SUPREME COURT
OF THE UNITED STATES

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MARIETTA MEMORIAL HOSPITAL)
EMPLOYEE HEALTH BENEFIT PLAN,)
ET AL.,)
Petitioners,)
v.) No. 20-1641
DAVITA INC., ET AL.,)
Respondents.)

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Washington, D.C.

Tuesday, March 1, 2022

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

APPEARANCES:

JOHN J. KULEWICZ, ESQUIRE, Columbus, Ohio; on behalf of the Petitioners.

MATTHEW GUARNIERI, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting reversal.

SETH P. WAXMAN, ESQUIRE, Washington, D.C.; on behalf of the Respondents.

C O N T E N T S

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.

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

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

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

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

I welcome the questions of the Court.

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

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

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

So paying --

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

MR. KULEWICZ: That's --

JUSTICE THOMAS: -- of your approach.

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

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

JUSTICE THOMAS: Thank you.

MR. KULEWICZ: Thank you, Your Honor.

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

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

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

MR. KULEWICZ: That's right. The --

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

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

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

MR. KULEWICZ: Right.

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

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

reason --

JUSTICE BREYER: Yeah.

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

JUSTICE BREYER: But that's inpatient.

MR. KULEWICZ: That's inpatient. That's reimbursed at the -- at the Tier I rate, Your Honor. Yes.

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

MR. KULEWICZ: If the --

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

MR. KULEWICZ: Thank you, Your Honor.

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

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

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

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

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

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

JUSTICE SOTOMAYOR: So the --

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

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

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

And -- and, secondly, the Medicare Secondary Payer Act, by definition, contemplates that -- that plans will pay a rate that -- plans

may pay a rate below the Medicare base rate and --

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

Am I correct?

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

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

MR. KULEWICZ: We pay the --

JUSTICE SOTOMAYOR: Why isn't that cap

--

MR. KULEWICZ: We pay the same --

JUSTICE SOTOMAYOR: -- back at --

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

JUSTICE SOTOMAYOR: Yes.

MR. KULEWICZ: We pay the same percentage of reimbursement for Tier II -- for Tier II, it is treated as a virtual Tier II benefit. The only difference is that rather than accept what the Respondents say is a reasonable and customary rate because they are operating in a dysfunctional monopolistic market, so we -- we base the reimbursement on the Medicare rate.

JUSTICE SOTOMAYOR: But that's still a different way --

MR. KULEWICZ: Well --

JUSTICE SOTOMAYOR: -- of treating people. So why isn't that on the face of the statute --

MR. KULEWICZ: Your Honor --

JUSTICE SOTOMAYOR: -- not legal?

MR. KULEWICZ: -- because every -- every -- what the statute -- what the Medicare Secondary Payer Act requires is that a plan not

differentiate in the benefits that it provides between individuals with end-stage renal disease and others covered by the plan.

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

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

Are you in violation of the differentiation provision or not?

MR. KULEWICZ: What you would do in that situation, Your Honor, under the auspices of the Medicare Secondary Payer Act, is you

would look at the -- at the first group in Your Honor's hypothesis. If -- if they all are -- and bearing in mind this statute says individuals with end-stage renal disease.

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

JUSTICE KAGAN: I guess I'm not really quite understanding what you're getting at, so now we'll just go to the case. I mean, let's -- I mean, it doesn't take much of a change in the numbers to be a perfect proxy.

I mean, these are like 99 percent to 97 percent. But let's say you had a hundred percent and a hundred percent, meaning that a hundred percent of people with end-stage renal disease need dialysis and a hundred percent of the people who need outpatient dialysis have end -- end-stage renal disease.

Suppose it were a hundred percent, a

hundred percent, as opposed to what it is, which is 99.5 percent and 97 percent, all right, but let's just -- let's -- let's just round up and say it's a hundred.

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

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

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

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

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

MR. KULEWICZ: Well, there --

JUSTICE KAGAN: You would be in violation of the statute, is that what you're

saying?

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

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

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

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

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

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

MR. KULEWICZ: Well, just --

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

MR. KULEWICZ: No. No, Your Honor, because there's more to it than that be -- what -- what the Medicare Secondary -- Secondary Payer Act says is that if that -- if that situation exists, if you have -- whether it's a hundred percent overlap or -- or straight out

end-stage renal disease, if they are all on one side -- if the benefits that they have under the package are different and it's 100 percent on that side, then you go to the -- to the -- on the basis of qualifying phrases.

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

JUSTICE KAGAN: I mean, we could go down a list of these kinds of diseases with these kinds of treatments that are always necessary for that disease and only used for people with that disease. You know, we can -- we can do diabetes type 1 and insulin, or we could do antiretrovirals and AIDS.

And these are -- you know, you understand why people don't want to pay for these things. They're expensive.

But isn't that exactly what Congress was trying to do? It's saying stop trying to

get out of paying for the only treatment that is appropriate for a particular disease.

MR. KULEWICZ: Well --

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

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

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

So you could use --

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

have perfect end runs and, if the statute doesn't proscribe it, too bad.

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

The -- what the statute says is --

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

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

Here, what -- what we are -- what this plan does, Your Honor, it's -- it's essential, it's vitally important to the case, this plan provides exactly the same benefit to every individual in the plan. There is no --

CHIEF JUSTICE ROBERTS: Well, I --

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

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

But the statute says whether -- it turns on whether or not the health plan takes no notice whatsoever of whether the claimants are eligible. So even if, for example, it's a hundred percent proxy between people who are over six feet tall and, you know, people who have blue eyes or whatever and you cannot take account of how tall they are, is it really the case that you would be fine so long as you just

asked -- asked if they had blue eyes or not?

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

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

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

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

It -- it is -- it is the one perfect overlap here because it -- it -- it overlaps

directly with the objective of the -- the Medicare Secondary Payer Act.

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

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

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

MR. KULEWICZ: Well --

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

MR. KULEWICZ: Of course -- of course, Your Honor, the other side is not correct in

saying that there is a -- a correlation there. Ever since the Trade Preferences Extension Act of 2015, there is no correlation. Now people with acute kidney injury who go to outpatient dialysis, people with end-stage renal disease can get inpatient dialysis when they're -- when they're in a hospital.

The -- the -- the Ninth Circuit and the Sixth Circuit, the -- the difference between the Ninth Circuit and the Sixth Circuit is the Ninth Circuit stuck with the statutory text, honored the statutory text, honored the statutory text, read it verbatim and -- and literally.

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

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

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

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

Why doesn't that violate this statute?

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

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

MR. KULEWICZ: Well --

JUSTICE BREYER: -- get 95.

MR. KULEWICZ: Oh, I'm sorry.

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

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

JUSTICE BREYER: It would, but it

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

MR. KULEWICZ: Right.

JUSTICE BREYER: Do they?

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

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

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

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

everybody getting ESRD is getting the same?

MR. KULEWICZ: That's correct, Your Honor. If --

JUSTICE BREYER: Are you sure that's correct?

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas, anything further?

JUSTICE THOMAS: Nothing for me, Chief.

CHIEF JUSTICE ROBERTS: Justice Breyer, anything further?

Justice Alito?

JUSTICE ALITO: Well, I'm somewhat

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

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

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

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

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

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

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

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

MR. KULEWICZ: Well, let me give you

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

JUSTICE ALITO: Right.

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

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

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

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

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

JUSTICE ALITO: Well, that's what --

that's what was addressed by the first language.

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

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

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

What does that mean?

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

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

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

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

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

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

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

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

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

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

conditions as well.

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

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

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

JUSTICE ALITO: And Medicare.

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

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

There's a specter of balance billing,

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

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

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

CHIEF JUSTICE ROBERTS: Thank you.

MR. KULEWICZ: -- the individuals.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Sotomayor?

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

MR. KULEWICZ: Nothing, Your Honor.

JUSTICE SOTOMAYOR: Exactly.

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

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

anything for it.

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

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

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

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

MR. KULEWICZ: I'm sorry.

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

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

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

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

JUSTICE SOTOMAYOR: All right. Thank you.

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Kagan, anything further?

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

of it.

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

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

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

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

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

JUSTICE KAGAN: No, definitely not.

MR. KULEWICZ: Okay. All right.

(Laughter.)

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

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

It's there because they know you're going to do exactly what you're doing. It's there because they're saying don't try to distinguish between those with end-stage renal disease and those without end-stage renal disease by finding the perfect proxy, which is the therapy rather than the condition.

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

this group doesn't. And you can't do it by finding any other proxy that perfectly separates these two groups.

MR. KULEWICZ: Well, Your Honor, we respectfully disagree, and maybe if I can give a hypothetical that might cast it in a different light. Say that a plan said that there would be one set of benefits for people in North Dakota and another set of benefits for people in South Dakota, and it just -- just so it turns out that the people in South Dakota, some of the covered individuals, the -- the only individuals covered by the plan who have end-stage renal disease are in South Dakota.

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

And -- and -- and so then -- then we go to the -- that's when we go to the first, second, and third elements of the clause. If it -- you know, they would say, is it because I have end-stage renal disease? The plan may say no, it -- it's because -- because this is on the

basis of -- of geography, the laws in North Dakota are different from the laws in South Dakota or no, it's on the basis of -- of -- of collective bargaining, the people in -- in North Dakota are -- are in a bargaining unit, the people in South Dakota are not in a bargaining unit. It may be on the basis of -- of full-time/part-time, current employee/former employee.

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

JUSTICE KAGAN: Is there some relevance to this case?

MR. KULEWICZ: Well, no. Actually --

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

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

JUSTICE KAGAN: Yeah, I mean, that's like Anatole France is sleeping under the bridge

and the poor and the rich alike, right?

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

JUSTICE KAGAN: It's applied to everybody.

MR. KULEWICZ: Well --

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

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

So the -- the threshold inquiry --

JUSTICE KAGAN: Based on the need for renal dialysis.

MR. KULEWICZ: Well, and you -- you -- you get to that if there's a differentiation, but there has to be -- your threshold question, Your Honor, is, is there a -- is there a differentiation in benefits here? And if -- if there's no differentiation in benefits, if everybody in the plan has the same benefits, then -- then the dependent, the qualifying

client, would be no different.

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

MR. KULEWICZ: All right.

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

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

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

You're saying that if there is a human being in this plan, whether he has end-state or not, and if that individual should he get

end-state would be treated worse, that is covered by this language?

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

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

MR. KULEWICZ: I -- I believe I do, Your Honor. Yes.

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

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

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

Mr. Smith who has a heart attack or Mr. Smith who has your plan, should he, Mr. Smith, get end-state renal disease, under the plan, he won't be treated as well as all the other 98,000 people who have interstate --

end-state, that would violate it?

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

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

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

JUSTICE BREYER: Okay.

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

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

MR. KULEWICZ: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Justice

Gorsuch, anything further?

Justice Kavanaugh?

Justice Barrett?

Thank you, counsel.

MR. KULEWICZ: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Mr. Guarnieri, I understand you're with us remotely.

MR. GUARNIERI: I am, Your Honor.

CHIEF JUSTICE ROBERTS: You may proceed.

ORAL ARGUMENT OF MATTHEW GUARNIERI

FOR THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING REVERSAL

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

The Medicare secondary payer statute does not forbid group health plans from adopting uniform limits on coverage for renal dialysis. Fundamentally, the non-differentiation provision forbids only arrangements under which a group health plan provides different benefits to individuals with end-stage renal disease and other individuals covered by the plan.

Petitioners' plan does not do that. Respondents' proxy theory is therefore

irrelevant. Its plan is not providing a different package of benefits in the first place, by proxy or otherwise.

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

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

I welcome the Court's questions.

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

MR. GUARNIERI: Justice Thomas, we are concerned, frankly, about the effects that this decision may have. The provisions in this

statute have been in substantially the same form since 1989. And CMS's implementing regulations, including a regulation that expressly permits plans to impose uniform limits on coverage for dialysis, those regulations have been on the books since 1995.

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

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

JUSTICE THOMAS: Thank you.

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

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

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

And if a plan is providing the same package of benefits to all individuals who are covered by the plan, which is what Petitioners' plan does, then it is not differentiating in the

benefits it has provided, and, therefore, it is not violating this specific provision.

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

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

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

MR. GUARNIERI: I take the point, Justice Kagan, and -- and, in some ways, that's another reason -- I mean, the statutory text

itself here furnishes an additional basis that you don't need to kind of import into this coordination of benefits statute the concept of proxy discrimination drawn -- drawn from an opposite body of federal civil rights law.

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

MR. GUARNIERI: But, of course --

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

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

And so, if a plan is not doing that, if a plan is providing all individuals covered by the plan, regardless of whether or not they have end-stage renal disease and regardless of their need for renal dialysis, with the same package of benefits, meaning the same items and services are covered at the same premiums and any other sort of cost-sharing of individuals,

then the plan is not violating this specific provision.

JUSTICE KAGAN: Yeah, I think what most --

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

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

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

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

MR. GUARNIERI: And, of course, the principle that we --

JUSTICE KAGAN: -- by your adherence to -- I'm sorry. It's so -- it's so hard to do this with you not up here, Mr. Guarnieri.

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

MR. GUARNIERI: Justice Kagan --

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

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

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

MR. GUARNIERI: Certainly.

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

you're on this side?

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

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

Now, as to the broader question about, you know, wouldn't it be in the government's best financial interests for there to be, you know, circumstances in which group health plans could be compelled to pay higher rates to dialysis providers, you know, I don't -- I think part -- part of the story there is that Congress has, in general, in this statute chosen not to create an entitlement to dialysis coverage. That's consistent with Congress's overall choices in this area. In particular, ERISA,

which is the preeminent federal law regulating the design of health benefits plans, does not mandate that plans cover particular services, and that's -- that's true even with respect to ERISA's non-discrimination provision.

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

Now, you know, again, we -- we have filed in support of reversal, not actually in support of Petitioners' brief, because we have policy concerns that plan practices like this could ultimately lead to greater costs for the Medicare program and -- and potentially worse coverage or worse options for individuals with end-stage renal disease. We just don't think the statute in its current form prohibits the -- the particular plan provisions that are under scrutiny here.

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

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

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

The -- the -- the other point that Petitioners and their amici have made is that because the Medicare secondary payer statute itself does not require that group health plans provide coverage for renal dialysis, a decision in Respondents' favor might mean that more group

health plans choose not to cover dialysis at all if -- if, you know, the result of covering it would be exposing them to liability under the statute.

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

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

And -- and -- and even in that circumstance, that's going to save Medicare money in the sense that, you know, if -- if you take a circumstance -- if you take a situation in which the group health plan provides a relatively parsimonious coverage for outpatient dialysis and an individual makes a decision to enroll in Medicare as the secondary payer during the coordination period, the group health plan is still covering all of that individual's other

medical expenses, and that's going to save Medicare money. Medicare only steps in as the secondary payer with respect to items or services that the group health plan does not fully cover.

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

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

I understand how it works under your theory. It is a bit strange that the two groups are almost identical. But, if it's interpreted the way the Sixth Circuit interpreted it and the way Respondent interpreted it, you have the people who have end-stage renal disease and they need kidney dialysis, and the plan pays a certain amount of money to them for that service. What do you compare that to?

MR. GUARNIERI: I entirely agree with

you, Justice Alito. I don't think Respondents have very clearly answered that question. And as Judge Murphy explained in his partial dissent in the Sixth Circuit, it's -- the Medicare secondary payer statute itself does not provide guideposts for making that kind of judgment.

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

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

JUSTICE ALITO: All right. Thank you.

CHIEF JUSTICE ROBERTS: Justice Thomas, anything further?

Justice Breyer?

Justice Alito, anything further?

Thank you, Mr. Guarnieri.

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

CHIEF JUSTICE ROBERTS: Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE RESPONDENTS

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

Differential treatment of outpatient renal dialysis is most certainly differential treatment of individuals with ESRD. Congress determined that and it determined it because Congress understood in 1972 and in 1981 and thereafter that ESRD patients uniquely and utterly need outpatient dialysis for the rest of their lives.

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

The reading urged by the Petitioners and the solicitor general by which the anti-discrimination provision bars only plans that single out ESRD patients by name and the take-into-account provision only applies to plans that reference Medicare eligibility expressly, renders both of these statutory

protections utterly toothless.

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

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

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

And as was noted, I think by Justice Sotomayor, even the Ninth Circuit in Amy's Kitchen agreed, and I'm quoting from the opinion, "a plan would violate the MSP if it

provided differential coverage for routine maintenance dialysis," that is, dialysis received only by persons with ESRD, than for all other -- all other dialysis. That is exactly what this plan does.

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

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

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

I want to clarify just a couple of, I think, errors that my friend on the other side made. The notion that they are actually helping

beneficiaries because they are limiting the amount of balance billing available is -- is utterly wrong.

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

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

And as the -- there -- there are some really terrific and very knowledgeable amicus briefs filed in this case. It is completely clear and Congress has understood that if this Court accepts the other side's ruling, there is no reason on God's green earth that UnitedHealth

and AEtna and all the -- all the big plans that -- that -- health plans and big, big employer health plans, all of whom do not differentiate in any basis on the need for renal dialysis, I mean, they --

JUSTICE ALITO: Well --

MR. WAXMAN: -- have shareholders --

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

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

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

MR. WAXMAN: I hope.

JUSTICE ALITO: -- suppose a plan says that we will pay a maximum of X dollars, let's say $1,000, per year for renal dialysis, period.

Is that vulnerable?

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

JUSTICE ALITO: Is that vulnerable? Is that illegal, in your view?

MR. WAXMAN: So the -- the answer is it depends. If what the plan says is for all other forms of, you name it, treatment, medical treatment, chronic medical treatment, we will

pay the ordinary and -- customary, ordinary, and reasonable cost except for renal dialysis, that's a differentiation that's prohibited by the statute.

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

JUSTICE ALITO: Well, what if --

MR. WAXMAN: -- for heart disease --

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

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

JUSTICE ALITO: Yeah, so how do you compare what is -- maybe they're being very

stingy with renal dialysis as compared to other -- I just don't know what the standard is for making the comparison.

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

JUSTICE ALITO: Right.

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

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

JUSTICE BREYER: Who are you going to compare it with?

MR. WAXMAN: Yeah. So here, there's no doubt whatsoever that outpatient renal dialysis, that is, maintenance dialysis, the

dialysis that ESRD patients alone need to survive to the next day for the entire rest of their lives, is treated worse in a number of respects than any other.

JUSTICE KAGAN: So this might be --

MR. WAXMAN: -- treatment.

JUSTICE KAGAN: -- an easy case, but I think what Justice Alito was sort of suggesting to you is let's take a case where there are five different chronic health conditions and the plan sets up a payment scheme for each of the five. And it's like, well, you know, it's not as though four of them, they say we'll -- we'll pay the reasonable costs, and the fifth, we'll pay $500. You know, they put -- they put different --

MR. WAXMAN: Yep.

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

MR. WAXMAN: So I think what are you supposed to do is the same thing under our reading of the statute or the other side's reading of the statute. What if the statute said instead -- let's take an example. We're going to pay everybody -- we're going to pay the

ordinary, reasonable costs for everything except heart disease -- you know, congestive heart failure and ESRD. Congestive heart failure and renal dialysis -- no, the -- the treatments that are needed for congestive heart failure and the treatment that is needed for ESRD.

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

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

JUSTICE BREYER: No, it isn't. The -- the -- look, what they're saying, I think now, I -- I hope, because I've had a hard time with

this, okay, I think they're saying imagine -- or at least this is close -- there are 5,000 members of a plan. They each have a piece of paper which describes the whole plan. In this piece of paper, it says ESRD outpatient and it is identical whether you have the disease, whether you don't have the disease, you might get the disease, maybe you had it and it wasn't paid for, but anybody who has it or gets it or whatever it is will be paid identically. That's the end of the case.

MR. WAXMAN: Yeah, I agree.

JUSTICE BREYER: What you are saying --

MR. WAXMAN: That's their position.

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

But then what you are saying, it seems to me, is we look at that piece of paper and we see everybody is getting the same. Bah, people with heart conditions, something different. People with colds, something different. In-patient people where you add to the bill, normally, about $2,000 a day for hospital overhead, are paid something different.

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

MR. WAXMAN: I --

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

MR. WAXMAN: Okay.

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

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

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

MR. WAXMAN: I -- I --

JUSTICE BREYER: -- in the toothless.

MR. WAXMAN: I understand. The point --

JUSTICE BREYER: I'm interested in the chaotic.

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

JUSTICE BREYER: Compared to?

MR. WAXMAN: Compared to any other treatment.

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

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

JUSTICE BREYER: Then how do you --

MR. WAXMAN: -- any dispute about

this.

JUSTICE BREYER: -- avoid, if not this case, in the mine-run of cases, of people bringing non-stop cases where the judge as to look at heart attacks, in-patient diagnostic facilities -- you know, we could go on for about ten months listing all the other things.

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

There are a lot of other provisions that aren't. Now, is there a differentiation? If -- if there are various costs associated with various treatments, you don't need -- the complaint doesn't even satisfy the Twombly standard, but my ultimate point is that it doesn't matter whether you're focusing on, well, what about this treatment or what about that treatment?

They have the same problem if you're saying for people with ESRD or people with diabetes or people with congestive heart

failure, you get X, but for people who have, you know, hearing loss, you get Y. It's the same -- you can't avoid a comparator problem.

The problem is resolved by --

JUSTICE GORSUCH: Mr. Waxman, if -- if -- if -- if -- if -- if Justice Breyer is correct and -- and we have a comparator problem, as you call it, I -- I think you indicated earlier that you -- you think it would be solved from -- from the hospital's perspective, if they had given similarly limited benefits for congestive heart failure, then -- then they would win.

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

JUSTICE GORSUCH: Right?

MR. WAXMAN: Yes. In that instance we would have to show that the addition of congestive heart failure, which I think would be hard, but let's say they say, you know, you get the same thing for sleep apnea, the same disadvantageous treatment, the burden would be on us if there were -- if there were dis- -- if there were disadvan- -- disadvantageous treatment of a host of medical treatments.

The burden would be on us to plausibly

allege and then prove that those were, in essence, a sham.

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

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

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

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

MR. WAXMAN: Okay. So --

JUSTICE GORSUCH: You -- you --

MR. WAXMAN: -- putting that aside --

JUSTICE GORSUCH: -- indicated that if a plan could show that it was equally

parsimonious with respect to congestive heart failure it would -- it would prevail.

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

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

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

MR. WAXMAN: Well, there's no -- there is -- there's no doubt that one of the two objectives of this statute was, in fact, to protect the public fisc to avoid payors paying secondary to Medicare as soon as the patient is enrolled.

So whether you call this a

differentiation statute or a discrimination statute, everybody agrees that was one of Congress's objectives.

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

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

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

JUSTICE GORSUCH: If the beneficiary of the civil --

MR. WAXMAN: -- and the plans.

JUSTICE GORSUCH: If the beneficiary of the anti-discrimination principle is supposed

to be the public fisc then, what should we make of the fact that the government is on the other side of the V in this case, I mean I think you've -- if they're the beneficiary of the discrimination principle that you are asking us to adopt?

MR. WAXMAN: So they aren't the beneficiary. They are one of the two beneficiaries. And I will address the second later.

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

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

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

MR. WAXMAN: Oh, okay.

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

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

JUSTICE GORSUCH: Okay.

MR. WAXMAN: -- how much -- excuse me.
JUSTICE GORSUCH: And how much your company gets. I get that.
MR. WAXMAN: No, no --
JUSTICE GORSUCH: I get that. If you can --
MR. WAXMAN: -- no, I'm sorry, with respect.
JUSTICE GORSUCH: Counsel, please. Okay. If it is who benefits, if the only question is who pays and when, the beneficiary is government's fisc, why -- why shouldn't we take account of the fact that the government is on the other side of the V; how do we -- how do we handle that?
MR. WAXMAN: Well, I think Mr. Guarnieri has told you in his argument that the government is on the other side because it -- it -- it feels some duty to defend one particular sub-provision of its regulations which, as our briefs explain, is inconsistent with both the statute and the provision that immediately precedes it.
He has said in his brief and today here that the government is quite troubled by

what this plan is trying to do and it acknowledges that there very likely will be an adverse financial effect on the Medicare fisc if the Court reverses and adopts the -- the reading of the statute that -- that Judge Murphy provided in dissent below.

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

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

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

And there's real harm, Number 1, that in -- there is no uniquely, for this service,

there is no in-network available.

So there is no provider who has agreed not to balance bill and who has guaranteed that you can get treatment. It requires higher co-pays and deductibles, up to $7,000 a year. It doesn't provide any relief whatsoever for the first three months in which there is no Medicare backstop.

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

You pay Medicare $170 a month, or $250 a month, if you can get the secondary coverage. This is in addition to what these people of limited means and who are facing end-of-life worries are already paying to the group health plan.

And if they can't reasonably afford to pay two sets of benefits, they do what Patient A did in this case -- -

JUSTICE ALITO: Mr. Waxman --

MR. WAXMAN: -- which is --

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

MR. WAXMAN: I don't know the numbers, but they -- they -- there are essentially two large players and then several other players. And the reason that that exists, nobody -- I mean, there's -- to my knowledge, there's never been an antitrust complaint filed against these companies.

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

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

JUSTICE ALITO: Well, the statistic I

have is that your average cost per treatment is $269 and you charge on average $1,041. Is that right?

MR. WAXMAN: Well, it is $290, as -- as we explain in our brief, and the average price that we charge is $1,000. I mean, this is well, well -- this has been well-known to Congress for over 30 years.

This is how CMS has chosen to allow the dialysis industry to stay in business. If what happens is that you reverse, and plan -- plans widely can do what this plan has done, there -- there are going to be hundreds or thousands of dialysis centers --

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

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

MR. WAXMAN: Yes. In other words, our

-- the -- the -- the -- the differentiation here, Justice Gorsuch, is not -- doesn't depend on the fact that they pay 87 and a half percent of the already low Medicare rate.

JUSTICE GORSUCH: So, really, the --

MR. WAXMAN: It's --

JUSTICE GORSUCH: The scope of their payment plan isn't relevant to your argument.

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

JUSTICE GORSUCH: You'd still reserve --

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

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

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

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

I mean, if I can just --

JUSTICE SOTOMAYOR: Counsel, just --

MR. WAXMAN: -- go to why --

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

MR. WAXMAN: I mean, I --

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

MR. WAXMAN: Justice Sotomayor, I -- you know, this -- these are actually facts not in the record, and they're actually facts I

don't know the answer to. So, you know, this --

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

MR. WAXMAN: But I -- I --

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

MR. WAXMAN: There's no question --

JUSTICE SOTOMAYOR: That's your point?

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

Now, I -- I do want to go, just before my time runs out, whenever that will be, to explain because there are a lot of questions asked of my friends about the text. And I -- I

-- I fully endorse the "questions" or -- or reading of the statute that Justice Kagan provided, but I think it's unimportant --

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

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

JUSTICE SOTOMAYOR: Are you finished answering --

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

JUSTICE SOTOMAYOR: Okay. No, you're somewhere --

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

Neither the Petitioners nor the United States has given any content, yet to explain what content there can be if -- to the -- to the rest of it, if the first one simply means if you

discriminate against ESRD patients by name, that's illegal. And if you don't, that's not illegal.

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

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

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

What our provision says is you can't differentiate on the benefits you provide

between individuals having ESRD and other individuals covered by the plan on the basis of -- and then it explains what it means to differentiate -- on the basis of express. You can't do it, you can't call it out by name.

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

That reading of the statute, Justice Kagan's reading of the statute, gives meaning to every word of the statute. The government's reading or the Petitioners' reading gives no meaning whatsoever. The one example the government was able to come up with in its brief, which is, well, some plans may give greater benefits based on tenure and people with ESRD may be older, fails because a plan that gives higher benefits based on tenure doesn't even meet their test for the first part of the clause.

It's not differentiating on the basis of ESRD. I mean, the anomaly in this case -- and I would be interested in MedBen's lawyer

response to this is, as we allege in the complaint, MedBen, which is the plan administrator and this little consulting firm that has come up with the language that was imposed by this plan, its -- it expressly touts the benefit of its ability to "reduce dialysis procedures provided to ESRD patients" by implementing our proprietary dialysis health plan language.

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

CHIEF JUSTICE ROBERTS: Justice Thomas, anything further?

Justice Breyer? Anything?

Justice Sotomayor?

Justice Kagan?

Justice Barrett?

Thank you, counsel.

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

CHIEF JUSTICE ROBERTS: Rebuttal, Mr. Kulewicz.

REBUTTAL ARGUMENT OF JOHN J. KULEWICZ

ON BEHALF OF THE PETITIONERS

MR. KULEWICZ: Thank you, Mr. Chief

Justice. Four brief points, please.

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

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

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

My -- my friend indicated that -- that the -- this cost containment measure of the plan is unique to the plan. But if the Court would

look at any -- from pages -- pages 52 through 92 of the joint appendix alone, there are ten other examples in there, including five other out-of-network situations that the plan addresses, one other reference-based price that the plan uses, and four extraordinarily costly surgical centers that are -- that are completely excluded from the plan.

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

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

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

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Thank you, Mr. Guarnieri.

The case is submitted.

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