



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

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

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

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1 APPEARANCES:

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3 of the Petitioners.

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6 United States, as amicus curiae, supporting  
7 reversal.

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9 of the Respondents.

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P R O C E E D I N G S

(11:38 a.m.)

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

Mr. Kulewicz.

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

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

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

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

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

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

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

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

25          I welcome the questions of the Court.

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

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

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

21 So paying --

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

25 MR. KULEWICZ: That's --

1 JUSTICE THOMAS: -- of your approach.

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

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

24 JUSTICE THOMAS: Thank you.

25 MR. KULEWICZ: Thank you, Your Honor.



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

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

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

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

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

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

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

20 MR. KULEWICZ: Right.

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

1 MR. KULEWICZ: Well, if -- if a  
2 patient with ESRD is hospitalized for some  
3 reason --

4 JUSTICE BREYER: Yeah.

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

7 JUSTICE BREYER: But that's inpatient.

8 MR. KULEWICZ: That -- that's  
9 inpatient. That's reimbursed at the -- at the  
10 Tier I rate, Your Honor, yes.

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

13 MR. KULEWICZ: If the -- if the --

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

17 MR. KULEWICZ: Thank you, Your Honor.

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

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

23 JUSTICE SOTOMAYOR: Well, it's not  
24 really decision neutral. Those people who don't  
25 have Medicare can be balance billed, correct?

1 And so they really aren't encouraged, I put the  
2 words, to join Medicare?

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

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

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

11 JUSTICE SOTOMAYOR: So the --

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

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

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

25 And -- and, secondly, the Medicare

1 Secondary Payer Act, by definition, contemplates  
2 that -- that plans will pay a rate that -- plans  
3 may pay a rate below the Medicare base rate  
4 and --

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

12 Am I correct?

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

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

1 MR. KULEWICZ: We pay the --

2 JUSTICE SOTOMAYOR: Why isn't that cap

3 --

4 MR. KULEWICZ: We pay the same --

5 JUSTICE SOTOMAYOR: -- back at --

6 MR. KULEWICZ: I'm sorry, Your Honor.

7 JUSTICE SOTOMAYOR: Yes.

8 MR. KULEWICZ: We pay the same

9 percentage of imbursement for Tier II -- for

10 Tier II, it is treated as a virtual Tier II

11 benefit. The only difference is that rather

12 than accept what the Respondents say is a

13 reasonable and customary rate because they are

14 operating in a dysfunctional monopolistic

15 market, so we -- we base the reimbursement on

16 the Medicare rate.

17 JUSTICE SOTOMAYOR: But that's still a

18 different way --

19 MR. KULEWICZ: Well --

20 JUSTICE SOTOMAYOR: -- of treating

21 people. So why isn't that on the face of the

22 statute --

23 MR. KULEWICZ: Your Honor --

24 JUSTICE SOTOMAYOR: -- not legal?

25 MR. KULEWICZ: -- because every --

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

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

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

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

25 MR. KULEWICZ: What you would do in

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

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

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

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

1 -- end-stage renal disease.

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

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

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

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

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

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

25           MR. KULEWICZ: Well, there --



1 JUSTICE KAGAN: You would be in  
2 violation of the statute, is that what you're  
3 saying?

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

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

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

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

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

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

18 MR. KULEWICZ: Well, just --

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

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

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

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

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

1           But isn't that exactly what Congress  
2 was trying to do? It's saying stop trying to  
3 get out of paying for the only treatment that is  
4 appropriate for a particular disease.

5           MR. KULEWICZ: Well --

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

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

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

22           So you could use --

23           JUSTICE KAGAN: So I -- I -- I take  
24 the -- that answer to be something along the  
25 lines of -- and this is, you know, possibly

1 right -- we have found a perfect end run around  
2 the statute, but, you know, sometimes statutes  
3 have perfect end runs and, if the statute  
4 doesn't proscribe it, too bad.

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

11 The -- what the statute says is --

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

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

23 Here, what -- what we are -- what this  
24 plan does, Your Honor, it's -- it's essential,  
25 it's vitally important to the case, this plan

1 provides exactly the same benefit to every  
2 individual in the plan. There is no --

3 CHIEF JUSTICE ROBERTS: Well, I --

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

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

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

1 account of how tall they are, is it really the  
2 case that you would be fine so long as you just  
3 asked -- asked if they had blue eyes or not?

4 MR. KULEWICZ: Well, Your Honor, we're  
5 --

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

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

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

1 statute.

2           It -- it is -- it is the one perfect  
3 overlap here because it -- it -- it overlaps  
4 directly with the objective of the stat -- the  
5 Medicare Secondary Payer Act.

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

13           MR. KULEWICZ: We -- Your Honor,  
14 ultimately, we --

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

24           MR. KULEWICZ: Well --

25           JUSTICE SOTOMAYOR: -- E -- ERSD

1 patients, you're saying you're not violating.

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

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

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

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

24 Every single ESRD patient gets  
25 outpatient dialysis, all right? So the



1 insurance plan says you're going to get  
2 90 percent of the cost back. If you have a  
3 heart attack, however, you get 95 percent of the  
4 cost back, okay?

5 Why doesn't that violate this statute?

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

10 JUSTICE BREYER: Because it did --  
11 look, it -- it's only the ESRD patients that get  
12 90 percent, and the heart attack patients --

13 MR. KULEWICZ: Well --

14 JUSTICE BREYER: -- get 95.

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

16 JUSTICE BREYER: Why -- why doesn't  
17 that violate the statute?

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

1 under the differentiation clause.

2 JUSTICE BREYER: It would? But it  
3 seems to me there are 10,000 different diseases,  
4 and I can't believe that -- that insurance plans  
5 cover them all the same.

6 MR. KULEWICZ: Right.

7 JUSTICE BREYER: Do they?

8 MR. KULEWICZ: Which is exactly one of  
9 the problems with the --

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

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

21 JUSTICE BREYER: So your answer to  
22 Justice Kagan then is, even if there are --  
23 everybody that gets outpatient renal dialysis  
24 has ESRD, everybody, and we give everybody  
25 62 percent of the charge, all those ESRD, and we

1 give some other person with a heart attack more,  
2 that doesn't violate the statute because  
3 everybody getting ESRD is getting the same?

4 MR. KULEWICZ: That's correct, Your  
5 Honor. If you get --

6 JUSTICE BREYER: Are you sure that's  
7 correct?

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

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

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Justice Thomas, anything further?

22 JUSTICE THOMAS: Nothing for me,  
23 Chief.

24 CHIEF JUSTICE ROBERTS: Justice  
25 Breyer, anything further?

1 Justice Alito?

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

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

16 What does that mean? In what sense is  
17 it different from what I just read?

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

1 JUSTICE ALITO: What does that add to  
2 the language that came before it?

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

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

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

1 ESRD, that's right?

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

10 JUSTICE ALITO: Right.

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

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

20 MR. KULEWICZ: To -- to other  
21 individuals covered by the plan.

22 JUSTICE ALITO: Who don't need -- who  
23 --

24 MR. KULEWICZ: No. So they're --  
25 they're a -- a person with acute kidney injury

1 would need renal dialysis, Your Honor.

2 JUSTICE ALITO: Well, that's what --  
3 that's what was addressed by the first language.

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

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

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

24 What does that mean?

25 MR. KULEWICZ: Your Honor, what that

1 means is -- is any other manner related to the  
2 ESRD diagnosis. Under the ejusdem generis canon  
3 of statutory construction, when we have a -- a  
4 general -- when a general word or words follow a  
5 -- a series of specific words, they necessarily  
6 relate to the condition that the -- that the  
7 limiting words address.

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

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

21           JUSTICE ALITO: Okay. Well, I will  
22 ponder all that.

23           There are various categories of  
24 entities and people who might be financially  
25 affected by the outcome here. There are the



1 group health plans. There are the two companies  
2 that provide dialysis or basically two companies  
3 that provide dialysis. There's Medicare. And  
4 there are the people with ESRD.

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

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

24 So -- and it would be equally  
25 catastrophic for plans because it would -- it

1 would absorb plan resources that are needed for  
2 other -- to cover other vitally important health  
3 conditions as well.

4 JUSTICE SOTOMAYOR: I'm sorry, but to  
5 --

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

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

14 JUSTICE ALITO: And Medicare.

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

23 Patients right now who are -- who are  
24 paying on a -- on a allowable cost basis with a  
25 reference-based price to in particular the

1 Medicare price here, they're paying a much lower  
2 rate, their actual out-of-pocket.

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

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

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

25 CHIEF JUSTICE ROBERTS: Thank you.

1 MR. KULEWICZ: -- the individuals.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Justice Sotomayor?

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

15 MR. KULEWICZ: Nothing, Your Honor.

16 JUSTICE SOTOMAYOR: Exactly.

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

23 JUSTICE SOTOMAYOR: So why -- why --  
24 why does your system help patients? Meaning  
25 your system stops them from paying -- for you

1 giving them that little extra money, but it  
2 doesn't stop them from being charged for the  
3 real cost of the treatment and not getting  
4 anything for it.

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

7 JUSTICE SOTOMAYOR: No. That's what  
8 you're paying.

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

13 JUSTICE SOTOMAYOR: No, no, no. My  
14 point is --

15 MR. KULEWICZ: I'm sorry.

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

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

1 JUSTICE SOTOMAYOR: Yeah, but what --  
2 but the point is that you're not helping the  
3 patient in those situations.

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

14 JUSTICE SOTOMAYOR: All right. Thank  
15 you.

16 MR. KULEWICZ: -- which would put the  
17 patient in a much worse position because then --  
18 right now, they're paying 30 percent of  
19 125 percent of the Medicare rate. Then they  
20 would be paying 30 percent of up to \$6,000 per  
21 treatment.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Justice Kagan, anything further?

25 JUSTICE KAGAN: Yeah. I'd like to go

1 back to where Justice Alito was taking you about  
2 the exact language of this statute, and it is a  
3 confusingly written statute, but here's a theory  
4 of it.

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

9 MR. KULEWICZ: In -- in the benefits  
10 provided.

11 JUSTICE KAGAN: Yeah, yeah, yeah, in  
12 the benefits provided.

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

23 MR. KULEWICZ: Well, Your Honor, may  
24 I -- may I push back with an alternative  
25 hypothetical?

1 JUSTICE KAGAN: No, definitely not.

2 MR. KULEWICZ: Okay. All right.

3 (Laughter.)

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

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

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

22 And then the "in any other manner," in  
23 case there's a proxy that we haven't thought of,  
24 don't try that one either. So all together this  
25 is basically saying you can't distinguish



1 between people with end-stage renal disease and  
2 those without. You can't do it directly. You  
3 can't do it by means of the fact that this group  
4 needs dialysis and this group doesn't. And you  
5 can't do it by finding any other proxy that  
6 perfectly separates these two groups.

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

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

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

24 And -- and -- and so then -- then we  
25 go to the -- that's when we go to the first,

1 second, and third elements of the clause. If it  
2 -- you know, they would say, is it because I  
3 have end-stage renal disease? The plan may say  
4 no, it -- it's because -- because this is on the  
5 basis of -- of geography, the laws in North  
6 Dakota are different from the laws in South  
7 Dakota or no, it's on the basis of -- of -- of  
8 collective bargaining, the people in -- in North  
9 Dakota are -- are in a bargaining unit, the  
10 people in South Dakota are not in a bargaining  
11 unit. It may be on the basis of -- of  
12 full-time/part-time, current employee/former  
13 employee.

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

18 JUSTICE KAGAN: Is -- is there some  
19 relevance to this case?

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

21 JUSTICE KAGAN: I mean, what -- how do  
22 you -- how --

23 MR. KULEWICZ: Because the benefits in  
24 this case are -- are applied -- the same  
25 benefits are applied uniformly across the board

1 to every participant in the plan. There is no  
2 differentiation --

3 JUSTICE KAGAN: Yeah, I mean, that's  
4 like Anatole France is sleeping under the bridge  
5 and the poor and the rich alike, right?

6 MR. KULEWICZ: No, Your Honor, it's --  
7 I mean, it's -- it's a --

8 JUSTICE KAGAN: It's applied to  
9 everybody.

10 MR. KULEWICZ: Well --

11 JUSTICE KAGAN: Even those people who  
12 don't have any use for end-stage -- for  
13 dialysis.

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

19 So the -- the threshold inquiry --

20 JUSTICE KAGAN: Based on the need for  
21 renal dialysis.

22 MR. KULEWICZ: Well, and you -- you --  
23 you get to that if there's a differentiation,  
24 but there has to be -- your threshold question,  
25 Your Honor, is, is there a -- is there a

1 differentiation in benefits here? And if -- if  
2 there's no differentiation in benefits, if  
3 everybody in the plan has the same benefits,  
4 then -- then the dependent, the qualifying  
5 client, is -- we don't get to.

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

10 MR. KULEWICZ: All right.

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

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

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

1 grasping it.

2           You're saying that if there is a human  
3 being in this plan, whether he has end-state or  
4 not, and if that individual should he get  
5 end-state would be treated worse, that is  
6 covered by this language?

7           MR. KULEWICZ: If -- if the -- if the  
8 end-stage renal disease diagnosis operates you  
9 into a different plan --

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

12           MR. KULEWICZ: I -- I believe I do,  
13 Your Honor, yes.

14           JUSTICE BREYER: Okay. Then am I  
15 right or wrong?

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

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

25           Mr. Smith who has a heart attack or

1 Mr. Smith who has your plan, should he, Mr.  
2 Smith, get end-state renal disease, under the  
3 plan, he won't be treated as well as all the  
4 other 98,000 people who have interstate --  
5 end-state, that would violate it?

6 MR. KULEWICZ: Yes, Your Honor, if  
7 that diagnosis changed his -- operated to change  
8 the plan benefits available to him, that would  
9 --

10 JUSTICE BREYER: Change it? It would  
11 change -- you're saying your plan doesn't do  
12 that, but if we had the imaginary plan that did  
13 do it, should Mr. Smith get end-state renal  
14 disease next year, he will be paid by your  
15 insurance company at a lower rate than the  
16 980,000 people -- or the 300,000 people who now  
17 have end-state renal disease?

18 MR. KULEWICZ: Well, that -- that  
19 would -- that sounds to me like it would be a  
20 differentiation, Your Honor.

21 JUSTICE BREYER: Okay.

22 MR. KULEWICZ: And -- and -- and we  
23 would go to --

24 JUSTICE BREYER: So now I see what  
25 you're saying. Maybe I was the only one who

1 didn't understand what you were saying, but now  
2 I think I do. Thank you.

3 MR. KULEWICZ: Thank you, Your Honor.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Gorsuch, anything further?

6 Justice Kavanaugh?

7 Justice Barrett?

8 Thank you, counsel.

9 MR. KULEWICZ: Thank you, Your Honor.

10 CHIEF JUSTICE ROBERTS: Mr. Guarneri,  
11 I understand you're with us remotely.

12 MR. GUARNIERI: I am, Your Honor.

13 CHIEF JUSTICE ROBERTS: You may  
14 proceed.

15 ORAL ARGUMENT OF MATTHEW GUARNIERI  
16 FOR THE UNITED STATES, AS AMICUS CURIAE,  
17 SUPPORTING REVERSAL

18 MR. GUARNIERI: Thank you. Mr. Chief  
19 Justice, and may it please the Court:

20 The Medicare secondary payer statute  
21 does not forbid group health plans from adopting  
22 uniform limits on coverage for renal dialysis.  
23 Fundamentally, the non-differentiation provision  
24 forbids only arrangements under which a group  
25 health plan provides different benefits to

1 individuals with end-stage renal disease and  
2 other individuals covered by the plan.

3 Petitioners' plan does not do that.  
4 Respondents' proxy theory is therefore  
5 irrelevant. This plan is not providing a  
6 different package of benefits in the first  
7 place, by proxy or otherwise.

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

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

20 I welcome the Court's questions.

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



1 effects would be?

2 MR. GUARNIERI: Justice Thomas, we are  
3 concerned, frankly, about the effects that this  
4 decision may have. The provisions in this  
5 statute have been in substantially the same form  
6 since 1989, and CMS's implementing regulations,  
7 including a regulation that expressly permits  
8 plans to impose uniform limits on coverage for  
9 dialysis, those regulations have been on the  
10 books since 1995.

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

19 Of course, Medicare itself is  
20 available as a backstop here. The whole design  
21 of this statutory scheme is that individuals who  
22 develop end-stage renal disease after three  
23 months of dialysis, they are eligible to enroll  
24 in Medicare. And during the 30-month  
25 coordination of benefits period, Medicare is

1       there, if they would like to enroll in Medicare  
2       and pay for Part B, Medicare is there to cover  
3       any potential gaps in the coverage that the  
4       group health plan provides.

5                   JUSTICE THOMAS: Thank you.

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

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

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

1           And if a plan is providing the same  
2 package of benefits to all individuals who are  
3 covered by the plan, which is what Petitioners'  
4 plan does, then it is not differentiating in the  
5 benefits it has provided, and, therefore, it is  
6 not violating this specific provision.

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

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

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

1 it at all.

2 MR. GUARNIERI: I take the point,  
3 Justice Kagan, and -- and, in some ways, that's  
4 another reason -- I mean, the statutory text  
5 itself here furnishes an additional basis that  
6 you don't need to kind of import into this  
7 coordination of benefits statute the concept of  
8 proxy discrimination drawn -- drawn from an  
9 opposite body of federal civil rights law.

10 JUSTICE KAGAN: No, I was suggesting  
11 that that --

12 MR. GUARNIERI: But, of course --

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

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

22 And so, if a plan is not doing that,  
23 if a plan is providing all individuals covered  
24 by the plan, regardless of whether or not they  
25 have end-stage renal disease and regardless of

1 their need for renal dialysis, with the same  
2 package of benefits, meaning the same items and  
3 services are covered at the same premiums and  
4 any other sort of cost-sharing of individuals,  
5 then the plan is not violating this specific  
6 provision.

7 JUSTICE KAGAN: Yeah, I think what  
8 most --

9 MR. GUARNIERI: This is a statute in  
10 which --

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

19 MR. GUARNIERI: That -- that -- that  
20 may well be the case, Justice Kagan. And,  
21 again, as I tried to say, as I tried to stress,  
22 in response to Justice Thomas's question, I  
23 mean, we don't -- we take these policy concerns  
24 lightly. We don't think the policy -- I'm  
25 sorry, we don't -- we don't take them lightly.

1 We just don't think in this instance that those  
2 policy concerns are sufficient to overcome the  
3 best reading of the statutory text.

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

5 MR. GUARNIERI: And, of course --

6 JUSTICE KAGAN: -- by your adherence

7 --

8 MR. GUARNIERI: -- the principle that

9 we --

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

11 It's so -- it's so hard to do this with you not  
12 up here, Mr. Guarnieri.

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

20 MR. GUARNIERI: Justice Kagan --

21 JUSTICE KAGAN: -- I keep on thinking  
22 surely they --

23 MR. GUARNIERI: -- but the principle  
24 that we are here to vindicate --

25 JUSTICE KAGAN: Sorry. Sorry, Mr.

1 Guarnieri, if I could just -- sorry about that.

2 MR. GUARNIERI: Certainly.

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

9 MR. GUARNIERI: Sure. Let -- let me  
10 see what I can do there.

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

22 Now, as to the broader question about,  
23 you know, wouldn't it be in the government's  
24 best financial interests for there to be, you  
25 know, circumstances in which group health plans

1     could be compelled to pay higher rates to  
2     dialysis providers, you know, I don't -- I think  
3     part -- part of the story there is that Congress  
4     has, in general, in this statute chosen not to  
5     create an entitlement to dialysis coverage.  
6     That's consistent with Congress's overall  
7     choices in this area. In particular, ERISA,  
8     which is the preeminent federal law regulating  
9     the design of health benefits plans, does not  
10    mandate that plans cover particular services,  
11    and that's -- that's true even with respect to  
12    ERISA's non-discrimination provision.

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

22                   Now, you know, again, we -- we have  
23    filed in support of reversal, not actually in  
24    support of Petitioners' brief, because we have  
25    policy concerns that plan practices like this



1     could ultimately lead to greater costs for the  
2     Medicare program and -- and potentially worse  
3     coverage or worse options for individuals with  
4     end-stage renal disease. We just don't think  
5     the statute in its current form prohibits the --  
6     the particular plan provisions that are under  
7     scrutiny here.

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

13                   He said that an affirmance here would  
14    work against their financial interests. Is that  
15    correct?

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

1 30 percent of the undiscounted rate.

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

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

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

23           And -- and -- and even in that  
24          circumstance, that's going to save Medicare  
25          money in the sense that, you know, if -- if you

1 take a circumstance -- if you take a situation  
2 in which the group health plan provides a  
3 relatively parsimonious coverage for outpatient  
4 dialysis and an individual makes a decision to  
5 enroll in Medicare as the secondary payer during  
6 the coordination period, the group health plan  
7 is still covering all of that individual's other  
8 medical expenses, and that's going to save  
9 Medicare money. Medicare only steps in as the  
10 secondary payer with respect to items or  
11 services that the group health plan does not  
12 fully cover.

13 And, you know, that -- that's sort of  
14 -- that's another cost-saving feature of the  
15 statute irrespective of the dialysis issue.

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

23 I understand how it works under your  
24 theory. It is a bit strange that the two groups  
25 are almost identical. But, if it's interpreted

1 the way the Sixth Circuit interpreted it and the  
2 way Respondent interpreted it, you have the  
3 people who have end-stage renal disease and they  
4 need kidney dialysis, and the plan pays a  
5 certain amount of money to them for that  
6 service. What do you compare that to?

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

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

21 And so I do think that their view  
22 would -- would -- would give rise to substantial  
23 practical problems.

24 JUSTICE ALITO: All right. Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Thomas, anything further?

2 Justice Breyer?

3 Justice Alito, anything further?

4 Thank you, Mr. Guarnieri.

5 MR. GUARNIERI: Thank you, Mr. Chief  
6 Justice.

7 CHIEF JUSTICE ROBERTS: Mr. Waxman.

8 ORAL ARGUMENT OF SETH P. WAXMAN

9 ON BEHALF OF THE RESPONDENTS

10 MR. WAXMAN: Mr. Chief Justice, and  
11 may it please the Court:

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

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

25 The reading urged by the Petitioners

1 and the solicitor general by which the  
2 anti-discrimination provision bars only plans  
3 that single out ESRD patients by name and the  
4 take-into-account provision only applies to  
5 plans that reference Medicare eligibility  
6 expressly, renders both of these statutory  
7 protections utterly toothless.

8           And in each respect, their reading  
9 violates the text of the statute. Take the  
10 anti-discrimination -- the anti-differentiation  
11 provision, which has occupied, I think,  
12 virtually all of the argument so far.

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

22           Ninety-nine and a half percent of all  
23 of DaVita's outpatient patients, outpatient  
24 dialysis patients, have ESRD. There is simply  
25 no reasonable argument for singling out ES --

1 outpatient dialysis as anything but differential  
2 treatment of individuals with ESRD.

3           And as was noted, I think by Justice  
4 Sotomayor, even the Ninth Circuit in Amy's  
5 Kitchen agreed, and I'm quoting from the  
6 opinion, "a plan would violate the MSP if it  
7 provided differential coverage for routine  
8 maintenance dialysis," that is, dialysis  
9 received only by persons with ESRD, "than for  
10 all other -- all other dialysis." That is  
11 exactly what this plan does.

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

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

24           And so the statute also prohibits  
25 differentiation on any other manner, which, in

1 context, should be understood to mean in any  
2 other manner that in effect singles out a  
3 treatment for ESRD.

4 I want to clarify just a couple of, I  
5 think, errors that my friend on the other side  
6 made. The notion that they are actually helping  
7 beneficiaries because they are limiting the  
8 amount of balance billing available is -- is  
9 utterly wrong.

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

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



1           And as the -- there -- there are some  
2 really terrific and very knowledgeable amicus  
3 briefs filed in this case. It is completely  
4 clear and Congress has understood that if this  
5 Court accepts the other side's ruling, there is  
6 no reason on God's green earth that UnitedHealth  
7 and AETna and all the -- all the big plans that  
8 -- that -- health plans and big, big employer  
9 health plans, all of whom do not differentiate  
10 in any basis on the need for renal dialysis, I  
11 mean, they --

12           JUSTICE ALITO: Well --

13           MR. WAXMAN: -- have shareholders --

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

15           MR. WAXMAN: -- of course, they're  
16 going to do it.

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

20           MR. WAXMAN: I hope.

21           JUSTICE ALITO: -- suppose a plan says  
22 that we will pay a maximum of X dollars, let's  
23 say a thousand dollars, per year for renal  
24 dialysis, period.

25           Is that vulnerable?

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

2 JUSTICE ALITO: Is that vulnerable?  
3 Is that illegal in your view?

4 MR. WAXMAN: So the -- the answer is  
5 it depends. If what the plan says is, for all  
6 other forms of, you name it, treatment, medical  
7 treatment, chronic medical treatment, we will  
8 pay the ordinary and -- customary, ordinary, and  
9 reasonable cost except for renal dialysis,  
10 that's a differentiation that's prohibited by  
11 the statute.

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

17 JUSTICE ALITO: Well, what if --

18 MR. WAXMAN: -- whether it's heart  
19 disease or --

20 JUSTICE ALITO: -- they do something  
21 like -- like I understand Medicare does? So  
22 they have a certain amount for different  
23 conditions. They go by the Medicare code. They  
24 -- they provide a certain amount for different  
25 conditions. So they -- they distinguish among,

1 discriminate among, different medical  
2 conditions, and they pay different amounts for  
3 different medical conditions.

4 MR. WAXMAN: So, Justice Alito,  
5 there's no doubt that different medical  
6 treatments require different amounts.

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

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

18 JUSTICE BREYER: What.

19 MR. WAXMAN: -- are -- there is a  
20 violation.

21 Now, in this case, there's no dispute  
22 about the relevant character -- comparators.  
23 This plan, as is plausibly alleged in the  
24 complaint, and I don't think there's really any  
25 dispute, but if there were, it would be

1 developed when -- when, and I hope, the -- the  
2 order dismissing the complaint is reversed,  
3 there -- I've lost my thought for a minute.

4 JUSTICE BREYER: Who -- who are you  
5 going to compare it with?

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

13 JUSTICE KAGAN: So this might be --

14 MR. WAXMAN: -- treatment.

15 JUSTICE KAGAN: -- an easy case, but I  
16 think what Justice Alito --

17 MR. WAXMAN: I --

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

1 they put different --

2 MR. WAXMAN: Yep.

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

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

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

25 In their reading of the statute, they

1 say, well, look, you can forget the last 18  
2 words of the statute. All you have to know is  
3 whether it differentiates on the basis of people  
4 who have ESRD. So what if the statute -- what  
5 if the plan said, okay, people who have ESRD and  
6 people who have congestive heart failure or  
7 people who have cancer get a lower level. It's  
8 the same comparator probably.

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

23 MR. WAXMAN: Yeah, I agree.

24 JUSTICE BREYER: What you are saying  
25 --

1 MR. WAXMAN: That's their position.

2 JUSTICE BREYER: Good. At least I've  
3 got that right.

4 But then what you are saying, it seems  
5 to me, is we look at that piece of paper and we  
6 see everybody's getting the same. Bah, people  
7 with heart conditions, something different.  
8 People with colds, something different.  
9 Inpatient people, where you add to the bill,  
10 normally, about \$2,000 a day for hospital  
11 overhead, are paid something different.

12 And, lo and behold, that's what you  
13 want us to look at. And what the bell is, if  
14 that's so, what goes off in my head is you are  
15 substituting for people who make decisions as to  
16 costs several thousand judges who know far less  
17 about it than --

18 MR. WAXMAN: I am --

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

23 MR. WAXMAN: Okay.

24 JUSTICE BREYER: And I ask it so I can  
25 see your answer.

1           MR. WAXMAN: And this is -- in no way  
2 does applying this statute as we read it -- and  
3 I do want to -- I -- I want to continue on the  
4 comparator issue because I -- I gather that's  
5 something that you also are concerned about, but  
6 I do want to come back and underscore why their  
7 reading of the statute renders exactly one half  
8 of the words of the statute complete surplusage  
9 and renders this statute utterly toothless  
10 because --

11           JUSTICE BREYER: Now I'm not  
12 interested at the moment --

13           MR. WAXMAN: I -- I under- --

14           JUSTICE BREYER: -- in the toothless.

15           MR. WAXMAN: -- I under- -- I  
16 understand. The point --

17           JUSTICE BREYER: I'm interested in the  
18 chaotic teeth.

19           MR. WAXMAN: -- the point about the  
20 comparator is in a case like this, where we  
21 allege -- and our complaint was dismissed --  
22 that out -- that renal dialysis and outpatient  
23 renal dialysis are treated uniquely  
24 disadvantageously and --

25           JUSTICE BREYER: Compared to?



1                   MR. WAXMAN: Compared to any other  
2 treatment.

3                   JUSTICE BREYER: All right. Does it  
4 compare -- does -- are you going to introduce  
5 evidence, whether it's this one, compared to  
6 heart attack patients?

7                   MR. WAXMAN: Yeah, absolutely.  
8 There's not -- there's not going to be --

9                   JUSTICE BREYER: All right. Then how  
10 do you --

11                  MR. WAXMAN: -- any dispute about  
12 this.

13                  JUSTICE BREYER: -- avoid, if not this  
14 case, in the mine-run of cases, of people  
15 bringing nonstop cases where the judge has to  
16 look at heart attacks, inpatient diagnostic  
17 facilities -- you know, we could go on for about  
18 10 months listing all the other things.

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

25                  There are a lot of other provisions

1 that aren't. Now is there a differentiation?  
2 If -- if there are various costs associated with  
3 various treatments, you don't even -- the  
4 complaint doesn't even satisfy the Twombly  
5 standard, but my ultimate point is that it  
6 doesn't matter whether you're focusing on, well,  
7 what about this treatment or what about that  
8 treatment?

9           They have the same problem if you're  
10 saying for people with ESRD or people with  
11 diabetes or people with congestive heart  
12 failure, you get X, but for people who have, you  
13 know, hearing loss, you get Y. It's the same --  
14 you can't avoid a comparator problem.

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

25           MR. WAXMAN: Right, we -- in that

1 instance --

2 JUSTICE GORSUCH: Right?

3 MR. WAXMAN: Yes. In that instance,  
4 we would have to show that the addition of  
5 congestive heart failure, which I think would be  
6 hard, but let's say they say, you know, you get  
7 the same thing for sleep apnea, the same  
8 disadvantageous treatment, the burden would be  
9 on us if there were -- if there were  
10 disadvantageous treatment of a host of medical  
11 treatments. The burden would be on us to  
12 plausibly allege and then prove that those were,  
13 in essence, a sham.

14 JUSTICE GORSUCH: Okay. And what --  
15 what -- what -- what incentive structure does  
16 that create if -- might that encourage health  
17 plans to provide more parsimonious limits for  
18 other similar chronic diseases?

19 MR. WAXMAN: So I think not, and I'll  
20 say one reason is historical and the other is  
21 logical and -- and I suppose political with a  
22 small "p."

23 These plans have been -- this  
24 anti-differentiation provision has been around  
25 for 31 years. This is -- this and the plan in

1 -- in Amy's Kitchen and a few other ones are  
2 utterly --

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

7 MR. WAXMAN: Okay. So --

8 JUSTICE GORSUCH: You -- you --

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

10 JUSTICE GORSUCH: -- indicated that if  
11 a plan could show that it was equally  
12 parsimonious with respect to congestive heart  
13 failure, it would -- it would prevail.

14 I -- I would think that would be a  
15 suggestion to plans that that's exactly what  
16 they should do, and should we worry about that?

17 MR. WAXMAN: You know, I -- I really  
18 think you don't need to worry about this, not  
19 only for historical reasons but also because it  
20 is only H -- ESRD patients who are immediately  
21 eligible after three months, regardless of age,  
22 for Medicare. And --

23 JUSTICE GORSUCH: And that -- that  
24 raises another question I had actually, and --  
25 and that is, you know, I understand an

1 anti-discrimination law to protect patients, but  
2 I'm -- I'm not familiar with one that this  
3 Court's encountered before with -- that would  
4 only protect the public fisc.

5 MR. WAXMAN: Oh, there's no -- there  
6 is -- there's no doubt that one of the two  
7 objectives of this statute was, in fact, to  
8 protect the public fisc to avoid payers paying  
9 secondary to Medicare as soon as the patient's  
10 enrolled. So whether you call this a  
11 differentiation statute or a discrimination  
12 statute, everybody agrees that was one of  
13 Congress's objectives.

14 Congress -- and this is clear from the  
15 fact that the anti-discrimination provision was  
16 enacted at the same time that the secondary --

17 JUSTICE GORSUCH: But -- but we'd  
18 agree, I think, wouldn't we, that -- that the  
19 only thing that, the outcome of this case, is  
20 how soon Medicare will wind up paying for these  
21 services? Is that --

22 MR. WAXMAN: That's right. And -- and  
23 Congress was very well aware, and it's  
24 explicated in several of the amicus briefs,  
25 Congress has been expressly aware that the only

1 way that an -- an outpatient dialysis system in  
2 this country of private medicine can survive is  
3 if the 10 percent of dialysis treatments that  
4 aren't covered by Medicare are the result of a  
5 negotiation between the providers --

6 JUSTICE GORSUCH: If the beneficiary  
7 of the civil --

8 MR. WAXMAN: -- and the plans.

9 JUSTICE GORSUCH: If the beneficiary  
10 of the anti-discrimination principle is supposed  
11 to be the public fisc then, what should we make  
12 of the fact that the government is on the other  
13 side of the V in this case?

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

15 JUSTICE GORSUCH: If they're the  
16 beneficiary of the discrimination principle --

17 MR. WAXMAN: I -- I --

18 JUSTICE GORSUCH: -- you're asking us  
19 to adopt.

20 MR. WAXMAN: So they aren't the  
21 beneficiary. They are one of the two  
22 beneficiaries. And I'll address the second  
23 later.

24 JUSTICE GORSUCH: Well, we agree that  
25 the patient's going to receive the services

1 under Medicare, right? It's just a matter of  
2 who pays and -- and when?

3 MR. WAXMAN: The -- let me first  
4 address the -- the perplexing question of why  
5 the government is on the other side.

6 JUSTICE GORSUCH: I mean, but why  
7 don't you answer that question first.

8 MR. WAXMAN: Oh, okay.

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

11 MR. WAXMAN: The only question is who  
12 pays and when and --

13 JUSTICE GORSUCH: Okay.

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

15 JUSTICE GORSUCH: And how much your  
16 company gets. I get that.

17 MR. WAXMAN: No.

18 JUSTICE GORSUCH: I -- I get that.

19 But --

20 MR. WAXMAN: No, no, I'm -- I'm -- I'm  
21 sorry --

22 JUSTICE GORSUCH: -- but if you can  
23 just --

24 MR. WAXMAN: -- with respect.

25 JUSTICE GORSUCH: Counsel, please.

1     Okay.  If it's who benefits, if the only  
2     question is who pays and when, the beneficiary  
3     is the government's fisc, why -- why shouldn't  
4     we take account of the fact that the  
5     government's on the other side of the V?  How do  
6     we -- how do we handle that?

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

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

23                    But here -- here is -- and I -- I -- I  
24    apologize if I was wrangling with you, but I was  
25    objecting to your suggestion, which I know you



1 don't mean, but I had heard it mistakenly, that  
2 the only people who are harmed here are possibly  
3 the Medicare fisc and my company or the  
4 companies.

5           The harm here -- and this is -- this  
6 is probably laid out as well as anywhere by the  
7 amicus brief of the Dialysis Patients coalition,  
8 which is three -- 30,000 dialysis ESRD  
9 sufferers, who explain all the ways in which the  
10 provisions of this plan harm people.

11           Now it -- you can say that, you know,  
12 this is just a payment dispute, but it's not.  
13 The core benefit that these plans provide is  
14 payment for medical services.

15           And there's real harm, number one,  
16 that in -- there is no -- uniquely, for this  
17 service, there is no in-network available. So  
18 there is no provider who has agreed not to  
19 balance bill and who has guaranteed that you can  
20 get treatment.

21           It requires higher co-pays and  
22 deductibles, up to \$7,000 a year. It doesn't  
23 provide any relief whatsoever for the first  
24 three months in which there is no Medicare  
25 backstop.

1                   And you can say: Oh, well, this is  
2                   the Medicare Secondary Payer Act, you can always  
3                   enroll in Medicare secondary. The government  
4                   says that's an extra \$170 a month, which is, by  
5                   the way, the minimum. It is certainly not  
6                   applicable to everybody.

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

15                  JUSTICE ALITO: Mr. Waxman --

16                  MR. WAXMAN: -- which is --

17                  JUSTICE ALITO: -- isn't it true that  
18                  your company and another company control around  
19                  89 percent of the market for dialysis?

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

23                  JUSTICE ALITO: Yeah.

24                  MR. WAXMAN: And the reason that that  
25                  exists, nobody -- I mean, there's -- to my

1 knowledge, there's never been an antitrust  
2 complaint filed against these companies.

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

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

17 JUSTICE ALITO: Well, the statistic I  
18 have is that your average cost per treatment is  
19 \$269 and you charge on average \$1,041. Is that  
20 right?

21 MR. WAXMAN: Well, it's \$290, as -- as  
22 we explain in our brief, and the average price  
23 that we charge is \$1,000. I mean, this is well,  
24 well-known -- this has been well-known to  
25 Congress for over 30 years. This is how CMS has

1 chosen to allow the dialysis industry to stay in  
2 business.

3 If what happens is that you reverse --  
4 and plan -- plans widely can do what this plan  
5 has done -- there -- there are going to be  
6 hundreds or thousands of dialysis centers --

7 JUSTICE GORSUCH: But, Mr. Waxman, I  
8 understand -- I understand you -- you're  
9 attacking the -- the low rates this group plan  
10 provides for dialysis, and -- and one -- one --  
11 one -- one can make strong arguments about that.

12 But even if -- even if a group plan  
13 agreed to reimburse at 200 percent of Medicare  
14 rates, you know, \$500, you'd -- you'd still --  
15 your companies would still reserve the right to  
16 balance bill for the other \$500, say, right?

17 MR. WAXMAN: Yes. In other words, our  
18 -- the -- the -- the -- the differentiation  
19 here, Justice Gorsuch, is not -- doesn't depend  
20 on the fact that they pay 87 and a half percent  
21 of the already low Medicare rate.

22 JUSTICE GORSUCH: So, really, the --

23 MR. WAXMAN: It's --

24 JUSTICE GORSUCH: -- the scope of  
25 their payment plan isn't relevant to your

1 argument.

2 MR. WAXMAN: The scope of their  
3 payment plan is --

4 JUSTICE GORSUCH: You'd still reserve  
5 --

6 MR. WAXMAN: -- our argument. And it  
7 is this --

8 JUSTICE GORSUCH: -- you'd still  
9 reserve the right to balance bill for whatever  
10 difference there were, right?

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

19 So the question is not a loss of  
20 coverage unless the interpretation that Judge  
21 Murphy in dissent provided becomes the law of  
22 the land, in which case there aren't going to be  
23 for-profit dialysis centers in many, many, many  
24 communities in the United States. It is already  
25 only the ones that can be the most ruthlessly

1 efficient and have economies of scale that even  
2 operate. That's why there are two predominant  
3 companies here.

4 I mean, if I can just --

5 JUSTICE SOTOMAYOR: Counsel, just --

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

7 JUSTICE SOTOMAYOR: -- just one  
8 question in what you just said about this. Are  
9 you -- how do -- how do you decide who can  
10 afford this treatment? I'm sure there are  
11 plenty of people with means who come in and say,  
12 I can't afford it. Do you just accept their  
13 word?

14 MR. WAXMAN: I mean, I --

15 JUSTICE SOTOMAYOR: So are you really  
16 accepting whatever people are willing to pay?

17 MR. WAXMAN: Justice Sotomayor, I --  
18 you know, this -- these are actually facts not  
19 in the record, and they're actually facts I  
20 don't know the answer to. So, you know, this --

21 JUSTICE SOTOMAYOR: I'm -- I'm just  
22 curious.

23 MR. WAXMAN: But I -- I --

24 JUSTICE SOTOMAYOR: I do see -- I do  
25 see your argument, however, that if every other

1 provider does this and is paying just whatever  
2 the average cost might be because they're  
3 charging 125 percent of Medicare -- paying 125  
4 of Medicaid, that for many providers, if it's  
5 uniform now that nobody is going to pay much,  
6 that many of the providers just have to go out  
7 of business, correct?

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

9 JUSTICE SOTOMAYOR: That's your point?

10 MR. WAXMAN: -- there's -- there's no  
11 question about that. I mean, if you look, for  
12 example, not only at the -- the Kidney Care  
13 Partners' amicus brief but also the brief of  
14 former CMS Administrator Scully, he explains why  
15 that's the case.

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

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

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

1 JUSTICE SOTOMAYOR: Are you finished  
2 with --

3 MR. WAXMAN: -- I answered your  
4 question, which is --

5 JUSTICE SOTOMAYOR: Okay. No, you're  
6 so --

7 MR. WAXMAN: -- I don't know the  
8 facts.

9 JUSTICE SOTOMAYOR: Okay.

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

18 Neither the Petitioners nor the United  
19 States has given any content, has explained what  
20 content there can be if -- to the -- to the rest  
21 of it, if the first one simply means, if you  
22 discriminate against ESRD patients by name,  
23 that's illegal, and if you don't, that's not  
24 illegal.

25 And what this -- but what this



1 provision says -- and I think, here, you know,  
2 it's really important, in their reply brief, the  
3 Petitioner says, look, what they wanted was  
4 parity. They wanted parity between ESRD  
5 patients. They wanted them to have the same  
6 benefits whether you have ESRD or not.

7           The text completely refutes that.  
8 First of all, a few lines above is the provision  
9 about -- that deals with people over 65, and it  
10 says, number one, you can't take into account  
11 the fact that they're eligible for Medicare,  
12 which is the same as the take-into-account  
13 provision here.

14           And, second, it says, you must provide  
15 -- they shall -- people over 65 shall be  
16 entitled to the same benefits under the same  
17 conditions as any other individual under age 65.  
18 That's not what this provision -- what our  
19 provision says.

20           What our provision says is you can't  
21 differentiate on the benefits you provide  
22 between individuals having ESRD and other  
23 individuals covered by the plan on the basis of  
24 -- and then it explains what it means to  
25 differentiate -- on the basis of express. You

1 can't do it. You can't call it out by name.

2           There is a statutory proxy. You may  
3 not do it on the basis of the need for renal  
4 dialysis, and you may not do it in any other  
5 manner that serves as a proxy for what ESRD  
6 patients uniquely need.

7           That reading of the statute, Justice  
8 Kagan's reading of the statute, gives meaning to  
9 every word of the statute. The government's  
10 reading or the Petitioners' reading gives no  
11 meaning whatsoever.

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

20           I mean, the anomaly in this case --  
21 and I would be interested in MedBen's lawyer  
22 response to this -- is, as we allege in the  
23 complaint, MedBen, which is the plan  
24 administrator and this little consulting firm  
25 that's come up with the language that was

1 imposed by this plan, its -- it expressly touts  
2 the benefit of its ability to "reduce dialysis  
3 procedures provided to ESRD patients" by  
4 implementing our proprietary dialysis health  
5 plan language.

6 And, in this case, it is here trying  
7 to deny that that is what its plan does.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Thomas, anything further?

10 Justice Breyer, anything?

11 Justice Sotomayor?

12 Justice Kagan?

13 Justice Barrett?

14 Okay. Thank you, counsel.

15 MR. WAXMAN: Thank you very much, Your  
16 Honor.

17 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.  
18 Kulewicz.

19 REBUTTAL ARGUMENT OF JOHN J. KULEWICZ

20 ON BEHALF OF THE PETITIONERS

21 MR. KULEWICZ: Thank you, Mr. Chief  
22 Justice. Four brief points, please.

23 First, in response -- in further  
24 response to Justice Alito's question about the  
25 network, it does, of course, take two to

1 network. DaVita never tells you or never says  
2 either in the record or even up to today that it  
3 wants to come into the network. What it seeks  
4 is the right to be paid at its undiscounted  
5 charges.

6 That would destroy any incentive to  
7 come into network. It would have, obviously,  
8 the catastrophic effect upon patients in the  
9 plans that we've discussed.

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

19 My -- my friend indicated that -- that  
20 the -- this cost containment measure of the plan  
21 is unique to the plan. But, if the Court would  
22 look at any -- from pages -- pages 52 through 92  
23 of the Joint Appendix alone, there are 10 other  
24 examples in there, including five other  
25 out-of-network situations that the plan

1 addresses, one other reference-based price that  
2 the plan uses, and four extraordinarily costly  
3 surgical centers that are -- that are completely  
4 excluded from the plan.

5           These don't have anything to do with  
6 dialysis, but the point that I want to make is  
7 that dialysis is not the only situation that is  
8 a cost-containment function here.

9           And then, finally, in -- in response  
10 to Justice Sotomayor's question about what would  
11 happen to -- to plans, plans, of course -- or,  
12 I'm sorry, what would happen -- what would  
13 happen to providers, the providers, of course,  
14 have gone to Congress before to get an increase  
15 in the Medicare rate. They are still able to do  
16 that.

17           And if the Court were to reverse, as  
18 we are asking in this case, and enter final  
19 judgment in favor of Petitioners on all claims,  
20 perhaps that will give Respondents the incentive  
21 to negotiate a network rate that is fair and  
22 reasonable.

23           Thank you, Your Honor.

24           CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Thank you, Mr. Guarnieri.

2 The case is submitted.

3 (Whereupon, at 1:06 p.m., the case was  
4 submitted.)

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