

# Proposed Legislative Language – Overarching Points

- Goal is to restore protections intended by Congress in the original enactment of the language at issue in the MSPA
  - Individuals with ESRD – or dialysis patients – right to maintain employer group health plan during coordination period
  - Protection of Medicare Trust Fund for coordination period
- Not intended to expand scope or create a mandate for coverage
- Limited language to respond to majority and dissent in Marietta
  - Directly addressing distinction between a plan that targets individuals and one that targets the services that basically only those individuals need
  - Language close tracks the dissent language

## Summary of Proposed Legislative Language

Proposed Language	Explanation
Addition of “or that such an individual requires the use of an item or service” in (C)(i) – “take into account” provision	<ul style="list-style-type: none"> <li>• Include concept of targeting the <b>services</b> needed (nearly exclusively) by individuals with ESRD as proxy to target the individuals in the “take into account” provision</li> <li>• Even though SCOTUS basically ignored this section, thought it was important to address the issues in both places</li> </ul>
Addition of <i>“For purposes of clause (ii), because nearly all individuals with end stage renal disease require renal dialysis services, a plan impermissibly differentiates in the benefits it provides to individuals with end stage renal disease by limiting or impairing the benefits it provides for renal dialysis services as compared to other covered medical services it provides under the plan.”</i> as penultimate sentence of “except” provision.	<ul style="list-style-type: none"> <li>• In lieu of editing (ii) directly (because language choices got confusing and too close to a mandate), we added an explanation of what the “do not differentiate” provision in (ii) includes as prohibited conduct – specifically limiting or impairing dialysis services benefits as a means to discrimination against ESRD patients</li> <li>• Tracked the language and interpretation of Justice Kagan’s dissent</li> <li>• The “because nearly all . . .” language is meant to explain the reason for the addition</li> <li>• Understand that the “as compared to other covered medical services” could be gamed by a plan, but that highlights our intent not to create a mandate (e.g., can be a “skinny” plan that does not cover benefits for any chronic conditions)</li> </ul>
Addition of <i>“This clause shall apply notwithstanding any law or regulations to the contrary, including Section 411.161(c) of title 42, Code of Federal Regulation.”</i> at end of “except” provision	<ul style="list-style-type: none"> <li>• Important to be clear that the contradictory guidance in 411.161(b)(2)(C) is void.</li> </ul>