

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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AMERICAN HOSPITAL ASSOCIATION,	)	
ET AL.,	)	
Petitioners,	)	
v.	)	No. 20-1114
XAVIER BECERRA, SECRETARY OF	)	
HEALTH AND HUMAN SERVICES, ET AL.,	)	
Respondents.	)	

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Pages: 1 through 83  
 Place: Washington, D.C.  
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5                                    Petitioners,        )  
6                                    v.                                ) No. 20-1114  
7   XAVIER BECERRA, SECRETARY OF        )  
8   HEALTH AND HUMAN SERVICES, ET AL., )  
9                                    Respondents.        )  
10  - - - - -

11  
12                                    Washington, D.C.  
13                                    Tuesday, November 30, 2021

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15           The above-entitled matter came on for  
16   oral argument before the Supreme Court of the  
17   United States at 11:23 a.m.

18  
19   APPEARANCES:  
20   DONALD B. VERRILLI, JR., ESQUIRE, Washington, D.C.; on  
21   behalf of the Petitioners.  
22   CHRISTOPHER G. MICHEL, Assistant to the Solicitor  
23   General, Department of Justice, Washington, D.C.;  
24   on behalf of the Respondents.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	DONALD B. VERRILLI, JR., ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	CHRISTOPHER G. MICHEL, ESQ.	
7	On behalf of the Respondents	38
8	REBUTTAL ARGUMENT OF:	
9	DONALD B. VERRILLI, JR., ESQ.	
10	On behalf of the Petitioners	79
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
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P R O C E E D I N G S

(11:23 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 20-1114, American Hospital Association versus Becerra.

Mr. Verrilli.

ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,  
ON BEHALF OF THE PETITIONERS

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

Congress enacted the statute at issue, which I will refer to as paragraph (14), to curb the discretion HHS normally enjoys when it sets Medicare rates for outpatient hospital services. For the drugs covered by the statute, paragraph (14) directs that the agency may set rates based on acquisition cost and vary rates by hospital groups if it conducts a cost study that meets the requirements of the paragraph.

If it does not do a cost study, rates must equal the average price for the drug determined by a cross-referenced statutory formula calculated and adjusted as necessary for purposes of the paragraph.

Now, in the order at issue, HHS set

1 rates for Section 340B hospitals different from  
2 the rates for all other hospitals and purported  
3 to base those rates on acquisition costs, but it  
4 did not conduct the cost study that the statute  
5 requires.

6 Now, at the threshold, the government  
7 asserts that courts cannot review that agency  
8 action. But no statutory text precludes review,  
9 and it makes sense that Congress would want  
10 review because the point of paragraph (14) was  
11 to constrain agency discretion.

12 On the merits, the government asserts  
13 that separate cost-based rates for 340B  
14 hospitals can be justified as an exercise of the  
15 agency's authority to adjust price-based rates  
16 that the statute requires in the absence of a  
17 cost study.

18 But paragraph (14) does not authorize  
19 HHS to vary price-based rates by hospital group,  
20 and it authorizes varying cost-based rates only  
21 in the presence of a cost study.

22 And beyond that, HHS didn't base the  
23 rates it set for 340B hospitals on average price  
24 at all. It estimated the acquisition cost using  
25 a different formula and then swapped that number

1 in for the average price number. That's a  
2 substitution. It's not an adjustment.

3 And it can't be justified under  
4 Chevron. Congress spoke directly to the  
5 question of when rates can be based on  
6 acquisition cost and varied by hospital groups,  
7 and that's when it conducts a cost study.  
8 Congress surely did not delegate to HHS the  
9 authority to remove that statutory requirement.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: Mr. Verrilli, if we  
12 don't agree with your last statement but rather  
13 with the D.C. Circuit that you -- and its  
14 application of Chevron and that we agree that  
15 Chevron disposes of this, would you argue or are  
16 you arguing that we should overrule Chevron to  
17 get to the statutory approach that you're  
18 taking?

19 MR. VERRILLI: Well, I think, Your  
20 Honor, the -- the way we've approached that  
21 question is that we think, with respect to the  
22 application of Chevron here, we are asking the  
23 Court to reject the D.C. Circuit's application  
24 of Chevron.

25 But there are several steps before

1 getting to that final question that Your Honor  
2 asked. We do think that what the D.C. Circuit  
3 did was essentially go hunting for ambiguity and  
4 purport to find it by finding superfluity in one  
5 provision and superfluity in another and saying  
6 there's no hierarchy of superfluity, throwing up  
7 its hands and deferring.

8           We think this is a situation in which  
9 the statute is clear, unambiguous, at the first  
10 stage of Chevron I -- of Chevron and, therefore,  
11 that one doesn't get to the -- to the question  
12 of whether Chevron needs to be overruled.

13           And even if the Court finds some  
14 ambiguity in that with respect to the statute,  
15 we think this is a case very much like MCI or  
16 very much like the Iowa Utilities Board case,  
17 which is cited at page 16 of the Chamber brief,  
18 in which whatever ambiguity and, therefore,  
19 discretion the agency has, this is so far  
20 outside of it because it effectively writes this  
21 provision out of the statute entirely, and  
22 Congress can't possibly have intended to  
23 delegate the agency the authority to do that.

24           JUSTICE BREYER: Why? I mean, it's --  
25 I read the -- you understand this better than I

1 do. I looked at paragraph (14). Okay, we're in  
2 this thing that says Roman numeral II down --  
3 down here on page 42a, and it says now what  
4 we're trying to do here is if -- we -- we -- we  
5 want them -- we'll pay them back for what they  
6 pay the hospitals. That's 1. But, if you can't  
7 figure out what they pay, then look at the price  
8 of the drug. That's 2. And then it says "as  
9 calculated and adjusted by the Secretary as  
10 necessary for purposes of this paragraph."

11 So I thought, A, what's the paragraph?  
12 The paragraph is (14). That's made pretty --  
13 pretty clear because above they say W -- they  
14 say E is a subparagraph, okay? So the paragraph  
15 must be (14).

16 Now I read (14) two or three times,  
17 and I say, what's the point of that? And the  
18 point seems to be to pay the hospitals what they  
19 actually pay for the drugs, which sometimes you  
20 can figure out and sometimes you can't. And  
21 when it says adjust for purposes, they mean  
22 adjust so that you get closer to what the  
23 hospitals are really paying for these drugs.  
24 And that's what they did.

25 MR. VERRILLI: So --



1 JUSTICE BREYER: Where am I wrong?

2 MR. VERRILLI: Yeah. So I do -- I do  
3 --

4 JUSTICE BREYER: And I -- I bet there  
5 are at least seven places, so go ahead.

6 MR. VERRILLI: -- I do disagree with  
7 that, Your Honor, because I think there's a  
8 fundamental precept at stake here --

9 JUSTICE BREYER: What?

10 MR. VERRILLI: -- which is that  
11 Congress doesn't just legislate objectives. It  
12 legislates the means by which those objectives  
13 are to be accomplished. And --

14 JUSTICE BREYER: That isn't what this  
15 says. This says "for purposes of this  
16 paragraph."

17 MR. VERRILLI: Right. And --

18 JUSTICE BREYER: And "purposes" refers  
19 to, I think, objective.

20 MR. VERRILLI: So -- but -- but what I  
21 think the objective of this paragraph is, that  
22 this paragraph is all about the means. Remember  
23 the provenance of this paragraph is that,  
24 previously, these rates were set under the  
25 general section 2 authority --

1 JUSTICE BREYER: Yeah.

2 MR. VERRILLI: -- that the agency --  
3 the agency had. And that was producing  
4 unsatisfactory results. And so Congress pulled  
5 this out of the section 2 methodology and said  
6 we are actually going to prescribe in minute  
7 detail --

8 JUSTICE BREYER: Uh-huh.

9 MR. VERRILLI: -- the means by which  
10 you are going to calculate the rates for this.

11 JUSTICE BREYER: They did.

12 MR. VERRILLI: And --

13 JUSTICE BREYER: Why did they pull it  
14 out?

15 MR. VERRILLI: They --

16 JUSTICE BREYER: What word did you  
17 just use?

18 MR. VERRILLI: They -- they pulled it  
19 out because --

20 JUSTICE BREYER: It was  
21 unsatisfactory.

22 MR. VERRILLI: Correct. Paragraph 2  
23 of --

24 JUSTICE BREYER: All right. Now, if  
25 it's unsatisfactory, we want more satisfactory.

1 What counts as satisfactory? Getting closer to  
2 the cost.

3 MR. VERRILLI: No.

4 JUSTICE BREYER: And now we're at  
5 purposes.

6 MR. VERRILLI: No, I think that the  
7 purpose of the statute is -- is evident on its  
8 face, and the purpose of the statute is to  
9 ensure reliability and accuracy and transparency  
10 in the methods that Congress has prescribed for  
11 calculating the rates and accuracy and  
12 transparency in the calculation of average cost  
13 rates by using a cost study, accuracy and  
14 transparency in the calculation of price-based  
15 rates using the statutory formula, adjusted as  
16 necessary for purposes of the paragraph.

17 But to read the "for purposes of the  
18 paragraph" language as -- as giving them carte  
19 blanche to, A, set acquisition cost rates and,  
20 B, vary those rates between hospital groups --  
21 which is the key point here, of course, they  
22 have varied the rates between hospital groups --  
23 without doing the cost study that subparagraph 1  
24 says you have to do to do those things --

25 CHIEF JUSTICE ROBERTS: Well, I don't

1 know -- maybe accuracy, but the transparency of  
2 Section 1395l(t)(14)(A)(iii)(II), they haven't  
3 succeeded in that objective.

4 But it -- it does seem to me you have  
5 to have some limiting principle for what  
6 "necessary for purposes of this paragraph"  
7 means, or your -- your -- your case is pretty --  
8 well, I think it might be wrong, right? I mean,  
9 you -- because you have to say that doesn't mean  
10 they can do what they would otherwise do under  
11 Roman numeral I.

12 MR. VERRILLI: Correct. But -- and  
13 there are things --

14 CHIEF JUSTICE ROBERTS: Well, so what  
15 does it mean? Where -- I mean, "purposes of  
16 this paragraph" seems pretty unlimited.

17 MR. VERRILLI: You know, I -- I don't  
18 think it can be read as unlimited, Your Honor,  
19 for the reason that it creates this giant  
20 superfluity problem. Subparagraph 1 seems very  
21 clearly to say that -- that rates shall be equal  
22 to acquisition cost as determined by the  
23 Secretary, taking into account the cost study.

24 All of that becomes irrelevant if one  
25 reads paragraph -- the sub --

1 CHIEF JUSTICE ROBERTS: Right. No --

2 MR. VERRILLI: -- the second subclause  
3 that way, and that seems to me itself to be a  
4 very significant constraint on the extent to  
5 which the agency can rely --

6 CHIEF JUSTICE ROBERTS: Well, so what  
7 --

8 MR. VERRILLI: -- on that, and so --

9 CHIEF JUSTICE ROBERTS: -- do you  
10 think "purposes" means?

11 MR. VERRILLI: So I -- I think  
12 "purposes" means that when -- when the agency is  
13 following the methodology for rates based on  
14 acquisition costs, that it's -- it -- it needs  
15 to follow the steps that the statute prescribes  
16 to ensure that those rates are as accurate and  
17 transparent as possible. And then --

18 CHIEF JUSTICE ROBERTS: No, this is  
19 kind of a catch-all at -- at the end. The  
20 Secretary can adjust the costs that he's come up  
21 with for the purposes.

22 MR. VERRILLI: But the price-based  
23 rates are calculated in an entirely different  
24 manner. That statute that is cross-referenced  
25 in subclause 2 takes you to another statute, and

1 that other statute contains a very detailed  
2 formula for how one calculates a price-based  
3 rate. And one looks at entirely -- the agency  
4 has to look at an entirely different set of data  
5 for the subclause 1 acquisition cost analysis.

6 CHIEF JUSTICE ROBERTS: Yeah, yeah,  
7 that's your overarching argument. I want to --  
8 he does have the authority, or she, to adjust  
9 for -- consistent with the purposes. What is  
10 that adjustment? Are you saying it can only be  
11 up to 1 percent, up to 10 percent? What?

12 MR. VERRILLI: No, I'm saying that it  
13 needs to be with -- the adjustment to the  
14 price-based rates has to be consistent with the  
15 authority to set price-based rates. So they can  
16 make adjustments, for example, as we have  
17 argued, they can make adjustments for overhead  
18 to ensure that -- that there's fair  
19 compensation. There are other kinds of  
20 adjustments that they can make to fill in gaps  
21 in that statutory formula that are --

22 JUSTICE KAGAN: But like what, I mean,  
23 just to be more concrete here.

24 MR. VERRILLI: Yeah, sure.

25 JUSTICE KAGAN: Because I understand

1 the basic point that this phrase shouldn't be  
2 taken to give the Secretary authority to  
3 circumvent Roman numeral I. But -- but what is  
4 left? I mean, the overhead costs seem to be  
5 provided for elsewhere, so what are these  
6 adjustments that this Roman numeral II provision  
7 is talking about?

8 MR. VERRILLI: So let me talk about  
9 overhead costs, and then I'll give you some  
10 other examples.

11 With respect to overhead costs, it  
12 isn't entirely taken care of. Paragraph (14E)  
13 gave authority to adjust for overhead for two  
14 calendar years, and thereafter the authority  
15 flows from this paragraph. And although there  
16 is a plus 6 percent figure built into the price  
17 formula in the cross-referenced statute that I  
18 identified, it could well be that for some  
19 particular drugs that is inadequate.

20 For example, some -- you know, these  
21 are extremely serious, significant drugs,  
22 chemotherapy drugs, radiation therapy drugs, et  
23 cetera. Some of them come with very high  
24 handling costs, refrigeration, special  
25 treatment, et cetera, so one might adjust that

1 formula in order to ensure that there's fair  
2 compensation for that.

3           There are other situations just -- I  
4 can give you some specifics in the statute, but  
5 there are other generic situations that one can  
6 imagine. Let's say year over year over year the  
7 average price for a particular drug is coming in  
8 at a certain level, and then the data comes in  
9 for a particular year and somehow it's dropped  
10 by 80 percent and that seems like an anomaly.

11           That's a situation, it seems to me, in  
12 which the agency would exercise its authority to  
13 adjust the results of the statutory formula to  
14 bring them into line with a more accurate  
15 average price.

16           And then some other specifics, one we  
17 cite at page 24 of our brief, which is the  
18 statutory discretion in the cross-referenced  
19 formula to include other price concessions in  
20 calculating the average price. They've got to  
21 make a judgment: Are they going to be in? Are  
22 they going to be out? That's an adjustment.

23           Another one is 1395w-3(a)(c)(2)(B) --  
24 excuse me for the long references, but they are  
25 what they are in this case -- that's the



1 discretion to exclude certain sales from an  
2 entity that are nominal in amount. The agency  
3 has to make a judgment about that. That's an  
4 adjustment.

5 Another one, there's Section  
6 1395w-3(a)(c)(4), payment rules for when prices  
7 are not available. When they don't actually  
8 have the data, they've got to estimate that.  
9 That's an adjustment. All of those adjustments  
10 are done, though, to bring that average price  
11 number into line, making it a more accurate  
12 average price number.

13 And, again, I do think the key point  
14 here is that the -- the -- the main thing that  
15 happened here --

16 JUSTICE KAGAN: But aren't those  
17 adjustments the adjustments that lead to the  
18 average price number? What Roman numeral II --  
19 I don't know even how to do this -- is referring  
20 to are adjustments made to the average price.

21 MR. VERRILLI: Well, I'm not --

22 JUSTICE KAGAN: So any adjustments  
23 that are being made in -- in -- in -- in saying  
24 what the average price is has already been done.  
25 Now the Secretary has additional authority.

1           MR. VERRILLI: I don't think one needs  
2 to read that provision that way at all, Your  
3 Honor. It says calculated and adjusted. And I  
4 think, if one reads those two words together,  
5 it's conveying the sense that I'm describing of  
6 what the Secretary's responsibility is or  
7 authority is in trying to come up with a more  
8 accurate number.

9           Particularly when we're talking about  
10 varying rates by hospital group, you cannot  
11 determine on the basis of the price data that --  
12 that that statutory cross-reference requires the  
13 agency to look at what the rates for hospital  
14 groups are because that's data that comes from  
15 manufacturers. It's not broken out by hospital  
16 group. It's the average sale price of the  
17 manufacturers to everyone.

18           JUSTICE ALITO: And I -- I gather you  
19 think that under subparagraph 2, the Secretary  
20 can make distinctions among providers? It -- it  
21 -- you say it can't make distinctions among  
22 hospital groups, but it can make distinctions  
23 between hospitals in general and other  
24 providers, is that right? That's what I  
25 understand you to say on page 44 of your brief.

1           MR. VERRILLI: I think, if the -- if  
2 the data would allow them to make meaningful  
3 price distinctions, then I don't read the  
4 statute as foreclosing it. The problem, of  
5 course, is that the data doesn't allow them to  
6 make -- the data that the statute requires them  
7 to consider doesn't allow them to make those  
8 distinctions because the data isn't broken out  
9 by hospital versus non-hospital purchaser.

10           JUSTICE ALITO: Well, you say on page  
11 44 the agency could adjust average price numbers  
12 to focus more closely on price paid by hospitals  
13 since those numbers include other kinds of  
14 medical providers as well. So I took that to  
15 mean you can draw a distinction between  
16 hospitals and other providers. Is that right?

17           MR. VERRILLI: If the data supports  
18 it, I think that that wouldn't -- that wouldn't  
19 be outside of the scope of the -- the authority.  
20 But the statutory authority here that the agency  
21 would have to have is the authority to vary the  
22 rates among hospital groups. And instead --

23           JUSTICE ALITO: Well, okay. And how  
24 do you -- what do you find in subparagraph 2  
25 that provides the basis for a distinction

1 between adjusting prices among hospital groups  
2 versus adjusting prices of all hospital --

3 MR. VERRILLI: Well, I --

4 JUSTICE ALITO: -- incurred by all --  
5 paid by all hospitals versus other providers?

6 MR. VERRILLI: Well, I think the key  
7 point is that -- I think the key point is that  
8 subclause 1 confers authority to vary among  
9 hospital groups if a condition is met, a cost  
10 study.

11 Subclause 2 doesn't contain that  
12 authorization to vary among hospital groups. It  
13 just isn't there. And that seems to me quite  
14 significant. Congress granted it in the first  
15 subclause, did not grant it in the second  
16 subclause. And I think the reason for that is  
17 because Congress wanted -- now I have to infer  
18 this because there really isn't any legislative  
19 history here -- but I think the reason that  
20 Congress wanted that, made that distinction, is  
21 because it's a significant thing to break out  
22 hospital groups and have them be reimbursed at  
23 differential rates.

24 And so, if you're going to do that, we  
25 want to make sure that that's a -- that you're

1 acting on reliable numbers. You have to look at  
2 the acquisition cost data. It has to be  
3 statistically significant. You've got to take  
4 the steps that the statute requires, and then  
5 you can make those judgments.

6 And I think there's a -- you know,  
7 there's actually a common-sense reason why  
8 Congress would have wanted that, which is --

9 JUSTICE ALITO: Is there any dispute  
10 here that the 340B hospitals pay a lot less?

11 MR. VERRILLI: No. They -- it's --  
12 it's certainly a subsidy that --

13 JUSTICE ALITO: It's not disputed,  
14 right?

15 MR. VERRILLI: No, it's not disputed.  
16 There's a subsidy here, but, of course, it's a  
17 subsidy that Congress was well aware of when it  
18 enacted paragraph (14). The 340B program had  
19 been in effect in a -- for a while.

20 And, in fact, that statute that  
21 Congress cross-references in the second  
22 subclause to calculate the rates, it  
23 specifically says that the discounts provided to  
24 340B hospitals shall not be included in that  
25 calculation. And the agency recognizes that at

1 page 53 of the Joint Appendix.

2           So it would be very odd to say that  
3 Congress said don't -- don't consider that when  
4 you're -- when you're factoring in this number,  
5 but then let it back in the back door by  
6 allowing an adjustment that effectively sets a  
7 different cost-based rate for 340B hospitals  
8 without doing the very thing that the statute  
9 requires as a precondition to have.

10           JUSTICE BARRETT: Mr. Verrilli, should  
11 we care about the difference between the word  
12 "cost" and "price"? Does price do any work  
13 here?

14           MR. VERRILLI: So I -- I -- I think  
15 that, Justice Barrett, what matters there is  
16 that, in the operation of this statute, that  
17 "cost" and "price" are two different things  
18 because they go to two different data sets.

19           The calculation of cost under the  
20 first subclause goes to -- requires the agency  
21 to get data from the hospitals about what they  
22 actually spend. So it provides a more accurate  
23 basis for assessing what the accurate -- what  
24 the cost is and then, in turn, an accurate basis  
25 for varying among hospital groups.

1           The price data, as I said earlier, the  
2 average price provision in subclause 2, as I  
3 said earlier, cross-references a statute which  
4 then tells the agency to look at data that they  
5 get from the manufacturers.

6           And then that statute is very  
7 detailed. It says include these kinds of  
8 rebates; don't include those kinds of rebates.  
9 Include these kinds of discounts; don't include  
10 those kinds of discounts. And come up with --  
11 and the statutory text is -- the average price  
12 for the drug for the year.

13           JUSTICE BARRETT: And I think --

14           MR. VERRILLI: It seems very clear to  
15 me to --

16           JUSTICE BARRETT: -- that's a good  
17 argument for you because it's hard -- I mean,  
18 there's a difference between the sticker price  
19 for -- on a car and, you know, what the actual  
20 cost is, you know, when I leave the lot. And  
21 price does seem like something like the -- as  
22 you point out, the definite article --

23           MR. VERRILLI: Right.

24           JUSTICE BARRETT: -- the average price  
25 seems -- I -- I take your point, it seems harder

1 to vary.

2 MR. VERRILLI: Right. And then -- and  
3 then I do think that this goes to what the  
4 meaning of "adjust" is here. Now, you know,  
5 we've gone back and forth in the briefs about  
6 whether you can have a major adjustment or a  
7 minor adjustment, but I do think, with respect  
8 to the meaning of the word "adjust," at a  
9 minimum, what it does is require you to have a  
10 consistent baseline. You start with A and you  
11 adjust A. You don't start with A and substitute  
12 something totally different in for it and call  
13 it an adjustment. So --

14 JUSTICE SOTOMAYOR: Counsel, I'm  
15 looking not at cost because -- or price because,  
16 as I see it, price is what it -- acquisition  
17 cost is based on data that shows the actual  
18 price or cost, but the average acquisition --  
19 the average price for the drug is gotten from  
20 manufacturers, and you have this very rigorously  
21 articulated system to decide cost.

22 And under the three subdivisions,  
23 basically, Congress says you can look at this  
24 plus X, Y, and Z discounts but not A, B, and C  
25 discounts. And one of the A, B, and C discounts



1 they don't let you look at is the 340B. That's  
2 what you mentioned earlier --

3 MR. VERRILLI: Correct.

4 JUSTICE SOTOMAYOR: -- correct? And I  
5 think you have a stronger argument to say, if  
6 Congress says you can't include the 340B costs,  
7 then you can't add it back in and adjust it  
8 later when they restricted you from using it  
9 once already.

10 I have a more difficult time buying  
11 your argument that a word as broad as "adjust"  
12 for purposes of this paragraph would limit the  
13 agency altogether from deciding that there were  
14 regional differences that had to be compensated.

15 So, for example, if there were higher  
16 wages in one part of the country as opposed to  
17 another, I don't see why the agency couldn't and  
18 wouldn't say for the Northeast, we think the  
19 ASOP should be 8 percent as opposed to 6 percent  
20 because wages are comparable to overhead costs  
21 and we should vary the ASOP on that basis.

22 And so I -- I have problems with your  
23 argument that, in all situations, we should say  
24 the agency can't define regional differences or  
25 can't define hospital groups. I find it a

1 stronger argument to say they can't do it on  
2 340B because acquisition cost says you can't  
3 base it on that.

4 MR. VERRILLI: So, Your Honor, given  
5 that you seem to have embraced at least part of  
6 our argument, I'm hesitant to push back.

7 JUSTICE SOTOMAYOR: I know you're --  
8 you're hesitant to --

9 MR. VERRILLI: But -- but -- but --  
10 but I do want to push a little bit --

11 JUSTICE SOTOMAYOR: No, because that's  
12 the most important.

13 MR. VERRILLI: -- because I do think  
14 the provenance of the statute matters. That's  
15 the kind of judgment that the agency could make  
16 prior to the enactment of paragraph (14) when it  
17 was calculating rates under paragraph 2. That's  
18 exactly what paragraph 2 authorizes the agency  
19 to do, is make those kinds of distinctions.

20 And what Congress did was pull these  
21 judgments out of paragraph 2 and say no, no,  
22 we're not going to have you make those kinds of  
23 decisions anymore, and with -- and you can make  
24 the -- you can set rates based on acquisition  
25 cost if you've got the reliable, transparent

1 data.

2           And if I could just make a point about  
3 that, I think an important reason why Congress  
4 would want that kind of reliable, transparent  
5 data as a basis for varying among hospital  
6 groups is to avoid political favoritism and  
7 avoid going in -- powerful interests going in to  
8 the agency and jawboning the agency into giving  
9 them higher rates based on whatever formula they  
10 can come up with.

11           What this statute does is say no, no,  
12 there's one way to do this and one way only;  
13 that is get the acquisition costs, make -- do a  
14 statistically significant analysis of them, and  
15 if you can justify the differences based on that  
16 transparent data that we, Congress, can look at  
17 and the public can look at, go ahead and make  
18 that. If you don't have that, no variations  
19 among hospital groups.

20           And then I do think that goes back to  
21 the statutory language about "the" average price  
22 for "the" drug for "the" year, which seems to me  
23 very clearly to be an indication of Congress  
24 that there is a single average price for the  
25 drug for the year and the absence of any

1 statutory authority to vary among hospital  
2 groups when undertaking that task.

3           And I think it's -- I, again, am  
4 inferring this -- but I think that's a reason to  
5 infer that Congress would have wanted to  
6 constrict the agency's ability to make these  
7 group-based variations in situations where they  
8 don't have the transparent, reliable data --  
9 data that a cost study provides.

10           JUSTICE BREYER: Okay. This has been  
11 -- you've -- as I've got this so far, dangerous,  
12 but I'm looking at 2, and it says the average  
13 price for the drug in the year -- quite right --  
14 calculated and adjusted as necessary for  
15 purposes of this paragraph. So I'm back to  
16 "purposes."

17           And you make a strong argument. You  
18 say, look, average price for the drug in the  
19 year is something that some people in the agency  
20 might read off a few charts, and they read that  
21 off from a drugstore's sale price or whatever.  
22 And then they make some changes in it because it  
23 isn't quite right, but they can't go so far as  
24 to cut it 28 percent because they think the  
25 whole thing's too expensive. That isn't what

1 "purposes" allows them to do. It's the smaller  
2 thing, not the bigger thing.

3 So far, am I -- are you -- is that  
4 right?

5 MR. VERRILLI: That's part of our  
6 argument, yes.

7 JUSTICE BREYER: A part, okay. Next  
8 part. Now suppose I think, which I'm not sure,  
9 but it's possible, you know, I now see you could  
10 read it both ways. It's possible. Now what do  
11 I do?

12 And the natural instinct for me is to  
13 say Chevron. Ahh, but Chevron's controversial,  
14 et cetera. And, actually, when you think about  
15 it, Chevron's the wrong case, because whatever  
16 Congress wanted done here, it didn't want to  
17 give the agency to choose. They did something  
18 definite. That word "purposes" means definite.  
19 It's definite. It means you're right or they're  
20 right. And so the right case is Skidmore.

21 Now that doesn't help you --

22 MR. VERRILLI: Well --

23 JUSTICE BREYER: -- because Skidmore  
24 says, when we get to something like they know  
25 more about it, just like A. James Casner used to

1 know more about property than I did, when they  
2 get to something they know more about, we ought  
3 to pay attention to them. So I don't want you  
4 to sit down, please, without saying something  
5 about Skidmore.

6 MR. VERRILLI: Sure. Two points about  
7 that. I don't -- I don't think Skidmore helps  
8 in this situation, and I think that's because  
9 you can't -- this is not a question about the  
10 agency's expertise. This is a question about  
11 whether the agency is invoking the statutory  
12 purpose to go beyond the means that Congress  
13 prescribed for carrying out that purpose.

14 That's a question of statutory  
15 interpretation. And this Court has said over  
16 and over again that agencies can't invoke  
17 purpose to go beyond the specific means that  
18 Congress prescribed.

19 And I really think that's critical  
20 here. This was -- I mean, micromanaging may be  
21 putting it a little too strongly, but Congress  
22 legislated with respect to this category of  
23 drugs in minute detail. It -- it said you're  
24 going to either do it this way, acquisition cost  
25 with a cost study that's statistically

1 significant, or you're going to do it that way.  
2 You're going to set the average price for the  
3 drug for the year using this statutory formula.  
4 Now -- with -- of course, with the power to  
5 calculate and adjust as necessary for purposes  
6 of the paragraph.

7 But I think to read that language, "as  
8 necessary for the purposes of the paragraph," to  
9 give the agency essentially carte blanche to do  
10 whatever it wants is really to disregard the  
11 fundamental judgment that Congress made when it  
12 enacted this provision.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Thomas?

15 JUSTICE THOMAS: None for me, Chief.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Breyer, anything further? No?

18 Justice Alito?

19 JUSTICE ALITO: Yeah. Can I just take  
20 you back to Justice Thomas's first question? If  
21 the only way we can reverse the D.C. Circuit is  
22 to overrule Chevron, do you want us to overrule  
23 Chevron?

24 MR. VERRILLI: Yes. We want to win  
25 the case. Yes.

1 (Laughter.)

2 JUSTICE GORSUCH: Along those lines,  
3 counsel, say that I -- I don't buy the argument  
4 that this case implicates the major questions  
5 doctrine, as you've suggested, and that  
6 adjustments in light of this "purposes of this  
7 paragraph" can be reasonably read as the D.C.  
8 Circuit said it could be read and as some of my  
9 colleagues have suggested here today.

10 Say I accept those things. You  
11 indicate that we should reconsider Chevron, and  
12 I -- you just did again in -- in -- in response  
13 to Justice Alito. What would you have us  
14 replace it with? What would it look like in  
15 your world?

16 MR. VERRILLI: Well, I -- I think the  
17 -- I wouldn't presume to tell the Court what it  
18 should do in response to that question, but I --  
19 there's -- there are some options, and one  
20 certainly is to look at this statute and say:  
21 Well, we don't think this is the case. We think  
22 this statute is unambiguous.

23 JUSTICE GORSUCH: I understand that.

24 MR. VERRILLI: But to say -- but to  
25 say --



1 JUSTICE GORSUCH: But if a majority --

2 MR. VERRILLI: Sure.

3 JUSTICE GORSUCH: -- of the Court  
4 disagrees with you about that, and you say you  
5 still want to win the case, what does that look  
6 like?

7 MR. VERRILLI: Well, I -- I think it  
8 could look like any number of things. One is,  
9 even if one thinks that the reading of the D.C.  
10 Circuit is within the realm of possibility and  
11 this idea of dueling superfluties is a valid  
12 justification for invoking Chevron, which I  
13 don't think it is, that there's clearly a best  
14 reading of this statute, and it's our reading,  
15 that because the consequence of reading it in  
16 the way that the -- that the government is  
17 asking you to read it, is that you really do  
18 read -- you take -- you take something that  
19 Congress prescribed as mandatory, as a  
20 precondition for setting cost-based rates, and  
21 you turn it into an option that the agency is  
22 free to accept or reject as it wishes. That's  
23 clearly not the best reading of the statute, so  
24 I think that gets you to where we want to go.

25 The other -- the other way seems to me

1 just -- I think we're not really exactly  
2 invoking the major questions doctrine, but  
3 there's a corollary here, which is --

4 JUSTICE GORSUCH: None of that works  
5 for me, say. Then what?

6 MR. VERRILLI: Well, I -- I -- I -- I  
7 -- I've told you, if you think that you need to  
8 overrule Chevron and --

9 JUSTICE GORSUCH: Then you just pick  
10 the best -- the best reading, 51-49, you win?

11 MR. VERRILLI: Yes, yes.

12 JUSTICE GORSUCH: Okay. And -- and  
13 you in your cert petition suggested that this  
14 case is part of a troubling trend, that though  
15 this Court has emphasized repeatedly that lower  
16 courts should employ all the tools of statutory  
17 interpretation, as it turns out, at least  
18 according to your studies, only about 30 percent  
19 of them resolve cases at step one and that this  
20 case is an example of what you call that  
21 troubling trend. I wanted to give you a chance  
22 to comment on that.

23 MR. VERRILLI: Yeah, I -- I just  
24 elaborate on the dueling superfluities point, I  
25 mean, that's the essence of the finding of

1 ambiguity in the court of appeals, is that,  
2 well, if adjust -- our reading of "adjust" can't  
3 be right because overhead is already accounted  
4 for in other ways, so there's a superfluity  
5 there.

6 True, there's a superfluity in the way  
7 the government wants to read it because the  
8 mandatory -- what seems like a mandatory cost  
9 study requirement in subclause A for acquisition  
10 cost rates and variances among hospital groups,  
11 sure, that -- that -- that becomes superfluous  
12 in a sense. But there's no hierarchy of  
13 superfluity here, and, therefore, Chevron  
14 governs and we defer.

15 Well, respectfully, as I -- I tried to  
16 illustrate in my conversation with Justice  
17 Kagan, there isn't superfluity with our reading.  
18 But even if you grant that there is, there's a  
19 vast difference between superfluity in the sense  
20 of belt and suspenders, which is the -- the  
21 superfluity accusation against our position, and  
22 superfluity in the sense of writing a whole  
23 column of the U.S. Code out of the Code entirely  
24 and telling the agency it doesn't have to do the  
25 very thing that Congress said it has to do.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 No?

3 Justice Kavanaugh?

4 JUSTICE KAVANAUGH: I have a couple  
5 questions on -- to follow up on Justice  
6 Gorsuch's question. If you take Footnote 9 of  
7 Chevron seriously, that says to apply all the  
8 traditional tools of statutory interpretation  
9 and construction, and you get -- presumably, if  
10 you do that, you get an answer. I understand  
11 that to be what you're saying we should do here  
12 and not give up too soon, but follow it all the  
13 way through and try to --

14 MR. VERRILLI: Right. I -- I -- I  
15 guess what we're -- we're advocating the Court  
16 essentially follow the path that was set forth  
17 for our deference in Kisor. The same idea here.

18 You've got to exhaust the toolkit, and  
19 that requires consideration of context and  
20 structure and the overall operation of the  
21 statute, the provenance of the statute, all the  
22 things that would bring to bear -- you would  
23 bring to bear. And if you do, we think there's  
24 one clear answer.

25 JUSTICE KAVANAUGH: And then a second

1 question, more on what Congress was getting at  
2 here. You said they did this to protect against  
3 executive favoritism of particular kinds of  
4 hospitals. You didn't kind of connect that up  
5 to what happened here with the 340B hospitals.

6 But I gather what happened is that HHS  
7 thought just it was inappropriate to give this  
8 degree of subsidy to a certain category of 340B  
9 hospitals. Is that --

10 MR. VERRILLI: Yeah. So --

11 JUSTICE KAVANAUGH: -- the accurate  
12 story, or what is the story?

13 MR. VERRILLI: -- a couple -- a couple  
14 points about that. I -- I want want to be clear  
15 that political favoritism is an inference.  
16 There isn't any legislative history --

17 JUSTICE KAVANAUGH: No, but it could  
18 be --

19 MR. VERRILLI: -- suggesting that, but  
20 it seems like a quite reasonable inference to  
21 me.

22 JUSTICE KAVANAUGH: Regional  
23 favoritism --

24 MR. VERRILLI: Yeah.

25 JUSTICE KAVANAUGH: -- category

1 favoritism.

2 MR. VERRILLI: Now, with respect to  
3 340B hospitals, yes, that's what the agency  
4 decided, that it -- that this subsidy had been  
5 around for a long time. It didn't want it to  
6 continue.

7 And we're not saying that that's  
8 beyond the agency's authority. We're saying  
9 that the agency has to -- if the agency wants to  
10 get rid of it, it's got two options, it seems to  
11 me. One is you follow the means that the  
12 statute prescribed for varying by hospital  
13 groups, which is you do a cost study. You  
14 determine -- you -- you -- you come up with a --  
15 a -- you come up with data that's statistically  
16 significant on which you can rely to justify the  
17 variation and you vary it.

18 And then, if -- if -- if you don't  
19 want to do that, if you think it's too  
20 burdensome, you think it's bad policy, you go to  
21 Congress and say change the law. But they  
22 didn't do either of those things. Instead, they  
23 took a shortcut that the statute doesn't  
24 authorize.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: All right.

2 Thank you, counsel.

3 Mr. Michel.

4 ORAL ARGUMENT OF CHRISTOPHER G. MICHEL

5 ON BEHALF OF THE RESPONDENTS

6 MR. MICHEL: Mr. Chief Justice, and

7 may it please the Court:

8 Petitioners ask this Court to hold  
9 that Congress compelled Medicare to knowingly  
10 and dramatically overpay 340B hospitals for  
11 covered drugs at the direct expense of Medicare  
12 beneficiaries and other hospitals. Neither the  
13 statutory text nor common sense supports that  
14 result.

15 First, Congress precluded review of  
16 covered drug rates for the same reasons that it  
17 precluded review of other OPPS rates. Those  
18 rates are bound together by the statutory budget  
19 neutrality requirement, and invalidating them  
20 years after payments have gone out the door  
21 would badly destabilize the Medicare system.

22 Congress instead reserved review for  
23 itself. Indeed, as my friend said this morning,  
24 the highly detailed nature of this provision  
25 illustrates that fact.

1           In any event, the rates here are  
2 lawful under that provision. Subclause 2  
3 authorizes the agency to adjust rates "for  
4 purposes of paragraph (14)." Those purposes  
5 must include aligning reimbursement rates with  
6 acquisition costs. After all, that is what  
7 subclause 1 expressly provides.

8           And, importantly, the cross-references  
9 in subclause 2 are to proxies for acquisition  
10 cost. The two subclauses are thus different  
11 means to the same end.

12           Petitioners have no plausible account  
13 of paragraph (14)'s purposes that exclude  
14 cost-based reimbursement. My friend said this  
15 morning that HHS could exclude price concessions  
16 or tailor the rate for different providers. But  
17 that's not materially different than what HHS  
18 did here.

19           My friend suggests that 340B, Section  
20 340B itself, ensures providers, 340B providers,  
21 a subsidy under Medicare. But that cannot be  
22 correct because everyone agrees that subclause 1  
23 allows the agency to set the rate for 340B  
24 hospitals at acquisition cost.

25           The agency here made a more modest



1 adjustment, requiring 340B providers to share  
2 some of their discount with Medicare  
3 beneficiaries in other hospitals. That sound  
4 approach was well within the agency's statutory  
5 authority, and the decision below should be  
6 affirmed.

7 JUSTICE THOMAS: Mr. Michel, it's hard  
8 to see what's left of subparagraph 1 if we  
9 accept your argument, your interpretation of  
10 subparagraph 2.

11 Why would you ever collect survey data  
12 under subparagraph 1 if we can -- you can do  
13 everything that you say you can do under  
14 subparagraph 2?

15 MR. MICHEL: Well, Justice Thomas, the  
16 survey still provides a lot of benefits to the  
17 agency. That's the subclause 1 authority.

18 First of all, subclause 1 makes it  
19 per se permissible for the agency to set rates  
20 at acquisition cost as determined by the survey.

21 Now, in subclause 2, the agency has to  
22 show a lot more than that. I don't think  
23 there's any dispute about the agency's showing  
24 in this case, and I took my friend this morning  
25 to accept that there's no debate about this

1 data, but that's idiosyncratic about this case  
2 because, remember, HHS runs the 340B program.

3 So it has that data. But there's all  
4 kinds of other data about hospitals that HHS  
5 could use under subclause 1 if it took the  
6 survey to -- to make as a basis for universal  
7 rates.

8 JUSTICE THOMAS: So how often do you  
9 -- have you conducted subclause 1 surveys?

10 MR. MICHEL: So the agency has only  
11 conducted one since this statute was enacted.

12 JUSTICE THOMAS: When was that?

13 MR. MICHEL: That was in 2020 while  
14 this case was pending.

15 JUSTICE THOMAS: Yeah.

16 MR. MICHEL: I -- I -- I would note,  
17 though, that in the same instruction that  
18 Congress gave to the agency to conduct "a  
19 periodic survey," it instructed the agency to  
20 take into account -- and this is (D)(II), sub  
21 (14)(D)(II) -- it told the agency to take into  
22 account the recommendations of the GAO, which  
23 conducted the original study back in 2004.

24 And the recommendations of the GAO  
25 were don't do very many studies because they're

1 very burdensome on the study takers, they're  
2 very burdensome on the hospitals, and they don't  
3 actually produce results that are all that  
4 accurate.

5 In fact, the GAO said the proxy rate,  
6 the rate set under subclause 2, is a better and  
7 more accurate rate than you'll often find under  
8 the survey. And so HHS, per the statutory  
9 instruction, has followed that approach.

10 And I'll just -- I'll say one word  
11 about the 2020 survey, and this is outlined in  
12 the Federal Register notice. HHS in that case  
13 surveyed about 1400 340B hospitals and they gave  
14 them two options. They said you can either tell  
15 us your acquisition cost, or you can check a box  
16 that says just use the data you already have.

17 Seven percent of the hospitals gave  
18 the actual data, 55 percent checked the box, and  
19 38 percent didn't respond. So the -- the survey  
20 ended up producing a rate that was very similar  
21 to the rate that would have been produced by the  
22 agency using its own data, which is, of course,  
23 what it did here under subclause 2.

24 JUSTICE SOTOMAYOR: Counsel, what do I  
25 do with the fact that 3a, when it's calculating

1 cost, permits -- says to you, you can count  
2 almost any discount that's given to a hospital  
3 in -- in the price that was established, except  
4 -- and it bars you from using the discount given  
5 to 340B.

6 What do I do with that statutory  
7 command not to include that in the average price  
8 data? How do you get the power to include it in  
9 the AOP -- what is it called, the ASP? Doesn't  
10 it seem contradictory that you're trying to  
11 sneak in through the back door a prohibition on  
12 the front door?

13 MR. MICHEL: No, I don't think so,  
14 Justice Sotomayor, and I have two basic answers  
15 to that. First, the reason that most discounts  
16 are included in the -- this is the 1395w-3a  
17 rate.

18 JUSTICE SOTOMAYOR: Yeah, 3a. You  
19 know what I --

20 MR. MICHEL: But -- no, yeah, I know,  
21 but -- but 340 -- that is the rate for  
22 reimbursing physicians, and physicians are not  
23 eligible for 340B discounts. So that's why that  
24 rate is excluded from 1395w-3a.

25 Now the second point is it can't be

1 the case that that provision or 340B imposes  
2 some kind of duty under the agency in this  
3 provision to give a subsidy to 340B hospitals  
4 because everyone agrees that if the agency took  
5 the survey, it could set the rate for 340B  
6 hospitals at acquisition cost simpliciter, no  
7 discount, no subsidy. And there's no way  
8 Congress said you can do that under subclause 1,  
9 but you lose that authority under subclause 2.

10 In fact, under subclause 2, Congress  
11 allowed the agency to make an adjustment. And  
12 the adjustment to -- to change the rate so that  
13 it's applicable to hospitals instead of just  
14 physicians is exactly the kind of adjustment  
15 Congress would have had in mind.

16 JUSTICE KAGAN: But --

17 JUSTICE BREYER: Why -- why --

18 JUSTICE KAGAN: -- the adjustment --

19 JUSTICE BREYER: We're probably going  
20 to ask the same question.

21 JUSTICE KAGAN: I doubt it.

22 (Laughter.)

23 JUSTICE BREYER: Well, no? All right,  
24 all right. I'll ask two questions quickly.  
25 One, as far as judicial review is concerned,

1 your problem is that 12 lists five other  
2 provisions where there's no judicial review, and  
3 (14) isn't one of them, okay? So I don't know  
4 how you get (14) in there when it says a bunch  
5 of others and not (14).

6 The second one is what he's saying is  
7 we have 1 and 2, okay? One is cost and 2 is  
8 price. Now when you're supposed to use 2 is  
9 when cost fails. You have no cost figures or  
10 they're all a mess and you can't figure out  
11 cost, so now we go to 2, which is price.  
12 Everybody knows price isn't as good as cost  
13 because we're trying to get at the cost, but 2  
14 is about price.

15 And so why would they put in there  
16 purposes, adjust for purposes, if they didn't  
17 mean price-based purposes? If they meant  
18 cost-based purposes or Section 2-based purposes,  
19 I mean, they wouldn't have destroyed 1 as  
20 they've done if we have your reading of 2.

21 MR. MICHEL: So, Justice --

22 JUSTICE BREYER: I hope I've got that  
23 right. I don't know. But I think that's the  
24 argument.

25 MR. MICHEL: So I don't want to

1 completely let the preclusion argument go, but  
2 I'll answer the second part of your -- and I  
3 hope I can come back to that, but I will answer  
4 the second part of your -- of your question  
5 first if that's okay.

6 I think subclauses 1 and 2 are  
7 pursuing the same end.

8 JUSTICE BREYER: Yeah.

9 MR. MICHEL: They're both pursuing  
10 acquisition cost-based reimbursement. And the  
11 way we know that -- this is following up on the  
12 question from Justice Sotomayor earlier -- is  
13 that the cross-referenced provision doesn't  
14 direct the agency to set the rate at price qua  
15 price or price simpliciter. It makes two  
16 important changes. It says add 6 percent.  
17 Everybody agrees that 6 percent is the  
18 acquisition cost. It's the little bit extra  
19 that it costs to acquire the drug. And then it  
20 says subtract most of the discounts except 340B,  
21 and we have a good explanation for why it  
22 doesn't say 340B. That's acquisition cost.

23 And that's not something the agency  
24 has come up with on the spot. That's been the  
25 agency's position the entire time since 2006.

1 And, in fact, in the 2006 rule, hospitals agreed  
2 that the ASP plus 6 percent is an accurate  
3 measure of acquisition cost. And, in fact, in  
4 the very rules at issue in this case, the agency  
5 set the rate --

6 JUSTICE KAGAN: But, Mr. Michel, to  
7 say that the two have some relationship to each  
8 other, of course, they do, but they're not the  
9 same in the ways that Justice Barrett pointed  
10 out, that the acquisition cost is really what a  
11 particular hospital has paid or a particular  
12 group of hospitals, and this average price, the  
13 average price, for the drug is something much  
14 broader than that. That does not -- that is --  
15 you know, that does not suggest that you can  
16 vary it by hospital group or by individual  
17 hospitals.

18 And the question here is why it is  
19 that you would read this little delegation at  
20 the end -- yeah, it's a broad delegation in its  
21 place, but why you would read it to override the  
22 basic statutory structure here. The basic  
23 statutory structure here is you can charge  
24 acquisition cost when you've done a survey, and  
25 when you haven't done a survey, which the agency



1 has refused to do for years, well, then you  
2 don't get to do this. You have to do something  
3 else.

4 MR. MICHEL: Well, Justice Kagan, a  
5 couple of answers.

6 First, on -- on the singular point,  
7 the average price, I don't think that can get my  
8 friend very far because, if you look at  
9 subclause 1, it also refers to the average  
10 acquisition cost, and I think we all agree that  
11 that can be varied.

12 JUSTICE KAGAN: One is varied by  
13 hospital group. The other is not varied by  
14 hospital group, so suggests a single uniform  
15 number.

16 MR. MICHEL: No, but, you know,  
17 respectfully, we would read the purposes of  
18 paragraph (14) -- I think this comes back to a  
19 question Justice Breyer asked earlier -- if  
20 you're trying to determine the purposes of a  
21 statutory provision, I think this Court has told  
22 us look at the text of the statutory provision.  
23 And, here, the purpose --

24 JUSTICE KAGAN: The text of the  
25 statutory provision sets it up as, if you do a

1 survey, you can do one thing, and if you don't  
2 do a survey, you can't do that thing.

3 MR. MICHEL: Justice Kagan, I --

4 JUSTICE KAGAN: And you're saying that  
5 this -- this -- this delegation should be read  
6 to say, if you do a survey, you can do this  
7 thing, and if you don't do a survey, you can  
8 also do this thing.

9 MR. MICHEL: Justice Kagan, if the  
10 statute said, if you don't do a survey, you  
11 can't do this, we'd be in real trouble in this  
12 case. But that's not what the statute says.  
13 The statute says, subclause B, if -- or  
14 subclause 2, excuse me, if acquisition cost data  
15 are not available, which everybody agrees that  
16 they're not in this case --

17 JUSTICE KAGAN: It's subparagraph 1  
18 that makes the use of the acquisition cost  
19 conditioned on doing a survey explicitly.

20 MR. MICHEL: I -- Justice Kagan,  
21 respectfully, I disagree. It doesn't say "if."  
22 It says set the rate at average acquisition  
23 cost, as determined by the Secretary, taking  
24 into account hospital cost survey data or, two,  
25 if acquisition cost data is not available --

1 JUSTICE KAGAN: Yeah. So --

2 MR. MICHEL: -- the average price as  
3 adjusted --

4 JUSTICE KAGAN: -- if you've done a  
5 survey --

6 MR. MICHEL: -- as necessary for the  
7 purposes of the paragraph.

8 JUSTICE KAGAN: -- do the acquisition  
9 cost. If you haven't done a survey, do the  
10 average price.

11 MR. MICHEL: As adjusted by the  
12 Secretary for purposes of this paragraph.

13 JUSTICE KAGAN: But not to override  
14 the point of doing a survey in order to get  
15 acquisition costs.

16 MR. MICHEL: Justice Kagan, I think  
17 the Court's opinion in Michigan versus EPA is  
18 helpful here. In that -- in that case, the  
19 Court was interpreting a provision of the Clean  
20 Air Act that allowed the agency to regulate as  
21 necessary and appropriate. The EPA's argument  
22 in that case was, because another provision of  
23 the Clean Air Act directed regulation based on  
24 cost, it wouldn't read "appropriate and  
25 necessary" to include cost.

1           And this Court unanimous -- there was  
2 a dissent in that case, but the Court was  
3 unanimous on the proposition that the agency --  
4 it was unreasonable for the agency to read the  
5 statute in that way because a broad term like  
6 "necessary and appropriate" necessarily took  
7 account of cost, and the fact that it was  
8 enumerated separately in the statute did not  
9 express, you know, some kind of expressio unius  
10 inference.

11           And, here, I think you have the  
12 opposite of expressio unius. Subclause 2 says  
13 take into account the purposes of the paragraph.  
14 How could you be clearer about what the purposes  
15 of the paragraph are than to read subclause 1 of  
16 that paragraph, which says you can set the rate  
17 at average acquisition cost?

18           And, again, this is not a new  
19 argument. This is the position that the agency  
20 has had all along. And in this very rule, the  
21 agency set the rates for the other non-340B  
22 drugs at acquisition cost, not by rote  
23 application of the statutory cross-reference,  
24 but it explicitly said because that approximates  
25 average acquisition cost.

1                   And my friend representing the  
2                   hospitals, many of which are not 340B hospitals,  
3                   is not here telling you that that's unlawful,  
4                   that that's inaccurate. And I think that's  
5                   because there's widespread consensus that  
6                   subclause 2 -- that the -- the cross-referenced  
7                   rate is a proxy for average acquisition cost.  
8                   And so I --

9                   CHIEF JUSTICE ROBERTS: I was  
10                  concerned about Mr. Verrilli's -- that the --  
11                  the -- the force of his argument was that the  
12                  adjustments for purposes didn't mean anything.  
13                  And I think you have the flip concern, which you  
14                  seem to think it means everything.

15                  MR. MICHEL: Not at all, Mr. Chief  
16                  Justice. I mean, I -- paragraph (14) is not  
17                  that broad. All we -- all you really have to  
18                  hold in this case, of course, we think, is that  
19                  paragraph (14)'s purposes include the very  
20                  purpose that's specified in subclause 1 of  
21                  paragraph (14).

22                  Now you could certainly imagine the  
23                  agency coming up with all kinds of reasons it  
24                  would like to adjust reimbursement rates up or  
25                  down. There could be political favoritism. It

1 could be that the agency likes hospitals that  
2 provide one particular service or dislikes  
3 hospitals that provide a particular service.

4 None of that would be in bounds under  
5 this provision. The purposes of paragraph (14)  
6 are limited to those that are specified in the  
7 text of paragraph (14).

8 And, again, my friend made the point  
9 about the agency trying to read broadly  
10 statutory purpose. I just want to make  
11 completely clear this is not an invocation of  
12 the purpose -- purposivist canon of statutory  
13 interpretation. We're reading the text of the  
14 provision that directs the -- the Secretary to  
15 adjust for purposes of paragraph (14).

16 JUSTICE KAGAN: But -- but you're  
17 reading the text of the provision, Mr. Michel,  
18 as though the provision said use average  
19 acquisition cost if you have survey data or, if  
20 you don't have survey data, do the same thing.

21 And that's not what this provision  
22 says. This provision says, if you have survey  
23 data, you do one thing, and if you don't have  
24 survey data, you do a different thing.

25 MR. MICHEL: Well, respectfully,

1 Justice Kagan, the different thing is because it  
2 includes adjustment for the purposes of the  
3 paragraph --

4 JUSTICE KAGAN: Yeah, you're saying  
5 the different thing is the same thing. But why  
6 would Congress have written a -- a statute like  
7 that? If you have survey data, you can do this.  
8 If you don't have survey data, you can do that.  
9 But then we'll read the statute to make that  
10 mean this.

11 MR. MICHEL: No, I think -- so I think  
12 Congress wanted -- wanted the common-sense  
13 notion that reimbursement would reflect  
14 acquisition cost instead of, for example, as  
15 Justice -- in Justice Barrett's earlier example,  
16 someone who says, you know, I bought a car for  
17 \$20,000 and I'd like to be reimbursed by my  
18 employer at the sticker price of \$28,000.

19 I mean, that doesn't make any sense.  
20 And there's no reason that Congress -- but  
21 that's exactly what my friend's argument is in  
22 this case. His argument is that --

23 JUSTICE KAGAN: Well, then you should  
24 go do a survey.

25 MR. MICHEL: Well, we did -- to be

1 clear, we did do a survey. And I -- I would  
2 also point out my friend yet objected vigorously  
3 to that survey, which I think really underlies  
4 -- undermines the argument that that's a  
5 superfluous provision since he's invoking it  
6 against us in this very case.

7 JUSTICE ALITO: If you did -- if the  
8 Secretary does a survey, does the Secretary have  
9 to survey all hospitals? Could the Secretary do  
10 a survey of just the 340B hospitals?

11 MR. MICHEL: I mean, that's a very  
12 hotly -- that's the issue that we're disputing  
13 about the survey. The 2020 survey, as I noted  
14 to Justice Thomas earlier, was just of 340B  
15 hospitals. We think that complies with the  
16 survey instructions in paragraph (14)D. The  
17 340B hospitals unsurprisingly don't because I  
18 think the 340B hospitals don't want the result  
19 of the survey because the survey is going to  
20 lead to lower rates for them, lower rates even  
21 than they have now under HHS's guidelines.

22 JUSTICE ALITO: Well, if the survey  
23 has to be of all the hospitals, that -- that is  
24 the Respond -- that is the Petitioners'  
25 position, there has to be a survey of all



1 hospitals or no hospitals?

2 MR. MICHEL: Well, I -- I don't want  
3 to put words in my friend's mouth.

4 JUSTICE ALITO: Well, okay, that's an  
5 unfair question.

6 MR. MICHEL: But my -- I think there  
7 was a footnote in their brief where they object  
8 to that aspect of the survey.

9 JUSTICE BARRETT: Mr. Michel --

10 JUSTICE ALITO: Well, then --

11 JUSTICE BARRETT: I'm sorry, finish.

12 JUSTICE ALITO: Well, if that's the  
13 case, then that -- that does seem to provide an  
14 additional reason for what you've done under 2.  
15 So, if you -- if you have a group of hospitals  
16 that indisputably pay less, but the only way in  
17 which you could adjust for that hospital group  
18 is to do a survey of all hospitals, 2 provides  
19 you a way of doing -- of making a much more  
20 targeted response to that particular provision,  
21 that particular situation.

22 MR. MICHEL: I -- I think that's  
23 exactly right. It goes back to the point I made  
24 to the Chief Justice earlier that, you know,  
25 this is a sort of idiosyncratic case in that HHS

1 has this data, the 340B data, because we run the  
2 program. And, also, there's been a decade's  
3 worth of independent studies that we cite.

4 That's not going to be the case for  
5 all manner of other adjustments that HHS might  
6 want to make. And, in fact, that -- the  
7 original 2005 survey that I mentioned to Justice  
8 Thomas earlier drew distinctions between  
9 teaching hospitals, urban hospitals, large  
10 hospitals, and the GAO found that there are  
11 significant differences in all of those  
12 different categories.

13 But, because we don't have that data,  
14 we're not going to make adjustments based on  
15 that in our subclause 2 data. All we're saying  
16 is that, here, where we do have the -- the data,  
17 which I take it my friend doesn't dispute, we  
18 can take that into account to make a modest  
19 adjustment.

20 And his position has to be that  
21 Congress compelled the overpayment. And I -- I  
22 -- I don't want the point to slip away.

23 JUSTICE KAVANAUGH: Well, the word  
24 "over" --

25 MR. MICHEL: But that overpayment

1 comes at the expense -- just a half sentence --  
2 at the expense of Medicare beneficiaries and  
3 other hospitals, which is right in the teeth of  
4 the purpose of this statute.

5 JUSTICE KAVANAUGH: But the word  
6 "overpayment" with respect to 340B hospitals is  
7 -- is questionable, isn't it? At least the  
8 amicus brief suggests they provide -- they're  
9 about a third of the DSH hospitals in the  
10 country. They provide a huge amount of the  
11 uncompensated care in the hospital. A lot of  
12 them, as the amicus brief points out, are in  
13 rural areas, Kentucky, West Virginia -- the  
14 states are listed -- Arkansas -- in the amicus  
15 brief -- Texas, rural areas.

16 And those hospitals say that -- and  
17 Congress is well aware of this, and so, to say  
18 overpayment, I think, is part of the picture but  
19 doesn't take account of the whole 340B picture,  
20 which is more complicated.

21 MR. MICHEL: Two points, one of which  
22 I've made already, but I think it's important.

23 Congress allowed HHS to take out the  
24 whole 340B discount and set the rate at  
25 acquisition cost if it takes a survey.

1 JUSTICE KAVANAUGH: But that's a  
2 constraint because then the agency would have to  
3 treat the hospitals the same.

4 MR. MICHEL: No, subclause 1 allows it  
5 to vary by hospital --

6 JUSTICE KAVANAUGH: I -- I -- I mean,  
7 it's a -- I'm sorry, it's a constraint unless  
8 they did that, the Congress -- the agency would  
9 have to treat the hospitals the same, only if  
10 they do the survey. So it's a precondition,  
11 right?

12 MR. MICHEL: I mean, my point, again,  
13 is that that's not what the statute says. And  
14 there's -- I don't understand how Congress would  
15 have had that purpose in subclause 1 and somehow  
16 abandoned it by subclause 2 --

17 JUSTICE KAVANAUGH: Okay.

18 MR. MICHEL: -- where it gave the --  
19 the agency authority. But, to -- to -- to take  
20 your more factual point on, I would urge you to  
21 read the -- the -- as I know you have -- the  
22 amicus briefs of the Federation of American  
23 Hospitals and the rural hospitals that are filed  
24 on our side of the case, and those briefs  
25 explain that the rural hospitals in particular

1 have relied on the offsetting 3.2 percent  
2 adjustment that we made in this rule to provide  
3 care to their patients. And, also, the  
4 Federation of American Hospitals represents  
5 for-profit hospitals. But many of those provide  
6 equally large levels of care to un- -- to  
7 uninsured persons and -- and other people too.

8 So I -- I don't think it's as simple  
9 as saying 340B hospitals have some kind of  
10 distinctive entitlement to that. I want to make  
11 clear the agency supports the work of 340B  
12 hospitals. You know, we made major DSH payments  
13 to them. We're certainly not here saying that  
14 -- that -- that the work is -- shouldn't be  
15 valued. What we're saying is that the Medicare  
16 program was not designed to subsidize 340B  
17 hospitals.

18 JUSTICE BARRETT: Mr. Michel --

19 MR. MICHEL: And --

20 JUSTICE BARRETT: I'm sorry. Finish  
21 your answer.

22 MR. MICHEL: Just the last point on  
23 340B, I want to stress three things really  
24 quickly.

25 One, they are keeping a lot of the

1 overpayment here because we made a modest  
2 adjustment.

3 Two, they're keeping a lot of the  
4 discounts that they get under 340B because we're  
5 only talking here about Medicare. Obviously,  
6 they benefit from the 340B discounts and all of  
7 their other operations, private insurance, state  
8 insurance, et cetera.

9 And, third, they themselves benefit  
10 from the 3.2 percent offsetting adjustment  
11 because that goes to all other OPPS services,  
12 and, obviously, 340B hospitals provide a lot of  
13 those services.

14 JUSTICE BARRETT: So, Mr. Michel, I  
15 want to return to the question of Chevron  
16 deference here. You know, your friend on the  
17 other side has said that we should, you know,  
18 apply a Kisor versus Wilkie approach here,  
19 emphasize that lower courts in applying Chevron  
20 need to apply all of the tools in the toolkit.

21 And a lot of the questions that you've  
22 been getting that we've been going back and  
23 forth about have to do with the problem that  
24 there's superfluity maybe on either side of  
25 this.

1           So -- and I -- I would have thought  
2           that the theory of Chevron is that when there's  
3           ambiguity in a statute, maybe vagueness would be  
4           the better description, that that's an  
5           indication that Congress has delegated authority  
6           to the agency to fill it.

7           But the D.C. Circuit described it this  
8           way. It said: When competing readings of a  
9           statute would each occasion their own notable  
10          superfluity, that manifests the kind of  
11          statutory ambiguity that Chevron permits the  
12          agency to weigh and resolve.

13          Does the government agree with that  
14          statement of when Chevron deference applies?

15          MR. MICHEL: I think that is an  
16          accurate statement about Chevron deference. I  
17          mean, of course, our principal submission here  
18          is that you don't need to apply Chevron  
19          deference because we have the better reading of  
20          the statute. And, again, I think, really, the  
21          key question in this case is what does the  
22          textual phrase "purposes of" --

23          JUSTICE BREYER: Yeah, but I don't  
24          think it is Chevron, and -- and I was serious  
25          about that. Why? Because Chevron, you go back

1 and look what -- what a reasonable legislature,  
2 who didn't give this two seconds' thought,  
3 because if their -- but would a reasonable  
4 legislator have wanted to give the agency the  
5 power to do either?

6           Perhaps first one, then the other.  
7 They could change its mind, okay? The answer to  
8 that question must be no because, if you are  
9 right, those words purpose gave the agency a big  
10 power, and Justice Alito went into it to some  
11 degree, and others have and so did Justice  
12 Kagan, a big power --

13           JUSTICE BARRETT: Can I --

14           JUSTICE BREYER: -- through Roman  
15 numeral II, and if they're right, it was a  
16 little power, and it's an important question in  
17 this area. And I don't really see how a  
18 reasonable person in Congress would have wanted  
19 to give the agency the power to first interpret  
20 it the one way, then interpret it the other way.  
21 But there is a ready-made doctrine for this  
22 situation I'm describing, and that's Skidmore.

23           MR. MICHEL: Justice Breyer --

24           JUSTICE BREYER: So what do you think?  
25 I -- I -- I'm not as definite as I sounded.



1 MR. MICHEL: I'm not here to reject,  
2 you know, any kind of deference you want to give  
3 us, but, I mean, if you look at the --

4 JUSTICE BREYER: No, no, we want to  
5 get this right for the reason --

6 MR. MICHEL: Right.

7 JUSTICE BREYER: -- that it is -- it  
8 has implications well beyond this case.

9 MR. MICHEL: Right. So, Justice  
10 Breyer, the provision that we're interpreting  
11 here says: As calculated and adjusted by the  
12 Secretary as necessary for purposes of this  
13 paragraph.

14 I -- I think you would be hard-pressed  
15 to find a more explicit delegation of authority  
16 to -- to an agency. And then, of course, the --

17 JUSTICE BREYER: Of course, there's  
18 delegation. But the question is does that word  
19 "purposes" mean purposes more directly related  
20 to Section 14, or does it mean purposes that  
21 might be broad enough to come in under 2? And  
22 that would underscore Justice Kagan's point  
23 about eviscerating, through the use of 2, the  
24 limitation that is set in 1.

25 Now, having listened to this and not

1 before, I now think that's a fairly -- I do  
2 think it's a fairly important question. And I  
3 don't see how the agency would be given the  
4 power to shift from the one to the other, this  
5 year the one, the next year the other, okay?

6 That's where I am at this moment.  
7 I'll change probably 50 times.

8 MR. MICHEL: Sure. So I think, as a  
9 doctrinal matter, this is clearly -- this is  
10 clearly a Chevron case in that there's an  
11 express delegation of authority to the  
12 Secretary, the Secretary issued a  
13 notice-and-comment rule in which it explained  
14 the reasons for its legal interpretation.

15 In some ways, this is almost, you  
16 know, more of a State Farm question in that the  
17 question is what factors can the agency consider  
18 when it -- when it interprets the phrase  
19 "purposes of paragraph (14)." And I take my  
20 friend to have -- my friend has the argument  
21 that the purposes of paragraph (14) don't  
22 include aligning reimbursement rate with the  
23 cost. We think that they do.

24 But, in either event, I don't think  
25 there's any existential broad Chevron question

1 going on here. I think, you know, you could  
2 view it as a step one argument. You could view  
3 it as a State Farm argument. But this fits  
4 clearly within the doctrinal box of -- of  
5 Chevron.

6 JUSTICE SOTOMAYOR: In one sentence,  
7 what is the purpose of this paragraph?

8 MR. MICHEL: So, Justice --

9 JUSTICE SOTOMAYOR: How do you define  
10 that?

11 MR. MICHEL: I would say, at a  
12 minimum, it includes setting the reimbursement  
13 rate equivalent to drug acquisition cost. After  
14 all, that's the purpose that's specified in  
15 paragraph 1. And -- and, by the way, that's  
16 also the purpose -- when you look at the  
17 purposes of the paragraph, I think you have to  
18 look at it within the context of the broader  
19 statute.

20 The Medicare statute, as this Court  
21 said in the Regions Hospital case, has a  
22 pervasive focus on cost-based reimbursement.  
23 The OPPS program, paragraph T that we're looking  
24 at, has all kinds of references to cost, labor  
25 cost, wage cost, other things like that. And

1 it's just a common-sense understanding of the --  
2 of the notion of reimbursement.

3 So I think all of those things  
4 illustrate that, whatever the purposes of  
5 paragraph (14) are, they have to at least  
6 include that.

7 Now I also think, if you look at --

8 JUSTICE SOTOMAYOR: All right. I said  
9 one sentence.

10 MR. MICHEL: Yeah. Okay.

11 JUSTICE BARRETT: Mr. Michel, can I  
12 return to my question from before, because I  
13 think I actually do see this a little  
14 differently than as Justice Breyer posed the  
15 question to you.

16 So the D.C. Circuit said that the  
17 basis for Chevron deference here was that  
18 resolving which superfluity was worse was one  
19 for the agency. Is that -- is that kind of  
20 statutory interpretation difficulty one that  
21 should trigger any kind of deference, whether it  
22 be Chevron or Justice Breyer was, you know,  
23 posing Skidmore? It seems to me that that might  
24 be just an interpretive question, you know, the  
25 classic problem of statutory interpretation that

1 a court should resolve, that the APA says courts  
2 resolve, as opposed to one that reflects some  
3 sort of delegation to the agency.

4 MR. MICHEL: Right. So, I mean, as I  
5 said, I think there's a clear delegation to the  
6 agency here. I think that the Court has many  
7 times deferred to HHS in interpreting Medicare  
8 statutes. We do think deference is -- is  
9 warranted here.

10 We also recognize, as I think Justice  
11 Kavanaugh said earlier, that Footnote 9 of  
12 Chevron indicates that a court should, you know,  
13 apply all the tools of statutory construction.  
14 We accept that approach. And that would include  
15 looking at superfluity questions --

16 JUSTICE BARRETT: So you would reject  
17 that -- that statement of when Chevron deference  
18 would be appropriate?

19 MR. MICHEL: No, not at all. I just  
20 meant to say it -- it's appropriate for the  
21 Court to --

22 JUSTICE BARRETT: I mean, I understand  
23 you have other reasons --

24 MR. MICHEL: Right.

25 JUSTICE BARRETT: -- for asking for

1 Chevron deference. I'm just saying, if that  
2 were the basis, would you say that that's an  
3 accurate statement of when Chevron deference  
4 should apply?

5 MR. MICHEL: I -- I think it is, you  
6 know, but I -- not only do I not think Chevron  
7 is necessary in this case, I don't think that  
8 particular application of Chevron is -- is  
9 necessary in this case either.

10 JUSTICE GORSUCH: Counsel --

11 JUSTICE KAVANAUGH: Well, I think  
12 you're saying --

13 JUSTICE GORSUCH: No, go -- please go  
14 ahead. After you.

15 JUSTICE KAVANAUGH: Go ahead.

16 JUSTICE GORSUCH: Golly. All right.

17 I did want to follow up. I think we  
18 probably both are going to wind up asking the  
19 same question in truth this time.

20 In -- in your answer to Justice  
21 Barrett, I think you focused on, you know, the  
22 -- the competing problems of both  
23 interpretations. They both create a  
24 superfluity. And is that enough ambiguity -- in  
25 my mind, I think of that not as a delegation

1 question. You've got some language talking  
2 about delegation to statute, fine.

3 But the question that Chevron tends to  
4 pose, the difficulty with lower courts and with  
5 this Court, is what's ambiguous enough to  
6 trigger deference to the government?

7 And in a lot of circumstances where we  
8 don't have Chevron applicable and have competing  
9 statutory problems, we -- we go down and apply  
10 all the tools of statutory interpretation, as  
11 Chevron Footnote 9 says and you've endorsed, and  
12 we come up with an answer. It may be 51-49. It  
13 may be really close. You both have spots. You  
14 -- you both -- where you have weaknesses. But  
15 we have to pick one and we do. And we're always  
16 able to do it.

17 So why shouldn't that be true here?

18 MR. MICHEL: Sure. I mean, I want to  
19 make -- to -- to be clear at the outset, we're  
20 not conceding that there's superfluity on both  
21 sides. I mean, we think that --

22 JUSTICE GORSUCH: Suppose there is,  
23 because you also say the D.C. Circuit was right  
24 to invoke that as a basis for -- in -- for --  
25 for Chevron deference, correct?

1                   MR. MICHEL: I agree that that is  
2                   theoretically true. I'm not sure the D.C.  
3                   Circuit was saying that the government's reading  
4                   is superfluous.

5                   JUSTICE GORSUCH: So -- so --

6                   MR. MICHEL: In fact, I don't think it  
7                   said --

8                   JUSTICE GORSUCH: -- both created that  
9                   problem and that, therefore, Chevron deference  
10                  is appropriate. You say it's warranted on that  
11                  grounds. And so I guess I'm just asking why --  
12                  why in this particular area, why in this case,  
13                  when we're able to resolve these cases as -- as  
14                  Mr. Verrilli said in other situations, 51-49,  
15                  without any problem?

16                  MR. MICHEL: Well, I mean, again, I  
17                  would reread the -- I don't think that's what  
18                  the D.C. Circuit was saying. I think that it  
19                  said that -- made essentially the argument that  
20                  we're making here, which is the purposes of  
21                  paragraph (14) include those that are specified  
22                  in subclause 1. And there is no superfluity  
23                  because --

24                  JUSTICE GORSUCH: Then maybe I'll ask  
25                  you the question more generally. How much



1 ambiguity is enough?

2 MR. MICHEL: That's a -- you know, you  
3 could write a whole law review article about  
4 that.

5 JUSTICE GORSUCH: Somebody has.

6 MR. MICHEL: Yeah. I know. You know,  
7 I -- I don't think I can give you an answer to  
8 that question, Justice Gorsuch. But, you know,  
9 I -- I suppose I would say we agree that you  
10 would apply the tools of statutory  
11 interpretation. Absolutely.

12 JUSTICE GORSUCH: So the government  
13 can't tell us how much ambiguity is enough?

14 MR. MICHEL: I'm not sure anybody's  
15 answered that question.

16 JUSTICE GORSUCH: It's been a long  
17 time.

18 MR. MICHEL: But, at a -- at a  
19 minimum, in this case, I don't think there's  
20 much ambiguity at all --

21 JUSTICE GORSUCH: All right. Thank  
22 you.

23 MR. MICHEL: -- because the purposes  
24 include those that are specified in the  
25 paragraph.

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

3 JUSTICE THOMAS: No, none for me,  
4 Chief.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Breyer?

7 Justice Gorsuch, any?

8 JUSTICE GORSUCH: I -- I can't help  
9 myself, sorry.

10 (Laughter.)

11 JUSTICE GORSUCH: One last question.  
12 If -- if the government can't tell us how much  
13 ambiguity is enough 40 years almost after  
14 Chevron, and these cases always tend to arise or  
15 often tend to arise in circumstances just like  
16 this, where the government's seeking deference  
17 for a rule that advantages it -- we saw one  
18 yesterday; here's another one -- advantage the  
19 federal fisc at the expense of hospitals that  
20 serve low-income patients and who are relatively  
21 politically powerless and cannot capture  
22 agencies or lobby them as effectively as others,  
23 what are -- what are your thoughts about that?

24 MR. MICHEL: So I have to start,  
25 Justice Gorsuch, by saying that's not this

1 statute. This statute does not advantage the  
2 federal fisc. It expressly calls for  
3 reallocating the funds among other hospitals  
4 and, as I said, in direct correspondence with  
5 the \$1.6 billion downward adjustment that HHS  
6 made in this case to align 340B hospitals'  
7 reimbursement with their costs, it reallocated  
8 3.2 percent to all other providers of OP  
9 services.

10 JUSTICE GORSUCH: To other more  
11 favored providers.

12 MR. MICHEL: Well, no, it --

13 JUSTICE GORSUCH: And so these --  
14 these -- these providers wouldn't be here if  
15 they weren't hurt, right? You -- you don't  
16 dispute that the -- that the 340B hospitals have  
17 a complaint?

18 MR. MICHEL: I don't dispute that they  
19 have a complaint. I would point out, as I think  
20 I did earlier, that they actually benefit from  
21 the 3.2 percent increase as well. And if you  
22 read the Federation of American Hospitals'  
23 amicus brief, it cites a study indicating that  
24 nearly half of 340B hospitals come out ahead  
25 under these rules.

1           We're not disputing their standing.  
2           They certainly do have an interest in -- they  
3           have an interest in obtaining the higher, you  
4           know, extra payments. But I -- I did want to  
5           take issue with the characterization of the  
6           statute as one that is meant to advantage the  
7           federal government, because the budget  
8           neutrality requirement makes clear that that's  
9           not how this particular statute operates.

10           CHIEF JUSTICE ROBERTS: Justice  
11           Barrett?

12           JUSTICE KAVANAUGH: To pick up on  
13           Justice Barrett's and Justice Gorsuch's  
14           question, I would think the tools of statutory  
15           interpretation that are referenced in Chevron  
16           Footnote 9 would include resolving competing  
17           superfluties. No?

18           MR. MICHEL: I -- I think it could,  
19           you know, but I think the D.C. Circuit in this  
20           case applied all of the canons of statutory  
21           interpretation and concluded that there was, in  
22           its view, still some ambiguity, although I will  
23           say the opinion does not -- at least I don't  
24           think, respectfully, the opinion reads like a  
25           case where the D.C. Circuit threw up its hands

1 and said we're just going to go with whatever  
2 the government says.

3           There's a detailed statutory analysis  
4 by Judge Srinivasan on behalf of the court in  
5 which he goes through lots of different canons  
6 of interpretation. And, ultimately, we  
7 understand the holding of the D.C. Circuit to be  
8 that the language "purposes" of paragraph (14)  
9 include aligning reimbursements with acquisition  
10 costs, which, although done within the Chevron  
11 framework, is a -- is an interpretation that  
12 doesn't ultimately require Chevron deference.

13           JUSTICE KAVANAUGH: And second  
14 question, I don't think we've talked enough  
15 about the word "adjust." I mean, that's not a  
16 word of breadth, as the MCI -- the MCI decision  
17 seems to me on point here in saying don't read a  
18 word like "modify" or "adjust," which imply  
19 something modest, to allow this kind of broad  
20 effort, as Justice Kagan's questions pointed  
21 out.

22           So, on that word "adjust," even though  
23 you have the "for the purposes of the  
24 paragraph," you still -- it's linked back to  
25 calculated and adjust -- "adjust" seems modest.

1           MR. MICHEL: Well, I think "adjust"  
2 has to take its meaning from, like most  
3 statutory terms, from context. I mean, if you  
4 -- if somebody said, I'm going to adjust my  
5 spending patterns because there's a new bridge  
6 toll or said I'm going to adjust my spending  
7 patterns because I have a child in college,  
8 those would mean two different things, and it  
9 would mean -- its meaning would come from  
10 context.

11           And, here, the context is making an  
12 adjustment, I mean, of course, our whole  
13 position in this case is that it means making an  
14 adjustment --

15           JUSTICE KAVANAUGH: But I guess --

16           MR. MICHEL: -- that corresponds to  
17 the difference between acquisition costs and --  
18 and reimbursements.

19           And if that difference was 5 percent  
20 and we made a 50 percent change, I think you  
21 would say that's not an adjustment. I think  
22 you'd probably also say it's not for the  
23 purposes. But, in this case, everybody agrees  
24 that the change is a modest conservative  
25 estimate, cautious estimate of -- of that

1 change.

2 JUSTICE KAVANAUGH: But the  
3 adjustment -- this is going to repeat Justice  
4 Kagan's question a little bit, but I'll close  
5 with this -- the adjustment ends up eradicating  
6 the requirement to do the survey and allows you  
7 to accomplish the end that the statute permits  
8 only with the survey, just by calling it an  
9 adjustment.

10 MR. MICHEL: So just to come back to  
11 that point, I mean, the statute requires -- what  
12 the statute requires with respect to the survey  
13 is that the Secretary take it periodically,  
14 that's (D)(II), (14)(D)(II), after taking into  
15 account recommendations from GAO.

16 The fact that subclause 2, the pro --  
17 the provision we're so focused on here, starts  
18 with if hospital acquisition cost data are not  
19 available, that means that Congress had to  
20 contemplate that there would be years in which  
21 the agency didn't take the survey and that it  
22 wanted it to use this rate.

23 So there's -- there's -- there's no  
24 requirement that the agency take a survey. And  
25 the agency is not -- other than periodically.

1 But my friend's argument here was not that the  
2 agency failed the periodic requirement.

3 So I -- I think the agency is not  
4 evading the survey requirement because there is  
5 no survey requirement in this case. On -- on  
6 adjust --

7 JUSTICE KAVANAUGH: Thank -- thank  
8 you.

9 MR. MICHEL: Okay.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?  
11 Justice Barrett?

12 JUSTICE BARRETT: No.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Rebuttal, Mr. Verrilli?

16 REBUTTAL ARGUMENT OF DONALD B. VERRILLI, JR.

17 ON BEHALF OF THE PETITIONERS

18 MR. VERRILLI: Thank you, Mr. Chief  
19 Justice.

20 I've got four points. And in the  
21 second point, Justice Alito, I'll address your  
22 question about the studies.

23 The first point, you know, I think the  
24 essence of my friend's argument here is that  
25 subclause 1 and subclause 2 are two paths to the



1 same end and it's all about the ends.

2           Respectfully, I submit that this  
3 statute is all about the means.

4           Congress had the -- had given the  
5 agency the authority in paragraph 2(a)(2),  
6 previous to this statute, to consider cost in a  
7 -- in a discretionary way. This statute came  
8 along and said: No, no, for these drugs, we're  
9 taking that discretion away and we're telling  
10 you exactly how to do it in minute detail.

11           And I'm sure that this provision was  
12 the consequence of a hard-fought legislative  
13 compromise. You just read it and you see how  
14 much care and specificity went into it. So this  
15 case is about the means, not the ends.

16           Second, with respect to the issue of  
17 accuracy, a few points here.

18           First, with respect to the study that  
19 the agency has conducted, Justice Alito, the --  
20 the statutory requirement is that the survey  
21 conducted shall have a large sample of hospitals  
22 that's sufficient to generate a statistically  
23 sufficient -- significant estimate of average  
24 hospital acquisition costs for each specified  
25 outpatient drug.

1           So it's not that it's an either, you  
2 know, only 340B or all hospitals. It's you've  
3 got to meet that general requirement.

4           And you heard what my friend described  
5 in terms of their ability to gather, their  
6 effort to gather data with respect to this  
7 study. Seven percent of the hospitals, was it,  
8 that gave them the data they wanted. Another 53  
9 checked the box. A whole lot of them didn't  
10 respond. There's no way that that study is  
11 going to meet the requirement of that -- of the  
12 statute.

13           And then, more generally, the study on  
14 which the government relied here to drop the  
15 rates 22 point some odd percent, you know, the  
16 -- the government has said repeatedly that we  
17 don't contest the accuracy of it.

18           I would note that the -- the  
19 government itself recognized its flaws. MedPAC,  
20 the entity that did it, recognized its flaws.  
21 And MedPAC, the entity that did it, had so  
22 little confidence in the result that it  
23 recommended only a 5.3 percent drop in the rates  
24 for 340B hospitals, not four times that rate,  
25 which is what the government did.

1           The third point, with respect to  
2 effects here, I mean, Justice Kavanaugh alluded  
3 to this. I think it's important to understand  
4 the full picture, that you take this \$1.6  
5 billion away from these -- from these hospitals,  
6 you are reducing the care that they provide to  
7 underserved populations by that amount. And at  
8 the same time, other Medicare beneficiaries are  
9 going to pay more because this statute is -- it  
10 is budget neutral. That's -- that's true.

11           But what that means is that there's an  
12 extra billion six a year that raised the  
13 reimbursement rates for other -- for other  
14 services, which, in turn, raises the co-pays for  
15 those other services. So other people are going  
16 to be paying more as a result of this judgment.  
17 So I -- I just don't think that that's a -- a  
18 meaningful argument.

19           And then, finally, the question with  
20 respect to Chevron deference is, how much  
21 ambiguity is enough? I think the answer is way  
22 more than you have here.

23           Thank you.

24           CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel. The case is submitted.

1                   (Whereupon, at 12:37 p.m., the case  
2 was submitted.)  
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<p style="text-align: center;"><b>\$</b></p> <p><b>\$1.6</b> [2] 74:5 82:4  <b>\$20,000</b> [1] 54:17  <b>\$28,000</b> [1] 54:18</p> <hr/> <p style="text-align: center;"><b>1</b></p> <p><b>1</b> [28] 7:6 10:23 11:20 13:5,  11 19:8 39:7,22 40:8,12,17,  18 41:5,9 44:8 45:7,19 46:  6 48:9 49:17 51:15 52:20  59:4,15 64:24 66:15 71:22  79:25  <b>10</b> [1] 13:11  <b>11:23</b> [2] 1:17 3:2  <b>12</b> [1] 45:1  <b>12:37</b> [1] 83:1  <b>1395I(t)(14)(A)(iii)(II)</b> [1]  11:2  <b>1395w-3(a)(c)(2)(B)</b> [1] 15:  23  <b>1395w-3(a)(c)(4)</b> [1] 16:6  <b>1395w-3a</b> [2] 43:16,24  <b>14</b> [26] 3:12,16 4:10,18 7:1,  12,15,16 20:18 25:16 39:4  45:3,4,5 48:18 52:16,21  53:5,7,15 64:20 65:19,21  67:5 71:21 76:8  <b>14)'s</b> [2] 39:13 52:19  <b>14)(D)(II)</b> [2] 41:21 78:14  <b>14)D</b> [1] 55:16  <b>1400</b> [1] 42:13  <b>14E</b> [1] 14:12  <b>16</b> [1] 6:17</p> <hr/> <p style="text-align: center;"><b>2</b></p> <p><b>2</b> [40] 7:8 8:25 9:5,22 12:25  17:19 18:24 19:11 22:2 25:  17,18,21 27:12 39:2,9 40:  10,14,21 42:6,23 44:9,10  45:7,7,8,11,13,20 46:6 49:  14 51:12 52:6 56:14,18 57:  15 59:16 64:21,23 78:16  79:25  <b>2(a)(2)</b> [1] 80:5  <b>2-based</b> [1] 45:18  <b>20-1114</b> [1] 3:4  <b>2004</b> [1] 41:23  <b>2005</b> [1] 57:7  <b>2006</b> [2] 46:25 47:1  <b>2020</b> [3] 41:13 42:11 55:13  <b>2021</b> [1] 1:13  <b>22</b> [1] 81:15  <b>24</b> [1] 15:17  <b>28</b> [1] 27:24</p> <hr/> <p style="text-align: center;"><b>3</b></p> <p><b>3</b> [1] 2:4  <b>3.2</b> [4] 60:1 61:10 74:8,21  <b>30</b> [2] 1:13 33:18  <b>340</b> [1] 43:21  <b>340B</b> [49] 4:1,13,23 20:10,  18,24 21:7 24:1,6 25:2 36:  5,8 37:3 38:10 39:19,20,20,</p>	<p>23 40:1 41:2 42:13 43:5,  23 44:1,3,5 46:20,22 52:2  55:10,14,17,18 57:1 58:6,  19,24 60:9,11,16,23 61:4,6,  12 74:6,16,24 81:2,24  <b>38</b> [2] 2:7 42:19  <b>3a</b> [2] 42:25 43:18</p> <hr/> <p style="text-align: center;"><b>4</b></p> <p><b>40</b> [1] 73:13  <b>42a</b> [1] 7:3  <b>44</b> [2] 17:25 18:11</p> <hr/> <p style="text-align: center;"><b>5</b></p> <p><b>5</b> [1] 77:19  <b>5.3</b> [1] 81:23  <b>50</b> [2] 65:7 77:20  <b>51-49</b> [3] 33:10 70:12 71:14  <b>53</b> [2] 21:1 81:8  <b>55</b> [1] 42:18</p> <hr/> <p style="text-align: center;"><b>6</b></p> <p><b>6</b> [5] 14:16 24:19 46:16,17  47:2</p> <hr/> <p style="text-align: center;"><b>7</b></p> <p><b>79</b> [1] 2:10</p> <hr/> <p style="text-align: center;"><b>8</b></p> <p><b>8</b> [1] 24:19  <b>80</b> [1] 15:10</p> <hr/> <p style="text-align: center;"><b>9</b></p> <p><b>9</b> [4] 35:6 68:11 70:11 75:  16</p> <hr/> <p style="text-align: center;"><b>A</b></p> <p><b>a.m</b> [2] 1:17 3:2  <b>abandoned</b> [1] 59:16  <b>ability</b> [2] 27:6 81:5  <b>able</b> [2] 70:16 71:13  <b>above</b> [1] 7:13  <b>above-entitled</b> [1] 1:15  <b>absence</b> [2] 4:16 26:25  <b>Absolutely</b> [1] 72:11  <b>accept</b> [5] 31:10 32:22 40:  9,25 68:14  <b>accomplish</b> [1] 78:7  <b>accomplished</b> [1] 8:13  <b>according</b> [1] 33:18  <b>account</b> [10] 11:23 39:12  41:20,22 49:24 51:7,13 57:  18 58:19 78:15  <b>accounted</b> [1] 34:3  <b>accuracy</b> [6] 10:9,11,13 11:  1 80:17 81:17  <b>accurate</b> [13] 12:16 15:14  16:11 17:8 21:22,23,24 36:  11 42:4,7 47:2 62:16 69:3  <b>accretion</b> [1] 34:21  <b>acquire</b> [1] 46:19  <b>acquisition</b> [47] 3:17 4:3,  24 5:6 10:19 11:22 12:14  13:5 20:2 23:16,18 25:2,  24 26:13 29:24 34:9 39:6,</p>	<p>9,24 40:20 42:15 44:6 46:  10,18,22 47:3,10,24 48:10  49:14,18,22,25 50:8,15 51:  17,22,25 52:7 53:19 54:14  58:25 66:13 76:9 77:17 78:  18 80:24  <b>Act</b> [2] 50:20,23  <b>acting</b> [1] 20:1  <b>action</b> [1] 4:8  <b>actual</b> [3] 22:19 23:17 42:  18  <b>actually</b> [9] 7:19 9:6 16:7  20:7 21:22 28:14 42:3 67:  13 74:20  <b>add</b> [2] 24:7 46:16  <b>additional</b> [2] 16:25 56:14  <b>address</b> [1] 79:21  <b>adjust</b> [31] 4:15 7:21,22 12:  20 13:8 14:13,25 15:13 18:  11 23:4,8,11 24:7,11 30:5  34:2,2 39:3 45:16 52:24  53:15 56:17 76:15,18,22,  25,25 77:1,4,6 79:6  <b>adjusted</b> [8] 3:23 7:9 10:  15 17:3 27:14 50:3,11 64:  11  <b>adjusting</b> [2] 19:1,2  <b>adjustment</b> [27] 5:2 13:10,  13 15:22 16:4,9 21:6 23:6,  7,13 40:1 44:11,12,14,18  54:2 57:19 60:2 61:2,10  74:5 77:12,14,21 78:3,5,9  <b>adjustments</b> [13] 13:16,17,  20 14:6 16:9,17,17,20,22  31:6 52:12 57:5,14  <b>advantage</b> [3] 73:18 74:1  75:6  <b>advantages</b> [1] 73:17  <b>advocating</b> [1] 35:15  <b>affirmed</b> [1] 40:6  <b>agencies</b> [2] 29:16 73:22  <b>agency</b> [82] 3:16 4:7,11 6:  19,23 9:2,3 12:5,12 13:3  15:12 16:2 17:13 18:11,20  20:25 21:20 22:4 24:13,17,  24 25:15,18 26:8,8 27:19  28:17 29:11 30:9 32:21 34:  24 37:3,9,9 39:3,23,25 40:  17,19,21 41:10,18,19,21  42:22 44:2,4,11 46:14,23  47:4,25 50:20 51:3,4,19,21  52:23 53:1,9 59:2,8,19 60:  11 62:6,12 63:4,9,19 64:16  65:3,17 67:19 68:3,6 78:  21,24,25 79:2,3 80:5,19  <b>agency's</b> [7] 4:15 27:6 29:  10 37:8 40:4,23 46:25  <b>agree</b> [6] 5:12,14 48:10 62:  13 71:1 72:9  <b>agreed</b> [1] 47:1  <b>agrees</b> [5] 39:22 44:4 46:  17 49:15 77:23</p>	<p><b>ahead</b> [5] 8:5 26:17 69:14,  15 74:24  <b>Ahh</b> [1] 28:13  <b>Air</b> [2] 50:20,23  <b>AL</b> [2] 1:4,8  <b>align</b> [1] 74:6  <b>aligning</b> [3] 39:5 65:22 76:  9  <b>ALITO</b> [17] 17:18 18:10,23  19:4 20:9,13 30:18,19 31:  13 55:7,22 56:4,10,12 63:  10 79:21 80:19  <b>allow</b> [4] 18:2,5,7 76:19  <b>allowed</b> [3] 44:11 50:20 58:  23  <b>allowing</b> [1] 21:6  <b>allows</b> [4] 28:1 39:23 59:4  78:6  <b>alluded</b> [1] 82:2  <b>almost</b> [3] 43:2 65:15 73:  13  <b>already</b> [5] 16:24 24:9 34:3  42:16 58:22  <b>although</b> [3] 14:15 75:22  76:10  <b>altogether</b> [1] 24:13  <b>ambiguity</b> [13] 6:3,14,18  34:1 62:3,11 69:24 72:1,  13,20 73:13 75:22 82:21  <b>ambiguous</b> [1] 70:5  <b>AMERICAN</b> [5] 1:3 3:4 59:  22 60:4 74:22  <b>amicus</b> [5] 58:8,12,14 59:  22 74:23  <b>among</b> [12] 17:20,21 18:22  19:1,8,12 21:25 26:5,19  27:1 34:10 74:3  <b>amount</b> [3] 16:2 58:10 82:  7  <b>analysis</b> [3] 13:5 26:14 76:  3  <b>anomaly</b> [1] 15:10  <b>another</b> [8] 6:5 12:25 15:  23 16:5 24:17 50:22 73:18  81:8  <b>answer</b> [10] 35:10,24 46:2,  3 60:21 63:7 69:20 70:12  72:7 82:21  <b>answered</b> [1] 72:15  <b>answers</b> [2] 43:14 48:5  <b>anybody's</b> [1] 72:14  <b>AOP</b> [1] 43:9  <b>APA</b> [1] 68:1  <b>appeals</b> [1] 34:1  <b>APPEARANCES</b> [1] 1:19  <b>Appendix</b> [1] 21:1  <b>applicable</b> [2] 44:13 70:8  <b>application</b> [5] 5:14,22,23  51:23 69:8  <b>applied</b> [1] 75:20  <b>applies</b> [1] 62:14  <b>apply</b> [8] 35:7 61:18,20 62:  18 68:13 69:4 70:9 72:10  <b>applying</b> [1] 61:19  <b>approach</b> [5] 5:17 40:4 42:  9 61:18 68:14  <b>approached</b> [1] 5:20  <b>appropriate</b> [6] 50:21,24  51:6 68:18,20 71:10  <b>approximates</b> [1] 51:24  <b>area</b> [2] 63:17 71:12  <b>areas</b> [2] 58:13,15  <b>aren't</b> [1] 16:16  <b>argue</b> [1] 5:15  <b>argued</b> [1] 13:17  <b>arguing</b> [1] 5:16  <b>argument</b> [34] 1:16 2:2,5,8  3:4,7 13:7 22:17 24:5,11,  23 25:1,6 27:17 28:6 31:3  38:4 40:9 45:24 46:1 50:  21 51:19 52:11 54:21,22  55:4 65:20 66:2,3 71:19  79:1,16,24 82:18  <b>arise</b> [2] 73:14,15  <b>Arkansas</b> [1] 58:14  <b>around</b> [1] 37:5  <b>article</b> [2] 22:22 72:3  <b>articulated</b> [1] 23:21  <b>ASOP</b> [2] 24:19,21  <b>ASP</b> [2] 43:9 47:2  <b>aspect</b> [1] 56:8  <b>asserts</b> [2] 4:7,12  <b>assessing</b> [1] 21:23  <b>Assistant</b> [1] 1:22  <b>ASSOCIATION</b> [2] 1:3 3:5  <b>attention</b> [1] 29:3  <b>authority</b> [26] 4:15 5:9 6:  23 8:25 13:8,15 14:2,13,14  15:12 16:25 17:7 18:19,20,  21 19:8 27:1 37:8 40:5,17  44:9 59:19 62:5 64:15 65:  11 80:5  <b>authorization</b> [1] 19:12  <b>authorize</b> [2] 4:18 37:24  <b>authorizes</b> [3] 4:20 25:18  39:3  <b>available</b> [4] 16:7 49:15,25  78:19  <b>average</b> [37] 3:21 4:23 5:1  10:12 15:7,15,20 16:10,12,  18,20,24 17:16 18:11 22:2,  11,24 23:18,19 26:21,24  27:12,18 30:2 43:7 47:12,  13 48:7,9 49:22 50:2,10  51:17,25 52:7 53:18 80:23  <b>avoid</b> [2] 26:6,7  <b>aware</b> [2] 20:17 58:17  <b>away</b> [3] 57:22 80:9 82:5</p> <hr/> <p style="text-align: center;"><b>B</b></p> <p><b>back</b> [18] 7:5 21:5,5 23:5  24:7 25:6 26:20 27:15 30:  20 41:23 43:11 46:3 48:18  56:23 61:22 62:25 76:24  78:10</p>
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## Official - Subject to Final Review

<p><b>bad</b> [1] 37:20</p> <p><b>badly</b> [1] 38:21</p> <p><b>BARRETT</b> [20] 21:10,15 22:13,16,24 47:9 56:9,11 60:18,20 61:14 63:13 67: 11 68:16,22,25 69:21 75: 11 79:11,12</p> <p><b>Barrett's</b> [2] 54:15 75:13</p> <p><b>bars</b> [1] 43:4</p> <p><b>base</b> [3] 4:3,22 25:3</p> <p><b>based</b> [9] 3:16 5:5 12:13 23:17 25:24 26:9,15 50:23 57:14</p> <p><b>baseline</b> [1] 23:10</p> <p><b>basic</b> [4] 14:1 43:14 47:22, 22</p> <p><b>basically</b> [1] 23:23</p> <p><b>basis</b> [10] 17:11 18:25 21: 23,24 24:21 26:5 41:6 67: 17 69:2 70:24</p> <p><b>bear</b> [2] 35:22,23</p> <p><b>BECERRA</b> [2] 1:7 3:5</p> <p><b>becomes</b> [2] 11:24 34:11</p> <p><b>behalf</b> [9] 1:21,24 2:4,7,10 3:8 38:5 76:4 79:17</p> <p><b>below</b> [1] 40:5</p> <p><b>belt</b> [1] 34:20</p> <p><b>beneficiaries</b> [4] 38:12 40: 3 58:2 82:8</p> <p><b>benefit</b> [3] 61:6,9 74:20</p> <p><b>benefits</b> [1] 40:16</p> <p><b>best</b> [4] 32:13,23 33:10,10 <b>bet</b> [1] 8:4</p> <p><b>better</b> [4] 6:25 42:6 62:4,19</p> <p><b>between</b> [10] 10:20,22 17: 23 18:15 19:1 21:11 22:18 34:19 57:8 77:17</p> <p><b>beyond</b> [5] 4:22 29:12,17 37:8 64:8</p> <p><b>big</b> [2] 63:9,12</p> <p><b>bigger</b> [1] 28:2</p> <p><b>billion</b> [3] 74:5 82:5,12</p> <p><b>bit</b> [3] 25:10 46:18 78:4</p> <p><b>blanche</b> [2] 10:19 30:9</p> <p><b>Board</b> [1] 6:16</p> <p><b>both</b> [9] 28:10 46:9 69:18, 22,23 70:13,14,20 71:8</p> <p><b>bought</b> [1] 54:16</p> <p><b>bound</b> [1] 38:18</p> <p><b>bounds</b> [1] 53:4</p> <p><b>box</b> [4] 42:15,18 66:4 81:9</p> <p><b>breadth</b> [1] 76:16</p> <p><b>break</b> [1] 19:21</p> <p><b>BREYER</b> [35] 6:24 8:1,4,9, 14,18 9:1,8,11,13,16,20,24 10:4 27:10 28:7,23 30:17 44:17,19,23 45:22 46:8 48: 19 62:23 63:14,23,24 64:4, 7,10,17 67:14,22 73:6</p> <p><b>bridge</b> [1] 77:5</p> <p><b>brief</b> [8] 6:17 15:17 17:25 56:7 58:8,12,15 74:23</p>	<p><b>briefs</b> [3] 23:5 59:22,24</p> <p><b>bring</b> [4] 15:14 16:10 35:22, 23</p> <p><b>broad</b> [7] 24:11 47:20 51:5 52:17 64:21 65:25 76:19</p> <p><b>broader</b> [2] 47:14 66:18</p> <p><b>broadly</b> [1] 53:9</p> <p><b>broken</b> [2] 17:15 18:8</p> <p><b>budget</b> [3] 38:18 75:7 82: 10</p> <p><b>built</b> [1] 14:16</p> <p><b>bunch</b> [1] 45:4</p> <p><b>burdensome</b> [3] 37:20 42: 1,2</p> <p><b>buy</b> [1] 31:3</p> <p><b>buying</b> [1] 24:10</p> <p style="text-align: center;"><b>C</b></p> <p><b>calculate</b> [3] 9:10 20:22 30: 5</p> <p><b>calculated</b> [7] 3:23 7:9 12: 23 17:3 27:14 64:11 76:25</p> <p><b>calculates</b> [1] 13:2</p> <p><b>calculating</b> [4] 10:11 15: 20 25:17 42:25</p> <p><b>calculation</b> [4] 10:12,14 20:25 21:19</p> <p><b>calendar</b> [1] 14:14</p> <p><b>call</b> [2] 23:12 33:20</p> <p><b>called</b> [1] 43:9</p> <p><b>calling</b> [1] 78:8</p> <p><b>calls</b> [1] 74:2</p> <p><b>came</b> [2] 1:15 80:7</p> <p><b>cannot</b> [4] 4:7 17:10 39:21 73:21</p> <p><b>canon</b> [1] 53:12</p> <p><b>canons</b> [2] 75:20 76:5</p> <p><b>capture</b> [1] 73:21</p> <p><b>car</b> [2] 22:19 54:16</p> <p><b>care</b> [7] 14:12 21:11 58:11 60:3,6 80:14 82:6</p> <p><b>carrying</b> [1] 29:13</p> <p><b>carte</b> [2] 10:18 30:9</p> <p><b>Case</b> [48] 3:4 6:15,16 11:7 15:25 28:15,20 30:25 31:4, 21 32:5 33:14,20 40:24 41: 1,14 42:12 44:1 47:4 49: 12,16 50:18,22 51:2 52:18 54:22 55:6 56:13,25 57:4 59:24 62:21 64:8 65:10 66: 21 69:7,9 71:12 72:19 74: 6 75:20,25 77:13,23 79:5 80:15 82:25 83:1</p> <p><b>cases</b> [3] 33:19 71:13 73: 14</p> <p><b>Casner</b> [1] 28:25</p> <p><b>catch-all</b> [1] 12:19</p> <p><b>categories</b> [1] 57:12</p> <p><b>category</b> [3] 29:22 36:8,25</p> <p><b>cautious</b> [1] 77:25</p> <p><b>cert</b> [1] 33:13</p> <p><b>certain</b> [3] 15:8 16:1 36:8</p> <p><b>certainly</b> [5] 20:12 31:20</p>	<p>52:22 60:13 75:2</p> <p><b>cetera</b> [4] 14:23,25 28:14 61:8</p> <p><b>Chamber</b> [1] 6:17</p> <p><b>chance</b> [1] 33:21</p> <p><b>change</b> [7] 37:21 44:12 63: 7 65:7 77:20,24 78:1</p> <p><b>changes</b> [2] 27:22 46:16</p> <p><b>characterization</b> [1] 75:5</p> <p><b>charge</b> [1] 47:23</p> <p><b>charts</b> [1] 27:20</p> <p><b>check</b> [1] 42:15</p> <p><b>checked</b> [2] 42:18 81:9</p> <p><b>chemotherapy</b> [1] 14:22</p> <p><b>Chevron</b> [47] 5:4,14,15,16, 22,24 6:10,10,12 28:13 30: 22,23 31:11 32:12 33:8 34: 13 35:7 61:15,19 62:2,11, 14,16,18,24,25 65:10,25 66:5 67:17,22 68:12,17 69: 1,3,6,8 70:3,8,11,25 71:9 73:14 75:15 76:10,12 82: 20</p> <p><b>Chevron's</b> [2] 28:13,15</p> <p><b>CHIEF</b> [26] 3:3,9 10:25 11: 14 12:1,6,9,18 13:6 30:13, 15,16 35:1 38:1,6 52:9,15 56:24 73:1,4,5 75:10 79: 10,13,18 82:24</p> <p><b>child</b> [1] 77:7</p> <p><b>choose</b> [1] 28:17</p> <p><b>CHRISTOPHER</b> [3] 1:22 2: 6 38:4</p> <p><b>Circuit</b> [13] 5:13 6:2 30:21 31:8 32:10 62:7 67:16 70: 23 71:3,18 75:19,25 76:7</p> <p><b>Circuit's</b> [1] 5:23</p> <p><b>circumstances</b> [2] 70:7 73:15</p> <p><b>circumvent</b> [1] 14:3</p> <p><b>cite</b> [2] 15:17 57:3</p> <p><b>cited</b> [1] 6:17</p> <p><b>cites</b> [1] 74:23</p> <p><b>classic</b> [1] 67:25</p> <p><b>Clean</b> [2] 50:19,23</p> <p><b>clear</b> [1] 6:9 7:13 22:14 35: 24 36:14 53:11 55:1 60:11 68:5 70:19 75:8</p> <p><b>clearer</b> [1] 51:14</p> <p><b>clearly</b> [7] 11:21 26:23 32: 13,23 65:9,10 66:4</p> <p><b>close</b> [2] 70:13 78:4</p> <p><b>closely</b> [1] 18:12</p> <p><b>closer</b> [2] 7:22 10:1</p> <p><b>co-pays</b> [1] 82:14</p> <p><b>Code</b> [2] 34:23,23</p> <p><b>colleagues</b> [1] 31:9</p> <p><b>collect</b> [1] 40:11</p> <p><b>college</b> [1] 77:7</p> <p><b>column</b> [1] 34:23</p> <p><b>come</b> [14] 12:20 14:23 17:7 22:10 26:10 37:14,15 46:3,</p>	<p>24 64:21 70:12 74:24 77:9 78:10</p> <p><b>comes</b> [4] 15:8 17:14 48: 18 58:1</p> <p><b>coming</b> [2] 15:7 52:23</p> <p><b>command</b> [1] 43:7</p> <p><b>comment</b> [1] 33:22</p> <p><b>common</b> [1] 38:13</p> <p><b>common-sense</b> [3] 20:7 54:12 67:1</p> <p><b>comparable</b> [1] 24:20</p> <p><b>compelled</b> [2] 38:9 57:21</p> <p><b>compensated</b> [1] 24:14</p> <p><b>compensation</b> [2] 13:19 15:2</p> <p><b>competing</b> [4] 62:8 69:22 70:8 75:16</p> <p><b>complaint</b> [2] 74:17,19</p> <p><b>completely</b> [2] 46:1 53:11</p> <p><b>complicated</b> [1] 58:20</p> <p><b>complies</b> [1] 55:15</p> <p><b>compromise</b> [1] 80:13</p> <p><b>conceding</b> [1] 70:20</p> <p><b>concern</b> [1] 52:13</p> <p><b>concerned</b> [2] 44:25 52:10</p> <p><b>concessions</b> [2] 15:19 39: 15</p> <p><b>concluded</b> [1] 75:21</p> <p><b>concrete</b> [1] 13:23</p> <p><b>condition</b> [1] 19:9</p> <p><b>conditioned</b> [1] 49:19</p> <p><b>conduct</b> [2] 4:4 41:18</p> <p><b>conducted</b> [5] 41:9,11,23 80:19,21</p> <p><b>conducts</b> [2] 3:18 5:7</p> <p><b>confers</b> [1] 19:8</p> <p><b>confidence</b> [1] 81:22</p> <p><b>Congress</b> [50] 3:11 4:9 5:4, 8 6:22 8:11 9:4 10:10 19: 14,17,20 20:8,17,21 21:3 23:23 24:6 25:20 26:3,16, 23 27:5 28:16 29:12,18,21 30:11 32:19 34:25 36:1 37: 21 38:9,15,22 41:18 44:8, 10,15 54:6,12,20 57:21 58: 17,23 59:8,14 62:5 63:18 78:19 80:4</p> <p><b>connect</b> [1] 36:4</p> <p><b>consensus</b> [1] 52:5</p> <p><b>consequence</b> [2] 32:15 80:12</p> <p><b>conservative</b> [1] 77:24</p> <p><b>consider</b> [4] 18:7 21:3 65: 17 80:6</p> <p><b>consideration</b> [1] 35:19</p> <p><b>consistent</b> [3] 13:9,14 23: 10</p> <p><b>constrain</b> [1] 4:11</p> <p><b>constraint</b> [3] 12:4 59:2,7</p> <p><b>constrict</b> [1] 27:6</p> <p><b>construction</b> [2] 35:9 68: 13</p>	<p><b>contain</b> [1] 19:11</p> <p><b>contains</b> [1] 13:1</p> <p><b>contemplate</b> [1] 78:20</p> <p><b>contest</b> [1] 81:17</p> <p><b>context</b> [5] 35:19 66:18 77: 3,10,11</p> <p><b>continue</b> [1] 37:6</p> <p><b>contradictory</b> [1] 43:10</p> <p><b>controversial</b> [1] 28:13</p> <p><b>conversation</b> [1] 34:16</p> <p><b>conveying</b> [1] 17:5</p> <p><b>corollary</b> [1] 33:3</p> <p><b>Correct</b> [6] 9:22 11:12 24:3, 4 39:22 70:25</p> <p><b>correspondence</b> [1] 74:4</p> <p><b>corresponds</b> [1] 77:16</p> <p><b>cost</b> [7] 3:17,18,20 4:4,17, 21,24 5:6,7 10:2,12,13,19, 23 11:22,23 13:5 19:9 20: 2 21:12,17,19,24 22:20 23: 15,17,18,21 25:2,25 27:9 29:24,25 34:8,10 37:13 39: 10,24 40:20 42:15 43:1 44: 6 45:7,9,11,12,13 46:18, 22 47:3,10,24 48:10 49:14, 18,23,24,25 50:9,24,25 51: 7,17,22,25 52:7 53:19 54: 14 58:25 65:23 66:13,24, 25,25 78:18 80:6</p> <p><b>cost-based</b> [8] 4:13,20 21: 7 32:20 39:14 45:18 46:10 66:22</p> <p><b>costs</b> [17] 4:3 12:14,20 14: 4,9,11,24 24:6,20 26:13 39: 6 46:19 50:15 74:7 76:10 77:17 80:24</p> <p><b>couldn't</b> [1] 24:17</p> <p><b>Counsel</b> [7] 23:14 31:3 38: 2 42:24 69:10 79:14 82:25</p> <p><b>count</b> [1] 43:1</p> <p><b>country</b> [2] 24:16 58:10</p> <p><b>counts</b> [1] 10:1</p> <p><b>couple</b> [4] 35:4 36:13,13 48:5</p> <p><b>course</b> [11] 10:21 18:5 20: 16 30:4 42:22 47:8 52:18 62:17 64:16,17 77:12</p> <p><b>COURT</b> [24] 1:1,16 3:10 5: 23 6:13 29:15 31:17 32:3 33:15 34:1 35:15 38:7,8 48:21 50:19 51:1,2 66:20 68:1,6,12,21 70:5 76:4</p> <p><b>Court's</b> [2] 5:10 50:17</p> <p><b>courts</b> [5] 4:7 33:16 61:19 68:1 70:4</p> <p><b>covered</b> [3] 3:15 38:11,16</p> <p><b>create</b> [1] 69:23</p> <p><b>created</b> [1] 71:8</p> <p><b>creates</b> [1] 11:19</p> <p><b>critical</b> [1] 29:19</p> <p><b>cross-reference</b> [2] 17:12 51:23</p>
---	--	---	---	---

## Official - Subject to Final Review

<p><b>cross-referenced</b> [6] 3:22 12:24 14:17 15:18 46:13 52:6</p> <p><b>cross-references</b> [3] 20: 21 22:3 39:8</p> <p><b>curb</b> [1] 3:12</p> <p><b>cut</b> [1] 27:24</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D</b>(II) [2] 41:20 78:14</p> <p><b>D.C</b> [17] 1:12,20,23 5:13,23 6:2 30:21 31:7 32:9 62:7 67:16 70:23 71:2,18 75:19, 25 76:7</p> <p><b>dangerous</b> [1] 27:11</p> <p><b>data</b> [47] 13:4 15:8 16:8 17: 11,14 18:2,5,6,8,17 20:2 21:18,21 22:1,4 23:17 26: 1,5,16 27:8,9 37:15 40:11 41:1,3,4 42:16,18,22 43:8 49:14,24,25 53:19,20,23, 24 54:7,8 57:1,1,13,15,16 78:18 81:6,8</p> <p><b>debate</b> [1] 40:25</p> <p><b>decade's</b> [1] 57:2</p> <p><b>decide</b> [1] 23:21</p> <p><b>decided</b> [1] 37:4</p> <p><b>deciding</b> [1] 24:13</p> <p><b>decision</b> [2] 40:5 76:16</p> <p><b>decisions</b> [1] 25:23</p> <p><b>defer</b> [1] 34:14</p> <p><b>deference</b> [18] 35:17 61:16 62:14,16,19 64:2 67:17,21 68:8,17 69:1,3 70:6,25 71: 9 73:16 76:12 82:20</p> <p><b>deferred</b> [1] 68:7</p> <p><b>deferring</b> [1] 6:7</p> <p><b>define</b> [3] 24:24,25 66:9</p> <p><b>definite</b> [5] 22:22 28:18,18, 19 63:25</p> <p><b>degree</b> [2] 36:8 63:11</p> <p><b>delegate</b> [2] 5:8 6:23</p> <p><b>delegated</b> [1] 62:5</p> <p><b>delegation</b> [10] 47:19,20 49:5 64:15,18 65:11 68:3, 5 69:25 70:2</p> <p><b>Department</b> [1] 1:23</p> <p><b>described</b> [2] 62:7 81:4</p> <p><b>describing</b> [2] 17:5 63:22</p> <p><b>description</b> [1] 62:4</p> <p><b>designed</b> [1] 60:16</p> <p><b>destabilize</b> [1] 38:21</p> <p><b>destroyed</b> [1] 45:19</p> <p><b>detail</b> [3] 9:7 29:23 80:10</p> <p><b>detailed</b> [4] 13:1 22:7 38: 24 76:3</p> <p><b>determine</b> [3] 17:11 37:14 48:20</p> <p><b>determined</b> [4] 3:22 11:22 40:20 49:23</p> <p><b>difference</b> [5] 21:11 22:18 34:19 77:17,19</p> <p><b>differences</b> [4] 24:14,24</p>	<p>26:15 57:11</p> <p><b>different</b> [17] 4:1,25 12:23 13:4 21:7,17,18 23:12 39: 10,16,17 53:24 54:1,5 57: 12 76:5 77:8</p> <p><b>differential</b> [1] 19:23</p> <p><b>differently</b> [1] 67:14</p> <p><b>difficult</b> [1] 24:10</p> <p><b>difficulty</b> [2] 67:20 70:4</p> <p><b>direct</b> [3] 38:11 46:14 74:4</p> <p><b>directed</b> [1] 50:23</p> <p><b>directly</b> [2] 5:4 64:19</p> <p><b>directs</b> [2] 3:16 53:14</p> <p><b>disagree</b> [2] 8:6 49:21</p> <p><b>disagrees</b> [1] 32:4</p> <p><b>discount</b> [5] 40:2 43:2,4 44:7 58:24</p> <p><b>discounts</b> [11] 20:23 22:9, 10 23:24,25,25 43:15,23 46:20 61:4,6</p> <p><b>discretion</b> [6] 3:13 4:11 6: 19 15:18 16:1 80:9</p> <p><b>discretionary</b> [1] 80:7</p> <p><b>dislikes</b> [1] 53:2</p> <p><b>disposes</b> [1] 5:15</p> <p><b>dispute</b> [5] 20:9 40:23 57: 17 74:16,18</p> <p><b>disputed</b> [2] 20:13,15</p> <p><b>disputing</b> [2] 55:12 75:1</p> <p><b>disregard</b> [1] 30:10</p> <p><b>dissent</b> [1] 51:2</p> <p><b>distinction</b> [3] 18:15,25 19: 20</p> <p><b>distinctions</b> [7] 17:20,21, 22 18:3,8 25:19 57:8</p> <p><b>distinctive</b> [1] 60:10</p> <p><b>doctrinal</b> [2] 65:9 66:4</p> <p><b>doctrine</b> [3] 31:5 33:2 63: 21</p> <p><b>doing</b> [5] 10:23 21:8 49:19 50:14 56:19</p> <p><b>DONALD</b> [5] 1:20 2:3,9 3:7 79:16</p> <p><b>done</b> [10] 16:10,24 28:16 45:20 47:24,25 50:4,9 56: 14 76:10</p> <p><b>door</b> [4] 21:5 38:20 43:11, 12</p> <p><b>doubt</b> [1] 44:21</p> <p><b>down</b> [5] 7:2,3 29:4 52:25 70:9</p> <p><b>downward</b> [1] 74:5</p> <p><b>dramatically</b> [1] 38:10</p> <p><b>draw</b> [1] 18:15</p> <p><b>drew</b> [1] 57:8</p> <p><b>drop</b> [2] 81:14,23</p> <p><b>dropped</b> [1] 15:9</p> <p><b>drug</b> [15] 3:21 7:8 15:7 22: 12 23:19 26:22,25 27:13, 18 30:3 38:16 46:19 47:13 66:13 80:25</p> <p><b>drugs</b> [11] 3:15 7:19,23 14:</p>	<p>19,21,22,22 29:23 38:11 51:22 80:8</p> <p><b>drugstore's</b> [1] 27:21</p> <p><b>DSH</b> [2] 58:9 60:12</p> <p><b>dueling</b> [2] 32:11 33:24</p> <p><b>duty</b> [1] 44:2</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>each</b> [3] 47:7 62:9 80:24</p> <p><b>earlier</b> [11] 22:1,3 24:2 46: 12 48:19 54:15 55:14 56: 24 57:8 68:11 74:20</p> <p><b>effect</b> [1] 20:19</p> <p><b>effectively</b> [3] 6:20 21:6 73:22</p> <p><b>effects</b> [1] 82:2</p> <p><b>effort</b> [2] 76:20 81:6</p> <p><b>either</b> [8] 29:24 37:22 42: 14 61:24 63:5 65:24 69:9 81:1</p> <p><b>elaborate</b> [1] 33:24</p> <p><b>eligible</b> [1] 43:23</p> <p><b>elsewhere</b> [1] 14:5</p> <p><b>embraced</b> [1] 25:5</p> <p><b>emphasize</b> [1] 61:19</p> <p><b>emphasized</b> [1] 33:15</p> <p><b>employ</b> [1] 33:16</p> <p><b>employer</b> [1] 54:18</p> <p><b>enacted</b> [4] 3:11 20:18 30: 12 41:11</p> <p><b>enactment</b> [1] 25:16</p> <p><b>end</b> [6] 12:19 39:11 46:7 47: 20 78:7 80:1</p> <p><b>ended</b> [1] 42:20</p> <p><b>endorsed</b> [1] 70:11</p> <p><b>ends</b> [3] 78:5 80:1,15</p> <p><b>enjoys</b> [1] 3:13</p> <p><b>enough</b> [8] 64:21 69:24 70: 5 72:1,13 73:13 76:14 82: 21</p> <p><b>ensure</b> [4] 10:9 12:16 13: 18 15:1</p> <p><b>ensures</b> [1] 39:20</p> <p><b>entire</b> [1] 46:25</p> <p><b>entirely</b> [6] 6:21 12:23 13:3, 4 14:12 34:23</p> <p><b>entitlement</b> [1] 60:10</p> <p><b>entity</b> [3] 16:2 81:20,21</p> <p><b>enumerated</b> [1] 51:8</p> <p><b>EPA</b> [1] 50:17</p> <p><b>EPA's</b> [1] 50:21</p> <p><b>equal</b> [2] 3:21 11:21</p> <p><b>equally</b> [1] 60:6</p> <p><b>equivalent</b> [1] 66:13</p> <p><b>eradicating</b> [1] 78:5</p> <p><b>ESQ</b> [3] 2:3,6,9</p> <p><b>ESQUIRE</b> [1] 1:20</p> <p><b>essence</b> [2] 33:25 79:24</p> <p><b>essentially</b> [4] 6:3 30:9 35: 16 71:19</p> <p><b>established</b> [1] 43:3</p> <p><b>estimate</b> [4] 16:8 77:25,25 80:23</p>	<p><b>estimated</b> [1] 4:24</p> <p><b>ET</b> [6] 1:4,8 14:22,25 28:14 61:8</p> <p><b>evading</b> [1] 79:4</p> <p><b>even</b> [6] 6:13 16:19 32:9 34: 18 55:20 76:22</p> <p><b>event</b> [2] 39:1 65:24</p> <p><b>Everybody</b> [4] 45:12 46:17 49:15 77:23</p> <p><b>everyone</b> [3] 17:17 39:22 44:4</p> <p><b>everything</b> [2] 40:13 52:14</p> <p><b>evident</b> [1] 10:7</p> <p><b>eviscerating</b> [1] 64:23</p> <p><b>exactly</b> [6] 25:18 33:1 44: 14 54:21 56:23 80:10</p> <p><b>example</b> [6] 13:16 14:20 24:15 33:20 54:14,15</p> <p><b>examples</b> [1] 14:10</p> <p><b>except</b> [2] 43:3 46:20</p> <p><b>exclude</b> [3] 16:1 39:13,15</p> <p><b>excluded</b> [1] 43:24</p> <p><b>excuse</b> [2] 15:24 49:14</p> <p><b>executive</b> [1] 36:3</p> <p><b>exercise</b> [2] 4:14 15:12</p> <p><b>exhaust</b> [1] 35:18</p> <p><b>existential</b> [1] 65:25</p> <p><b>expense</b> [4] 38:11 58:1,2 73:19</p> <p><b>expensive</b> [1] 27:25</p> <p><b>expertise</b> [1] 29:10</p> <p><b>explain</b> [1] 59:25</p> <p><b>explained</b> [1] 65:13</p> <p><b>explanation</b> [1] 46:21</p> <p><b>explicit</b> [1] 64:15</p> <p><b>explicitly</b> [2] 49:19 51:24</p> <p><b>express</b> [2] 51:9 65:11</p> <p><b>expressio</b> [2] 51:9,12</p> <p><b>expressly</b> [2] 39:7 74:2</p> <p><b>extent</b> [1] 12:4</p> <p><b>extra</b> [3] 46:18 75:4 82:12</p> <p><b>extremely</b> [1] 14:21</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>face</b> [1] 10:8</p> <p><b>fact</b> [11] 20:20 38:25 42:5, 25 44:10 47:1,3 51:7 57:6 71:6 78:16</p> <p><b>factoring</b> [1] 21:4</p> <p><b>factors</b> [1] 65:17</p> <p><b>factual</b> [1] 59:20</p> <p><b>failed</b> [1] 79:2</p> <p><b>fails</b> [1] 45:9</p> <p><b>fair</b> [2] 13:18 15:1</p> <p><b>fairly</b> [2] 65:1,2</p> <p><b>far</b> [6] 6:19 27:11,23 28:3 44:25 48:8</p> <p><b>Farm</b> [2] 65:16 66:3</p> <p><b>favored</b> [1] 74:11</p> <p><b>favoritism</b> [6] 26:6 36:3,15, 23 37:1 52:25</p> <p><b>Federal</b> [4] 42:12 73:19 74: 2 75:7</p>	<p><b>Federation</b> [3] 59:22 60:4 74:22</p> <p><b>few</b> [2] 27:20 80:17</p> <p><b>figure</b> [4] 7:7,20 14:16 45: 10</p> <p><b>figures</b> [1] 45:9</p> <p><b>filed</b> [1] 59:23</p> <p><b>fill</b> [2] 13:20 62:6</p> <p><b>final</b> [1] 6:1</p> <p><b>finally</b> [1] 82:19</p> <p><b>find</b> [5] 6:4 18:24 24:25 42: 7 64:15</p> <p><b>finding</b> [2] 6:4 33:25</p> <p><b>finds</b> [1] 6:13</p> <p><b>fine</b> [1] 70:2</p> <p><b>finish</b> [2] 56:11 60:20</p> <p><b>first</b> [13] 6:9 19:14 21:20 30: 20 38:15 40:18 43:15 46:5 48:6 63:6,19 79:23 80:18</p> <p><b>fisc</b> [2] 73:19 74:2</p> <p><b>fits</b> [1] 66:3</p> <p><b>five</b> [1] 45:1</p> <p><b>flaws</b> [2] 81:19,20</p> <p><b>flip</b> [1] 52:13</p> <p><b>flows</b> [1] 14:15</p> <p><b>focus</b> [2] 18:12 66:22</p> <p><b>focused</b> [2] 69:21 78:17</p> <p><b>follow</b> [6] 12:15 35:5,12,16 37:11 69:17</p> <p><b>followed</b> [1] 42:9</p> <p><b>following</b> [2] 12:13 46:11</p> <p><b>Footnote</b> [5] 35:6 56:7 68: 11 70:11 75:16</p> <p><b>for-profit</b> [1] 60:5</p> <p><b>force</b> [1] 52:11</p> <p><b>foreclosing</b> [1] 18:4</p> <p><b>formula</b> [11] 3:23 4:25 10: 15 13:2,21 14:17 15:1,13, 19 26:9 30:3</p> <p><b>forth</b> [3] 23:5 35:16 61:23</p> <p><b>found</b> [1] 57:10</p> <p><b>four</b> [2] 79:20 81:24</p> <p><b>framework</b> [1] 76:11</p> <p><b>free</b> [1] 32:22</p> <p><b>friend</b> [13] 38:23 39:14,19 40:24 48:8 52:1 53:8 55:2 57:17 61:16 65:20,20 81:4</p> <p><b>friend's</b> [4] 54:21 56:3 79: 1,24</p> <p><b>front</b> [1] 43:12</p> <p><b>full</b> [1] 82:4</p> <p><b>fundamental</b> [2] 8:8 30:11</p> <p><b>funds</b> [1] 74:3</p> <p><b>further</b> [2] 30:17 73:2</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>GAO</b> [5] 41:22,24 42:5 57: 10 78:15</p> <p><b>gaps</b> [1] 13:20</p> <p><b>gather</b> [4] 17:18 36:6 81:5, 6</p> <p><b>gave</b> [7] 14:13 41:18 42:13, 17 59:18 63:9 81:8</p>
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## Official - Subject to Final Review

<p><b>General</b> [4] 1:23 8:25 17:23 81:3  <b>generally</b> [2] 71:25 81:13  <b>generate</b> [1] 80:22  <b>generic</b> [1] 15:5  <b>gets</b> [1] 32:24  <b>getting</b> [4] 6:1 10:1 36:1 61:22  <b>giant</b> [1] 11:19  <b>give</b> [14] 14:2,9 15:4 28:17 30:9 33:21 35:12 36:7 44:3 63:2,4,19 64:2 72:7  <b>given</b> [5] 25:4 43:2,4 65:3 80:4  <b>giving</b> [2] 10:18 26:8  <b>Golly</b> [1] 69:16  <b>GORSUCH</b> [25] 31:2,23 32:1,3 33:4,9,12 69:10,13,16 70:22 71:5,8,24 72:5,8,12,16,21 73:7,8,11,25 74:10,13  <b>Gorsuch's</b> [2] 35:6 75:13  <b>got</b> [11] 15:20 16:8 20:3 25:25 27:11 35:18 37:10 45:22 70:1 79:20 81:3  <b>gotten</b> [1] 23:19  <b>government</b> [14] 4:6,12 32:16 34:7 62:13 70:6 72:12 73:12 75:7 76:2 81:14,16,19,25  <b>government's</b> [2] 71:3 73:16  <b>governs</b> [1] 34:14  <b>grant</b> [2] 19:15 34:18  <b>granted</b> [1] 19:14  <b>grounds</b> [1] 71:11  <b>group</b> [9] 4:19 17:10,16 47:12,16 48:13,14 56:15,17  <b>group-based</b> [1] 27:7  <b>groups</b> [18] 3:18 5:6 10:20,22 17:14,22 18:22 19:1,9,12,22 21:25 24:25 26:6,19 27:2 34:10 37:13  <b>guess</b> [3] 35:15 71:11 77:15  <b>guidelines</b> [1] 55:21</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>half</b> [2] 58:1 74:24  <b>handling</b> [1] 14:24  <b>hands</b> [2] 6:7 75:25  <b>happened</b> [3] 16:15 36:5,6  <b>hard</b> [2] 22:17 40:7  <b>hard-fought</b> [1] 80:12  <b>hard-pressed</b> [1] 64:14  <b>harder</b> [1] 22:25  <b>HEALTH</b> [1] 1:8  <b>hear</b> [1] 3:3  <b>heard</b> [1] 81:4  <b>help</b> [2] 28:21 73:8  <b>helpful</b> [1] 50:18  <b>helps</b> [1] 29:7  <b>hesitant</b> [2] 25:6,8</p>	<p><b>HHS</b> [17] 3:13,25 4:19,22 5:8 36:6 39:15,17 41:2,4 42:8,12 56:25 57:5 58:23 68:7 74:5  <b>HHS's</b> [1] 55:21  <b>hierarchy</b> [2] 6:6 34:12  <b>high</b> [1] 14:23  <b>higher</b> [3] 24:15 26:9 75:3  <b>highly</b> [1] 38:24  <b>history</b> [2] 19:19 36:16  <b>hold</b> [2] 38:8 52:18  <b>holding</b> [1] 76:7  <b>Honor</b> [6] 5:20 6:1 8:7 11:18 17:3 25:4  <b>hope</b> [2] 45:22 46:3  <b>HOSPITAL</b> [38] 1:3 3:4,14,17 4:19 5:6 10:20,22 17:10,13,15,22 18:9,22 19:1,2,9,12,22 21:25 24:25 26:5,19 27:1 34:10 37:12 43:2 47:11,16 48:13,14 49:24 56:17 58:11 59:5 66:21 78:18 80:24  <b>hospitals</b> [74] 4:1,2,14,23 7:6,18,23 17:23 18:12,16 19:5 20:10,24 21:7,21 36:4,5,9 37:3 38:10,12 39:24 40:3 41:4 42:2,13,17 44:3,6,13 47:1,12,17 52:2,2 53:1,3 55:9,10,15,17,18,23 56:1,1,15,18 57:9,9,10 58:3,6,9,16 59:3,9,23,23,25 60:4,5,9,12,17 61:12 73:19 74:3,16,24 80:21 81:2,7,24 82:5  <b>hospitals'</b> [2] 74:6,22  <b>hotly</b> [1] 55:12  <b>huge</b> [1] 58:10  <b>HUMAN</b> [1] 1:8  <b>hunting</b> [1] 6:3  <b>hurt</b> [1] 74:15</p> <hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p><b>idea</b> [2] 32:11 35:17  <b>identified</b> [1] 14:18  <b>idiosyncratic</b> [2] 41:1 56:25  <b>II</b> [4] 7:2 14:6 16:18 63:15  <b>illustrate</b> [2] 34:16 67:4  <b>illustrates</b> [1] 38:25  <b>imagine</b> [2] 15:6 52:22  <b>implicates</b> [1] 31:4  <b>implications</b> [1] 64:8  <b>imply</b> [1] 76:18  <b>important</b> [7] 25:12 26:3 46:16 58:22 63:16 65:2 82:3  <b>importantly</b> [1] 39:8  <b>imposes</b> [1] 44:1  <b>inaccurate</b> [1] 52:4  <b>inadequate</b> [1] 14:19  <b>inappropriate</b> [1] 36:7  <b>include</b> [19] 15:19 18:13 22:7,8,9,9 24:6 39:5 43:7,</p>	<p>8 50:25 52:19 65:22 67:6 68:14 71:21 72:24 75:16 76:9  <b>included</b> [2] 20:24 43:16  <b>includes</b> [2] 54:2 66:12  <b>increase</b> [1] 74:21  <b>incurred</b> [1] 19:4  <b>Indeed</b> [1] 38:23  <b>independent</b> [1] 57:3  <b>indicate</b> [1] 31:11  <b>indicates</b> [1] 68:12  <b>indicating</b> [1] 74:23  <b>indication</b> [2] 26:23 62:5  <b>indisputably</b> [1] 56:16  <b>individual</b> [1] 47:16  <b>infer</b> [2] 19:17 27:5  <b>inference</b> [3] 36:15,20 51:10  <b>inferring</b> [1] 27:4  <b>instead</b> [5] 18:22 37:22 38:22 44:13 54:14  <b>instinct</b> [1] 28:12  <b>instructed</b> [1] 41:19  <b>instruction</b> [2] 41:17 42:9  <b>instructions</b> [1] 55:16  <b>insurance</b> [2] 61:7,8  <b>intended</b> [1] 6:22  <b>interest</b> [2] 75:2,3  <b>interests</b> [1] 26:7  <b>interpret</b> [2] 63:19,20  <b>interpretation</b> [14] 29:15 33:17 35:8 40:9 53:13 65:14 67:20,25 70:10 72:11 75:15,21 76:6,11  <b>interpretations</b> [1] 69:23  <b>interpreting</b> [3] 50:19 64:10 68:7  <b>interpretive</b> [1] 67:24  <b>interprets</b> [1] 65:18  <b>invalidating</b> [1] 38:19  <b>invocation</b> [1] 53:11  <b>invoke</b> [2] 29:16 70:24  <b>invoking</b> [4] 29:11 32:12 33:2 55:5  <b>Iowa</b> [1] 6:16  <b>irrelevant</b> [1] 11:24  <b>isn't</b> [12] 8:14 14:12 18:8 19:13,18 27:23,25 34:17 36:16 45:3,12 58:7  <b>issue</b> [6] 3:11,25 47:4 55:12 75:5 80:16  <b>issued</b> [1] 65:12  <b>itself</b> [4] 12:3 38:23 39:20 81:19</p> <hr/> <p style="text-align: center;"><b>J</b></p> <hr/> <p><b>James</b> [1] 28:25  <b>jawboning</b> [1] 26:8  <b>Joint</b> [1] 21:1  <b>JR</b> [5] 1:20 2:3,9 3:7 79:16  <b>Judge</b> [1] 76:4  <b>judgment</b> [5] 15:21 16:3 25:15 30:11 82:16</p>	<p><b>judgments</b> [2] 20:5 25:21  <b>judicial</b> [2] 44:25 45:2  <b>Justice</b> [207] 1:23 3:3,9 5:11 6:24 8:1,4,9,14,18 9:1,8,11,13,16,20,24 10:4,25 11:14 12:1,6,9,18 13:6,22,25 16:16,22 17:18 18:10,23 19:4 20:9,13 21:10,15 22:13,16,24 23:14 24:4 25:7,11 27:10 28:7,23 30:13,13,15,16,16,18,19,20 31:2,13,23 32:1,3 33:4,9,12 34:16 35:1,1,3,4,5,25 36:11,17,22,25 37:25 38:1,6 40:7,15 41:8,12,15 42:24 43:14,18 44:16,17,18,19,21,23 45:21,22 46:8,12 47:6,9 48:4,12,19,24 49:3,4,9,17,20 50:1,4,8,13,16 52:9,16 53:16 54:1,4,15,15,23 55:7,14,22 56:4,9,10,11,12,24 57:7,23 58:5 59:1,6,17 60:18,20 61:14 62:23 63:10,11,13,14,23,24 64:4,7,9,17,22 66:6,8,9 67:8,11,14,22 68:10,16,22,25 69:10,11,13,15,16,20 70:22 71:5,8,24 72:5,8,12,16,21 73:1,1,3,5,5,7,8,11,25 74:10,13 75:10,10,12,13,13 76:13,20 77:15 78:2,3 79:7,10,10,11,12,13,19,21 80:19 82:2,24  <b>justification</b> [1] 32:12  <b>justified</b> [2] 4:14 5:3  <b>justify</b> [2] 26:15 37:16</p> <hr/> <p style="text-align: center;"><b>K</b></p> <hr/> <p><b>KAGAN</b> [29] 13:22,25 16:16,22 34:17 35:1 44:16,18,21 47:6 48:4,12,24 49:3,4,9,17,20 50:1,4,8,13,16 53:16 54:1,4,23 63:12 79:10  <b>Kagan's</b> [3] 64:22 76:20 78:4  <b>Kavanaugh</b> [22] 35:3,4,25 36:11,17,22,25 37:25 57:23 58:5 59:1,6,17 68:11 69:11,15 75:12 76:13 77:15 78:2 79:7 82:2  <b>keeping</b> [2] 60:25 61:3  <b>Kentucky</b> [1] 58:13  <b>key</b> [5] 10:21 16:13 19:6,7 62:21  <b>kind</b> [13] 12:19 25:15 26:4 36:4 44:2,14 51:9 60:9 62:10 64:2 67:19,21 76:19  <b>kinds</b> [12] 13:19 18:13 22:7,8,9,10 25:19,22 36:3 41:4 52:23 66:24  <b>Kisor</b> [2] 35:17 61:18  <b>knowingly</b> [1] 38:9  <b>knows</b> [1] 45:12</p>	<p style="text-align: center;"><b>L</b></p> <hr/> <p><b>labor</b> [1] 66:24  <b>language</b> [5] 10:18 26:21 30:7 70:1 76:8  <b>large</b> [3] 57:9 60:6 80:21  <b>last</b> [3] 5:12 60:22 73:11  <b>later</b> [1] 24:8  <b>Laughter</b> [3] 31:1 44:22 73:10  <b>law</b> [2] 37:21 72:3  <b>lawful</b> [1] 39:2  <b>lead</b> [2] 16:17 55:20  <b>least</b> [6] 8:5 25:5 33:17 58:7 67:5 75:23  <b>leave</b> [1] 22:20  <b>left</b> [2] 14:4 40:8  <b>legal</b> [1] 65:14  <b>legislate</b> [1] 8:11  <b>legislated</b> [1] 29:22  <b>legislates</b> [1] 8:12  <b>legislative</b> [3] 19:18 36:16 80:12  <b>legislator</b> [1] 63:4  <b>legislature</b> [1] 63:1  <b>less</b> [2] 20:10 56:16  <b>level</b> [1] 15:8  <b>levels</b> [1] 60:6  <b>light</b> [1] 31:6  <b>likes</b> [1] 53:1  <b>limit</b> [1] 24:12  <b>limitation</b> [1] 64:24  <b>limited</b> [1] 53:6  <b>limiting</b> [1] 11:5  <b>line</b> [2] 15:14 16:11  <b>lines</b> [1] 31:2  <b>linked</b> [1] 76:24  <b>listed</b> [1] 58:14  <b>listened</b> [1] 64:25  <b>lists</b> [1] 45:1  <b>little</b> [8] 25:10 29:21 46:18 47:19 63:16 67:13 78:4 81:22  <b>lobby</b> [1] 73:22  <b>long</b> [3] 15:24 37:5 72:16  <b>look</b> [21] 7:7 13:4 17:13 20:1 22:4 23:23 24:1 26:16,17 27:18 31:14,20 32:5,8 48:8,22 63:1 64:3 66:16,18 67:7  <b>looked</b> [1] 7:1  <b>looking</b> [4] 23:15 27:12 66:23 68:15  <b>looks</b> [1] 13:3  <b>lose</b> [1] 44:9  <b>lot</b> [11] 20:10 22:20 40:16,22 58:11 60:25 61:3,12,21 70:7 81:9  <b>lots</b> [1] 76:5  <b>low-income</b> [1] 73:20  <b>lower</b> [5] 33:15 55:20,20 61:19 70:4</p>
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## Official - Subject to Final Review

<p><b>M</b></p> <p><b>made</b> <sup>[15]</sup> 7:12 16:20,23 19:20 30:11 39:25 53:8 56:23 58:22 60:2,12 61:1 71:19 74:6 77:20</p> <p><b>main</b> <sup>[1]</sup> 16:14</p> <p><b>major</b> <sup>[4]</sup> 23:6 31:4 33:2 60:12</p> <p><b>majority</b> <sup>[1]</sup> 32:1</p> <p><b>mandatory</b> <sup>[3]</sup> 32:19 34:8, 8</p> <p><b>manifests</b> <sup>[1]</sup> 62:10</p> <p><b>manner</b> <sup>[2]</sup> 12:24 57:5</p> <p><b>manufacturers</b> <sup>[4]</sup> 17:15, 17 22:5 23:20</p> <p><b>many</b> <sup>[4]</sup> 41:25 52:2 60:5 68:6</p> <p><b>materially</b> <sup>[1]</sup> 39:17</p> <p><b>matter</b> <sup>[2]</sup> 1:15 65:9</p> <p><b>matters</b> <sup>[2]</sup> 21:15 25:14</p> <p><b>MCI</b> <sup>[3]</sup> 6:15 76:16,16</p> <p><b>mean</b> <sup>[37]</sup> 6:24 7:21 11:8,9, 15,15 13:22 14:4 18:15 22:17 29:20 33:25 45:17,19 52:12,16 54:10,19 55:11 59:6,12 62:17 64:3,19,20 68:4,22 70:18,21 71:16 76:15 77:3,8,9,12 78:11 82:2</p> <p><b>meaningful</b> <sup>[2]</sup> 23:4,8 77:2,9</p> <p><b>meaningful</b> <sup>[2]</sup> 18:2 82:18</p> <p><b>means</b> <sup>[18]</sup> 8:12,22 9:9 11:7 12:10,12 28:18,19 29:12, 17 37:11 39:11 52:14 77:13 78:19 80:3,15 82:11</p> <p><b>meant</b> <sup>[3]</sup> 45:17 68:20 75:6</p> <p><b>measure</b> <sup>[1]</sup> 47:3</p> <p><b>medical</b> <sup>[1]</sup> 18:14</p> <p><b>Medicare</b> <sup>[12]</sup> 3:14 38:9,11, 21 39:21 40:2 58:2 60:15 61:5 66:20 68:7 82:8</p> <p><b>MedPAC</b> <sup>[2]</sup> 81:19,21</p> <p><b>meet</b> <sup>[2]</sup> 81:3,11</p> <p><b>meets</b> <sup>[1]</sup> 3:18</p> <p><b>mentioned</b> <sup>[2]</sup> 24:2 57:7</p> <p><b>merits</b> <sup>[1]</sup> 4:12</p> <p><b>mess</b> <sup>[1]</sup> 45:10</p> <p><b>met</b> <sup>[1]</sup> 19:9</p> <p><b>methodology</b> <sup>[2]</sup> 9:5 12:13</p> <p><b>methods</b> <sup>[1]</sup> 10:10</p> <p><b>MICHEL</b> <sup>[75]</sup> 1:22 2:6 38:3, 4,6 40:7,15 41:10,13,16 43:13,20 45:21,25 46:9 47:6 48:4,16 49:3,9,20 50:2,6, 11,16 52:15 53:17,25 54:11,25 55:11 56:2,6,9,22 57:25 58:21 59:4,12,18 60:18, 19,22 61:14 62:15 63:23 64:1,6,9 65:8 66:8,11 67:10,11 68:4,19,24 69:5 70:18 71:1,6,16 72:2,6,14,18, 23 73:24 74:12,18 75:18</p>	<p>77:1,16 78:10 79:9</p> <p><b>Michigan</b> <sup>[1]</sup> 50:17</p> <p><b>micromanaging</b> <sup>[1]</sup> 29:20</p> <p><b>might</b> <sup>[6]</sup> 11:8 14:25 27:20 57:5 64:21 67:23</p> <p><b>mind</b> <sup>[3]</sup> 44:15 63:7 69:25</p> <p><b>minimum</b> <sup>[3]</sup> 23:9 66:12 72:19</p> <p><b>minor</b> <sup>[1]</sup> 23:7</p> <p><b>minute</b> <sup>[3]</sup> 9:6 29:23 80:10</p> <p><b>modest</b> <sup>[6]</sup> 39:25 57:18 61:1 76:19,25 77:24</p> <p><b>modify</b> <sup>[1]</sup> 76:18</p> <p><b>moment</b> <sup>[1]</sup> 65:6</p> <p><b>morning</b> <sup>[3]</sup> 38:23 39:15 40:24</p> <p><b>most</b> <sup>[4]</sup> 25:12 43:15 46:20 77:2</p> <p><b>mouth</b> <sup>[1]</sup> 56:3</p> <p><b>much</b> <sup>[10]</sup> 6:15,16 47:13 56:19 71:25 72:13,20 73:12 80:14 82:20</p> <p><b>must</b> <sup>[4]</sup> 3:21 7:15 39:5 63:8</p> <p><b>myself</b> <sup>[1]</sup> 73:9</p> <p><b>N</b></p> <p><b>natural</b> <sup>[1]</sup> 28:12</p> <p><b>nature</b> <sup>[1]</sup> 38:24</p> <p><b>nearly</b> <sup>[1]</sup> 74:24</p> <p><b>necessarily</b> <sup>[1]</sup> 51:6</p> <p><b>necessary</b> <sup>[14]</sup> 3:23 7:10 10:16 11:6 27:14 30:5,8 50:6,21,25 51:6 64:12 69:7,9</p> <p><b>need</b> <sup>[3]</sup> 33:7 61:20 62:18</p> <p><b>needs</b> <sup>[4]</sup> 6:12 12:14 13:13 17:1</p> <p><b>Neither</b> <sup>[1]</sup> 38:12</p> <p><b>neutral</b> <sup>[1]</sup> 82:10</p> <p><b>neutrality</b> <sup>[2]</sup> 38:19 75:8</p> <p><b>new</b> <sup>[2]</sup> 51:18 77:5</p> <p><b>next</b> <sup>[3]</sup> 3:4 28:7 65:5</p> <p><b>nominal</b> <sup>[1]</sup> 16:2</p> <p><b>non-340B</b> <sup>[1]</sup> 51:21</p> <p><b>non-hospital</b> <sup>[1]</sup> 18:9</p> <p><b>None</b> <sup>[4]</sup> 30:15 33:4 53:4 73:3</p> <p><b>nor</b> <sup>[1]</sup> 38:13</p> <p><b>normally</b> <sup>[1]</sup> 3:13</p> <p><b>Northeast</b> <sup>[1]</sup> 24:18</p> <p><b>notable</b> <sup>[1]</sup> 62:9</p> <p><b>note</b> <sup>[2]</sup> 41:16 81:18</p> <p><b>noted</b> <sup>[1]</sup> 55:13</p> <p><b>notice</b> <sup>[1]</sup> 42:12</p> <p><b>notice-and-comment</b> <sup>[1]</sup> 65:13</p> <p><b>notion</b> <sup>[2]</sup> 54:13 67:2</p> <p><b>November</b> <sup>[1]</sup> 1:13</p> <p><b>number</b> <sup>[9]</sup> 4:25 5:1 16:11, 12,18 17:8 21:4 32:8 48:15</p> <p><b>numbers</b> <sup>[3]</sup> 18:11,13 20:1</p>	<p><b>numeral</b> <sup>[6]</sup> 7:2 11:11 14:3, 6 16:18 63:15</p> <p><b>O</b></p> <p><b>object</b> <sup>[1]</sup> 56:7</p> <p><b>objected</b> <sup>[1]</sup> 55:2</p> <p><b>objective</b> <sup>[3]</sup> 8:19,21 11:3</p> <p><b>objectives</b> <sup>[2]</sup> 8:11,12</p> <p><b>obtaining</b> <sup>[1]</sup> 75:3</p> <p><b>Obviously</b> <sup>[2]</sup> 61:5,12</p> <p><b>occasion</b> <sup>[1]</sup> 62:9</p> <p><b>odd</b> <sup>[2]</sup> 21:2 81:15</p> <p><b>offsetting</b> <sup>[2]</sup> 60:1 61:10</p> <p><b>often</b> <sup>[3]</sup> 41:8 42:7 73:15</p> <p><b>Okay</b> <sup>[15]</sup> 7:1,14 18:23 27:10 28:7 33:12 45:3,7 46:5 56:4 59:17 63:7 65:5 67:10 79:9</p> <p><b>once</b> <sup>[1]</sup> 24:9</p> <p><b>one</b> <sup>[49]</sup> 6:4,11 11:24 13:2, 3 14:25 15:5,16,23 16:5 17:1,4 23:25 24:16 26:12, 12 31:19 32:8,9 33:19 35:24 37:11 41:11 42:10 44:25 45:3,6,7 48:12 49:1 53:2,23 58:21 60:25 63:6,20 65:4,5 66:2,6 67:9,18,20 68:2 70:15 73:11,17,18 75:6</p> <p><b>only</b> <sup>[13]</sup> 4:20 13:10 26:12 30:21 33:18 41:10 56:16 59:9 61:5 69:6 78:8 81:2, 23</p> <p><b>operates</b> <sup>[1]</sup> 75:9</p> <p><b>operation</b> <sup>[2]</sup> 21:16 35:20</p> <p><b>operations</b> <sup>[1]</sup> 61:7</p> <p><b>opinion</b> <sup>[3]</sup> 50:17 75:23,24</p> <p><b>opposed</b> <sup>[3]</sup> 24:16,19 68:2</p> <p><b>opposite</b> <sup>[1]</sup> 51:12</p> <p><b>OPPS</b> <sup>[4]</sup> 38:17 61:11 66:23 74:8</p> <p><b>option</b> <sup>[1]</sup> 32:21</p> <p><b>options</b> <sup>[3]</sup> 31:19 37:10 42:14</p> <p><b>oral</b> <sup>[5]</sup> 1:16 2:2,5 3:7 38:4</p> <p><b>order</b> <sup>[3]</sup> 3:25 15:1 50:14</p> <p><b>original</b> <sup>[2]</sup> 41:23 57:7</p> <p><b>other</b> <sup>[45]</sup> 4:2 13:1,19 14:10 15:3,5,16,19 17:23 18:13,16 19:5 32:25,25 34:4 38:12,17 40:3 41:4 45:1 47:8 48:13 51:21 57:5 58:3 60:7 61:7,11,17 63:6,20 65:4,5 66:25 68:23 71:14 74:3,8,10 78:25 82:8,13,13, 15,15</p> <p><b>others</b> <sup>[3]</sup> 45:5 63:11 73:22</p> <p><b>otherwise</b> <sup>[1]</sup> 11:10</p> <p><b>ought</b> <sup>[1]</sup> 29:2</p> <p><b>out</b> <sup>[24]</sup> 6:21 7:7,20 9:5,14, 19 15:22 17:15 18:8 19:21 22:22 25:21 29:13 33:17 34:23 38:20 45:10 47:10</p>	<p>55:2 58:12,23 74:19,24 76:21</p> <p><b>outlined</b> <sup>[1]</sup> 42:11</p> <p><b>outpatient</b> <sup>[2]</sup> 3:14 80:25</p> <p><b>outset</b> <sup>[1]</sup> 70:19</p> <p><b>outside</b> <sup>[2]</sup> 6:20 18:19</p> <p><b>over</b> <sup>[5]</sup> 15:6,6 29:15,16 57:24</p> <p><b>overall</b> <sup>[1]</sup> 35:20</p> <p><b>overarching</b> <sup>[1]</sup> 13:7</p> <p><b>overhead</b> <sup>[7]</sup> 13:17 14:4,9, 11,13 24:20 34:3</p> <p><b>overpay</b> <sup>[1]</sup> 38:10</p> <p><b>overpayment</b> <sup>[5]</sup> 57:21,25 58:6,18 61:1</p> <p><b>override</b> <sup>[2]</sup> 47:21 50:13</p> <p><b>overrule</b> <sup>[4]</sup> 5:16 30:22,22 33:8</p> <p><b>overruled</b> <sup>[1]</sup> 6:12</p> <p><b>own</b> <sup>[2]</sup> 42:22 62:9</p> <p><b>P</b></p> <p><b>p.m</b> <sup>[1]</sup> 83:1</p> <p><b>PAGE</b> <sup>[7]</sup> 2:2 6:17 7:3 15:17 17:25 18:10 21:1</p> <p><b>paid</b> <sup>[3]</sup> 18:12 19:5 47:11</p> <p><b>paragraph</b> <sup>[62]</sup> 3:12,15,19, 24 4:10,18 7:1,10,11,12,14 8:16,21,22,23 9:22 10:16, 18 11:6,16,25 14:12,15 20:18 24:12 25:16,17,18,21 27:15 30:6,8 31:7 39:4,13 48:18 50:7,12 51:13,15,16 52:16,19,21 53:5,7,15 54:3 55:16 64:13 65:19,21 66:7, 15,17,23 67:5 71:21 72:25 76:8,24 80:5</p> <p><b>part</b> <sup>[9]</sup> 24:16 25:5 28:5,7,8 33:14 46:2,4 58:18</p> <p><b>particular</b> <sup>[14]</sup> 14:19 15:7, 9 36:3 47:11,11 53:2,3 56:20,21 59:25 69:8 71:12 75:9</p> <p><b>Particularly</b> <sup>[1]</sup> 17:9</p> <p><b>path</b> <sup>[1]</sup> 35:16</p> <p><b>paths</b> <sup>[1]</sup> 79:25</p> <p><b>patients</b> <sup>[2]</sup> 60:3 73:20</p> <p><b>patterns</b> <sup>[2]</sup> 77:5,7</p> <p><b>pay</b> <sup>[9]</sup> 7:5,6,7,18,19 20:10 29:3 56:16 82:9</p> <p><b>paying</b> <sup>[2]</sup> 7:23 82:16</p> <p><b>payment</b> <sup>[1]</sup> 16:6</p> <p><b>payments</b> <sup>[3]</sup> 38:20 60:12 75:4</p> <p><b>pending</b> <sup>[1]</sup> 41:14</p> <p><b>people</b> <sup>[3]</sup> 27:19 60:7 82:15</p> <p><b>per</b> <sup>[2]</sup> 40:19 42:8</p> <p><b>percent</b> <sup>[23]</sup> 13:11,11 14:16 15:10 24:19,19 27:24 33:18 42:17,18,19 46:16, 17 47:2 60:1 61:10 74:8, 21 77:19,20 81:7,15,23</p>	<p><b>Perhaps</b> <sup>[1]</sup> 63:6</p> <p><b>periodic</b> <sup>[2]</sup> 41:19 79:2</p> <p><b>periodically</b> <sup>[2]</sup> 78:13,25</p> <p><b>permissible</b> <sup>[1]</sup> 40:19</p> <p><b>permits</b> <sup>[3]</sup> 43:1 62:11 78:7</p> <p><b>person</b> <sup>[1]</sup> 63:18</p> <p><b>persons</b> <sup>[1]</sup> 60:7</p> <p><b>pervasive</b> <sup>[1]</sup> 66:22</p> <p><b>petition</b> <sup>[1]</sup> 33:13</p> <p><b>Petitioners</b> <sup>[8]</sup> 1:5,21 2:4, 10 3:8 38:8 39:12 79:17</p> <p><b>Petitioners'</b> <sup>[1]</sup> 55:24</p> <p><b>phrase</b> <sup>[3]</sup> 14:1 62:22 65:18</p> <p><b>physicians</b> <sup>[3]</sup> 43:22,22 44:14</p> <p><b>pick</b> <sup>[3]</sup> 33:9 70:15 75:12</p> <p><b>picture</b> <sup>[3]</sup> 58:18,19 82:4</p> <p><b>place</b> <sup>[1]</sup> 47:21</p> <p><b>places</b> <sup>[1]</sup> 8:5</p> <p><b>plausible</b> <sup>[1]</sup> 39:12</p> <p><b>please</b> <sup>[4]</sup> 3:10 29:4 38:7 69:13</p> <p><b>plus</b> <sup>[3]</sup> 14:16 23:24 47:2</p> <p><b>point</b> <sup>[30]</sup> 4:10 7:17,18 10:21 14:1 16:13 19:7,7 22:22,25 26:2 33:24 43:25 48:6 50:14 53:8 55:2 56:23 57:22 59:12,20 60:22 64:22 74:19 76:17 78:11 79:21,23 81:15 82:1</p> <p><b>pointed</b> <sup>[2]</sup> 47:9 76:20</p> <p><b>points</b> <sup>[6]</sup> 29:6 36:14 58:12, 21 79:20 80:17</p> <p><b>policy</b> <sup>[1]</sup> 37:20</p> <p><b>political</b> <sup>[3]</sup> 26:6 36:15 52:25</p> <p><b>politically</b> <sup>[1]</sup> 73:21</p> <p><b>populations</b> <sup>[1]</sup> 82:7</p> <p><b>pose</b> <sup>[1]</sup> 70:4</p> <p><b>posed</b> <sup>[1]</sup> 67:14</p> <p><b>posing</b> <sup>[1]</sup> 67:23</p> <p><b>position</b> <sup>[6]</sup> 34:21 46:25 51:19 55:25 57:20 77:13</p> <p><b>possibility</b> <sup>[1]</sup> 32:10</p> <p><b>possible</b> <sup>[3]</sup> 12:17 28:9,10</p> <p><b>possibly</b> <sup>[1]</sup> 6:22</p> <p><b>power</b> <sup>[8]</sup> 30:4 43:8 63:5, 10,12,16,19 65:4</p> <p><b>powerful</b> <sup>[1]</sup> 26:7</p> <p><b>powerless</b> <sup>[1]</sup> 73:21</p> <p><b>precept</b> <sup>[1]</sup> 8:8</p> <p><b>precluded</b> <sup>[2]</sup> 38:15,17</p> <p><b>precludes</b> <sup>[1]</sup> 4:8</p> <p><b>preclusion</b> <sup>[1]</sup> 46:1</p> <p><b>precondition</b> <sup>[3]</sup> 21:9 32:20 59:10</p> <p><b>prescribe</b> <sup>[1]</sup> 9:6</p> <p><b>prescribed</b> <sup>[5]</sup> 10:10 29:13,18 32:19 37:12</p> <p><b>prescribes</b> <sup>[1]</sup> 12:15</p>
--	---	--	--	--

## Official - Subject to Final Review

<p><b>presence</b> <sup>[1]</sup> 4:21  <b>presumably</b> <sup>[1]</sup> 35:9  <b>presume</b> <sup>[1]</sup> 31:17  <b>pretty</b> <sup>[4]</sup> 7:12, 13 11:7, 16  <b>previous</b> <sup>[1]</sup> 80:6  <b>previously</b> <sup>[1]</sup> 8:24  <b>price</b> <sup>[54]</sup> 3:21 4:23 5:1 7:7  <b>14:16 15:7, 15, 19, 20 16:10, 12, 18, 20, 24 17:11, 16 18:3, 11, 12 21:12, 12, 17 22:1, 2, 11, 18, 21, 24 23:15, 16, 18, 19 26:21, 24 27:13, 18, 21 30:2 39:15 43:3, 7 45:8, 11, 12, 14 46:14, 15, 15 47:12, 13 48:7 50:2, 10 54:18</b>  <b>price-based</b> <sup>[8]</sup> 4:15, 19  <b>10:14 12:22 13:2, 14, 15 45: 17</b>  <b>prices</b> <sup>[3]</sup> 16:6 19:1, 2  <b>principal</b> <sup>[1]</sup> 62:17  <b>principle</b> <sup>[1]</sup> 11:5  <b>prior</b> <sup>[1]</sup> 25:16  <b>private</b> <sup>[1]</sup> 61:7  <b>pro</b> <sup>[1]</sup> 78:16  <b>probably</b> <sup>[4]</sup> 44:19 65:7 69: 18 77:22  <b>problem</b> <sup>[7]</sup> 11:20 18:4 45: 1 61:23 67:25 71:9, 15  <b>problems</b> <sup>[3]</sup> 24:22 69:22 70:9  <b>produce</b> <sup>[1]</sup> 42:3  <b>produced</b> <sup>[1]</sup> 42:21  <b>producing</b> <sup>[2]</sup> 9:3 42:20  <b>program</b> <sup>[5]</sup> 20:18 41:2 57: 2 60:16 66:23  <b>prohibition</b> <sup>[1]</sup> 43:11  <b>property</b> <sup>[1]</sup> 29:1  <b>proposition</b> <sup>[1]</sup> 51:3  <b>protect</b> <sup>[1]</sup> 36:2  <b>provenance</b> <sup>[3]</sup> 8:23 25: 14 35:21  <b>provide</b> <sup>[9]</sup> 53:2, 3 56:13 58:8, 10 60:2, 5 61:12 82:6  <b>provided</b> <sup>[2]</sup> 14:5 20:23  <b>providers</b> <sup>[12]</sup> 17:20, 24 18: 14, 16 19:5 39:16, 20, 20 40: 1 74:8, 11, 14  <b>provides</b> <sup>[6]</sup> 18:25 21:22 27:9 39:7 40:16 56:18  <b>provision</b> <sup>[27]</sup> 6:5, 21 14:6 17:2 22:2 30:12 38:24 39: 2 44:1, 3 46:13 48:21, 22, 25 50:19, 22 53:5, 14, 17, 18, 21, 22 55:5 56:20 64:10 78:17 80:11  <b>provisions</b> <sup>[1]</sup> 45:2  <b>proxies</b> <sup>[1]</sup> 39:9  <b>proxy</b> <sup>[2]</sup> 42:5 52:7  <b>public</b> <sup>[1]</sup> 26:17  <b>pull</b> <sup>[2]</sup> 9:13 25:20  <b>pulled</b> <sup>[2]</sup> 9:4, 18  <b>purchaser</b> <sup>[1]</sup> 18:9</p>	<p><b>purport</b> <sup>[1]</sup> 6:4  <b>purported</b> <sup>[1]</sup> 4:2  <b>purpose</b> <sup>[15]</sup> 10:7, 8 29:12, 13, 17 48:23 52:20 53:10, 12 58:4 59:15 63:9 66:7, 14, 16  <b>purposes</b> <sup>[55]</sup> 3:24 7:10, 21 8:15, 18 10:5, 16, 17 11:6, 15 12:10, 12, 21 13:9 24:12 27:15, 16 28:1, 18 30:5, 8 31:6 39:4, 4, 13 45:16, 16, 17, 18, 18 48:17, 20 50:7, 12 51: 13, 14 52:12, 19 53:5, 15 54: 2 62:22 64:12, 19, 19, 20 65: 19, 21 66:17 67:4 71:20 72: 23 76:8, 23 77:23  <b>purposivist</b> <sup>[1]</sup> 53:12  <b>pursuing</b> <sup>[2]</sup> 46:7, 9  <b>push</b> <sup>[2]</sup> 25:6, 10  <b>put</b> <sup>[2]</sup> 45:15 56:3  <b>putting</b> <sup>[1]</sup> 29:21</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <p><b>qua</b> <sup>[1]</sup> 46:14  <b>question</b> <sup>[41]</sup> 5:5, 21 6:1, 11 29:9, 10, 14 30:20 31:18 35: 6 36:1 44:20 46:4, 12 47: 18 48:19 56:5 61:15 62:21 63:8, 16 64:18 65:2, 16, 17, 25 67:12, 15, 24 69:19 70:1, 3 71:25 72:8, 15 73:11 75: 14 76:14 78:4 79:22 82:19  <b>questionable</b> <sup>[1]</sup> 58:7  <b>questions</b> <sup>[8]</sup> 5:10 31:4 33: 2 35:5 44:24 61:21 68:15 76:20  <b>quickly</b> <sup>[2]</sup> 44:24 60:24  <b>quite</b> <sup>[4]</sup> 19:13 27:13, 23 36: 20</p> <hr/> <p style="text-align: center;"><b>R</b></p> <p><b>radiation</b> <sup>[1]</sup> 14:22  <b>raised</b> <sup>[1]</sup> 82:12  <b>raises</b> <sup>[1]</sup> 82:14  <b>rate</b> <sup>[24]</sup> 13:3 21:7 39:16, 23 42:5, 6, 7, 20, 21 43:17, 21, 24 44:5, 12 46:14 47:5 49:22 51:16 52:7 58:24 65:22 66: 13 78:22 81:24  <b>rates</b> <sup>[52]</sup> 3:14, 16, 17, 20 4:1, 2, 3, 13, 15, 19, 20, 23 5:5 8: 24 9:10 10:11, 13, 15, 19, 20, 22 11:21 12:13, 16, 23 13: 14, 15 17:10, 13 18:22 19: 23 20:22 25:17, 24 26:9 32: 20 34:10 38:16, 17, 18 39:1, 3, 5 40:19 41:7 51:21 52: 24 55:20, 20 81:15, 23 82: 13  <b>rather</b> <sup>[1]</sup> 5:12  <b>read</b> <sup>[28]</sup> 6:25 7:16 10:17 11:18 17:2 18:3 27:20, 20 28:10 30:7 31:7, 8 32:17,</p>	<p><b>18 34:7 47:19, 21 48:17 49: 5 50:24 51:4, 15 53:9 54:9 59:21 74:22 76:17 80:13</b>  <b>reading</b> <sup>[13]</sup> 32:9, 14, 14, 15, 23 33:10 34:2, 17 45:20 53: 13, 17 62:19 71:3  <b>readings</b> <sup>[1]</sup> 62:8  <b>reads</b> <sup>[3]</sup> 11:25 17:4 75:24  <b>ready-made</b> <sup>[1]</sup> 63:21  <b>real</b> <sup>[1]</sup> 49:11  <b>reallocated</b> <sup>[1]</sup> 74:7  <b>reallocating</b> <sup>[1]</sup> 74:3  <b>really</b> <sup>[13]</sup> 7:23 19:18 29:19 30:10 32:17 33:1 47:10 52: 17 55:3 60:23 62:20 63:17 73:13  <b>realm</b> <sup>[1]</sup> 32:10  <b>reason</b> <sup>[10]</sup> 11:19 19:16, 19 20:7 26:3 27:4 43:15 54: 20 56:14 64:5  <b>reasonable</b> <sup>[4]</sup> 36:20 63:1, 3, 18  <b>reasonably</b> <sup>[1]</sup> 31:7  <b>reasons</b> <sup>[4]</sup> 38:16 52:23 65:14 68:23  <b>rebates</b> <sup>[2]</sup> 22:8, 8  <b>REBUTTAL</b> <sup>[3]</sup> 2:8 79:15, 16  <b>recognize</b> <sup>[1]</sup> 68:10  <b>recognized</b> <sup>[2]</sup> 81:19, 20  <b>recognizes</b> <sup>[1]</sup> 20:25  <b>recommendations</b> <sup>[3]</sup> 41: 22, 24 78:15  <b>recommended</b> <sup>[1]</sup> 81:23  <b>reconsider</b> <sup>[1]</sup> 31:11  <b>reducing</b> <sup>[1]</sup> 82:6  <b>refer</b> <sup>[1]</sup> 3:12  <b>referenced</b> <sup>[1]</sup> 75:15  <b>references</b> <sup>[2]</sup> 15:24 66:24  <b>referring</b> <sup>[1]</sup> 16:19  <b>refers</b> <sup>[2]</sup> 8:18 48:9  <b>reflect</b> <sup>[1]</sup> 54:13  <b>reflects</b> <sup>[1]</sup> 68:2  <b>refrigeration</b> <sup>[1]</sup> 14:24  <b>refused</b> <sup>[1]</sup> 48:1  <b>regional</b> <sup>[3]</sup> 24:14, 24 36: 22  <b>Regions</b> <sup>[1]</sup> 66:21  <b>Register</b> <sup>[1]</sup> 42:12  <b>regulate</b> <sup>[1]</sup> 50:20  <b>regulation</b> <sup>[1]</sup> 50:23  <b>reimbursed</b> <sup>[2]</sup> 19:22 54: 17  <b>reimbursement</b> <sup>[11]</sup> 39:5, 14 46:10 52:24 54:13 65: 22 66:12, 22 67:2 74:7 82: 13  <b>reimbursements</b> <sup>[2]</sup> 76:9 77:18  <b>reimbursing</b> <sup>[1]</sup> 43:22  <b>reject</b> <sup>[4]</sup> 5:23 32:22 64:1 68:16</p>	<p><b>related</b> <sup>[1]</sup> 64:19  <b>relationship</b> <sup>[1]</sup> 47:7  <b>relatively</b> <sup>[1]</sup> 73:20  <b>reliability</b> <sup>[1]</sup> 10:9  <b>reliable</b> <sup>[4]</sup> 20:1 25:25 26:4 27:8  <b>relied</b> <sup>[2]</sup> 60:1 81:14  <b>rely</b> <sup>[2]</sup> 12:5 37:16  <b>Remember</b> <sup>[2]</sup> 8:22 41:2  <b>remove</b> <sup>[1]</sup> 5:9  <b>repeat</b> <sup>[1]</sup> 78:3  <b>repeatedly</b> <sup>[2]</sup> 33:15 81:16  <b>replace</b> <sup>[1]</sup> 31:14  <b>representing</b> <sup>[1]</sup> 52:1  <b>represents</b> <sup>[1]</sup> 60:4  <b>require</b> <sup>[2]</sup> 23:9 76:12  <b>requirement</b> <sup>[12]</sup> 5:9 34:9 38:19 75:8 78:6, 24 79:2, 4, 5 80:20 81:3, 11  <b>requirements</b> <sup>[1]</sup> 3:19  <b>requires</b> <sup>[10]</sup> 4:5, 16 17:12 18:6 20:4 21:9, 20 35:19 78:11, 12  <b>requiring</b> <sup>[1]</sup> 40:1  <b>reread</b> <sup>[1]</sup> 71:17  <b>reserved</b> <sup>[1]</sup> 38:22  <b>resolve</b> <sup>[5]</sup> 33:19 62:12 68: 1, 2 71:13  <b>resolving</b> <sup>[2]</sup> 67:18 75:16  <b>respect</b> <sup>[13]</sup> 5:21 6:14 14: 11 23:7 29:22 37:2 58:6 78:12 80:16, 18 81:6 82:1, 20  <b>respectfully</b> <sup>[6]</sup> 34:15 48: 17 49:21 53:25 75:24 80:2  <b>respond</b> <sup>[3]</sup> 42:19 55:24 81:10  <b>Respondents</b> <sup>[4]</sup> 1:9, 24 2: 7 38:5  <b>response</b> <sup>[3]</sup> 31:12, 18 56: 20  <b>responsibility</b> <sup>[1]</sup> 17:6  <b>restricted</b> <sup>[1]</sup> 24:8  <b>result</b> <sup>[4]</sup> 38:14 55:18 81: 22 82:16  <b>results</b> <sup>[9]</sup> 4:15 13 42:3  <b>return</b> <sup>[2]</sup> 61:15 67:12  <b>reverse</b> <sup>[1]</sup> 30:21  <b>review</b> <sup>[9]</sup> 4:7, 8, 10 38:15, 17, 22 44:25 45:2 72:3  <b>rid</b> <sup>[1]</sup> 37:10  <b>rigorously</b> <sup>[1]</sup> 23:20  <b>ROBERTS</b> <sup>[19]</sup> 3:3 10:25 11:14 12:1, 6, 9, 18 13:6 30: 13, 16 35:1 38:1 52:9 73:1, 5 75:10 79:10, 13 82:24  <b>Roman</b> <sup>[6]</sup> 7:2 11:11 14:3, 6 16:18 63:14  <b>rote</b> <sup>[1]</sup> 51:22  <b>rule</b> <sup>[5]</sup> 47:1 51:20 60:2 65: 13 73:17  <b>rules</b> <sup>[3]</sup> 16:6 47:4 74:25</p>	<p><b>run</b> <sup>[1]</sup> 57:1  <b>runs</b> <sup>[1]</sup> 41:2  <b>rural</b> <sup>[4]</sup> 58:13, 15 59:23, 25</p> <hr/> <p style="text-align: center;"><b>S</b></p> <p><b>sale</b> <sup>[2]</sup> 17:16 27:21  <b>sales</b> <sup>[1]</sup> 16:1  <b>same</b> <sup>[14]</sup> 35:17 38:16 39: 11 41:17 44:20 46:7 47:9 53:20 54:5 59:3, 9 69:19 80:1 82:8  <b>sample</b> <sup>[1]</sup> 80:21  <b>satisfactory</b> <sup>[2]</sup> 9:25 10:1  <b>saw</b> <sup>[1]</sup> 73:17  <b>saying</b> <sup>[21]</sup> 6:5 13:10, 12 16: 23 29:4 35:11 37:7, 8 45:6 49:4 54:4 57:15 60:9, 13, 15 69:1, 12 71:3, 18 73:25 76:17  <b>says</b> <sup>[34]</sup> 7:2, 3, 8, 21 8:15, 15 10:24 17:3 20:23 22:7 23: 23 24:6 25:2 27:12 28:24 35:7 42:16 43:1 45:4 46: 16, 20 49:12, 13, 22 51:12, 16 53:22, 22 54:16 59:13 64:11 68:1 70:11 76:2  <b>scope</b> <sup>[1]</sup> 18:19  <b>se</b> <sup>[1]</sup> 40:19  <b>second</b> <sup>[11]</sup> 12:2 19:15 20: 21 35:25 43:25 45:6 46:2, 4 76:13 79:21 80:16  <b>seconds'</b> <sup>[1]</sup> 63:2  <b>SECRETARY</b> <sup>[17]</sup> 1:7 7:9 11:23 12:20 14:2 16:25 17: 19 49:23 50:12 53:14 55:8, 8, 9 64:12 65:12, 12 78:13  <b>Secretary's</b> <sup>[1]</sup> 17:6  <b>Section</b> <sup>[8]</sup> 4:1 8:25 9:5 11: 2 16:5 39:19 45:18 64:20  <b>see</b> <sup>[8]</sup> 23:16 24:17 28:9 40: 8 63:17 65:3 67:13 80:13  <b>seeking</b> <sup>[1]</sup> 73:16  <b>seem</b> <sup>[7]</sup> 11:4 14:4 22:21 25:5 43:10 52:14 56:13  <b>seems</b> <sup>[18]</sup> 7:18 11:16, 20 12:3 15:10, 11 19:13 22:14, 25, 25 26:22 32:25 34:8 36: 20 37:10 67:23 76:17, 25  <b>sense</b> <sup>[7]</sup> 4:9 17:5 34:12, 19, 22 38:13 54:19  <b>sentence</b> <sup>[3]</sup> 58:1 66:6 67: 9  <b>separate</b> <sup>[1]</sup> 4:13  <b>separately</b> <sup>[1]</sup> 51:8  <b>serious</b> <sup>[2]</sup> 14:21 62:24  <b>seriously</b> <sup>[1]</sup> 35:7  <b>serve</b> <sup>[1]</sup> 73:20  <b>service</b> <sup>[2]</sup> 53:2, 3  <b>SERVICES</b> <sup>[7]</sup> 1:8 3:14 61: 11, 13 74:9 82:14, 15  <b>set</b> <sup>[21]</sup> 3:16, 25 4:23 8:24 10:19 13:4, 15 25:24 30:2 35:16 39:23 40:19 42:6 44:</p>
--	--	--	---	--

## Official - Subject to Final Review

<p>5 46:14 47:5 49:22 51:16, 21 58:24 64:24 sets [4] 3:13 21:6,18 48:25 setting [2] 32:20 66:12 seven [3] 8:5 42:17 81:7 several [1] 5:25 shall [3] 11:21 20:24 80:21 share [1] 40:1 shift [1] 65:4 shortcut [1] 37:23 shouldn't [3] 14:1 60:14 70:17 show [1] 40:22 showing [1] 40:23 shows [1] 23:17 side [3] 59:24 61:17,24 sides [1] 70:21 significant [10] 12:4 14:21 19:14,21 20:3 26:14 30:1 37:16 57:11 80:23 similar [1] 42:20 simple [1] 60:8 simpliciter [2] 44:6 46:15 since [4] 18:13 41:11 46:25 55:5 single [2] 26:24 48:14 singular [1] 48:6 sit [1] 29:4 situation [5] 6:8 15:11 29: 8 56:21 63:22 situations [5] 15:3,5 24:23 27:7 71:14 six [1] 82:12 Skidmore [6] 28:20,23 29: 5,7 63:22 67:23 slip [1] 57:22 smaller [1] 28:1 sneak [1] 43:11 Solicitor [1] 1:22 Somebody [2] 72:5 77:4 somehow [2] 15:9 59:15 someone [1] 54:16 sometimes [2] 7:19,20 soon [1] 35:12 sorry [4] 56:11 59:7 60:20 73:9 sort [2] 56:25 68:3 SOTOMAYOR [1] 23:14 24:4 25:7,11 42:24 43:14, 18 46:12 66:6,9 67:8 sound [1] 40:3 sounded [1] 63:25 special [1] 14:24 specific [1] 29:17 specifically [1] 20:23 specificity [1] 80:14 specifics [2] 15:4,16 specified [6] 52:20 53:6 66:14 71:21 72:24 80:24 spend [1] 21:22 spending [2] 77:5,6 spoke [1] 5:4</p>	<p>spot [1] 46:24 spots [1] 70:13 Srinivasan [1] 76:4 stage [1] 6:10 stake [1] 8:8 standing [1] 75:1 start [3] 23:10,11 73:24 starts [1] 78:17 state [3] 61:7 65:16 66:3 statement [5] 5:12 62:14, 16 68:17 69:3 STATES [3] 1:1,17 58:14 statistically [5] 20:3 26:14 29:25 37:15 80:22 statute [6] 3:11,15 4:4,16 6:9,14,21 10:7,8 12:15,24, 25 13:1 14:17 15:4 18:4,6 20:4,20 21:8,16 22:3,6 25: 14 26:11 31:20,22 32:14, 23 35:21,21 37:12,23 41: 11 49:10,12,13 51:5,8 54:6, 9 58:4 59:13 62:3,9,20 66: 19,20 70:2 74:1,1 75:6,9 78:7,11,12 80:3,6,7 81:12 82:9 statutes [1] 68:8 statutory [43] 3:22 4:8 5:9, 17 10:15 13:21 15:13,18 17:12 18:20 22:11 26:21 27:1 29:11,14 30:3 33:16 35:8 38:13,18 40:4 42:8 43:6 47:22,23 48:21,22,25 51:23 53:10,12 62:11 67: 20,25 68:13 70:9,10 72:10 75:14,20 76:3 77:3 80:20 step [2] 33:19 66:2 steps [3] 5:25 12:15 20:4 sticker [2] 22:18 54:18 still [4] 32:5 40:16 75:22 76: 24 story [2] 36:12,12 stress [1] 60:23 strong [1] 27:17 stronger [2] 24:5 25:1 strongly [1] 29:21 structure [3] 35:20 47:22, 23 studies [4] 33:18 41:25 57: 3 79:22 study [2] 3:18,20 4:4,17, 21 5:7 10:13,23 11:23 19: 10 27:9 29:25 34:9 37:13 41:23 42:1 74:23 80:18 81: 7,10,13 sub [2] 11:25 41:20 subclause [40] 12:2,25 13: 5 19:8,11,15,16 20:22 21: 20 22:2 34:9 39:2,7,9,22 40:17,18,21 41:5,9 42:6,23 44:8,9,10 48:9 49:13,14 51:12,15 52:6,20 57:15 59: 4,15,16 71:22 78:16 79:25,</p>	<p>25 subclauses [2] 39:10 46:6 subdivisions [1] 23:22 submission [1] 62:17 submit [1] 80:2 submitted [2] 82:25 83:2 subparagraph [10] 7:14 10:23 11:20 17:19 18:24 40:8,10,12,14 49:17 subsidize [1] 60:16 subsidy [8] 20:12,16,17 36: 8 37:4 39:21 44:3,7 substitute [1] 23:11 substitution [1] 5:2 subtract [1] 46:20 succeeded [1] 11:3 sufficient [2] 80:22,23 suggest [1] 47:15 suggested [3] 31:5,9 33: 13 suggesting [1] 36:19 suggests [3] 39:19 48:14 58:8 superfluities [3] 32:11 33: 24 75:17 superfluity [18] 6:4,5,6 11: 20 34:4,6,13,17,19,21,22 61:24 62:10 67:18 68:15 69:24 70:20 71:22 superfluous [3] 34:11 55: 5 71:4 supports [3] 18:17 38:13 60:11 suppose [3] 28:8 70:22 72: 9 supposed [1] 45:8 SUPREME [2] 1:1,16 surely [1] 5:8 survey [53] 40:11,16,20 41: 6,19 42:8,11,19 44:5 47:24, 25 49:1,2,6,7,10,19,24 50: 5,9,14 53:19,20,22,24 54:7, 8,24 55:1,3,8,9,10,13,13, 16,19,19,22,25 56:8,18 57: 7 58:25 59:10 78:6,8,12,21, 24 79:4,5 80:20 surveyed [1] 42:13 surveys [1] 41:9 suspenders [1] 34:20 swapped [1] 4:25 system [2] 23:21 38:21</p>	<p>term [1] 51:5 terms [2] 77:3 81:5 Texas [1] 58:15 text [8] 4:8 22:11 38:13 48: 22,24 53:7,13,17 textual [1] 62:22 themselves [1] 61:9 theoretically [1] 71:2 theory [1] 62:2 therapy [1] 14:22 there's [42] 6:6 8:7 13:18 15:1 16:5 20:6,7,16 22:18 26:12 31:19 32:13 33:3 34: 4,6,12,18 35:23 40:23,25 41:3 44:7 45:2 52:5 54:20 57:2 59:14 61:24 62:2 64: 17 65:10,25 68:5 70:20 72: 19 76:3 77:5 78:23,23,23 81:10 82:11 thereafter [1] 14:14 therefore [4] 6:10,18 34:13 71:9 They've [3] 15:20 16:8 45: 20 thing's [1] 27:25 thinks [1] 32:9 third [3] 58:9 61:9 82:1 THOMAS [12] 5:11 30:14, 15 40:7,15 41:8,12,15 55: 14 57:8 73:2,3 Thomas's [1] 30:20 though [5] 16:10 33:14 41: 17 53:18 76:22 thoughts [1] 73:23 three [3] 7:16 23:22 60:23 threshold [1] 4:6 threw [1] 75:25 throwing [1] 6:6 today [1] 31:9 together [2] 17:4 38:18 toll [1] 77:6 took [6] 18:14 37:23 40:24 41:5 44:4 51:6 toolkit [2] 35:18 61:20 tools [7] 33:16 35:8 61:20 68:13 70:10 72:10 75:14 totally [1] 23:12 traditional [1] 35:8 transparency [4] 10:9,12, 14 11:1 transparent [5] 12:17 25: 25 26:4,16 27:8 treat [2] 59:3,9 treatment [1] 14:25 trend [2] 33:14,21 tried [1] 34:15 trigger [2] 67:21 70:6 trouble [1] 49:11 troubling [2] 33:14,21 True [4] 34:6 70:17 71:2 82: 10 truth [1] 69:19</p>	<p>try [1] 35:13 trying [6] 7:4 17:7 43:10 45: 13 48:20 53:9 Tuesday [1] 1:13 turn [3] 21:24 32:21 82:14 turns [1] 33:17 two [19] 7:16 14:13 17:4 21: 17,18 29:6 37:10 39:10 42: 14 43:14 44:24 46:15 47:7 49:24 58:21 61:3 63:2 77: 8 79:25</p>
<b>U</b>				
<p>U.S [1] 34:23 ultimately [2] 76:6,12 un [1] 60:6 unambiguous [2] 6:9 31: 22 unanimous [2] 51:1,3 uncompensated [1] 58: 11 under [25] 5:3 8:24 11:10 17:19 21:19 23:22 25:17 39:2,21 40:12,13 41:5 42: 6,7,23 44:2,8,9,10 53:4 55: 21 56:14 61:4 64:21 74:25 underlies [1] 55:3 undermines [1] 55:4 underscore [1] 64:22 underserved [1] 82:7 understand [9] 6:25 13:25 17:25 31:23 35:10 59:14 68:22 76:7 82:3 understanding [1] 67:1 undertaking [1] 27:2 unfair [1] 56:5 uniform [1] 48:14 uninsured [1] 60:7 UNITED [2] 1:1,17 unius [2] 51:9,12 universal [1] 41:6 unlawful [1] 52:3 unless [1] 59:7 unlimited [2] 11:16,18 unreasonable [1] 51:4 unsatisfactory [3] 9:4,21, 25 unsurprisingly [1] 55:17 up [24] 6:6 12:20 13:11,11 17:7 22:10 26:10 35:5,12 36:4 37:14,15 42:20 46:11, 24 48:25 52:23,24 69:17, 18 70:12 75:12,25 78:5 urban [1] 57:9 urge [1] 59:20 using [7] 4:24 10:13,15 24: 8 30:3 42:22 43:4 Utilities [1] 6:16</p>				
<b>V</b>				
<p>vagueness [1] 62:3 valid [1] 32:11 valued [1] 60:15</p>				

## Official - Subject to Final Review

<p><b>variances</b> <sup>[1]</sup> 34:10  <b>variation</b> <sup>[1]</sup> 37:17  <b>variations</b> <sup>[2]</sup> 26:18 27:7  <b>varied</b> <sup>[5]</sup> 5:6 10:22 48:11, 12,13  <b>vary</b> <sup>[12]</sup> 3:17 4:19 10:20 18:21 19:8,12 23:1 24:21 27:1 37:17 47:16 59:5  <b>varying</b> <sup>[5]</sup> 4:20 17:10 21:25 26:5 37:12  <b>vast</b> <sup>[1]</sup> 34:19  <b>VERRILLI</b> <sup>[69]</sup> 1:20 2:3,9 3:6,7,9 5:11,19 7:25 8:2,6,10,17,20 9:2,9,12,15,18,22 10:3,6 11:12,17 12:2,8,11,22 13:12,24 14:8 16:21 17:1 18:1,17 19:3,6 20:11,15 21:10,14 22:14,23 23:2 24:3 25:4,9,13 28:5,22 29:6 30:24 31:16,24 32:2,7 33:6,11,23 35:14 36:10,13,19,24 37:2 71:14 79:15,16,18  <b>Verrilli's</b> <sup>[1]</sup> 52:10  <b>versus</b> <sup>[6]</sup> 3:5 18:9 19:2,5 50:17 61:18  <b>view</b> <sup>[3]</sup> 66:2,2 75:22  <b>vigorously</b> <sup>[1]</sup> 55:2  <b>Virginia</b> <sup>[1]</sup> 58:13</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>wage</b> <sup>[1]</sup> 66:25  <b>wages</b> <sup>[2]</sup> 24:16,20  <b>wanted</b> <sup>[12]</sup> 19:17,20 20:8 27:5 28:16 33:21 54:12,12 63:4,18 78:22 81:8  <b>wants</b> <sup>[3]</sup> 30:10 34:7 37:9  <b>warranted</b> <sup>[2]</sup> 68:9 71:10  <b>Washington</b> <sup>[3]</sup> 1:12,20,23  <b>way</b> <sup>[24]</sup> 5:20 12:3 17:2 26:12,12 29:24 30:1,21 32:16,25 34:6 35:13 44:7 46:11 51:5 56:16,19 62:8 63:20,20 66:15 80:7 81:10 82:21  <b>ways</b> <sup>[4]</sup> 28:10 34:4 47:9 65:15  <b>weaknesses</b> <sup>[1]</sup> 70:14  <b>weigh</b> <sup>[1]</sup> 62:12  <b>welcome</b> <sup>[1]</sup> 5:10  <b>West</b> <sup>[1]</sup> 58:13  <b>whatever</b> <sup>[7]</sup> 6:18 26:9 27:21 28:15 30:10 67:4 76:1  <b>Whereupon</b> <sup>[1]</sup> 83:1  <b>whether</b> <sup>[4]</sup> 6:12 23:6 29:11 67:21  <b>whole</b> <sup>[7]</sup> 27:25 34:22 58:19,24 72:3 77:12 81:9  <b>widespread</b> <sup>[1]</sup> 52:5  <b>Wilkie</b> <sup>[1]</sup> 61:18  <b>will</b> <sup>[3]</sup> 3:12 46:3 75:22  <b>win</b> <sup>[3]</sup> 30:24 32:5 33:10  <b>wind</b> <sup>[1]</sup> 69:18  <b>wishes</b> <sup>[1]</sup> 32:22</p>	<p><b>within</b> <sup>[5]</sup> 32:10 40:4 66:4,18 76:10  <b>without</b> <sup>[4]</sup> 10:23 21:8 29:4 71:15  <b>word</b> <sup>[13]</sup> 9:16 21:11 23:8 24:11 28:18 42:10 57:23 58:5 64:18 76:15,16,18,22  <b>words</b> <sup>[3]</sup> 17:4 56:3 63:9  <b>work</b> <sup>[3]</sup> 21:12 60:11,14  <b>works</b> <sup>[1]</sup> 33:4  <b>world</b> <sup>[1]</sup> 31:15  <b>worse</b> <sup>[1]</sup> 67:18  <b>worth</b> <sup>[1]</sup> 57:3  <b>write</b> <sup>[1]</sup> 72:3  <b>writes</b> <sup>[1]</sup> 6:20  <b>writing</b> <sup>[1]</sup> 34:22  <b>written</b> <sup>[1]</sup> 54:6</p> <hr/> <p style="text-align: center;"><b>X</b></p> <hr/> <p><b>XAVIER</b> <sup>[1]</sup> 1:7</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>year</b> <sup>[13]</sup> 15:6,6,6,9 22:12 26:22,25 27:13,19 30:3 65:5,5 82:12  <b>years</b> <sup>[5]</sup> 14:14 38:20 48:1 73:13 78:20  <b>yesterday</b> <sup>[1]</sup> 73:18</p>
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