

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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XAVIER BECERRA, SECRETARY OF)
HEALTH AND HUMAN SERVICES,)
Petitioner,)
v.) No. 20-1312
EMPIRE HEALTH FOUNDATION,)
FOR VALLEY HOSPITAL MEDICAL CENTER,)
Respondent.)
- - - - -

Pages: 1 through 76
Place: Washington, D.C.
Date: November 29, 2021

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5 Petitioner,)
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8 FOR VALLEY HOSPITAL MEDICAL CENTER,))
9 Respondent.)
10 - - - - -

11
12 Washington, D.C.
13 Monday, November 29, 2021
14

15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 10:00 a.m.
18

19 APPEARANCES:
20 JONATHAN C. BOND, Assistant to the Solicitor General,
21 Department of Justice, Washington, D.C.; on behalf
22 of the Petitioner.
23 DANIEL J. HETTICH, ESQUIRE, Washington, D.C.; on
24 behalf of the Respondent.
25

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 20-1312, Becerra versus Empire Health Fund.

Mr. Bond.

ORAL ARGUMENT OF JONATHAN C. BOND

ON BEHALF OF THE PETITIONER

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

The Medicare fraction directs HHS to count patient days of patients who, for such days, were entitled to benefits under Part A of Medicare. The question here is which patients are entitled to Part A benefits.

Section 426 states that every individual who satisfies certain requirements shall be eligible -- or shall -- shall be entitled to Part A benefits, and that provision and others make clear that the entitlement is not absolute but subject to conditions, and it is not negated merely because Medicare does not pay for particular units of care.

That is the best reading of the statute's text, context, and its

1 population-focused design, and, at a minimum, a
2 reasonable reading that deserves deference.

3 The court of appeals and Respondent's
4 contrary reading rests on two inferences based
5 on other language concerning other programs.
6 The court of appeals inferred from Congress's
7 references to "persons eligible for Medicaid"
8 that in the Medicare fraction Congress must have
9 meant "entitled to Part A" to mean something
10 different than it means throughout the statute.

11 But Congress's use of "entitled" and
12 "eligible" is fully explained by its usage of
13 those terms in the underlying Medicare and
14 Medicaid programs governed by separate statutory
15 frameworks. Congress simply took those terms as
16 it found them.

17 Respondent contends that the agency's
18 approach to SSI benefits conflicts with its
19 position here. That is not correct, as the
20 agency explained in the 2010 regulation and as
21 the Sixth Circuit explained in Metro Hospital.

22 But even if there were a conflict, the
23 solution is not to skew the meaning of "entitled
24 to benefits under Part A." The Court should
25 give that phrase the meaning that Congress did

1 in the statute and reserve the SSI benefits
2 issue for a future case.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: Mr. Bond, before we
5 get bogged down in this indecipherable language,
6 what does -- what's the difference between
7 "entitled to" and "eligible for"?

8 MR. BOND: So, in the context of these
9 programs, they --

10 JUSTICE THOMAS: No, no, no. Just in
11 ordinary meaning.

12 MR. BOND: So, in ordinary language, I
13 think "entitled" refers to having a right to
14 something, but that something may itself be
15 subject to conditions. It does not signify an
16 absolute right.

17 The district court, at Petition
18 Appendix 42a, pointed to dictionary definitions
19 that go in both directions, and I think that's
20 consistent with ordinary usage, as our season
21 ticket holder example explains.

22 Now, in ordinary usage, "eligible"
23 more naturally means that someone qualifies for
24 something, which is one of the definitions of
25 "entitled" in the dictionaries the district

1 court identified.

2 But whatever the ordinary meanings of
3 those terms, I think it's clear how Congress
4 used them in this particular setting with
5 respect to "entitled" in Part A. You know who
6 is entitled from Section 426 --

7 JUSTICE THOMAS: So how far can we go
8 with that if there's no definition of "entitled"
9 in the statute? Can we redefine it simply by
10 looking at how it's used throughout the statute?

11 MR. BOND: So, to be clear, our
12 argument is not how it's used. We think there
13 is what functions as a definition both of who is
14 entitled and what that entitlement means.

15 Now those provisions are at 426(a) and
16 (b), which answers the question who is entitled.
17 It says every individual in these categories
18 shall be entitled. And then it says in
19 426(c)(1) and 1395d what that entitlement
20 consists of, and it says that that entitlement
21 is a right to have payment made for certain
22 services but subject to conditions set forth in
23 the statute.

24 So the statute is telling you that
25 entitlement here does not mean an absolute

1 right. And I think that's clarified further by
2 Section 1395l, which refers in two places to a
3 person who is entitled to benefits under Part A
4 but has exhausted them, showing that exhaustion
5 and entitlement can coexist and further
6 distinguishes that person from one who is not
7 entitled to Part A benefits at all.

8 JUSTICE KAVANAUGH: But, Mr. Bond, you
9 are interpreting the word "entitled" to mean
10 something different in the same sentence,
11 different with respect to Medicare and SSI. So
12 that's problem one.

13 Then you're interpreting the word
14 "entitled" actually to mean the same thing as
15 "eligible," Justice Thomas's question, even
16 though they are different words and should,
17 therefore, convey different meanings. So that's
18 problem two. And then the phrase "for such
19 days," as I analyze this, becomes surplusage.

20 Then we look at the history of this,
21 and for the first 20 years, you interpreted
22 "eligible for Medicaid" to mean entitled, and
23 the courts all said, well, you can't do that;
24 "eligible" is something different from
25 "entitled." So you correct that by saying: Oh,

1 we can't interpret "eligible" to mean
2 "entitled," so we're going to interpret
3 "entitled" to mean "eligible" in the Medicare
4 fraction. Okay? So that's problem four.

5 And then, in the -- in the
6 administrative process -- and I know you're just
7 the lawyer. In the administrative process, HHS
8 mis-describes the existing rule and the
9 proposal, corrects it a week before the comment
10 period closes, and finally changes the -- the --
11 the final rule from what it had -- what it had
12 been. So that's problem five.

13 We've -- we've whacked agency rules
14 for much less than that. I know that's not the
15 issue presented, but it is an atmospheric here.
16 So there's just kind of a panoply of problems
17 here. And that's -- that's -- you know, that's
18 more of a comment for you to figure out how to
19 respond to. That's a lot of problems.

20 MR. BOND: Sure. If I may respond to
21 those in turn, starting with the use of
22 "entitled" in the Medicare fraction referring
23 both to entitled to SSI benefits and Part A
24 benefits. Our interpretation of that term is
25 consistent in that we read it to mean a person

1 who is entitled by the statute that's being
2 referenced.

3 Those statutes, as the Sixth Circuit
4 and the 2010 regulation explained, use
5 "entitled" differently. In the Medicare
6 statute, a person who satisfies these criteria
7 is entitled by operation of law, as the D.C.
8 Circuit in Hall versus Sebelius explained.
9 That's not how it works under SSI. The
10 entitlement does not arise automatically. There
11 must also be an application and a determination.

12 JUSTICE KAVANAUGH: I don't see why
13 that matters, but keep going.

14 MR. BOND: Sure. Our -- our -- our
15 point is that we are interpreting the phrase
16 consistently, and that fits with both the nature
17 of the benefits under those two programs and
18 with how Congress is using the terms here.

19 SSI is a cash benefit program, so to
20 say that someone is entitled to that cash
21 benefit more naturally signifies a person who is
22 able to get that benefit.

23 Medicare Part A is hospital insurance
24 coverage, and it is perfectly natural to say
25 that a person is entitled to that coverage even

1 though their insurer won't pay for particular
2 units of care, including because a third party
3 was responsible for the injury, and so the
4 third-party insurance must pay for it. And
5 that's one of the issues here.

6 Respondent's theory would say, if the
7 person's injury was caused by a third party
8 whose insurer must pay, that person moves from
9 the Medicare fraction and that population that
10 Congress separately addressed, for at least that
11 patient stay, to the other fraction, and we
12 don't think that's consonant with the statute.

13 CHIEF JUSTICE ROBERTS: Mr. Bond, I
14 think Justice Kavanaugh left out problem six,
15 which is that there's a backstory to all this,
16 and that was that Congress was, I would say,
17 extremely frustrated with what the agency was
18 doing over time. Several times they tried to
19 tighten the statutory language to push it, I
20 would say, fairly, say, in a direction contrary
21 to what the agency wanted.

22 So it strikes me as a situation where
23 I think we ought to be particularly precise in
24 interpreting the language Congress used without
25 any gloss added by the agency.

1 MR. BOND: So, if I can address that
2 history in turn before returning to the rest of
3 Justice Kavanaugh's question, I think the
4 history is more complicated and nuanced than is
5 sometimes described, and I'd like to walk
6 through it in a bit of detail, but I think the
7 through line is that the agency is not flouting
8 Congress but responding in good faith under the
9 circumstances to actions by Congress and
10 judicial decisions.

11 I think the relevant history starts in
12 1983 in the statute that created the prospective
13 payment program. In that statute, Congress did
14 tell HHS to adopt adjustments, including for
15 low-income patients, but what it said was as the
16 Secretary deems appropriate.

17 And the agency determined after
18 looking at the data that it didn't think an
19 adjustment was appropriate. That's reflected in
20 a series of Federal Register rulemakings that
21 are cited collectively at JA 39 to 40. So the
22 agency made that initial determination.

23 Now, at that point, you're right,
24 Congress disagreed and said, no, you really must
25 adopt a definition, and it gave the agency a

1 very short deadline that the agency didn't meet.
2 But, when a court ordered the agency to meet
3 another deadline, the agency complied. All of
4 that was overtaken by the 1986 definition that
5 Congress adopted.

6 Now the agency did interpret that for
7 the first decade or so not to include patient
8 days that were not paid for, i.e., covered by
9 the Medicaid or Medicare programs, and Congress
10 did not step in to correct that.

11 But four courts of appeals did reject
12 that interpretation in the context of the
13 Medicaid fraction, and the agency responded by
14 acquiescing to those courts' decisions, and it
15 then carried over that interpretation to the
16 Medicare context.

17 JUSTICE GORSUCH: Mr. Bond, in -- in
18 that history, what -- what's helpful to the
19 government?

20 MR. BOND: What's helpful is --

21 JUSTICE GORSUCH: I mean, I've heard a
22 lot -- a lot of detail, but the through line
23 doesn't seem to be an effort to fully vindicate
24 the -- the terms of the statute. It seems like
25 at each step of the way there's some -- some

1 foot-dragging that's at issue.

2 MR. BOND: There -- there may have
3 been inefficiency or misunderstanding of
4 Congress's direction, but I think that's
5 fundamentally different than the agency trying
6 to flout the directive.

7 JUSTICE GORSUCH: No, fair enough. I
8 -- I -- I don't mean to cast aspersions on
9 intentions, just -- just the facts on the ground
10 are mistakes and -- and -- and mistaking
11 Congress's intention repeatedly. Is that -- is
12 that a fair through line of this?

13 MR. BOND: I think there are several
14 occasions of mistaking what Congress clarified
15 was its intention. And I think what Congress --
16 or what the agency did in 2004 was carry over
17 the approach that it understood from the courts
18 of appeals was appropriate in approaching --

19 JUSTICE SOTOMAYOR: Counsel --

20 MR. BOND: -- the Medicaid fraction to
21 the Medicare fraction to focus not on which
22 patient days are paid for by a program but
23 whether a person satisfies the definition of the
24 term Congress used, "eligible" as opposed to
25 "entitled."

1 JUSTICE SOTOMAYOR: Counsel, how do
2 you -- or do we give you any Chevron deference
3 for this interpretation? Are you relying on
4 that at all, or are you taking the position that
5 this is what the statute plainly says even
6 though, as Justice Kavanaugh pointed out, that's
7 subject to a great deal of dispute?

8 MR. BOND: What we're saying is two
9 things. We think we have the better reading
10 writing on a clean slate and, at a minimum, a
11 reasonable reading. I think what we're saying
12 is what the --

13 JUSTICE SOTOMAYOR: Answer my
14 question. Do you think you're entitled to
15 Chevron deference?

16 MR. BOND: We do think we are entitled
17 to Chevron deference.

18 JUSTICE SOTOMAYOR: So how do you get
19 past Encino Motorcars given the odd
20 flip-flopping in the administrative process? It
21 first misstated its existing policy in 2003.
22 You correct the misstatement at the end of the
23 rulemaking process in 2004. But what's most
24 significant to me, the final rule did the
25 opposite of what the agency initially proposed

1 to do.

2 So there's sort of three steps, all of
3 them at the end of an agency process. I don't
4 see how we give you Chevron deference under
5 those circumstances.

6 MR. BOND: I would say several things,
7 first about Encino and then about the particular
8 rulemaking history here.

9 Encino does not hold that a procedural
10 error of any kind results in a lack of Chevron
11 deference. I think that the error at issue
12 there was fundamental. The agency had
13 engendered substantial reliance interests that
14 it did not address. That's not at issue here.

15 Moreover, the procedural error that --
16 that is asserted was rejected by the Ninth
17 Circuit, and this Court declined to review that
18 determination.

19 JUSTICE SOTOMAYOR: What does that
20 have to do with anything? Whether there's an
21 administrative failing under the APA is a
22 different question than are you entitled to
23 deference for an interpretation that it took you
24 until the end of the process to fix and then,
25 when you fix it, you do the opposite of what you

1 said you were going to do?

2 MR. BOND: So, on those points,
3 deference goes to the final rule, the final
4 decision-making made by the agency, not to its
5 earlier statement. So deference hinges on what
6 the final rule said.

7 Now, to your point about the gap
8 between the final rule and the proposal, the
9 proposed rule put a binary choice to commenters
10 -- and these are sophisticated providers --
11 between counting these days in the Medicaid
12 fraction, as the agency proposed and as
13 Respondent now argues, and including them in the
14 Medicare fraction, which the agency mistakenly
15 described as its existing policy, but those two
16 options were on the table for commenters.

17 JUSTICE SOTOMAYOR: Can you point to
18 any other statute -- you said you have the
19 better reading -- where Congress uses words that
20 have three meanings, the same words that have
21 three meanings?

22 MR. BOND: I don't --

23 JUSTICE SOTOMAYOR: Because that's
24 what basically you're saying, which is "entitled
25 to" is different in -- from "eligible for," and

1 it's different for what we're going to do to
2 SSI.

3 MR. BOND: So we -- we don't have a
4 statute that gives the same terms three
5 meanings, and that's not what we're saying here.
6 We are saying that "entitled" and "eligible"
7 have similar meanings in practice because the
8 underlying statutes use those two different
9 terms to refer to similar ideas.

10 JUSTICE SOTOMAYOR: Is it fatal for
11 your argument if they don't use similar terms
12 throughout?

13 MR. BOND: No, it's not fatal to our
14 argument, but --

15 JUSTICE SOTOMAYOR: Meaning that the
16 statutes don't use "eligible" or "entitled" --

17 MR. BOND: Well --

18 JUSTICE SOTOMAYOR: -- consistently
19 throughout.

20 MR. BOND: -- the Medicaid statute
21 does consistently use "entitled or "eligible"
22 for Medicaid assistance to describe the category
23 of individuals that are covered.

24 JUSTICE SOTOMAYOR: But the Medicare
25 statute doesn't?

1 MR. BOND: The Medicare statute refers
2 to "entitled to Part A benefits" to describe
3 this category of persons.

4 JUSTICE SOTOMAYOR: Only because
5 you're saying it does, but the Act itself
6 doesn't use "entitled" throughout. It uses
7 "entitled" sometimes and "eligible" other times.

8 MR. BOND: When it uses "eligible,"
9 however, Your Honor, I think it's referring to
10 something different. In Parts B, C, and D --
11 and these provisions are cited in our brief --
12 Congress refers to a person who is eligible to
13 enroll in those programs if they are entitled to
14 benefits under Part A, and when that person
15 enrolls in that program, they then become
16 entitled to that opt-in program.

17 JUSTICE ALITO: Mr. Bond, could you
18 say something about what the Medicare fraction
19 is designed to do? Which of the two
20 interpretations fits that best? I assume you
21 will say yours, and, if that is so, why?

22 MR. BOND: The Medicare fraction and
23 the -- combined with the Medicaid fraction are
24 designed as proxies for the percentage of
25 low-income patients a patient has because

1 Congress, as this Court has explained, thought
2 that hospitals that serve a greater number of
3 low-income patients will necessarily have higher
4 costs.

5 Now these are --

6 JUSTICE KAGAN: Well, I think
7 everybody agrees with that, Mr. Bond. I -- I
8 had the same question as Justice Alito. I mean,
9 each of your formulas excludes certain
10 categories of people who would generally be
11 thought to be low-income, and the question is,
12 how is it that your formula better reflects that
13 purpose from Congress than -- than the
14 Respondent's formula?

15 MR. BOND: So two points.

16 The first is that Congress went about
17 this in a bifurcated way looking at two
18 different populations.

19 Now, if you take that premise, which I
20 think is clear from the face of the statute, our
21 approach is much more sensible because it
22 divides those populations based on their status
23 as a Medicare beneficiary. That's why it's in
24 the numerator and the denominator of the
25 Medicare fraction.

1 Whereas, on Respondent's view, which
2 population you're in turns on the happenstance
3 of who ultimately paid for your care.

4 Now, to the point of persons excluded
5 versus not excluded under the different
6 readings, I think that illustrates the same
7 illogic of Respondent's approach. So it's true
8 that on our view, a person who is entitled to
9 SSI and -- or, I'm sorry, a person who is not
10 entitled to SSI but is entitled to Medicaid and
11 is a Medicare patient doesn't count in either
12 fraction.

13 We think that follows directly from
14 Congress's choice to make for Medicare
15 participants SSI the exclusive proxy. But
16 Respondent's reading doesn't add back that
17 category of dual eligible patients who don't
18 qualify for SSI unless they happen not to have
19 had Medicare pay for their care.

20 So you could have two beneficiaries
21 who are equally low-income, and, on Respondent's
22 view, one is added to the Medicaid fraction and
23 one is not based on the fact that one was hit by
24 a third party in a car accident, and, for that
25 reason, Medicare did not cover their care.

1 JUSTICE KAGAN: Why is it that the
2 denominators of the two parts are different?
3 You know, if I understand your theory, it's
4 essentially that the Medicare fraction is meant
5 to deal with one population, the senior
6 population, and the Medicaid formula is meant to
7 deal with non-seniors, and that makes some
8 sense. But then why wouldn't the Congress have
9 used the same denominator in both?

10 MR. BOND: So Congress didn't explain
11 its use of those different denominators. We
12 know from the conference report that it's a
13 compromise between approaches that did those
14 different things.

15 Medicare patients are low-income
16 Medicare patients among all Medicare patients
17 and low-income measured by Medicaid against all.
18 Congress fused those two different measures not
19 in a way that you add together the patients but
20 that you effectively average out those two proxy
21 measures that examine different parts of the
22 population.

23 And Congress may have determined that
24 both of these approaches have some value and
25 some merit and we should combine them, and the

1 one adjustment that it made was taking Medicare
2 patients out of the numerator of the Medicaid
3 fraction to avoid double-counting them.

4 JUSTICE BARRETT: Mr. Bond, I have a
5 question about the difference between SSI and
6 Medicare Part A and the use of the word
7 "entitled." If I understand your argument, you
8 said in response to Justice Kavanaugh that the
9 distinction was that, for Medicare, eligibility
10 or entitlement arises directly by operation of
11 law, whereas, for SSI, it occurs after a
12 determination, correct?

13 MR. BOND: That's right.

14 JUSTICE BARRETT: Is that always true
15 for Medicare Part A, however? I mean, I see why
16 it's true for seniors, for people who are over
17 65. But it's my understanding that for people
18 who are entitled to it based on disability,
19 there did have to be a determination because
20 somebody has to say that, in fact, you're
21 disabled and you qualify.

22 MR. BOND: There's a determination of
23 that predicate qualification, but, once you
24 possess that qualification, you are entitled to
25 Medicare Part A benefits.

1 You must -- in certain circumstances,
2 you must enroll to access those benefits, but
3 you have a legal entitlement that, as the D.C.
4 Circuit recognized, cannot even be disclaimed.

5 There's a determination of that
6 underlying disability, and it's --

7 JUSTICE BARRETT: But why is that
8 different? It doesn't arise magically by
9 operation of law if someone is disabled and it's
10 unclear whether the disability qualifies, just
11 in the same way that it doesn't arise magically
12 by operation of law that someone's entitled to
13 SSI. Both depend on a predicate determination.

14 MR. BOND: I think the point is not
15 that one is dependent exclusively on a predicate
16 determination and the other is not but that
17 Congress specified which individuals fall into
18 these categories.

19 We understand "entitled to SSI" to
20 mean those persons whom SSA has determined are
21 entitled to SSI benefits, which requires the
22 application and determination. If we are wrong
23 about that and we're undercounting SSI, however,
24 the correct answer is not to skew the meaning of
25 "entitled to benefits under Part A," which

1 Congress has said encompasses everyone who
2 satisfies this definition and is not the same as
3 persons who still have benefits that are
4 unexhausted.

5 You should reserve the SSI issue for a
6 case in which it is presented. That issue is
7 being litigated in lower courts right now,
8 including in a case in the District of Columbia.

9 JUSTICE ALITO: Well, if I think that
10 you both have reasonable interpretations, what
11 should we do with the Encino issue? Should we
12 decide it? Do we have to decide it? Should it
13 be just --

14 MR. BOND: So, with respect to the
15 Encino issue, if you mean should we accord
16 Chevron deference --

17 JUSTICE ALITO: Right. Right, right.

18 MR. BOND: -- to the agency's view, I
19 think you should because the agency did not
20 disrupt reliance interests. And if I can
21 return, you know, to the -- the rulemaking
22 process, the agency put those two options in
23 front of commenters. Commenters did weigh in on
24 those issues. Commenters overwhelmingly favored
25 the substance of the approach that the agency

1 ultimately adopted. And so I don't think
2 there's a procedural error of that kind.

3 JUSTICE KAGAN: But wasn't it unclear
4 what the commenters thought they were being
5 asked to comment on? In other words, a
6 commenter who said I approve of the status quo,
7 it was unclear whether that was the real status
8 quo or the status quo as mis-described by the
9 agency?

10 MR. BOND: By and large, the substance
11 of their comments are not about what the agency
12 was already doing. They refer to the agency's
13 proposal as a change because that's how the
14 agency had framed it.

15 JUSTICE BREYER: So --

16 MR. BOND: But their arguments went to
17 the substance of the two proposals. The
18 Federation of American Hospitals, one of
19 Respondent's own amici, said that the agency
20 lacked statutory authority to do what Respondent
21 is now urging. That would not turn on which
22 approach the agency was already adopting.

23 JUSTICE BREYER: So you had to really
24 read all those comments in 2003.

25 MR. BOND: That's right, and --

1 JUSTICE BREYER: Well, that's quite a
2 job. I mean, do I understand this correctly?
3 And the chances I understand it correctly are
4 near zero, okay? Now just follow this and see
5 if I understand it.

6 There are two fractions, call them
7 Fraction 1 and Fraction 2, Medicare and the
8 Medicaid, okay, or the Medicare and -- and
9 Medicaid over Medicare and SSI over Medicare.
10 Okay. Fraction 1, Fraction 2. And there are a
11 few people who have Medicare. There are some
12 people who have Medicare, but there are benefits
13 Medicare won't pay, and it might not pay
14 because, in fact, there's somebody else to pay
15 or it might not pay because they used up all
16 they had on Medicare, okay, so they won't pay.

17 Now what do we do with those people?
18 Do we put them in 1, or do we put them in the
19 denominator of 2 somehow? Okay? That's the
20 issue. And so let's call them people who've
21 exhausted their benefits. So these people are
22 exhausted, just like me after reading this case,
23 okay?

24 (Laughter.)

25 JUSTICE BREYER: We're exhausted. And

1 now what do we do with the exhausted people?
2 And the fact is, in 2003, not even the agency
3 knew what they were doing with the people. They
4 wrote down that we are -- put all these people,
5 I think, in 1, but they hadn't. They actually
6 put them in 2. Or maybe it's vice versa. But I
7 think I got it right.

8 So now they say, what shall we do?
9 They say let's put them in 2. By now, it's
10 2008. And after they read the comments, they
11 say: No, we're going to put them in 2000 --
12 we're going to put them in 1.

13 Now, if I'm right so far, the
14 exhausted people are now in this rule over in 1.
15 And that's where I am, exhausted, okay? So
16 that's where they are. Do you know how many
17 people understood this from 2003 on? Two. Two
18 commenters out of God knows how many actually
19 understood it.

20 So, if I were in Congress and I had
21 this issue in front of me, you know what I would
22 say? Let the agency do what it wants as long as
23 it's reasonable because I have no idea. And so
24 my question is, how are we expected, nine
25 people, when only two people in the United

1 States in 2003 understood it in the way of
2 comments, how are we supposed to decide who's
3 right? I mean, if it were so obvious, it
4 wouldn't have taken 27 years -- or 17 years to
5 get to this point.

6 MR. BOND: To pick up on that last
7 point, the fact that Congress has not intervened
8 in the 17 years since the final rulemaking, I
9 think, tells you that Congress did not think the
10 agency had strayed and did not disagree with the
11 agency's approach.

12 And it's not because Congress wasn't
13 watching. As we note in the reply, Congress
14 specifically intervened to approve the agency's
15 Medicaid regulations relating to demonstration
16 projects and yet left its approach to this issue
17 unaltered.

18 Now, to the substance of your
19 question, the exhausted patients belong in
20 Fraction 1 because their exhaustion of certain
21 items of care does not transform them into
22 non-Medicare patients, and they can still get
23 other Medicaid -- Medicare Part A benefits even
24 if they've exhausted their inpatient care.

25 But, to the extent that the Court

1 thinks that question is unclear, that's a
2 quintessential question for the agency.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas, anything further?

6 JUSTICE THOMAS: I have nothing
7 further, Chief.

8 CHIEF JUSTICE ROBERTS: Justice
9 Breyer? Exhausted?

10 (Laughter.)

11 JUSTICE BREYER: Yes.

12 CHIEF JUSTICE ROBERTS: Justice Alito?
13 Justice Gorsuch, anything further?

14 JUSTICE GORSUCH: What do we do about
15 the fact that, as in this case, Chevron is very
16 often asserted by the government to defend an
17 interpretation that not only few people were
18 given any advance notice of or understood, or
19 maybe they were too exhausted to understand by
20 the time it all was adopted, but also tends to
21 favor the government's own pecuniary interests?
22 Should we be granting deference in those
23 circumstances?

24 MR. BOND: I don't think a carveout to
25 deference based on which way the needle goes in

1 terms of the federal government's expenditures
2 are not --

3 JUSTICE GORSUCH: We normally -- you
4 know, you -- you normally take into account when
5 you're interpreting a document who writes it and
6 their pecuniary interests.

7 Why would this be different?

8 MR. BOND: Well, I think, in this
9 particular instance, the fact that the
10 overwhelming majority of commenters said that
11 counting these patients in Fraction 1, the
12 Medicare fraction, was better for them than
13 counting them in the other and that the agency
14 said it's going to depend on the hospital, we
15 are not making a decision either way, but even
16 adopted the -- the approach that the commenters,
17 the sophisticated providers, preferred, I think,
18 undercuts any inference that the agency here was
19 trying to undermine payments.

20 Everyone agrees the goal is to
21 increase payments. The question here is by
22 precisely how much for precisely which providers
23 the agency provides billions of dollars a year,
24 and the question is exactly how much more it
25 must provide to certain providers.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh?

3 JUSTICE KAVANAUGH: To pick up on the
4 Chief Justice's earlier question and Justice
5 Gorsuch's question about the through line, it
6 seems from a 30,000-foot level that the through
7 line is the agency wanting to spend as little as
8 possible on this program because entitlement
9 spending, mandatory spending, is a huge part of
10 the federal budget, and the agency, especially
11 in 2003, '4, '5, the new prescription drug
12 benefit had just come in, which was going to be
13 a huge new expenditure for the government, and
14 so the government, the administration at that
15 time, was looking for places to restrain the
16 growth or cut, in government speak, spending.

17 And that's the through line going all
18 the way back, as the Chief Justice says, to the
19 -- the beginning. And you -- you do it by
20 interpreting "eligible" to mean "entitled" to
21 begin with and then interpreting "entitled" to
22 mean "eligible."

23 So why, when we look at the whole
24 picture, is that wrong to see? And it's not --
25 it's a laudatory motive, but the question, is

1 the statutory language getting in the way? Why
2 shouldn't we see the through line as the
3 government wanting to be stingy in its payout of
4 these benefits?

5 MR. BOND: Because I don't think that
6 tracks what the agency said at each of those
7 times. In 1984, it said we looked at the data
8 and don't think an adjustment is warranted.

9 Subsequently, after the 1986 statute,
10 it looked at the statute and thought based on
11 the legislative history and the language that
12 Congress didn't intend to -- to include
13 non-covered persons. But four courts of appeals
14 rejected that. So the agency is responding as
15 those events unfold.

16 But I think, at a broader level, the
17 -- the answer to the question which
18 interpretation is best can't be answered by
19 broad-brush statements of congressional purpose
20 to increase payments, especially given the
21 highly reticulated calculation set forth at 18a
22 to 25 of our appendix, where Congress laid out
23 all these detailed things.

24 So it's not the agency trying to skew
25 the calculus one way any more than it's Congress

1 trying to maximize payments. Indeed, the -- in
2 the Affordable Care Act, Congress reduced the
3 amount of these payments.

4 JUSTICE KAVANAUGH: One final
5 question. Do you agree, though, that the
6 agency's approach from the mid-'80s through
7 those four courts of appeals was to lower
8 payments beyond -- compared to what it would
9 have otherwise been, and then its approach,
10 starting in '03, '04, '05, similarly was to
11 lower payments compared to what it otherwise
12 would have been?

13 MR. BOND: So we're not in a position
14 to dispute that it generally had that effect.
15 We don't in the ordinary course calculate the --
16 the effects on individual hospitals because the
17 agency calculates the Medicare fraction, but the
18 remainder of the equation is calculated by the
19 contractors.

20 JUSTICE KAVANAUGH: You say you're not
21 in a position to dispute. It's -- it's almost
22 impossible to dispute, isn't it? I mean, your
23 -- the letter you sent in and the -- and the
24 stats in your brief, I just --

25 MR. BOND: And what that letter

1 reflects is that for hospitals in the Ninth
2 Circuit, for most, but not all, the Medicare
3 fraction would go up. Now the numbers that we
4 provided do not translate directly into
5 payments. But, yes, the general tendency is, if
6 you have a higher Medicare fraction, there may
7 be a higher payment at the end of the process.

8 That amount is probably going to be
9 small. The median and mean, as we note in the
10 letter, are really quite modest, and it still
11 depends on the hospital's population. And that,
12 I think, is the Agency's approach.

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett?

16 Thank you, counsel.

17 Mr. Hettich.

18 ORAL ARGUMENT DANIEL J. HETTICH

19 ON BEHALF OF THE RESPONDENT

20 MR. HETTICH: Mr. Chief Justice, and
21 may it please the Court:

22 In the face of HHS's recalcitrance,
23 Congress gave HHS detailed instructions to
24 ensure that hospitals that treat a
25 disproportionate share of indigent patients are

1 properly reimbursed.

2 HHS has repeatedly violated those
3 clear instructions and has done so again here.

4 In this case, HHS has concluded that
5 inpatients are entitled to benefits under Part A
6 for days on which they're entitled to no Part A
7 benefits, no inpatient benefits because those
8 benefits have been exhausted, and no other
9 benefits because all other Part A benefits are
10 incompatible with being a hospital inpatient who
11 requires discharge.

12 That interpretation is impermissible.
13 First, the agency's position violates the plain
14 meaning of the statute. As Justice Kavanaugh
15 pointed out, the agency reads the statutory
16 terms "entitled" and "eligible" to mean the same
17 thing. That is both inconsistent with the
18 ordinary meaning of "entitled" and contrary to
19 how the agency interprets "entitled" in the same
20 sentence of the statute.

21 The agency claims that the ordinary
22 meaning of "entitled" doesn't matter because
23 426, according to the agency, controls and --
24 and explains what Congress mean -- means by
25 "entitled to benefits under Part A." But that's

1 wrong. 426 is not a definitional provision,
2 and, in any event, it addresses a different
3 issue.

4 Second, the agency's interpretation is
5 unreasonable. HHS's rule provided almost no
6 justification for its repudiation of an
7 interpretation that it held for over two
8 decades.

9 Most fundamentally, despite
10 interpreting a statute governing DSH payments,
11 it didn't even assess what impact its
12 interpretation would have on DSH payments. We
13 now know 15 years later that the effect is to
14 reduce the Medicare fraction over 80 percent of
15 the time.

16 Since the agency's own interpretation
17 can only also reduce the Medicaid fraction, it
18 can never increase it, this means that the
19 agency has once again categorically excluded
20 indigent patients, in violation of Congress --
21 Congress's clear instructions.

22 Unless there are questions from this
23 Court, I'll begin with the statute's plain
24 language.

25 JUSTICE THOMAS: Just one quick

1 question. The -- there are other provisions
2 that are hinge -- that hinge on whether or not
3 someone is entitled to benefits under A. But,
4 if you limit it as you -- entitlement -- as you
5 want, as you suggest, what do you do with those
6 entitled -- with the enrolling under C or D, or
7 -- or what do you do also with the conflict the
8 government pointed out with 13951 that seems to
9 suggest that you can both exhaust and still be
10 entitled to benefits?

11 MR. HETTICH: Your Honor, the -- we
12 think it's possible for statutes to ask
13 different questions, and -- and there is a
14 distinction between asking whether a patient is
15 generally entitled to Medicare benefits or are
16 they a Medicare beneficiary generally, and we
17 think those other statutes ask that question.

18 But that's not the question the DSH
19 statute asks. And the proof is that the DSH
20 statute specifically qualifies "entitled to
21 benefits for such days." So the question the
22 DSH statute --

23 JUSTICE KAGAN: Well, but then you are
24 suggesting that the interpretation of this
25 provision would be out of kilter with other

1 provisions in the Medicare statute, and you
2 would be relying just on the parenthetical "for
3 such days."

4 So, as much as we can, you know, say
5 to the government, well, you're saying
6 "entitled" means two different things, I mean,
7 you have an equal or greater problem, which is
8 that you're interpreting this phrase in a way
9 that's very much not the way we would interpret
10 this phrase in the rest of the Medicare statute.

11 MR. HETTICH: Your Honor, I -- I think
12 the key distinction is -- is the "for such
13 days." And, tellingly, that language does not
14 appear in any of these other provisions that the
15 Secretary cites, right? It doesn't say, if
16 you're entitled to Medicare for such days or for
17 any particular days, then you can enroll in Part
18 B. It says, if you're generally entitled to
19 benefits under Part A, full stop, or if you're a
20 Medicare beneficiary generally.

21 And we agree, Your Honor, that these
22 patients are still Medicare beneficiaries
23 generally. As the Secretary points out, there
24 are benefits they could access once they are
25 discharged, not as hospital inpatients. They

1 can't get skilled nursing benefits while they're
2 an inpatient or home health benefits at a
3 hospital. So they're still Medicare
4 beneficiaries generally. But, again, that's not
5 the question that the DSH statute asks because
6 it has language that's not found anywhere else,
7 and that --

8 JUSTICE KAGAN: Well, but that
9 language might mean what you think it means, or
10 it might mean something entirely different. I
11 mean, you say that the government's reading
12 turns that language into a superfluity, but it's
13 not. That language continues to perform a very
14 important function and a function that Congress
15 might well have thought about when it was
16 drafting this statute, which was, oh, we have to
17 deal with the people who turn 65 during their
18 hospital stays.

19 I mean, that's not an inconsiderable
20 number of people. This is a gigantic program.
21 People turn 65 every day. It would make
22 complete sense for the drafters of the statute
23 to say: You know, we have to put in something
24 about, like, prorating it for the people who
25 turn 65 in the middle.

1 MR. HETTICH: Your Honor, it's -- it's
2 not just that "for such days" would do very
3 little work and this Court has rejected --

4 JUSTICE KAGAN: I mean, that's a lot
5 of work. A lot of people turn 65 during, you
6 know, every day in this country.

7 MR. HETTICH: Right. I -- I don't
8 know how many do it while they're hospital
9 inpatients, but -- but -- but there's a more
10 fundamental point in that that language would be
11 completely unnecessary because, remember, the
12 unit of measurement here is days.

13 And so, according to the Secretary,
14 what "for such days" does is tell HHS you cannot
15 treat a day as being entitled -- a specific day
16 as being entitled to benefits under Part A until
17 the patient has met the bare minimum for
18 Medicare eligibility requirements.

19 Well, no rational person would treat
20 days as being entitled to benefits under Part A
21 before the beneficiary had met the Medicare
22 eligibility requirements.

23 And, in fact, Your Honor, the same
24 thing holds true for the Part B enrollment and
25 the Part C enrollment and the Part D, right,

1 where no one would allow a person that had not
2 yet met the basic Medicare eligibility
3 requirements to enroll in Part B.

4 And yet "for such days" doesn't appear
5 in any of those languages, and HHS isn't
6 allowing folks to enroll in Part B before
7 they've met the general Medicare eligibility
8 requirements because it's obvious.

9 So it's not just that it would have
10 very little work, but the work it does, the "for
11 such days" under the Secretary's interpretation,
12 is completely unnecessary.

13 CHIEF JUSTICE ROBERTS: You will
14 agree, won't you, that in the abstract, in
15 particular contexts, that "entitled" and
16 "eligible" -- "entitled to" and "eligible for"
17 can be used as synonyms?

18 It's basically Mr. Bond's point that
19 "entitled to" does mean, conceding it, I guess,
20 for purposes of argument, that you have a right
21 to something, but the question is a right to
22 what?

23 If I say that, okay, I'm 65, I'm
24 entitled to Medicare benefits, that's true. I'm
25 entitled to Medicare benefits if this, this, and

1 this are satisfied, which would be the same
2 thing as saying I'm eligible for those benefits
3 if I meet those criteria.

4 MR. HETTICH: Your Honor, I -- I
5 think, in some cases and -- and speaking
6 loosely, occasionally those terms could be used
7 synonymously. I think, when they're juxtaposed
8 as they are here, two different words in the
9 same sentence, because it talks about folks that
10 are entitled to benefits under Part A and
11 eligible for -- for Medicaid, when those words
12 are juxtaposed in the same sentence, then we
13 have to actually look at what's the distinction
14 between those two words. We're not looking for
15 the commonality because Congress chose two
16 different words.

17 JUSTICE KAGAN: Well, but the
18 distinction is that the statutes are different
19 and that the statutes use those two words
20 differently. And the government essentially
21 picked up the "entitled to" from the Medicare
22 statute, where it consistently functions in the
23 way the government suggests, and the Medicaid
24 statute uses a different vocabulary.

25 And the Medicare statute uses a

1 vocabulary that, as the Chief Justice says, is
2 very consistent with ordinary meaning. Ask any
3 65-year-old are you entitled to Medicare, and
4 the answer is going to be yes. And it's really
5 not going to matter whether they've exhausted
6 their 90 days of coverage.

7 MR. HETTICH: Your Honor, I think, if
8 you ask any ordinary person that has exhausted
9 their Medicare benefits and that Medicare is not
10 paying a penny for and that, if they're lucky,
11 Medicaid maybe is picking up the tab, if you ask
12 them are you entitled to Medicare benefits for
13 these days, for these days after you've
14 exhausted, I think most folks would say no, I'm
15 entitled to no benefits now --

16 JUSTICE BREYER: Yeah, but -- but --

17 MR. HETTICH: -- I've exhausted them.

18 JUSTICE BREYER: -- but that isn't
19 what the statute says. The statute says
20 "entitled to benefits under Part A of Medicare."

21 MR. HETTICH: Uh-huh.

22 JUSTICE BREYER: Let's try it out,
23 ordinary language. Math class, high school
24 teacher has a list of special rewards. Part A
25 says ice cream, ice cream but no more than two a

1 week. So the kids use two a week. Huh? Yeah,
2 but he fits -- he needs the reward, he deserves
3 the reward. He's entitled -- he's entitled to
4 ice cream under Part A. He fits within it.
5 Ahh, but he's not eligible for ice cream now
6 because he's already had his two for the week.

7 So I read that and try and put it in
8 my ordinary English ice cream high school mind,
9 and there we are. And -- and I have a ordinary
10 meaning that seems to me closer by that much to
11 what the government says than what you say. So
12 suppose I believe that.

13 Next question: Chevron. Okay? Gee,
14 do you really apply Chevron where they're so
15 mixed up that there are only two people in the
16 United States when they -- when they put out the
17 -- the notice and comment and nobody understands
18 what it means and they don't even know what
19 their own program is? Hmm. Huh, I'm stuck.

20 All right. What do I do?

21 MR. HETTICH: So two quick points,
22 Your Honor. On the ice cream example, I think,
23 if you asked that student that had used up his
24 two ice cream cones on Wednesday, and you ask
25 him on Friday are you entitled to ice cream

1 today for -- for such day, for this Friday, he'd
2 say no, I used it up, I wasn't --

3 JUSTICE BREYER: But it doesn't say --

4 MR. HETTICH: -- I was that day --

5 JUSTICE BREYER: -- for this Friday.

6 It says "under Part A." And if you ask him are
7 you entitled to ice cream under Reward
8 Announcement Part A, he would say, well, yeah, I
9 just don't get it now because I used them up.

10 MR. HETTICH: Okay. Well, I --

11 JUSTICE BREYER: No, not so far.

12 MR. HETTICH: -- I respectfully
13 disagree, Your Honor, but -- but to -- to your
14 Chevron question, I think there are actually two
15 problems. The Chief Justice pointed out one of
16 them, which is that the premises for Chevron
17 deference simply -- the primary one, which is
18 that there was an implicit delegation from
19 Congress, which was what Mead and Epic said,
20 simply does not exist here.

21 Congress may have started off giving
22 the agency broad discretion in -- in 1983 where
23 it said go make an adjustment. After the agency
24 refused and refused, as Mr. Chief Justice
25 pointed out, the Congress got more and more

1 prescriptive, until it came up with a very
2 detailed, you know, unusually detailed,
3 provision that was meant to cabin -- that was
4 meant to tie the agency's hands and force the
5 agency to act. And so we think, in this
6 context, presuming that there was an implicit
7 delegation of -- of authority is -- is
8 unfound -- is belied by the record.

9 And it turns out Congress had good
10 reason to be wary of giving the agency
11 discretion because, even under those clear
12 instructions, the agency repeatedly violated the
13 clear instructions, as the amici for certain
14 hospitals and health systems pointed out.

15 But, as a second problem --

16 JUSTICE ALITO: Well, you -- you and
17 Mr. Bond have both said a lot about what
18 Congress intended, but do you really think that
19 a majority of the Senate and a majority of the
20 House thought through the particular question
21 that faces us in this case and they all said,
22 yes, your interpretation is the right
23 interpretation, that's what we want? Do you
24 seriously want to make that argument?

25 MR. HETTICH: Your Honor, I -- we

1 think the language speaks for itself, and -- and
2 it's quite -- quite prescriptive, and Congress
3 went out of its way in the statutory language --
4 you can just focus there -- to -- to define what
5 universe of patients would be subject to that
6 stricter "entitled to SSI" standard, and that
7 universe of patients were hospital patients who,
8 for such days, were entitled to benefits under
9 Part A.

10 JUSTICE ALITO: Well, could you -- I
11 -- I -- I understand your argument, and -- and
12 there's a lot of force to it, but could you
13 compare what a person has to do upon turning 65
14 in order to get Medicare Part A with what a
15 person has to do in order to get Medicaid -- I'm
16 sorry, in order to get SSI?

17 MR. HETTICH: Your Honor, so I think
18 there's a fundamental point that I want to make
19 on the SSI that, both in its briefing and in
20 oral argument today, I think there could be a
21 misimpression that the Secretary only excludes
22 SSI-eligible folks who haven't applied for SSI.
23 And that's the distinction, what you need to
24 apply.

25 On the contrary, though, HHS excludes

1 large numbers of patients that have applied for
2 SSI, been determined eligible for SSI, and
3 simply did not receive their SSI benefits --

4 JUSTICE ALITO: Well, the point is --

5 MR. HETTICH: -- for a determined --

6 JUSTICE ALITO: -- how many -- how
7 many hurdles do you have to clear upon turning
8 65 in order to get Medicare Part A and how many
9 hurdles do you have to clear in order to get
10 SSI? My impression is that you don't have to do
11 very much to get Medicare Part A, and you have
12 to do more to get SSI. Is that wrong?

13 MR. HETTICH: It -- it -- it's not
14 complete, Your Honor, I think, for two reasons.
15 As Justice Barrett pointed out, there are
16 categories of Medicare beneficiaries that need
17 to apply if -- if they -- based on age, if
18 they're disabled, et cetera. Even for those who
19 are 65, it's if they also get their Social
20 Security retirement benefits, which requires an
21 application, you have to ask, and you can
22 determine when you ask for the Social Security.
23 So the difference isn't that great between the
24 two.

25 But -- but -- but, more -- more

1 fundamentally, Your Honor, again, going back to
2 -- to my point a moment ago, even if -- even if
3 folks -- even if patients have applied and been
4 determined eligible for SSI, the Secretary will
5 still exclude them even though they've applied
6 and have met all the statutory -- simply because
7 they don't receive the benefit.

8 We cite in our brief patients that
9 refuse direct deposit or whose checks were
10 returned as undeliverable. Those folks are
11 excluded. Clearly, they applied for SSI.
12 They're trying to send them their SSI checks.

13 JUSTICE KAVANAUGH: Can I -- keep
14 going.

15 MR. HETTICH: Well, I was just -- I
16 was just going to conclude, Your Honor, these
17 folks are being excluded not because they didn't
18 apply but because they simply did not receive
19 their SSI cash for some reason.

20 JUSTICE KAVANAUGH: I want to go back
21 to Justice Alito's question about Congress in
22 the 1980s, and my understanding -- correct me if
23 I'm wrong -- is that these -- the two committees
24 involved were House Ways and Means and Senate
25 Finance, which were deeply involved in the

1 particulars of these programs, two of the most
2 expert staffs in the Congress then and now, and
3 were deeply involved. And then, secondly --
4 correct me if I'm wrong -- I mean, there's
5 hospitals in most districts.

6 Congress -- members of Congress, at
7 least in my experience, are pretty attuned to
8 payments to hospitals. But maybe you have a
9 better understanding of this than I do.

10 MR. HETTICH: That -- that's
11 completely correct, Your Honor. I mean, I was
12 focused on the statutory text, but if you look
13 at the legislative -- legislative history, it's
14 remarkably robust. These terms were debated.
15 They -- they evolved, et cetera.

16 And the agency's overall point is that
17 -- is to focus on this concept that Congress
18 meant these fractions to be hermetically sealed,
19 that no patient should move -- no indigent
20 patient should move from one fraction to the
21 other.

22 And, first, there's very little basis
23 for that because, even under the Secretary's
24 interpretation, a patient could move from one to
25 the other. The -- the legislation evolved. At

1 some points, the Senate was considering
2 including Medicaid beneficiaries and vice versa.

3 But more to the point, what's clear is
4 that what's important in the legislative history
5 isn't whether an indigent patient might move
6 from one fraction to the other; it's that the
7 indigent patient be counted in the first place.

8 Under the Secretary's interpretation,
9 Justice Kagan, to your question, the practical
10 impact, instead of increasing reimbursement,
11 instead of -- instead of giving hospitals
12 increased DSH payments for treating clearly
13 indigent patients that have exhausted benefits,
14 80 percent of the time the Secretary's
15 interpretation decreases the hospital's --

16 JUSTICE KAGAN: Yeah, but the purpose
17 here can't be thought to be -- you know, over
18 and over, you say in your brief, well, you know,
19 the -- the purpose is satisfied if hospitals get
20 more money.

21 But that's not right. I mean,
22 Congress put together a formula, and it was a
23 formula for counting low-income patients, and
24 the question is, who has the best reading of
25 that formula?

1 And I guess, you know, going back to
2 Justice Alito's question, it does strike me as
3 -- I mean, this -- this formula, there are good
4 arguments on both sides about what this formula
5 means. And, similarly, if you look at the
6 actual populations that are covered or not
7 covered in these two formulas, it's just not
8 clear which one is more reflective of a desire
9 to subsidize hospitals with low-income patients.
10 You know, the question is, you know, how and
11 which low-income patients?

12 So I guess this goes back to Justice
13 Breyer's question, you know, assuming that to --
14 to us or to me, it doesn't leap off the page
15 which formula -- you know, what this formula
16 means, you know, what should we do about that?

17 MR. HETTICH: Yeah, I -- I -- Your
18 Honor, I -- I don't think you should accord it
19 Chevron deference, and since it's not the best
20 meaning of the statute, I think this Court
21 should -- should overturn it, should say the
22 better reading is -- is giving words their
23 ordinary meaning, distinguishing between
24 "entitled" and "eligible," not a -- not --
25 rather, equating "entitled" and "entitled" as it

1 appears in the SSI and the Medicare fraction.

2 And -- and it's -- it's a good -- I
3 didn't finish my answer to -- I forget which
4 Justice -- about the deference, that there's
5 kind of a second reason why deference isn't
6 warranted, right, not just the lack of implicit
7 delegation under these circumstances but the
8 Encino point, which is that the final rule, you
9 could -- there's a lot to be said about the
10 proposed rule, but we don't even need to go
11 there. If you just look at the final rule
12 itself, there was almost no reasoning given for
13 a change of 20 years of practice affecting many
14 millions of dollars for indigent patients.

15 That's almost exactly what happened in
16 Encino, right? The agency engaged in
17 notice-and-comment rulemaking in Encino, but it
18 had a summary statement that it thought its
19 policy was, you know, a reasonable
20 interpretation of the statute. And this Court
21 said that's not good enough, particularly when
22 you're repudiating prior practice, and that's
23 exactly what -- what -- what went on here.

24 JUSTICE KAGAN: One thing that seems
25 to me attractive about the government's proposal

1 is that the government has a sort of simple
2 theory of the -- the two formulas and how
3 they're supposed to work together, in other
4 words, that the two formulas are really meant to
5 address two different populations. One is
6 supposed to address the senior population, and
7 the other is supposed to address the non-senior
8 population.

9 And the formulas were in -- you know,
10 if that's true, that the dual eligible patients
11 are supposed to be reflected in the Medicare
12 formula because they're seniors, and we're not
13 supposed to be doing this in such a way that
14 people are bopping back and forth between the
15 two formulas in -- in both a-hard-to-administer
16 way but also a kind of, like,
17 why-would-that-have-happened way.

18 So the -- the government's theory of
19 what these formulas were meant to do seems a lot
20 more sort of simple and straightforward than
21 yours does to me.

22 MR. HETTICH: Your -- Your Honor, I --
23 I suppose one fundamental point. By Congress
24 using the term "for such days," again, in -- in
25 its wisdom, it kind of eschewed the idea of

1 simple, right, because, I mean, it specifically
2 required an analysis, a day-by-day analysis,
3 precisely what the Secretary --

4 JUSTICE KAGAN: Well, on your theory
5 of --

6 MR. HETTICH: -- said shouldn't --

7 JUSTICE KAGAN: -- what that means, it
8 does, but not on the government's theory of what
9 that means. On the government's theory of what
10 that means, it was just meant to kick out people
11 who pick out -- kick out the days that people
12 were in hospitals before they were 65.

13 MR. HETTICH: Yeah, I -- I -- I think
14 another theory requires a day-by-day analysis.
15 In one case, you know, according to the
16 government's theory, which, as I discussed,
17 makes no sense because there's no reason to tell
18 HHS don't -- don't treat people as entitled to
19 benefits under Part A before they've met the
20 Medicare eligibility criteria.

21 JUSTICE KAGAN: Can you make --

22 JUSTICE GORSUCH: But, counsel --

23 JUSTICE KAGAN: -- your argument
24 without relying on that parenthetical?

25 MR. HETTICH: Yes, we can, Your Honor,

1 because, in either case, even without that paren
2 -- parenthetical, the agency is still equating
3 "entitled" and "eligible," even -- even
4 assigning the same reason, and that's kind of
5 beyond dispute.

6 In the Ninth Circuit, the government
7 contended --

8 JUSTICE KAGAN: Yeah, I guess I would
9 say can you make your argument, back to my
10 question about what these formulas are supposed
11 to do, without relying on that parenthetical?
12 The government, you know, is like this is the
13 senior formula, this is the non-senior formula.
14 That makes a lot of sense.

15 MR. HETTICH: Yeah. Your -- Your
16 Honor, I -- I mean, there -- there's at least
17 one other answer, and I think there's probably
18 more, but it makes sense for Congress to focus
19 on who -- who pays because the payment is
20 different. Medicare generally is going to pay
21 more generously than Medicaid.

22 So it makes some sense for Congress to
23 have said, if Medicare is paying for this
24 patient and you're getting, you know, generally
25 reasonable payment, the more stringent entitled

1 to SSI criteria apply. That's where you're
2 actually entitled, not just eligible, for SSI.

3 But, if Medicare isn't paying and
4 you're relying on Medicaid payments, which are
5 generally pretty -- pretty poor, then, in that
6 case, we need a more generous standard to -- to
7 apply, and so you go into the -- the Medicaid
8 fraction.

9 JUSTICE GORSUCH: Counsel, if I might
10 circle us back to Justice Breyer's question a
11 moment ago, if we -- if we thought this were
12 ambiguous, the statute ambiguous, and -- and you
13 -- your first argument against deference to the
14 government is that this matter wasn't assigned
15 to it because Congress became so prescriptive.
16 Got it.

17 Your second argument, which you call
18 your Encino argument, I think, I might think of
19 it as a Chenery argument if -- if you want to
20 put it in those terms, is, is the government now
21 relying on different sets of arguments than were
22 in the rulemaking and that -- that -- that
23 should be taken into account before we grant it
24 any kind of deference.

25 I think the government's argument --

1 response to that one, though, was that -- that
2 the deference belongs to the substance
3 regardless of what procedure was used to adopt
4 the rule.

5 What -- what do you say to that,
6 number one? And, number two, moving beyond
7 those two arguments -- you can think of it as
8 Mead and Chenery or Mead and Encino -- do you
9 have a third, or is that it?

10 MR. HETTICH: On -- on the first
11 question, Your Honor, it's -- and it's actually
12 very similar. So there were problems in the
13 procedure itself. And, again, we're willing to
14 put that aside. It's in our brief. I think --
15 I think it speaks for itself.

16 But, if you look then at -- at the
17 outcome of -- of the rulemaking, so -- so the
18 substance of it, what the agency said to justify
19 its policy, in that case, it's exact -- again,
20 it's on all fours with Encino, where, again, in
21 Encino, I don't think there was an allegation
22 that, you know, as -- as there could be here,
23 that the agency misstated its policy, et cetera.

24 But it was simply the fact that the
25 rationale given was insufficient, was

1 unreasonable, to support particularly a radical
2 change in policy. And that applies here too.

3 I -- I agree on the Chenery point.
4 426 never came up in the rulemaking. The phrase
5 "for such days," which the Secretary says was
6 the whole thing that changed, is interpreting
7 "for such days," doesn't appear anywhere in --
8 in the rulemaking. The legislative history
9 isn't, you know, cited in the rulemaking. The
10 agency didn't even do an impact analysis on a
11 rule that's --

12 JUSTICE KAVANAUGH: That --

13 MR. HETTICH: -- about payments.

14 JUSTICE KAVANAUGH: That's a third
15 then -- if I'm understanding your answer
16 correctly, that's a third problem, a lack of
17 reasoned explanation. They didn't address
18 particular aspects of the problem.

19 MR. HETTICH: Correct, Your Honor.

20 JUSTICE KAVANAUGH: State Farm maybe.

21 MR. HETTICH: Exactly. Didn't even
22 consider --

23 JUSTICE KAGAN: Counsel --

24 JUSTICE BREYER: I'm still stuck on
25 what we -- well, what we do. Actually, it's a

1 rather pretty difficult case for me. I mean, I
2 think what Justice Gorsuch said is probably
3 right. I mean, I have an awful qualm about
4 using Chevron here because the point of it is
5 supposed to be that a reasonable member of
6 Congress would have wanted the agency to figure
7 this out, and where it figures it out, doesn't
8 figure it out, gets everything mixed up, it's a
9 pretty tough case to use Chevron. Okay.

10 So then what do we do? I mean, if the
11 language slightly goes in their direction, and
12 now we have Justice Kagan's argument, which is
13 probably all created in 2020, 2021, to justify
14 something that was done who knows why in 2008 or
15 2003, at that point, I am actually baffled.

16 I know you're just going to say decide
17 for us, but that isn't going to help me when you
18 just say that. Can you think of anything else
19 to say?

20 MR. HETTICH: I can, Your Honor. I --
21 I think, in some ways, this is an -- an easy
22 case, with -- with all due respect, because the
23 Secretary's interpretation, admittedly, the
24 Secretary admits, requires departure from the
25 ordinary meaning of "entitled," requires the

1 violation of all sorts of statutory canons,
2 requires equating "entitled" to "eligible,"
3 departing from the ordinary meaning of
4 "entitled," rendering "for such days"
5 superfluous. We can -- but -- but we think it
6 clearly does.

7 And all of that is based on its view
8 that 426 controls. But 426 is not a
9 definitional provision. Title II has
10 definitional provisions, and 426 is not among
11 them. The Medicare statute has a definitional
12 provision, and "entitled" isn't -- isn't defined
13 there.

14 JUSTICE SOTOMAYOR: Counsel?

15 MR. HETTICH: And that's --

16 JUSTICE SOTOMAYOR: Counsel, doesn't
17 426(c) help you? I thought 426(a) and (b),
18 which the government is relying on, to equate
19 entitlement with eligibility, I read (c) and
20 it's clearly saying, which is made subject to
21 (a) and (b), (a) and (b) are made subject to
22 (c), it says entitlement of an individual to
23 hospital insurance benefits for a month shall
24 consist of entitlement to have payment made
25 under and subject to limitations in Part A.

1 I mean, it's taking away exactly what
2 they claim, that eligibility and entitlement are
3 equated, isn't it?

4 MR. HETTICH: Your -- Your Honor, we
5 agree. And -- and the second point, besides not
6 being a definitional provision, is -- and
7 perhaps more importantly, is the point that, as
8 you just said, 426(c), far from departing from
9 the ordinary meaning of "entitled," specifically
10 links entitlement to payment, as does 1395d, a
11 provision that actually appears in the Medicare
12 statute, that says almost the exact same thing.

13 Entitlement is not -- it's not a badge
14 of honor in Medicare beneficiary. What it is is
15 payment for services. And these patients were
16 entitled to no payment of services for the days
17 that they were hospital patients.

18 JUSTICE SOTOMAYOR: So is our bottom
19 line, do we reach the better reading? Do -- I'm
20 assuming you're saying Chevron doesn't apply for
21 four or five different reasons. We have to give
22 it the better reading, and the better reading is
23 yours because of all of the reasons Justice
24 Kavanaugh set forth earlier and the additional
25 ones developed, correct?

1 MR. HETTICH: Correct.

2 JUSTICE SOTOMAYOR: Have we left out
3 any other reason why yours is the better reason
4 or the better reading, I'm sorry?

5 MR. HETTICH: Your Honor, I -- I think
6 we covered the bases. Justice Kavanaugh listed
7 the five points. We would agree with those.
8 Chief Justice added -- added the sixth. I think
9 -- I think, among those six, I think we've
10 covered the bases of -- of the reasons.

11 JUSTICE KAVANAUGH: Can I ask how the
12 "for such days" worked in practice in the first
13 two decades? You would go -- someone would go
14 through and say this patient on November 10
15 received Medicare benefits for that hospital
16 stay. On November 11, they received Medicare.
17 On November 12, they did not. Is that -- it was
18 done at that granular level, correct?

19 MR. HETTICH: It -- it -- it -- it
20 was, Your Honor. And -- and it was even more
21 simple because, once a patient had exhausted
22 their Part A benefits, they -- they simply were
23 no longer counted. Medicare didn't care. They
24 weren't paying for those -- for those days, so
25 they couldn't possibly -- the agency had to

1 create a whole mechanism for tracking these
2 patients after they've exhausted their benefits
3 so that they could begin to add them to the
4 Medicare fraction, because, before that, there
5 wasn't a mechanism because they weren't -- they
6 weren't being paid. Medicare didn't -- didn't
7 care.

8 JUSTICE KAVANAUGH: And one thing --
9 this is now back to a big-picture question.
10 What -- what's the practical impact of the
11 difference between your two arguments here? I
12 mean, we're sitting here removed from how it's
13 going to affect hospitals that serve poor
14 patients, but is there -- you know, what's --
15 what's the impact?

16 MR. HETTICH: Yeah, the -- the impact
17 is very significant, Your Honor, particularly on
18 these hospitals, our safety net hospitals. As
19 amici point out, safety net hospitals have much
20 thinner margins than hospitals in general, where
21 a couple of percent -- I know my friend on the
22 other side said, oh, you know, it's just
23 a percent or two. For these hospitals, that can
24 be the difference between keeping their doors
25 open or closed.

1 And the study we cite in our brief and
2 amici cite shows that the average impact -- the
3 total impact of this policy is about \$150,000.
4 This is back in '05, so updated for inflation
5 and with inflation being what it is, who knows
6 what that number would be today?

7 But even at 150,000 times about a
8 thousand DSH hospitals over 10 years, we're
9 talking about a lot of money for hospitals that
10 -- that really need it.

11 And -- and, Your Honor, it raises a
12 question -- again, I just want to make this
13 clear -- that these hospitals are losing money.
14 It's not -- if you ask -- if you ask the
15 question would their DSH payments increase or
16 decrease by treating these indigent exhausted
17 day patients or stay the same -- three parts --
18 do their DSH payments increase, decrease, or
19 stay the same, the answer is their DSH payments
20 decrease. They get less DSH payments for
21 treating these patients.

22 And the proof is that it decreases the
23 Medicare fraction, right? By treating these
24 patients, it has no effect on the Medicaid
25 fraction. They're already excluded under the

1 Secretary's policy. What does it do to the
2 Medicare fraction? It decreases it. So it
3 leads to a net loss in DSH payments.

4 It's not that they stay the same or
5 they go up and not -- but don't go up as much as
6 we'd like. It's that they actually go down.
7 The agency has turned it on its head. It turned
8 what's supposed to be an incentive, as this
9 Court held in Allina, to treat inpatients and
10 turned it into a disincentive. You'll get less
11 money. We'll reduce your DSH payments for
12 treating these clearly indigent patients. I
13 just wanted to make sure that that was clear.

14 CHIEF JUSTICE ROBERTS: Justice
15 Thomas, anything further?

16 JUSTICE THOMAS: Just one question.
17 Are there -- are inpatient services the only
18 benefits under Part A? Because we've spent -- I
19 think so much of your argument is premised on
20 that being the only benefit and that that
21 benefit would be exhausted.

22 MR. HETTICH: It -- it's the only
23 benefit a hospital -- I mean, a patient can
24 receive while an inpatient. There are other
25 benefits that are categorically incompatible

1 with being an inpatient. So, upon discharge, if
2 they met the other criteria, many of these
3 patients aren't discharged, they -- they die in
4 the hospital, unfortunately, but if they were
5 discharged and they -- and they met the other
6 requirements for skilled nursing benefits, Part
7 A would cover that. They might be able to get
8 home health.

9 But, as the name suggests, all of
10 those additional possible potential benefits at
11 another time under different circumstances can
12 -- do not apply while the -- while the patient
13 is an inpatient in the hospital, Your Honor.

14 JUSTICE THOMAS: Well, I understand
15 that, but if we're going to premise, you know,
16 our analysis on exhaustion, it doesn't seem as
17 though the benefits under Part A are exhausted
18 if those benefits are still available.

19 MR. HETTICH: Again, Your Honor -- and
20 because of what the -- the way the DSH statute
21 is structured, right, it says are you entitled
22 to benefits for -- for these days, for these
23 hospital patient days, for such days, and that's
24 clearly focused on while the -- while the
25 patient is an inpatient. And while the patient

1 is an inpatient, they are entitled to no Part A
2 benefits. The -- they -- they might be upon
3 discharge, again, in a different time, different
4 circumstance, but, at that moment, for those
5 days, they are entitled to no benefits and
6 receive no benefits under Part A.

7 JUSTICE THOMAS: Well, but if you read
8 "entitled" broadly, they're still entitled to
9 the other benefits whether or not they have
10 applied for them. So, technically, they're
11 still entitled for some -- entitled to some
12 benefits.

13 MR. HETTICH: Your -- Your Honor, we
14 -- I -- I agree, and -- and I think that's the
15 question -- like the Part B enrollment and the
16 Part C enrollment, that's the question those
17 statutes are asking, and they don't include the
18 proviso for such days. They're saying, are you
19 generally a Medicare beneficiary, yes or no?

20 In the DSH statute, unlike all those
21 other other provisions, it specifically -- it
22 has a restrictive qualifier that takes a
23 snapshot in time and says right now, on this
24 day, are you entitled to -- to benefits under
25 Part A, and the answer is no. Tomorrow, upon

1 discharge, I might be. Today, I'm not.

2 Yesterday, maybe I was.

3 JUSTICE THOMAS: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Breyer?

6 Justice Alito?

7 JUSTICE ALITO: Well, let me add one
8 -- one more question. Which interpretation best
9 fits the design of what this -- these provisions
10 are supposed to do? And could you just explain
11 why you think yours best fits the -- better fits
12 the design in the simplest possible terms? Why
13 does yours fit better?

14 MR. HETTICH: Your Honor, obviously,
15 the Secretary was for our policy before it was
16 against it for -- so, for 20 years, it held --

17 JUSTICE ALITO: Okay. Well --

18 MR. HETTICH: -- it held the same
19 policy.

20 JUSTICE ALITO: Just the design.

21 MR. HETTICH: Yeah.

22 JUSTICE ALITO: Why does yours better
23 fit the design?

24 MR. HETTICH: I -- I think, Your
25 Honor, I mean, the statutory language, but --

1 but I think, then, if by design you mean, like,
2 what the stated intent, I mean, what the
3 purpose, the purpose of the DSH fraction, right?
4 As a patient -- as a hospital's DSH fraction
5 goes up, its DSH payment is supposed to go up.
6 That's the way it's -- it's designed. The --
7 the two work in tandem, higher DSH percentage,
8 higher payment.

9 In this case, as I was explaining a
10 moment ago, the Secretary turns that on -- on
11 its head, and by treating exhausted indigent
12 patients, the more of those patients you treat,
13 the lower your DSH payment goes. It's not just
14 that it stays the same or doesn't go up as much;
15 it -- it marches downwards. That is completely
16 inconsistent with, I think, what -- what this
17 Court recognized was the purpose and the design
18 --

19 JUSTICE ALITO: But I just mean -- are
20 you saying anything more than the purpose is to
21 give you money and your provision gives us --
22 your interpretation gives you more money? Are
23 you saying anything more than that?

24 MR. HETTICH: I -- I am saying
25 something more than that, Your Honor. I'm

1 saying that the -- the purpose, as this Court
2 held in Allina, was to -- and this Court used
3 the word "incentivize" -- to provide the
4 resources and incentive to treat indigent
5 patients. And by turning it on its head, it's
6 not just more money, but if you start taking
7 money away for treating indigent patients,
8 which, as I was explaining, that's the
9 phenomenon, 80 percent -- over 80 percent of the
10 time, they're actually losing money, that it
11 turns the whole -- you know, the whole DSH
12 payment into -- into a penalty, and that's
13 inconsistent with the design.

14 And -- and it gets to that place by
15 violating multiple canons of statutory
16 interpretation on top of it, right?

17 JUSTICE ALITO: Well, I know about all
18 the --

19 MR. HETTICH: Yeah.

20 JUSTICE ALITO: -- canons of statutory
21 interpretation. All right. Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor?

24 Justice Kagan?

25 Justice Gorsuch, anything further?

1 Justice Kavanaugh?

2 JUSTICE KAVANAUGH: Just so I
3 understand that, I -- I -- your answer there, I
4 mean, the two things are supposed to track
5 because the formula is supposed to track the
6 number roughly --

7 MR. HETTICH: Uh-huh.

8 JUSTICE KAVANAUGH: -- of poor
9 patients a hospital serves, and the more they
10 serve, the payments are supposed to correspond?

11 MR. HETTICH: Uh-huh.

12 JUSTICE KAVANAUGH: And this -- you
13 say yours more accurately tracks that, right?

14 MR. HETTICH: Correct.

15 JUSTICE KAVANAUGH: All right.

16 MR. HETTICH: That's right, yes.

17 JUSTICE KAVANAUGH: Just so I
18 understand. Okay.

19 CHIEF JUSTICE ROBERTS: Anything?

20 Thank you, counsel.

21 Mr. Bond, rebuttal?

22 REBUTTAL ARGUMENT OF JONATHAN C. BOND

23 ON BEHALF OF THE PETITIONER

24 MR. BOND: Thank you, Mr. Chief
25 Justice. Four points.

1 First, I understand Respondent to have
2 confirmed that his reading requires making the
3 Medicare fraction an island within the Medicare
4 statute, and the basis for that in their view is
5 the phrase "for such days," a reading of that
6 phrase that four circuits rejected in the
7 Medicaid fraction context. As I think the
8 colloquy illustrated, our reading does not
9 render that phrase superfluous because it tells
10 you at what point in time do you measure a
11 person's entitlement.

12 But, beyond that, that phrase can't
13 change what "entitled" means or what it takes to
14 be entitled, which the statute sets forth, and
15 the phrase doesn't give you a reason to think
16 that a person who -- whose care Medicare doesn't
17 pay for is any more low-income than another. So
18 it doesn't fit with the basic statutory design.

19 And, finally, it disregards the
20 additional benefits that Justice Thomas pointed
21 out are still available under Part A.

22 Second, Respondent referred to the SSI
23 benefit calculation and what codes are included.
24 The -- the agency specifically addressed this in
25 the 2010 regulation cited in our reply at page

1 10. The key part is at JA 179 to 83 and, on the
2 codes, at 181 to 83.

3 The agency explained that it got the
4 codes from the Social Security Administration to
5 confirm that it had the right codes to track
6 entitlement. The agency's view is not that
7 unless the check lands in your mailbox, you're
8 not entitled. It's, rather, if you meet the
9 criteria as determined by SSA, then you are
10 entitled.

11 But, if we're wrong about that, the
12 answer is not to skew the meaning of the
13 provision that is in front of you. Neither
14 court below addressed this -- the SSI fraction.
15 The district court concluded it lacked
16 jurisdiction to do so. And that is pending in
17 another case. So I would leave that to one side
18 and decide the question that is in front of you.

19 Third, on the question of the agency
20 reasoning and the explanation that it provided,
21 at a general level, I don't think the agency is
22 required in a rulemaking to provide all of its
23 legal arguments and rebut every possible legal
24 challenge to get Chevron deference. That would
25 read *Chenery* to require putting appellate briefs

1 into preambles.

2 But, in any event, here, the agency
3 has provided authoritative statements of its
4 reasoning in a variety of places, not just the
5 2004 rule that's directly at issue. Those
6 include CMS Ruling 1498-R, discussed in our
7 opening brief, which addresses Section 426 and
8 the other Part A benefits, the 2010 regulation
9 that I mentioned that addresses SSI benefits,
10 and going all the way back to its decision in
11 Edgewater, where it explained the overall design
12 and population focus drove its approach to drop
13 non-covered -- non-covered Medicare Part A
14 patients from the Medicaid fraction.

15 And fourth and finally, to the extent
16 the Court is struggling to ascertain exactly
17 what Congress is driving at in this very
18 complicated statute, I think the answer is,
19 regardless of whether there is any unambiguous
20 answer, to go with the one that makes the most
21 sense of the words Congress used and the overall
22 -- overall architecture.

23 Our approach does provide simplicity
24 by saying you interpret who is entitled by
25 looking at the provision that answers that

1 question and says who is entitled, and you
2 reject a reading that requires an exhausted
3 patient not to be entitled because the statute
4 says that.

5 Our reading fits together at least
6 better with the overwhelming majority of the
7 Act's provisions and has a plausible
8 straightforward theory of the congressional
9 design that fits with a population focus. And
10 at a minimum, that's a reasonable reading on
11 which Congress would want the agency's view to
12 get deference.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel, counsel. The case is submitted.

15 (Whereupon, at 11:09 a.m., the case
16 was submitted.)

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Official - Subject to Final Review

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