

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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AMERICAN HOSPITAL ASSOCIATION,)
ET AL.,)
 Petitioners,)
 v.) No. 20-1114
XAVIER BECERRA, SECRETARY OF)
HEALTH AND HUMAN SERVICES, ET AL.,)
 Respondents.)
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11
12 Washington, D.C.
13 Tuesday, November 30, 2021

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

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

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P R O C E E D I N G S

(11:23 a.m.)

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

Mr. Verrilli.

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

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

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

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

Now, in the order at issue, HHS set

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

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

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

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

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

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

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

10 I welcome the Court's questions.

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

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

25 But there are several steps before

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

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

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

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

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

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

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

25 MR. VERRILLI: So --

1 JUSTICE BREYER: Where am I wrong?

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

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

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

9 JUSTICE BREYER: What?

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

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

17 MR. VERRILLI: Right. And --

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

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

1 JUSTICE BREYER: Yeah.

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

8 JUSTICE BREYER: Uh-huh.

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

11 JUSTICE BREYER: They did.

12 MR. VERRILLI: And --

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

15 MR. VERRILLI: They --

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

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

20 JUSTICE BREYER: It was
21 unsatisfactory.

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

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

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

3 MR. VERRILLI: No.

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, I don't

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

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

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Right. No --

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

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

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

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

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

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

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

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

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

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

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

24 MR. VERRILLI: Yeah, sure.

25 JUSTICE KAGAN: Because I understand

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 MR. VERRILLI: Well, I --

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

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

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

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

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

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

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

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

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

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

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

1 page 53 of the Joint Appendix.

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

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

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

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

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

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

13 JUSTICE BARRETT: And I think --

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

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

23 MR. VERRILLI: Right.

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

1 to vary.

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

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

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

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

3 MR. VERRILLI: Correct.

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

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

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

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

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

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

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

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

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

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

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

1 data.

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

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

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

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

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

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

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

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

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

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

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

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

21 Now that doesn't help you --

22 MR. VERRILLI: Well --

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

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

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

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

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

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

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

13 CHIEF JUSTICE ROBERTS: Justice
14 Thomas?

15 JUSTICE THOMAS: None for me, Chief.

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

18 Justice Alito?

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

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

1 (Laughter.)

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

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

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

23 JUSTICE GORSUCH: I understand that.

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

1 JUSTICE GORSUCH: But if a majority --

2 MR. VERRILLI: Sure.

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

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

25 The other -- the other way seems to me

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

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

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

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

11 MR. VERRILLI: Yes, yes.

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

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 No?

3 Justice Kavanaugh?

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

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

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

25 JUSTICE KAVANAUGH: And then a second

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

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

10 MR. VERRILLI: Yeah. So --

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

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

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

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

22 JUSTICE KAVANAUGH: Regional
23 favoritism --

24 MR. VERRILLI: Yeah.

25 JUSTICE KAVANAUGH: -- category

1 favoritism.

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

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

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

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: All right.

2 Thank you, counsel.

3 Mr. Michel.

4 ORAL ARGUMENT OF CHRISTOPHER G. MICHEL

5 ON BEHALF OF THE RESPONDENTS

6 MR. MICHEL: Mr. Chief Justice, and

7 may it please the Court:

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

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

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

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

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

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

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

25 The agency here made a more modest

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

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

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

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

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

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

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

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

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

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

12 JUSTICE THOMAS: When was that?

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

15 JUSTICE THOMAS: Yeah.

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

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

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

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

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

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

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

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

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

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

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

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

25 Now the second point is it can't be

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

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

16 JUSTICE KAGAN: But --

17 JUSTICE BREYER: Why -- why --

18 JUSTICE KAGAN: -- the adjustment --

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

21 JUSTICE KAGAN: I doubt it.

22 (Laughter.)

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

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

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

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

21 MR. MICHEL: So, Justice --

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

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

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

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

8 JUSTICE BREYER: Yeah.

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

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

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

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

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

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

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

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

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

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

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

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

3 MR. MICHEL: Justice Kagan, I --

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

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

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

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

1 JUSTICE KAGAN: Yeah. So --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. MICHEL: Well, respectfully,

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

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

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

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

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

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

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

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

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

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

1 hospitals or no hospitals?

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

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

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

9 JUSTICE BARRETT: Mr. Michel --

10 JUSTICE ALITO: Well, then --

11 JUSTICE BARRETT: I'm sorry, finish.

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

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

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

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

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

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

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

25 MR. MICHEL: But that overpayment

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

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

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

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

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

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

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

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

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

17 JUSTICE KAVANAUGH: Okay.

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

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

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

18 JUSTICE BARRETT: Mr. Michel --

19 MR. MICHEL: And --

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

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

25 One, they are keeping a lot of the

1 overpayment here because we made a modest
2 adjustment.

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

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

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

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

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

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

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

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

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

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

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

13 JUSTICE BARRETT: Can I --

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

23 MR. MICHEL: Justice Breyer --

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

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

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

6 MR. MICHEL: Right.

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

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

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

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

25 Now, having listened to this and not

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

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

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

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

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

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

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

8 MR. MICHEL: So, Justice --

9 JUSTICE SOTOMAYOR: How do you define
10 that?

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

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

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

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

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

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

10 MR. MICHEL: Yeah. Okay.

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

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

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

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

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

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

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

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

24 MR. MICHEL: Right.

25 JUSTICE BARRETT: -- for asking for

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

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

10 JUSTICE GORSUCH: Counsel --

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

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

15 JUSTICE KAVANAUGH: Go ahead.

16 JUSTICE GORSUCH: Golly. All right.

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

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

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

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

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

17 So why shouldn't that be true here?

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

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

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

5 JUSTICE GORSUCH: So -- so --

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

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

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

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

1 ambiguity is enough?

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

5 JUSTICE GORSUCH: Somebody has.

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

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

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

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

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

21 JUSTICE GORSUCH: All right. Thank
22 you.

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

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

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

5 CHIEF JUSTICE ROBERTS: Justice
6 Breyer?

7 Justice Gorsuch, any?

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

10 (Laughter.)

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

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

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

10 JUSTICE GORSUCH: To other more
11 favored providers.

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

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

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

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

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett?

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

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

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

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

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

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

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

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

15 JUSTICE KAVANAUGH: But I guess --

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

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

1 change.

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

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

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

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

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

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

7 JUSTICE KAVANAUGH: Thank -- thank
8 you.

9 MR. MICHEL: Okay.

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

12 JUSTICE BARRETT: No.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Rebuttal, Mr. Verrilli?

16 REBUTTAL ARGUMENT OF DONALD B. VERRILLI, JR.

17 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 Thank you.

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

1 (Whereupon, at 12:37 p.m., the case
2 was submitted.)
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