provisions
21 that aren't. Now is there a differentiation?
22 If -- if there are various costs associated with
23 various treatments, you don't even -- the
24 complaint doesn't even satisfy the Twombly
25 standard, but my ultimate point is that it

1 doesn't matter whether you're focusing on, well,
2 what about this treatment or what about that
3 treatment?

4 They have the same problem if you're
5 saying for people with ESRD or people with
6 diabetes or people with congestive heart
7 failure, you get X, but for people who have, you
8 know, hearing loss, you get Y. It's the same --
9 you can't avoid a comparator problem.

10 The problem is resolved by a court --
11 JUSTICE GORSUCH: Mr. Waxman, if -- if
12 -- if -- if -- if Justice Breyer is correct and
13 -- and we have a comparator problem, as you call
14 it, I -- I think you indicated earlier that you
15 -- you think it would be solved, from -- from
16 the hospital's perspective, if they had given
17 similarly limited benefits for congestive heart
18 failure, then -- then they would win.

19 MR. WAXMAN: Right, we -- in that
20 instance --

21 JUSTICE GORSUCH: Right?

22 MR. WAXMAN: Yes. In that instance,
23 we would have to show that the addition of
24 congestive heart failure, which I think would be
25 hard, but let's say they say, you know, you get

1 the same thing for sleep apnea, the same
2 disadvantageous treatment, the burden would be
3 on us if there were dis- -- if there were
4 disadvan- -- disadvantageous treatment of a host
5 of medical treatments. The burden would be on
6 us to plausibly allege and then prove that those
7 were, in essence, a sham.

8 JUSTICE GORSUCH: Okay. And what --
9 what -- what -- what incentive structure does
10 that create if -- might that encourage health
11 plans to provide more parsimonious limits for
12 other similar chronic diseases?

13 MR. WAXMAN: So I think not, and I'll
14 say one reason is historical and the other is
15 logical and -- and I suppose political with a
16 small "p."

17 These plans have been -- this
18 anti-differentiation provision has been around
19 for 31 years. This is -- this and the plan in
20 -- in Amy's Kitchen and a few other ones are
21 utterly --

22 JUSTICE GORSUCH: Well, both sides can
23 talk about the -- the fact that the history is
24 on their side. And -- and I'm asking you to put
25 that aside for the moment.

1 MR. WAXMAN: Okay. So --

2 JUSTICE GORSUCH: You -- you --

3 MR. WAXMAN: -- putting that aside --

4 JUSTICE GORSUCH: -- indicated that if
5 a plan could show that it was equally
6 parsimonious with respect to congestive heart
7 failure, it would -- it would prevail.

8 I -- I would think that would be a
9 suggestion to plans that that's exactly what
10 they should do, and should we worry about that?

11 MR. WAXMAN: You know, I -- I really
12 think you don't need to worry about this, not
13 only for historical reasons but also because it
14 is only H -- ESRD patients who are immediately
15 eligible after three months, regardless of age,
16 for Medicare. And --

17 JUSTICE GORSUCH: And that -- that
18 raises another question I had actually, and --
19 and that is, you know, I understand
20 anti-discrimination law to protect patients, but
21 I'm -- I'm not familiar with one that this
22 Court's encountered before with -- that would
23 only protect the public fisc.

24 MR. WAXMAN: Well, there's no -- there
25 is -- there's no doubt that one of the two

1 objectives of this statute was, in fact, to
2 protect the public fisc to avoid payers paying
3 secondary to Medicare as soon as the patient's
4 enrolled. So whether you call this a
5 differentiation statute or a discrimination
6 statute, everybody agrees that was one of
7 Congress's objectives.

8 Congress -- and this is clear from the
9 fact that the anti-discrimination provision was
10 enacted at the same time that the secondary --

11 JUSTICE GORSUCH: But -- but we'd
12 agree, I think, wouldn't we, that -- that the
13 only thing that, the outcome of this case, is
14 how soon Medicare will wind up paying for these
15 services? Is that --

16 MR. WAXMAN: That's right. And -- and
17 Congress was very well aware, and it's
18 explicated in several of the amicus briefs,
19 Congress has been expressly aware that the only
20 way that an -- an outpatient dialysis system in
21 this country of private medicine can survive is
22 if the 10 percent of dialysis treatments that
23 aren't covered by Medicare are the result of a
24 negotiation between the providers --

25 JUSTICE GORSUCH: If the beneficiary

1 of the civil --

2 MR. WAXMAN: -- and the plans.

3 JUSTICE GORSUCH: If the beneficiary
4 of the anti-discrimination principle is supposed
5 to be the public fisc then, what should we make
6 of the fact that the government is on the other
7 side of the V in this case?

8 MR. WAXMAN: I mean, I think you've --

9 JUSTICE GORSUCH: If they're the
10 beneficiary of the discrimination principle --

11 MR. WAXMAN: I -- I --

12 JUSTICE GORSUCH: -- you're asking us
13 to adopt.

14 MR. WAXMAN: So they aren't the
15 beneficiary. They are one of the two
16 beneficiaries. And I'll address the second
17 later.

18 JUSTICE GORSUCH: Well, we agree that
19 the patient's going to receive the services
20 under Medicare, right? It's just a matter of
21 who pays and -- and when?

22 MR. WAXMAN: The -- let me first
23 address the -- the perplexing question of why
24 the government is on the other side.

25 JUSTICE GORSUCH: I mean, but why

1 don't you answer that question first.

2 MR. WAXMAN: Oh, okay.

3 JUSTICE GORSUCH: We agree that the
4 only question is who pays and when, right?

5 MR. WAXMAN: The only question is who
6 pays and when and --

7 JUSTICE GORSUCH: Okay.

8 MR. WAXMAN: -- how much -- excuse me.

9 JUSTICE GORSUCH: And how much your
10 company gets. I get that.

11 MR. WAXMAN: No.

12 JUSTICE GORSUCH: I -- I get that.

13 But --

14 MR. WAXMAN: No, no, I'm -- I'm -- I'm
15 sorry --

16 JUSTICE GORSUCH: -- but if you can
17 just --

18 MR. WAXMAN: -- with respect.

19 JUSTICE GORSUCH: Counsel, please.

20 Okay. If it's who benefits, if the only
21 question is who pays and when, the beneficiary
22 is the government fisc, why -- why shouldn't we
23 take account of the fact that the government's
24 on the other side of the V? How do we -- how do
25 we handle that?

1 MR. WAXMAN: Well, I think Mr.
2 Guarnieri has told you in his argument that the
3 government is on the other side because it -- it
4 -- it feels some duty to defend one particular
5 sub-provision of its regulations which, as our
6 briefs explain, is inconsistent with both the
7 statute and the provision that immediately
8 precedes it.

9 He has said in his brief and today
10 here that the government is quite troubled by
11 what this plan is trying to do and it
12 acknowledges that there very likely will be an
13 adverse financial effect on the Medicare fisc if
14 the Court reverses and adopts the -- the reading
15 of the statute that -- that Judge Murphy
16 provided in dissent below.

17 But here -- here is -- and I -- I -- I
18 apologize if I was wrangling with you, but I was
19 objecting to your suggestion, which I know you
20 don't mean, but I had heard it mistakenly, that
21 the only people who are harmed here are possibly
22 the Medicare fisc and my company or the
23 companies.

24 The harm here -- and this is -- this
25 is probably laid out as well as anywhere by the

1 amicus brief of the dialysis patients coalition,
2 which is three -- 30,000 dialysis ESRD
3 sufferers, who explain all the ways in which the
4 provisions of this plan harm people.

5 Now it -- you can say that, you know,
6 this is just a payment dispute, but it's not.
7 The core benefit that these plans provide is
8 payment for medical services.

9 And there's real harm, number one,
10 that in -- there is no -- uniquely, for this
11 service, there is no in-network available. So
12 there is no provider who has agreed not to
13 balance bill and who has guaranteed that you can
14 get treatment.

15 It requires higher co-pays and
16 deductibles, up to \$7,000 a year. It doesn't
17 provide any relief whatsoever for the first
18 three months in which there is no Medicare
19 backstop.

20 And you can say: Oh, well, this is
21 the Medicare Secondary Payer Act, you can always
22 enroll in Medicare secondary. The government
23 says that's an extra \$170 a month, which is, by
24 the way, the minimum. It is certainly not
25 applicable to everybody.

1 You pay Medicare \$170 a month or \$250
2 a month if you can get the secondary coverage.
3 This is in addition to what these people of
4 limited means and who are facing end-of-life
5 worries are already paying to the group health
6 plan. And if they can't reasonably afford to
7 pay two sets of benefits, they do what Patient A
8 did in this case -- -

9 JUSTICE ALITO: Mr. Waxman --

10 MR. WAXMAN: -- which is --

11 JUSTICE ALITO: -- isn't it true that
12 your company and another company control around
13 89 percent of the market for dialysis?

14 MR. WAXMAN: I don't know the numbers,
15 but they -- they -- there are essentially two
16 large players and then several other players.

17 JUSTICE ALITO: Yeah.

18 MR. WAXMAN: And the reason that that
19 exists, nobody -- I mean, there's -- to my
20 knowledge, there's never been an antitrust
21 complaint filed against these companies.

22 And if Marietta Memorial or MedBen had
23 some claim that they were, you know, refusing to
24 negotiate in good faith or agree to a reasonable
25 price, there are plenty of causes of action.

1 The reason that it exists, and I think
2 my friends on the other side agree, is because
3 Congress has chosen to -- for purposes of
4 Medicare or Medicare CMS has chosen, to
5 reimburse plan -- the centers at less than the
6 actual cost of providing the service, with the
7 understanding that in a few instances, that is,
8 the 10 percent of people who get outpatient
9 dialysis, they operate under negotiated
10 in-network plans with the providers.

11 JUSTICE ALITO: Well, the statistic I
12 have is that your average cost per treatment is
13 \$269 and you charge on average \$1,041. Is that
14 right?

15 MR. WAXMAN: Well, it's \$290, as -- as
16 we explain in our brief, and the average price
17 that we charge is \$1,000. I mean, this is well,
18 well-known -- this has been well-known to
19 Congress for over 30 years. This is how CMS has
20 chosen to allow the dialysis industry to stay in
21 business.

22 If what happens is that you reverse --
23 and plan -- plans widely can do what this plan
24 has done -- there -- there are going to be
25 hundreds or thousands of dialysis centers --

1 JUSTICE GORSUCH: But, Mr. Waxman, I
2 understand -- I understand you -- you're
3 attacking the -- the low rates this group plan
4 provides for dialysis, and -- and one -- one --
5 one -- one can make strong arguments about that.

6 But even if -- even if a group plan
7 agreed to reimburse at 200 percent of Medicare
8 rates, you know, \$500, you'd -- you'd still --
9 your companies would still reserve the right to
10 balance bill for the other \$500, say, right?

11 MR. WAXMAN: Yes. In other words, our
12 -- the -- the -- the -- the differentiation
13 here, Justice Gorsuch, is not -- doesn't depend
14 on the fact that they pay 87 and a half percent
15 of the already low Medicare rate.

16 JUSTICE GORSUCH: So, really, the --

17 MR. WAXMAN: It's --

18 JUSTICE GORSUCH: -- the scope of
19 their payment plan isn't relevant to your
20 argument.

21 MR. WAXMAN: The scope of their
22 payment plan is --

23 JUSTICE GORSUCH: You'd still reserve
24 --

25 MR. WAXMAN: -- our argument. And it

1 is this --

2 JUSTICE GORSUCH: -- you'd still
3 reserve the right to balance bill for whatever
4 difference there were, right?

5 MR. WAXMAN: We would still reserve
6 the right to balance bill. And as counsel has
7 pointed out, we don't cut off life-saving
8 treatment because people can't pay the
9 difference. We don't, in fact, balance bill --
10 people who come to our centers sign an agreement
11 saying they're responsible for the balance, but
12 people who can't afford it don't get billed.

13 So the question is not a loss of
14 coverage unless the interpretation that Judge
15 Murphy in dissent provided becomes the law of
16 the land, in which case there aren't going to be
17 for-profit dialysis centers in many, many, many
18 communities in the United States. It is already
19 only the ones that can be the most ruthlessly
20 efficient and have economies of scale that even
21 operate. That's why there are two predominant
22 companies here.

23 I mean, if I can just --

24 JUSTICE SOTOMAYOR: Counsel, just --

25 MR. WAXMAN: -- go to why --

1 JUSTICE SOTOMAYOR: -- just one
2 question in what you just said about this. Are
3 you -- how do -- how do you decide who can
4 afford this treatment? I'm sure there are
5 plenty of people with means who come in and say,
6 I can't afford it. Do you just accept their
7 word?

8 MR. WAXMAN: I mean, I --

9 JUSTICE SOTOMAYOR: So are you really
10 accepting whatever people are willing to pay?

11 MR. WAXMAN: Justice Sotomayor, I --
12 you know, this -- these are actually facts not
13 in the record, and they're actually facts I
14 don't know the answer to. So, you know, this --

15 JUSTICE SOTOMAYOR: I'm -- I'm just
16 curious.

17 MR. WAXMAN: But I -- I --

18 JUSTICE SOTOMAYOR: I do see -- I do
19 see your argument, however, that if every other
20 provider does this and is paying just whatever
21 the average cost might be because they're
22 charging 125 percent of Medicare -- paying 125
23 of Medicaid, that for many providers, if it's
24 uniform now that nobody is going to pay much,
25 that many of the providers just have to go out

1 of business, correct?

2 MR. WAXMAN: There's no question --

3 JUSTICE SOTOMAYOR: That's your point?

4 MR. WAXMAN: -- there's -- there's no
5 question about that. I mean, if you look, for
6 example, not only at the -- the Kidney Care
7 Partners' amicus brief but also the brief of
8 former CMS Administrator Scully, he explains why
9 that's the case.

10 Now I -- I do want to go, just before
11 my time runs out, whenever that will be, to
12 explain because there were a lot of questions
13 asked of my friends about the text. And I -- I
14 -- I fully endorse the "questions" or -- or
15 reading of the statute that Justice Kagan
16 provided, but I think it's unimportant --

17 JUSTICE SOTOMAYOR: You're off on
18 another -- not my question, correct?

19 MR. WAXMAN: Oh, I'm sorry, I --

20 JUSTICE SOTOMAYOR: Are you finished
21 with --

22 MR. WAXMAN: -- I answered your
23 question, which is --

24 JUSTICE SOTOMAYOR: Okay. No, you're
25 so --

1 MR. WAXMAN: -- I don't know the
2 facts.

3 JUSTICE SOTOMAYOR: Okay.

4 MR. WAXMAN: There -- there is simply
5 no -- under their reading of the statute, which
6 is you just look and see whether it calls out
7 ESRD and if it provides the same benefits,
8 whatever they are, you know, in-grown toenails
9 and whatever, to ESRD patients as to other, the
10 statute ends. You don't even need to read the
11 last 18 words of a 36-word provision.

12 Neither the Petitioners nor the United
13 States has given any content, yet to explain
14 what content there can be if -- to the -- to the
15 rest of it, if the first one simply means, if
16 you discriminate against ESRD patients by name,
17 that's illegal, and if you don't, that's not
18 illegal.

19 And what this -- but what this
20 provision says -- and I think, here, you know,
21 it's really important, in their reply brief, the
22 Petitioner says, look, what they wanted was
23 parity. They wanted parity between ESRD
24 patients. They wanted them to have the same
25 benefits whether you have ESRD or not.

1 The text completely refutes that.
2 First of all, a few lines above is the provision
3 about -- that deals with people over 65, and it
4 says, number one, you can't take into account
5 the fact that they're eligible for Medicare,
6 which is the same as the take-into-account
7 provision here.

8 And, second, it says, you must provide
9 -- they shall -- people over 65 shall be
10 entitled to the same benefits under the same
11 conditions as any other individual under age 65.
12 That's not what this provision -- what our
13 provision says.

14 What our provision says is you can't
15 differentiate on the benefits you provide
16 between individuals having ESRD and other
17 individuals covered by the plan on the basis of
18 -- and then it explains what it means to
19 differentiate -- on the basis of express. You
20 can't do it. You can't call it out by name.

21 There is a statutory proxy. You may
22 not do it on the basis of the need for renal
23 dialysis, and you may not do it in any other
24 manner that serves as a proxy for what ESRD
25 patients uniquely need.

1 That reading of the statute, Justice
2 Kagan's reading of the statute, gives meaning to
3 every word of the statute. The government's
4 reading or the Petitioners' reading gives no
5 meaning whatsoever.

6 The one example the government was
7 able to come up with in its brief, which is,
8 well, some plans may give greater benefits based
9 on tenure and people with ESRD may be older,
10 fails because a plan that gives higher benefits
11 based on tenure doesn't even meet their test for
12 the first part of the clause. It's not
13 differentiating on the basis of ESRD.

14 I mean, the anomaly in this case --
15 and I would be interested in MedBen's lawyer
16 response to this -- is, as we allege in the
17 complaint, MedBen, which is the plan
18 administrator and this little consulting firm
19 that's come up with the language that was
20 imposed by this plan, its -- it expressly touts
21 the benefit of its ability to "reduce dialysis
22 procedures provided to ESRD patients" by
23 implementing our proprietary dialysis health
24 plan language.

25 And, in this case, it is here trying

1 to deny that that is what its plan does.

2 CHIEF JUSTICE ROBERTS: Justice
3 Thomas, anything further?

4 Justice Breyer, anything?

5 Justice Sotomayor?

6 Justice Kagan?

7 Justice Barrett?

8 Okay. Thank you, counsel.

9 MR. WAXMAN: Thank you very much, Your
10 Honor.

11 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.
12 Kulewicz.

13 REBUTTAL ARGUMENT OF JOHN J. KULEWICZ
14 ON BEHALF OF THE PETITIONERS

15 MR. KULEWICZ: Thank you, Mr. Chief
16 Justice. Four brief points, please.

17 First, in response -- in further
18 response to Justice Alito's question about the
19 network, it does, of course, take two to
20 network. DaVita never tells you or never says
21 either in the record or even up to today that it
22 wants to come into the network. What it seeks
23 is the right to be paid at its undiscounted
24 charges.

25 That would destroy any incentive to

1 come into network. It would have, obviously,
2 the catastrophic effect upon patients in the
3 plans that we've discussed.

4 Justice Breyer, in response to your
5 ongoing search for a comparator, we -- we still
6 have not heard one. We don't have a comparator
7 in the brief of the Respondents. We have not
8 heard one today. What -- what comparator? If
9 we say that there is disparate impact and it
10 should be equal, the question is equal to what?
11 We haven't seen it in the briefs. We still
12 don't see it today.

13 My -- my friend indicated that -- that
14 the -- this cost containment measure of the plan
15 is unique to the plan. But, if the Court would
16 look at any -- from pages -- pages 52 through 92
17 of the Joint Appendix alone, there are 10 other
18 examples in there, including five other
19 out-of-network situations that the plan
20 addresses, one other reference-based price that
21 the plan uses, and four extraordinarily costly
22 surgical centers that are -- that are completely
23 excluded from the plan.

24 These don't have anything to do with
25 dialysis, but the point that I want to make is

1 that dialysis is not the only situation that is
2 a cost-containment function here.

3 And then, finally, in -- in response
4 to Justice Sotomayor's question about what would
5 happen to -- to plans, plans, of course -- or,
6 I'm sorry, what would happen -- what would
7 happen to providers, the providers, of course,
8 have gone to Congress before to get an increase
9 in the Medicare rate. They are still able to do
10 that.

11 And if the Court were to reverse, as
12 we are asking in this case, and enter final
13 judgment in favor of Petitioners on all claims,
14 perhaps that will give Respondents the incentive
15 to negotiate a network rate that is fair and
16 reasonable.

17 Thank you, Your Honor.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Thank you, Mr. Guarneri.

21 The case is submitted.

22 (Whereupon, at 1:06 p.m., the case was
23 submitted.)

24

25

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