

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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HEALTH AND HOSPITAL CORPORATION )  
OF MARION COUNTY, ET AL., )  
Petitioners, )  
v. ) No. 21-806  
IVANKA TALEVSKI, PERSONAL )  
REPRESENTATIVE OF THE ESTATE OF )  
GORGI TALEVSKI, DECEASED, )  
Respondent. )  
- - - - -

Pages: 1 through 98  
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Date: November 8, 2022

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4   OF MARION COUNTY, ET AL.,               )  
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8   REPRESENTATIVE OF THE ESTATE OF        )  
9   GORGI TALEVSKI, DECEASED,                )  
10                           Respondent.         )  
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13                            Washington, D.C.  
14                            Tuesday, November 8, 2022

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16           The above-entitled matter came on for  
17   oral argument before the Supreme Court of the  
18   United States at 11:53 a.m.

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3 behalf of the Petitioners.  
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10 supporting neither party.  
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12 of the Respondent.  
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P R O C E E D I N G S

(11:53 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 21-806, Health and Hospital Corporation of Marion County versus Talevski.

Mr. Robbins.

ORAL ARGUMENT OF LAWRENCE S. ROBBINS  
ON BEHALF OF THE PETITIONERS

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

The key to Spending Clause statutes, this Court said in Arlington Central School District, "is what the states are clearly told regarding the conditions that go along with the acceptance of federal funds."

Among the most costly conditions that may go along with the acceptance of federal funds is exposure to private litigation under Section 1983. This Court made that precise point in Barnes against Gorman, in which it said with respect to a school that "without doubt, the scope of potential damages liability is one of the most significant factors a school" -- or, as in this case, a nursing facility -- "would

1 consider in deciding whether to receive federal  
2 funds."

3 States are therefore entitled, in our  
4 view, to clear notice that they will be subject  
5 to such private lawsuits if they expect -- if  
6 they accept Spending Clause money. Such a clear  
7 notice rule comports with the federalism and  
8 separation-of-powers principles at stake in  
9 these cases, and it accords as well with the  
10 common law treatment of third-party beneficiary  
11 claims at the time Section 1983 was enacted.

12 At common law, third parties generally  
13 could not sue to enforce government contract  
14 rights unless the contract clearly specified  
15 that the breaching party would be liable to  
16 injured third parties. Because the Federal  
17 Nursing Home Reform Act contains no such clear  
18 statement, it should not give rise to  
19 Section 1983 liability. But, even if a clear  
20 notice rule is not required, the two purported  
21 rights that Respondent invokes under FNHRA do  
22 not give rise to Section 1983 claims.

23 First, FNHRA and its implementing  
24 regulations provide a comprehensive suite of  
25 remedies, including a more restrictive private

1 remedy that forecloses Section 1983 relief under  
2 Rancho Palos Verdes. And on this dispositive  
3 point, the U.S. Solicitor General agrees with  
4 us.

5 Second, the two rights Respondent  
6 invokes are not unambiguously phrased in terms  
7 of the persons benefited. Instead, the two  
8 rights invoked here today are but a small piece  
9 of an overarching set of requirements addressed  
10 to nursing facilities that receive federal  
11 money. And the command to protect and promote  
12 those rights are, as in *Blessing*, system-wide  
13 commands, not an unambiguous assurance of  
14 individual entitlement.

15 CHIEF JUSTICE ROBERTS: What do you  
16 mean -- what do you mean by "system commands"?

17 MR. ROBBINS: In the -- that, as in  
18 *Blessing*, the language of the statute, Mr. Chief  
19 Justice, is directed to the rights of -- the --  
20 the -- the obligation of the nursing facility to  
21 take care of the entire system and not focus on  
22 any particular individual.

23 The language, "protect and promote,"  
24 to promote something, it seems to me, evokes the  
25 notion that you are looking out at the whole

1 system in which you promote and protect a  
2 certain right.

3 CHIEF JUSTICE ROBERTS: No, I -- I --  
4 I -- I think you have a stronger argument on  
5 "promote," though, than you have on "protect."

6 MR. ROBBINS: Yes.

7 CHIEF JUSTICE ROBERTS: And -- and the  
8 -- the -- the statute uses both and then, you  
9 know, lists a variety of rights. And it seems  
10 to me that if you're supposed to protect those  
11 rights and you're the person who's responsible  
12 for conferring -- living up to those rights,  
13 that -- that seems to me that it ought to be  
14 sufficiently direct under -- under Blessing or  
15 Gonzaga or any of the others.

16 MR. ROBBINS: Well -- well, I -- I --  
17 I'm not inclined to think so, though, to be  
18 sure, I think our -- the stronger of our two  
19 Gonzaga arguments is the middle -- is the Sea  
20 Clammers preclusion argument. That's our --  
21 that's our first submission with respect to the  
22 Question 2.

23 What I would say with respect to the  
24 Chief -- Your Honor's question, it is a mistake,  
25 I think, to pick out the particular clauses that



1     embody these two rights and divorce them from  
2     the rest of the statute.  Pennhurst, after all,  
3     enjoins the Court to look at the whole statute.

4             And when you do that, when you look at  
5     the whole statute, the entirety of the FNHRA  
6     amendments, what you're going to see is that the  
7     core of it, contained in subsections (b), (c),  
8     and (d), are a series of commands to the nursing  
9     home to regulate and manage its facility in a  
10    particular way.

11            (c) refers to the nursing home's  
12    ability -- responsibility to protect and promote  
13    certain rights.  That's true.  (b), on the other  
14    hand, talks about administrative obligations, as  
15    does (d), whereas (e) and (f) are directed,  
16    respectively, to the states and to the federal  
17    government, to the Secretary.

18            That is to say, each one of the  
19    substantive sections of these amendments is  
20    directed to the particular office or officer  
21    that has the duty to promote the underlying  
22    obligations.  And so I would say that even  
23    though it's true --

24            JUSTICE KAVANAUGH:  Except --

25            JUSTICE KAGAN:  Well, that's true --

1 JUSTICE KAVANAUGH: Go ahead.

2 JUSTICE KAGAN: I guess I'm just not  
3 sure, Mr. Robbins, what that -- what that gets  
4 you. It's a big statute. It does a lot of  
5 things. But one of the things it does is to say  
6 every nursing facility has to ensure that  
7 individual rights are respected and lays out in  
8 considerable detail what those rights are and  
9 say it's your job to see that those rights are  
10 fulfilled.

11 MR. ROBBINS: Yeah. Well, again, it  
12 is our view that, taken as a whole, this --  
13 these are directions to the nursing facilities.  
14 Even subsection (c), which is the -- the one in  
15 which these rights can be found, begins with the  
16 command: the nursing home shall.

17 And -- and so, you know, if you're  
18 asking the question --

19 JUSTICE KAGAN: Well, it's true that  
20 the nursing home is involved in this because the  
21 nursing home is the entity that's supposed to  
22 respect the individual rights that are laid out.  
23 I mean, you have to think that any individual  
24 right imposes a correlative duty on somebody.  
25 And, here, it's the nursing home that is

1 supposed to make sure that those rights are not  
2 violated.

3 MR. ROBBINS: I -- I don't disagree  
4 with that at all, Justice Kagan. What I do  
5 think, however, is that -- and, again, this is  
6 on the assumption now that we're talking about  
7 the Gonzaga inquiry.

8 My threshold argument is based on the  
9 common law at the time Section 1983 was enacted  
10 and on federalism and separation-of-powers  
11 principles. But, if we are now in the guts of  
12 Question 2, I would suggest that the individual  
13 patient is not the unambiguous focus of this  
14 statute.

15 JUSTICE KAVANAUGH: It says rights. I  
16 mean, it says rights. It's very uncomfortable  
17 fact for you is that --

18 MR. ROBBINS: Yes.

19 JUSTICE KAVANAUGH: -- the statute  
20 says rights over and over again.

21 MR. ROBBINS: Yes. Precise --

22 JUSTICE KAVANAUGH: I mean, that --

23 MR. ROBBINS: And -- and no less so  
24 did --

25 JUSTICE KAVANAUGH: Residents' rights

1 too.

2 MR. ROBBINS: Yes, of course, it says  
3 rights. This Court has twice faced that precise  
4 circumstance, Justice Kavanaugh. It did in  
5 Pennhurst itself with a long section of bill --  
6 called Bill of Rights in Section 6010 of the  
7 Rehab Act of '73.

8 That wasn't enough. The Chief -- then  
9 Chief Justice Rehnquist said for the Court that  
10 we don't pick out little words like "rights," a  
11 point repeated by this Court in 2002 in Footnote  
12 7 of Gonzaga.

13 The mere fact that the word "right" is  
14 sprinkled through the statute -- obviously, I  
15 don't dispute that -- is not enough to get you  
16 over the unambiguous focus hurdle.

17 But let me be clear. Of the three  
18 arguments I'm making today, I promote two ahead  
19 of that, and on -- on those points, I think  
20 there is not a --

21 JUSTICE KAVANAUGH: What's your --  
22 what's your first argument then? That we should  
23 overrule the precedent, right?

24 MR. ROBBINS: Well, the first argument  
25 is that it should extend the principle in

1 Gonzaga to take account of the sate -- the state  
2 of third-party beneficiary law at the time 1983  
3 was enacted. That is our answer on Question 1.

4 On Question 2, we have two answers,  
5 but the first of those is that this is a case of  
6 Sea Clammers preclusion, that the set of  
7 remedies provided in subsection (h)(8) provides  
8 a comprehensive --

9 JUSTICE KAVANAUGH: But, in Sea  
10 Clammers, there's a citizens suit provision,  
11 right?

12 MR. ROBBINS: Indeed. But this Court  
13 has twice now taken account of the Sea Clammer  
14 and its progeny and twice, once in Rancho Palos  
15 Verdes and once in Fitzgerald, has said that the  
16 dividing line between what is preclusive and  
17 what is not is whether there is a private  
18 remedy, not a private judicial remedy, much less  
19 a private federal court remedy, a private  
20 judicial remedy.

21 That's what this Court has twice said  
22 is the dividing line in that body of law. There  
23 is no question, no even fair debating that there  
24 is a set of private remedies, which is --

25 JUSTICE KAVANAUGH: Private judicial

1 remedies or private administrative remedies?

2 MR. ROBBINS: Private administrative  
3 remedies.

4 JUSTICE KAVANAUGH: Okay. And we've  
5 said that the existence of a state  
6 administrative remedy does not ordinarily  
7 reclose -- foreclose resort to 1983. The  
8 Solicitor General quotes that --

9 MR. ROBBINS: That's right.

10 JUSTICE KAVANAUGH: -- portion as  
11 well. And I just want you to respond to that.  
12 How do we -- how do we address that?

13 MR. ROBBINS: Well, first off, these  
14 are -- these are not simply state remedies.  
15 They are remedies that both the Secretary can  
16 enforce, including the right to bring a  
17 grievance to the Secretary and a grievance to  
18 state officials.

19 But I would -- I -- I -- I would say,  
20 Justice Kavanaugh, that the -- you know, I  
21 really do insist on the dividing line that this  
22 Court has articulated more recently than the --  
23 than the language that you've quoted.

24 It seems to me Fitzgerald --

25 JUSTICE KAVANAUGH: Can you get -- I'm

1       sorry to interrupt.  I don't want to take too  
2       much time.

3                 MR. ROBBINS:  No, that's fine.

4                 JUSTICE KAVANAUGH:  But that's a key  
5       point for me on the comprehensive scheme  
6       argument, which is what exactly is the dividing  
7       line?  I mean, I've got the cases.  I've read  
8       the cases.  What do you think is exact  
9       formulation of the dividing line?

10                MR. ROBBINS:  I think, if I'm reading  
11       the two cases I've just cited correctly, and I  
12       think I'm quoting -- citing the -- the language  
13       almost verbatim, in fact, I think it uses the  
14       phrase "the dividing line" if I'm not mistaken  
15       in both Fitzgerald and Rancho Palos Verdes.

16                And what the Court has said is, if  
17       there is a private remedy -- in fact, in one of  
18       the cases, I can't now recall, it actually says  
19       judicial or administrative.

20                JUSTICE KAGAN:  You think any private  
21       remedy at all is --

22                MR. ROBBINS:  No, no, I -- I -- I -- I  
23       don't think so.  I mean --

24                JUSTICE KAGAN:  Because I had thought  
25       that we looked for some understanding of

1 incompatibility, that we looked for some ways in  
2 which the other private remedy was in conflict  
3 or in -- at least in tension with 1983.

4 So, in those cases that you're citing,  
5 those cases all had remedial schemes which had  
6 various requirements. They forced you to give  
7 notice, they required you to file at a certain  
8 time, things like that.

9 And if you gave a 1983 suit, it would  
10 be of a -- a way of evading all those  
11 requirements so that you could see that there  
12 was some kind of tension between the remedial  
13 scheme and 1983.

14 MR. ROBBINS: I -- I -- I --

15 JUSTICE KAGAN: But I don't see any of  
16 that here.

17 MR. ROBBINS: But I -- respectfully,  
18 Justice Kagan, I don't think that's the way this  
19 Court has thought about the preclusiveness of  
20 remedies.

21 I don't contend that 1983 is somehow  
22 flatly inconsistent with the exist -- with the  
23 comprehensive remedies provided under (h)(8) and  
24 --

25 JUSTICE KAGAN: Or even in tension



1 with or even that --

2 MR. ROBBINS: But --

3 JUSTICE KAGAN: -- 1983 would pro --  
4 would give you an out --

5 MR. ROBBINS: No --

6 JUSTICE KAGAN: -- and -- and -- and  
7 -- and so you could escape the requirements of a  
8 different remedial scheme.

9 MR. ROBBINS: Well, I think there are  
10 respects in which that's true here. For  
11 example, there are provisions that require that  
12 that the Secretary -- as I recall, there are  
13 provisions that require -- that -- that give,  
14 for example, the states discretion as to whether  
15 they're going to exercise any of their remedies,  
16 including because, for example, they're --  
17 they're managing the facility, they're looking  
18 it over and they -- they don't want to terminate  
19 a -- a funding or they want to take some more --  
20 lesser step.

21 I would contend that private  
22 litigation, which, of course, is not constrained  
23 in that way, is, in fact, antithetical to the  
24 discretion that states and the Secretary have.

25 But I also quarrel with the premise,

1 Your Honor. I do not think I have to show that  
2 1983 is -- and I -- is -- is at odds or even in  
3 tension with the -- with the elaborate  
4 administrative proceedings provisions given  
5 here.

6 JUSTICE KAGAN: Well, aren't we trying  
7 to figure out -- I mean, this is a matter of  
8 statutory interpretation -- we're trying to  
9 figure out whether Congress meant to preclude  
10 the 1983 suit.

11 And it can't be the case that Congress  
12 would mean to preclude the 1983 suit by doing  
13 any old thing. I mean, other administrative  
14 remedies can be perfectly complementary --

15 MR. ROBBINS: Yes.

16 JUSTICE KAGAN: -- with a 1983 suit.

17 MR. ROBBINS: I -- I under --

18 JUSTICE KAGAN: So we have to be  
19 looking for something more than that Congress  
20 has provided some other remedial avenues.

21 MR. ROBBINS: Well, I -- I -- I think  
22 in this case it's quite comprehensive. And  
23 what's striking about this case, of course, is  
24 that Mr. Talevski availed himself of all of  
25 those provisions, got the relief he wanted, and

1 then came back to court for money.

2 So it -- this is a case where the --  
3 where the actual regulations did a terrific job.  
4 But, again, let me just finish why I quarrel  
5 with Your Honor's premise.

6 To me, if I -- when -- as I read the  
7 body of law that was started with Sea Clammers  
8 and goes through Robinson and then up to City of  
9 Palos Verdes, what the Court has said is we  
10 usually begin with the assumption that the  
11 provision of one remedy excludes the others.

12 JUSTICE KAGAN: I don't think that  
13 that's the presumption here. I think, once  
14 there has been found to be a statute with the  
15 character of giving rights, the presumption  
16 actually is in favor of 1983 because that's what  
17 1983 is supposed to address.

18 And we're looking to see whether  
19 another statute negates that presumption by  
20 doing something particular, that suggests that  
21 Congress wouldn't have wanted nine -- the 1983  
22 to go forward -- 1983 suit to go forward at the  
23 same time.

24 So we need something more than another  
25 scheme that does something. We need a sense

1 that that other scheme was meant to be  
2 exclusive, that it was -- that --

3 MR. ROBBINS: Well --

4 JUSTICE KAGAN: -- that it -- it -- it  
5 would have been thought to be incompatible with  
6 1983.

7 MR. ROBBINS: Well, I -- I -- I would  
8 take a page from the Solicitor General's  
9 argument, of course, that it would -- it is  
10 surpassingly odd to imagine that we would have  
11 more exacting obligations on the very thin slice  
12 of state nursing homes that get federal money  
13 under this program. I'm going to leave that  
14 argument to them, and I hope they make it.

15 JUSTICE JACKSON: Mr. Robbins, can I  
16 just give you -- and are you finished with this?  
17 I'm sorry.

18 MR. ROBBINS: Well, if -- if I might,  
19 just --

20 JUSTICE JACKSON: Yes.

21 MR. ROBBINS: I -- I don't -- I  
22 certainly agree, there's no disputing that the  
23 presumption that Your Honor called my attention  
24 to is correct.

25 If the statute -- if there is an

1 enforceable right, which -- with which, of  
2 course, I quarrel, but, if there is, it is true  
3 that there's a presumption that 1983 kicks in,  
4 unless, of course, you take my view of the first  
5 question presented, which is that, as a general  
6 matter, 1983 did not permit third-party  
7 beneficiaries to be --

8 JUSTICE JACKSON: That -- that's what  
9 I wanted to talk about.

10 MR. ROBBINS: Yeah. And I do want to  
11 come to that.

12 JUSTICE JACKSON: Okay.

13 MR. ROBBINS: But the fact that the  
14 burden shifts to us to prove that -- that this  
15 -- that Congress intended to foreclose it,  
16 that's all well and good. The question is, what  
17 do you do to discharge that burden?

18 And in case after case, this Court has  
19 said that when Congress actually provides for a  
20 remedy, we usually begin with the premise that  
21 that's -- that that -- you know, I always get  
22 the Latin wrong, but I think it's *exclusio unius*  
23 or something to that effect -- that's in the  
24 case law. And it exists notwithstanding the  
25 fact that it becomes our burden to sustain --

1 that -- that -- to -- to -- our burden to show  
2 that 1983 is not available. One --

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 MR. ROBBINS: Okay.

6 CHIEF JUSTICE ROBERTS: I just have  
7 one last question. On the alternative remedy  
8 for grievances, does it matter that what you  
9 rely on the most is an administrative regulation  
10 rather than the statutory language? Because,  
11 obviously, the statutory language, you can  
12 analyze that as what the state had -- was on  
13 notice about or -- or not, but I don't know that  
14 that's true with respect to subsequent  
15 regulations.

16 MR. ROBBINS: Well, I -- I think our  
17 view is that if a regulation fairly interprets  
18 the statute, then that counts towards the same  
19 preclusive effect that the statute would.

20 Nobody contests that proposition in  
21 front of the Court today. Nobody says that a  
22 regulation can't have the same preclusive  
23 effect.

24 CHIEF JUSTICE ROBERTS: Well, I -- I  
25 -- I would contest that proposition since the

1 whole premise is that the state has to be on  
2 unambiguous, clear notice. But how can that be  
3 with respect to a regulation that hasn't even  
4 been issued at the time of the statute?

5 MR. ROBBINS: Well, I -- I'm not sure  
6 that the contract metaphor -- I mean, this Court  
7 has said in case after case that the contract  
8 metaphor is to -- is to limit the scope, not to  
9 expand the scope.

10 I'm not sure why a state would need to  
11 know that a 1983 -- I'm not sure why the -- the  
12 state would need to know what the regulations  
13 are --

14 CHIEF JUSTICE ROBERTS: Well, because  
15 --

16 MR. ROBBINS: -- all about.

17 CHIEF JUSTICE ROBERTS: -- you're  
18 talking about contract. The regulations can go  
19 two different ways. One could be a -- a  
20 regulation that expands the obligations of the  
21 state, rather than the one at issue here.

22 MR. ROBBINS: Yes. No, I -- I -- I --  
23 I recognize that. But, I guess, if what we're  
24 talking about is what the states clearly  
25 understood as a condition, I would then recur to

1 my central argument on Question 1, which is that  
2 no state would have thought that a private party  
3 could enforce the contract that consists of  
4 FNHRA because it doesn't advert in any way to  
5 the right of a private party to bring a lawsuit.

6 JUSTICE JACKSON: But isn't that a  
7 shift from --

8 CHIEF JUSTICE ROBERTS: Thank you.  
9 Justice Thomas?

10 JUSTICE THOMAS: Nothing, Chief.

11 CHIEF JUSTICE ROBERTS: Justice Alito?

12 JUSTICE ALITO: Well, Respondent  
13 relies on the Savings Clause, and you -- you  
14 responded only very briefly to that in the reply  
15 brief, so I wanted to give you another chance to  
16 talk about it.

17 The Savings Clause says "the remedies  
18 provided under this subsection are in addition  
19 to those otherwise available under" -- "for  
20 federal law and shall not be construed as  
21 limiting such other remedies."

22 Why doesn't that apply directly here?  
23 It doesn't say -- the provision does not say  
24 that the right that is asserted must arise from  
25 some source other than the law at issue. It --



1 it supplements remedies.

2 MR. ROBBINS: Yes.

3 JUSTICE ALITO: It says that this does  
4 not take away remedies. And 1983 provides a  
5 remedy.

6 MR. ROBBINS: Yes. I appreciate it,  
7 Justice Alito, and let me -- let me provide two  
8 -- two answers on that.

9 The first is both in Rancho Palos  
10 Verdes and in I want to say at least one other  
11 of the -- this Court's cases, maybe it's -- it's  
12 Robinson, the Court has said that when we  
13 refer -- when a savings -- so-called Savings  
14 Clause refers to federal law or federal statute,  
15 it is referring to statutes other than the very  
16 one that contains the Savings Clause. That's  
17 our first submission.

18 But I'd like to follow on to that  
19 because I think, if it -- if that's correct, the  
20 Savings Clause is our friend, not theirs, and  
21 the reason is this: It says in essence the  
22 rights in this section, (h)(8), which I have  
23 invoked as preclusive, the rights contained in  
24 (h)(h) -- (h)(8) are in addition to those in  
25 statute -- in federal statutes.

1           If "federal statutes" means all  
2 statutes other than FNHRA itself, then that  
3 seems to me pretty strong evidence that there  
4 are no other remedies except those found in, for  
5 example, the Americans with Disabilities Act or  
6 the Rehabilitation Act of '73.

7           That is to say, the Savings Clause  
8 says are -- these rights are for any other  
9 federal -- are in addition to other federal  
10 statutes. That seems to me to preclude the  
11 argument that they are relying on, which is an  
12 argument that 1983, married with FNHRA, gives  
13 them certain rights.

14           I think the fair reading of the  
15 Savings Clause is against that combination,  
16 precisely because its reference to statutes is  
17 to statutes other than FNHRA, and without FNHRA,  
18 they've got no 1983 claim in this case.

19           CHIEF JUSTICE ROBERTS: Justice  
20 Sotomayor?

21           JUSTICE ALITO: No, that's okay.  
22 That's fine.

23           JUSTICE SOTOMAYOR: Counsel, do you  
24 dispute the amici legal historians' point that  
25 the prevailing rule in American common law in

1 the 1870s, before 1983 was passed --

2 MR. ROBBINS: Yes.

3 JUSTICE SOTOMAYOR: -- permitted  
4 third-party beneficiaries to sue?

5 MR. ROBBINS: I absolutely do. And  
6 I'm so glad you --

7 JUSTICE SOTOMAYOR: So that's -- so  
8 that's just a matter of our reading of history.  
9 If we disagree with you --

10 MR. ROBBINS: Well --

11 JUSTICE SOTOMAYOR: -- what -- what --  
12 what's left?

13 MR. ROBBINS: Well, can -- can -- can  
14 I just perhaps answer the question by suggesting  
15 where they got it wrong and where instead we --  
16 the Court may wish to be looking?

17 JUSTICE SOTOMAYOR: Okay.

18 MR. ROBBINS: What they are saying --  
19 well, they -- they quote a particular secondary  
20 article in which --

21 JUSTICE SOTOMAYOR: Seems to be more  
22 than --

23 MR. ROBBINS: -- somebody actually  
24 went to the trouble --

25 JUSTICE SOTOMAYOR: There was more

1 than one, but let's keep going.

2 MR. ROBBINS: In which somebody  
3 actually went to the trouble of adding up all  
4 the cases and then saying 72 percent of these  
5 were allowed and 62 percent of these were  
6 allowed. But, if you look at Footnote 22 of the  
7 principal source they rely on, you will see that  
8 the author cut out from his sample all the  
9 so-called "incidental beneficiary cases," which  
10 are the ones we say are most like a Spending  
11 Clause statute.

12 In other words, the game was rigged.  
13 It -- the -- the -- the -- the denominator was  
14 gerrymandered to gin up very high numbers, but,  
15 if you go back and look at all of the  
16 government-to-government contract cases, and  
17 I've looked at a fair bit of them, you will find  
18 that unless the government contract called out  
19 the plaintiff, for example, Schnaier, the  
20 Schnaier case from 1918 in New York, or the  
21 Little -- the Little case that it cites from  
22 1880, in those cases, they said -- you know,  
23 these were the water company and fire company  
24 cases of the 19th century -- generally speaking,  
25 if your house burned down because the water

1 company didn't put enough water in the hydrants,  
2 you were out of luck.

3 JUSTICE SOTOMAYOR: But none of those  
4 contracts --

5 MR. ROBBINS: I'm sorry?

6 JUSTICE SOTOMAYOR: The incidental  
7 contracts are different than the ones you even  
8 admit if you call out the plaintiff. Isn't that  
9 what Blessing and Gonzaga are saying?

10 MR. ROBBINS: No. I -- I --

11 JUSTICE SOTOMAYOR: If the contract is  
12 giving a right to a particular class of people,  
13 that is a third-party beneficiary.

14 MR. ROBBINS: No. I -- I -- I  
15 respectfully suggest that it is not because, if  
16 you look at the cases I've just described, what  
17 you will find is that the contract had a -- for  
18 example, Schnaier is a -- is a water company  
19 case, and it said, in substance, if you don't  
20 deliver the water, you will be liable to anyone  
21 who is injured. In the Little case from 1880 --

22 JUSTICE SOTOMAYOR: But that's what  
23 1983 says. If I confer a government right on  
24 you, the state is going to be liable if it  
25 violates the law -- that right.

1                   MR. ROBBINS: No. Well, actually,  
2 what it says is if it violates a right secured  
3 by law. And what is --

4                   JUSTICE SOTOMAYOR: Exactly.

5                   MR. ROBBINS: -- and what is --

6                   JUSTICE SOTOMAYOR: And if I have a  
7 right under the law to a certain thing that the  
8 -- the government has contracted with a provider  
9 to give me, 1983 says I can go to court.

10                  MR. ROBBINS: Well, I -- I don't think  
11 it's quite that simple. I think what is secured  
12 by law depends, among other things, on how 1983  
13 would have been understood at the time it was  
14 enacted.

15                  And at that time, you could not sue on  
16 a government-to-government contract unless --  
17 and this is the general state of the law, as  
18 Cummings directs us to look at, not little  
19 outliers from the regression curve but the main  
20 curve that -- that joins most of the cases.

21                  What you will find, Justice Sotomayor,  
22 is that when somebody had the right to sue,  
23 somebody's house burns down or somebody who  
24 doesn't get a benefit from a government  
25 contract, the contract said you will be liable

1 to third parties if you breach this contract.

2 JUSTICE SOTOMAYOR: Except that, as  
3 Justice Alito pointed out, this Spending Clause  
4 provision provides that all other remedies of  
5 law, i.e., 1983, are not superseded.

6 MR. ROBBINS: No, I -- I -- I didn't  
7 take Justice Alito to be agreeing with that  
8 proposition, but -- and I certainly do not agree  
9 with that proposition.

10 The language of the -- of the Savings  
11 Clause says these are in addition to laws  
12 provided by statute, Constitution, and common  
13 law. And this Court has said in several cases  
14 that the reference to statutes is to statutes  
15 other than the very statute containing the  
16 Savings Clause.

17 That means other than FNHRA. And if  
18 it means other than FNHRA, which is the way I  
19 read it and the way this Court has read it more  
20 than once, then they have no claim because --

21 JUSTICE SOTOMAYOR: Okay, counsel, I  
22 understand.

23 MR. ROBBINS: -- you can't -- because  
24 FNHRA is not a statute other than FNHRA itself.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 Justice Gorsuch?

2 Justice Kavanaugh?

3 JUSTICE KAVANAUGH: If I understand  
4 your position on the preclusion, the implied  
5 preclusion, you're saying, if there is a private  
6 judicial remedy in the statute, then that would  
7 ordinarily mean no 1983 suit. Correct so far?

8 MR. ROBBINS: I -- I certainly agree  
9 with that.

10 JUSTICE KAVANAUGH: Okay. And then  
11 you're saying, if there's a private  
12 administrative remedy in the statute, that also,  
13 usually and here, precludes 1983, correct?

14 MR. ROBBINS: Correct.

15 JUSTICE KAVANAUGH: Okay. Some of the  
16 language supports you in the cases, some  
17 doesn't. The three cases where we've held that  
18 have involved private judicial remedies,  
19 however.

20 MR. ROBBINS: Correct. That is  
21 correct. But the --

22 JUSTICE KAVANAUGH: So the -- the --  
23 the issue here, I think, that if we get to this  
24 issue we'd have to nail down, is exactly under  
25 what circumstances the private administrative



1 remedy in the statute precludes 1983. Does that  
2 sound like the question?

3 MR. ROBBINS: That does sound like the  
4 question. On the other hand, with all respect,  
5 I --

6 JUSTICE KAVANAUGH: And the government  
7 has a whole different theory. I get that.

8 MR. ROBBINS: Yes.

9 JUSTICE KAVANAUGH: We'll get to that.

10 MR. ROBBINS: The government has a  
11 different --

12 JUSTICE KAVANAUGH: But let's not -- I  
13 don't want to get to that now. Just on --

14 MR. ROBBINS: Fair enough. But, on --  
15 on that proposition, I don't think I can do  
16 better than to cite this Court's cases that have  
17 said -- that have told us where the dividing  
18 line is. And if --

19 JUSTICE KAVANAUGH: Right. But even  
20 those, like if you look -- and then I won't  
21 belabor it too much -- but Rancho Palos Verdes  
22 says: "In all the cases in which we have held  
23 that 1983 is available, we have emphasized that  
24 the statute at issue did not provide a private  
25 judicial remedy."

1 MR. ROBBINS: Yes, they did say that  
2 as well.

3 JUSTICE KAVANAUGH: "Or, in most of  
4 the cases" -- that's key, "most" is a key word  
5 there -- "even a private administrative remedy."

6 MR. ROBBINS: Fair enough. But they  
7 go on to also say the -- the so-called "dividing  
8 line point."

9 JUSTICE KAVANAUGH: Yes, that helps  
10 you. I agree.

11 MR. ROBBINS: And -- and -- and it  
12 helps me --

13 JUSTICE KAVANAUGH: I think I'm done.  
14 Okay.

15 MR. ROBBINS: Okay.

16 JUSTICE KAVANAUGH: Thank you.

17 MR. ROBBINS: Okay.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Barrett?

20 JUSTICE BARRETT: I'm a little bit  
21 surprised, I guess, by the focus on the  
22 third-party beneficiary point, and this is why.

23 If you have -- and I think this  
24 dovetails with Justice Sotomayor's questions.  
25 It is true that in Spending Clause legislation

1 we have focused on the contract analogy. And  
2 so, as the Chief Justice was pointing out, we  
3 want to know when a state accepts the funds if  
4 it was on notice of its obligations.

5 MR. ROBBINS: Right.

6 JUSTICE BARRETT: In the 1983 context,  
7 I would have thought that the question is does  
8 this statute create rights, the Blessing/Gonzaga  
9 question, arguably just the Gonzaga question,  
10 after Gonzaga, but, if so, then you're referred  
11 to 1983 and the scope of that cause of action is  
12 dictated by 1983.

13 The question about third-party  
14 beneficiaries and the scope of the cause of  
15 action I would have thought arose only when  
16 we're talking about implied causes of action,  
17 like Cummings last term, for example.

18 If you're talking about it against a  
19 private party, if you're wanting to know what a  
20 private party might have signed up for and  
21 you're talking about an implied cause of action  
22 from the statute itself, then it might make  
23 sense to ask whether a third-party beneficiary  
24 was entitled to sue or whether punitive damages  
25 would have been available for this kind of

1 breach.

2 MR. ROBBINS: Right.

3 JUSTICE BARRETT: I just don't see the  
4 connecting of the dots in your situation where  
5 we're talking about resort to 1983.

6 MR. ROBBINS: Well, let me take a  
7 crack at it. It is -- I think the principle  
8 here is the same without regard to whether we're  
9 talking about purely implied rights of action or  
10 1983 claims.

11 And, here, I take the guidance from  
12 Gonzaga, which said that while it's true that  
13 you don't have to show an intent to create a  
14 private remedy, because 1983 already does that,  
15 you do have to make the same inquiry about  
16 whether this is a right secured by law.

17 And what we're saying is that whether  
18 a right is secured by law depends, among other  
19 things, on whether or not, at the time 1983 was  
20 enacted, the -- what the common law principles  
21 were. And it carries the old soil with it.

22 And this is a point I -- I -- I want  
23 to make sure I leave the Court with. The  
24 question whether they have a -- I'm sorry, Mr.  
25 Talevski and his family have an enforceable

1 right turns on the marriage of two statutes:  
2 1983, which brings with it whatever limitations  
3 are part of 1983's history and context and  
4 language, and the rights contained in the  
5 statute that provides the substantive rights.

6 And it's the combination of those two  
7 statutes and whatever old soil they bring with  
8 them which is why, among other things, the S --  
9 the Solicitor General's argument, that why are  
10 we looking at 19th century principles when FNHRA  
11 was only enacted in 1987, well, it's not as if,  
12 you know, the -- the --

13 JUSTICE BARRETT: I think you've  
14 answered my question.

15 MR. ROBBINS: Okay. Thank you.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Jackson?

18 JUSTICE JACKSON: Yes, but that was my  
19 question too. So let's -- let's explore a  
20 little bit.

21 I mean, I -- I don't understand your  
22 suggestion that an express cause of action,  
23 which I think we can all agree is what 1983 is,  
24 that says that you can sue to vindicate  
25 individual rights that are created by the

1 Constitution or laws of the United States, I --  
2 I don't understand why that carries with it  
3 common law that preceded it under circumstances  
4 in which you couldn't sue.

5 So you -- you seem to be suggesting  
6 that there isn't a -- that this isn't a  
7 situation in which Congress was actually  
8 providing a cause of action where there wasn't  
9 one before.

10 MR. ROBBINS: Right.

11 JUSTICE JACKSON: Which, when you look  
12 at the actual history of 1983, that was  
13 precisely what Congress was doing. It was a  
14 part -- it, 1983 -- of the Ku Klux Klan Act  
15 where Congress had looked at the situation of  
16 states not giving forum, not giving a cause of  
17 action to people who were being terrorized and,  
18 instead of adopting and incorporating those  
19 principles and saying here's this new law and  
20 we're going to incorporate the common law of  
21 excluding you from the court, in fact, Congress  
22 created the right in order to allow people to go  
23 to court.

24 So, while there might be situations in  
25 which we carry old soil into our interpretation,

1 I don't understand how you can interpret a -- an  
2 express grant of authority to go to court to  
3 enforce rights created by law, consistent with  
4 the opposite situation at common law, and say we  
5 have to limit the current right because, in  
6 common law, you didn't have that right.

7 MR. ROBBINS: Okay. Well, I -- I have  
8 a number of parts of answers that I'd like to be  
9 able to give, and I don't --

10 JUSTICE JACKSON: Well, let me just  
11 ask you this -- this way.

12 MR. ROBBINS: Yes.

13 JUSTICE JACKSON: How do we have  
14 authority to do that? Aren't -- wouldn't that  
15 just be us rewriting the statute?

16 MR. ROBBINS: No.

17 JUSTICE JACKSON: You're not saying  
18 that "laws" is ambiguous in the statute, are  
19 you?

20 MR. ROBBINS: I am not.

21 JUSTICE JACKSON: All right. So if  
22 it's -- usually, we only get to step in and look  
23 at common law or whatnot to assist in the  
24 interpretation of a statute.

25 MR. ROBBINS: I agree.

1 JUSTICE JACKSON: But, if you agree  
2 that this is unambiguous, that Congress was  
3 giving people the right to enforce, you know,  
4 laws that gave them certain rights, and if you  
5 agree that -- that FNHRA is a law, maybe you  
6 don't --

7 MR. ROBBINS: I do.

8 JUSTICE JACKSON: Okay. Then it seems  
9 to me odd to suggest that we as a Court can  
10 reinterpret the word "law" in Section 1983 to  
11 carve anything out.

12 MR. ROBBINS: An old professor of mine  
13 wrote a book in which he said: No answer is  
14 what the wrong question begets. Whether or not  
15 "laws" is supple enough to include 1983 or  
16 FNHRA, that's the wrong question, respectfully.

17 The right question is, what are the --  
18 what rights are secured by law within the  
19 meaning of 1983? And this Court has  
20 consistently held that when it comes to Spending  
21 Clause statutes, the common law of contracts  
22 gives us the clearest window into what 1983  
23 covered.

24 JUSTICE JACKSON: But that -- isn't  
25 that only -- isn't that only if there was some



1 ambiguity about what rights are being secured by  
2 the term "laws"? And isn't your answer one that  
3 has to reference what Congress would have  
4 intended?

5 What I don't understand is why your  
6 argument -- why you've come to the conclusion  
7 that when Congress wrote laws in 1983 it was  
8 thinking, oh, but not the laws that we enact  
9 pursuant to our Spending Clause power. Those  
10 are not the ones --

11 MR. ROBBINS: Yeah.

12 JUSTICE JACKSON: -- we intend to be  
13 secured by this. I see no evidence of that  
14 anywhere.

15 MR. ROBBINS: I -- I -- I'm not  
16 contending that there is affirmative evidence  
17 that the -- that the 1871 -- the Congress that  
18 enacted 1983 in -- in -- in 1871 actually had  
19 third-party beneficiary principles in mind.

20 JUSTICE JACKSON: But isn't that what  
21 you have to have in order for --

22 MR. ROBBINS: No, it is not. The --  
23 the way this Court has talked about common law  
24 principles is that it is presumed that Congress  
25 adopts common law principles, Justice Jackson,

1 unless there is affirmative evidence that they  
2 did not.

3 JUSTICE JACKSON: And the explicit  
4 language of the statute is not affirmative  
5 evidence to the extent that it conflicts with  
6 the -- the state of the common law.

7 MR. ROBBINS: Oh, I -- well, if -- if  
8 I thought there was text that actually  
9 foreclosed the adoption of common law  
10 principles, I would be the first to agree with  
11 you, Your Honor.

12 But I find no such evidence that FNHRA  
13 or 1983 abrogates the common law against which  
14 1983 was enacted. And when we ask the question  
15 what rights are secured by law, I contend that  
16 it is the marriage of these two statutes, 1983,  
17 enacted in 1871 and amended to add laws in '74,  
18 and FNHRA, enacted in 1987, and they both bring  
19 the old soil with them.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 Mr. Fisher.

23

24

25

1                   ORAL ARGUMENT OF THOMAS M. FISHER  
2                   FOR INDIANA, ET AL., AS AMICI CURIAE,  
3                   SUPPORTING THE PETITIONERS  
4                   MR. FISHER: Mr. Chief Justice, and  
5 may it please the Court:  
6                   Twenty years after Gonzaga,  
7 Section 1983 Spending Clause cases are  
8 unpredictable, with three consequences of  
9 particular concern for states. First, they  
10 frustrate informed state assessment of Spending  
11 Clause programs. Second, they disrupt state  
12 efforts to administer complex spending programs  
13 using scarce resources. And, third, they --  
14 they prevent states from pursuing policies  
15 valued more highly than full federal funding.  
16                   Fundamentally, private enforcement of  
17 federal spending conditions takes officials off  
18 the political hook for policy decisions and  
19 leaves voters without any elected officials to  
20 blame. Accordingly, the Court should finish  
21 what it started in Gonzaga and hold that federal  
22 spending conditions are not privately  
23 enforceable unless Congress expressly so  
24 provides.  
25                   I welcome the Court's questions.

1 CHIEF JUSTICE ROBERTS: Well, Gonzaga  
2 I -- I wouldn't say went that far because it  
3 didn't, but it imposed a pretty high bar in  
4 terms of the evidence that was required. Why  
5 isn't that sufficient?

6 MR. FISHER: Well, it held --

7 CHIEF JUSTICE ROBERTS: Unambiguous --  
8 it used words like "unambiguous" and so on and  
9 so forth.

10 MR. FISHER: I think the proof is in  
11 the pudding here, Chief Justice. The lower  
12 courts are unable to come to any kind of  
13 consistent decision-making with respect to  
14 Medicaid and other Spending Clause programs.  
15 They're all over the map. And I think that,  
16 notwithstanding the -- the use of the term  
17 "unambiguous," lower courts are finding  
18 everything quite ambiguous.

19 And I think that's why we think of it  
20 in terms of, if -- if the Court wants to stick  
21 with a -- a framework such as Gonzaga, maybe the  
22 way to do it is to say: Well, by "unambiguous,"  
23 we mean express right of action. I think that  
24 that's probably the only way to get away from  
25 such a flexible standard and get to a rule that

1 actually is meaningful.

2 JUSTICE JACKSON: You don't read 1983  
3 as being an express right of action?

4 MR. FISHER: Well, of course, it's a  
5 -- it's an express right of action, but I -- I  
6 agree with Mr. Robbins that the question is:  
7 What did Congress -- what could Congress -- what  
8 can we infer that they thought they were doing  
9 at the time? And I think it's critical that --  
10 well, it -- it's at least very important, if not  
11 critical, that 1983 is -- is properly thought  
12 of, I think, as a tort statute.

13 JUSTICE JACKSON: Yes.

14 MR. FISHER: Not a contract statute.

15 JUSTICE JACKSON: Yes.

16 MR. FISHER: And we're talking here  
17 about contracts, about who can enforce them.  
18 And the kind of -- of entitlement programs that  
19 we deal with today simply weren't around in  
20 1874.

21 JUSTICE JACKSON: No, no, no. But --  
22 but Mr. Robbins says -- you say tort statute,  
23 1983, totally agree with you, that seems to be  
24 what Congress was doing. So why does the common  
25 law of contracts have any role in us trying to

1 understand what 1983 is about?

2 MR. FISHER: Precisely because this  
3 Court has talked about it in -- in Pennhurst and  
4 in other cases that Spending Clause programs are  
5 in the nature of a contract.

6 JUSTICE JACKSON: Yeah, but you're --  
7 you're skipping ahead. Now I -- I'm just  
8 talking about what Congress would have intended  
9 at the time that 1983 was enacted.

10 MR. FISHER: Precisely. And I think  
11 Congress, at the time 1983 was enacted, was  
12 thinking of torts, not third-party contract  
13 enforcement rights, which I think is the proper  
14 analogy to this type of case.

15 So I think that that's why there's  
16 such a poor fit between 1983 and Spending Clause  
17 on -- you know, statutes on their own. They --  
18 they just don't coincide historically, I think.

19 JUSTICE BARRETT: Mr. Fisher, why  
20 wouldn't your problem about the lower court  
21 confusion be addressed by our simply saying:  
22 Listen, Gonzaga is the more recent case and it  
23 laid down a stricter standard than did Blessing,  
24 and so Gonzaga is where you look?

25 MR. FISHER: With respect, Your Honor,

1 I think that if -- if the Court were to do that,  
2 we -- states would be back here in case after  
3 case after case asking for clarification. If  
4 Gonzaga didn't do it talking about unambiguous  
5 rights, I don't think another restatement of  
6 that is going to -- is going to do the trick.

7 I think the Court has to be far more  
8 explicit about that. It has to reject certainly  
9 Wilder, which lower courts, including in this  
10 case, continue to cite. And I think it needs to  
11 set forth a -- a -- a very precise rule that  
12 lower courts know that they have to follow, and  
13 that would be no implied rights through 1983 and  
14 Spending Clause statutes.

15 JUSTICE SOTOMAYOR: Counsel, your --

16 CHIEF JUSTICE ROBERTS: I thought we

17 --

18 JUSTICE SOTOMAYOR: I'm sorry, Chief.

19 CHIEF JUSTICE ROBERTS: Just very  
20 briefly. I thought we did drive a wooden stake  
21 through Wilder in Gonzaga and Armstrong. It's  
22 pretty -- pretty explicit.

23 MR. FISHER: I -- I agree. But lower  
24 courts don't. They cite Wilder all the time,  
25 and especially in the context of Medicaid

1 litigation, we can't get around Wilder.

2 That is the case --

3 JUSTICE SOTOMAYOR: So why don't you  
4 bring us a case where the right is more  
5 ambiguous? This case doesn't seem to present  
6 that confusion that you seem to be referring to.

7 MR. FISHER: Well, regardless of -- of  
8 this particular case, I will submit this --

9 JUSTICE SOTOMAYOR: No, we're not  
10 asked to give advisory opinions.

11 MR. FISHER: Right.

12 JUSTICE SOTOMAYOR: We have a standing  
13 precedent.

14 MR. FISHER: Right.

15 JUSTICE SOTOMAYOR: You're asking us  
16 to overrule it. As the Chief said, Gonzaga and  
17 Blessing came after Wilder and they limited its  
18 holding very clearly. You're now asking us to  
19 overturn all these programs.

20 But neither the federal government nor  
21 the states can possibly investigate and remedy  
22 every violation of these rights that are given  
23 to people. 1983 speaks clearly. They have a  
24 judicial remedy. Why shouldn't we just respect  
25 our precedent?



1           MR. FISHER: Well, I think we -- what  
2 we have through spending statutes is a  
3 relationship, a -- a -- that -- that Congress  
4 establishes between states and the federal  
5 government. And I think, in fact, if you look  
6 at something like Medicaid, the only lawful  
7 directive is to the Secretary. And so it's, I  
8 think, important to look at these statutes more  
9 broadly.

10           But I will say also, you know, there  
11 are other cases waiting in the wings if this  
12 Court wants to wait to get to that issue  
13 elsewhere. But I don't think that -- that, you  
14 know, it's going to help anybody just to address  
15 FNHRA in this case. I think it's going to help  
16 a lot if the Court gets at the fundamental  
17 question about, you know, generally speaking,  
18 when are Spending Clause statutes privately  
19 enforceable in 1983 cases.

20           CHIEF JUSTICE ROBERTS: Justice  
21 Thomas, anything?

22           Justice Alito?

23           JUSTICE ALITO: Well, when you say  
24 that 1983 is about torts and not about  
25 contracts, do you mean to say that: If a

1 condition of a Spending Clause law was that the  
2 state agrees to be sued under 1983 for rights  
3 conferred by that statute, that that could not  
4 be the basis for a 1983 claim?

5 MR. FISHER: No, I think that's  
6 exactly the sort of thing that -- that we want  
7 Congress to have to say. I think the point is  
8 that, you know, it's not that Congress can't  
9 direct something here and specifically when it's  
10 extending an offer to states and states can  
11 agree with it in an informed way.

12 But just to try to -- without that,  
13 try to map onto 1983 what is essentially a  
14 third-party contract relationship I think is  
15 just an ill fit to begin with.

16 JUSTICE ALITO: You -- you -- so you  
17 just want proof beyond a reasonable doubt --

18 MR. FISHER: I --

19 JUSTICE ALITO: -- basically?

20 MR. FISHER: -- I want an express  
21 statement, a clear statement. I think, you  
22 know, there is -- there is a useful analogy here  
23 perhaps even to sovereign immunity, and that's  
24 the kind of thing that we want with respect to  
25 the right of action.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Sotomayor?

3 JUSTICE SOTOMAYOR: No further  
4 questions.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?  
6 Justice Jackson?

7 JUSTICE JACKSON: Yeah, I would just  
8 say that clear statement rules in the Court's  
9 precedents usually exist against the backdrop of  
10 the kinds of rights like sovereign immunity or  
11 habeas or that sort of thing.

12 And so it just seems odd to me that in  
13 this situation your position would be that  
14 Congress had to be clearer than saying all laws  
15 and rights created under the Constitution.

16 MR. FISHER: Well, I think it goes  
17 back to that fundamental state/federal  
18 relationship, which is akin in some respects to  
19 sovereign immunity and to that inquiry.

20 Congress can't go beyond its  
21 enumerated powers. It can't direct states to do  
22 particular things. But it can invite states to  
23 do them by extending, you know, an offer and the  
24 states accepting.

25 And I think part of that relationship

1 and making sure that there is legitimacy to that  
2 broader, you know, exhibition of power is a  
3 clear statement: Here is what you're in for if  
4 you -- if you take this money. Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Mr. Snyder.

8 ORAL ARGUMENT OF BENJAMIN W. SNYDER  
9 FOR THE UNITED STATES, AS AMICUS  
10 CURIAE, SUPPORTING NEITHER PARTY

11 MR. SNYDER: Mr. Chief Justice, and  
12 may it please the Court:

13 For half a century, this Court has  
14 recognized that Section 1983 means what it says,  
15 providing an express cause of action that by  
16 default applies to rights created by any federal  
17 statute.

18 Petitioners provide no sound basis for  
19 revisiting that precedent.

20 First, they offer no evidence that the  
21 Congress that enacted Section 1983 would have  
22 viewed breach-of-contract suits by third parties  
23 as remotely relevant to the new tort it was  
24 creating.

25 Second, Petitioners can't show that

1 their rule was the sort of well-settled  
2 background principle that Congress incorporates  
3 into a statute silently.

4 And, finally, Congress has  
5 affirmatively confirmed that some rights created  
6 in the Social Security Act are enforceable  
7 through Section 1983. Disregarding that  
8 ratification would unsettle decades of  
9 legitimate legislative reliance.

10 This Court should accordingly reaffirm  
11 the framework that it applied in *Gonzaga* and  
12 *Blessing*. Applying that framework here,  
13 however, we agree that Congress displaced  
14 Section 1983 in FNHRA, and we therefore ask the  
15 Court to reverse on that basis alone.

16 I welcome the Court's questions.

17 CHIEF JUSTICE ROBERTS: So you think  
18 -- the same question I posed to Mr. Robbins. In  
19 terms of looking to see if there's a  
20 comprehensive remedy, do administrative remedies  
21 provided by the Secretary count?

22 MR. SNYDER: So I think we would  
23 articulate the standard, frankly, much like  
24 Justice Kagan did. We think that they can count  
25 in some circumstances. We certainly don't think

1 that they count in all circumstances.

2 This Court has said that ordinarily a  
3 state administrative remedy is not sufficient to  
4 displace Section 1983. But, for two reasons, we  
5 think that the -- the remedy that Congress  
6 created here is -- is sufficient to displace  
7 1983.

8 The first is that it is an extensive  
9 system of remedies that include enforcement  
10 mechanisms by the Secretary himself. So the  
11 states administer FNHRA in the sense that they  
12 provide surveyors who go -- go out to each  
13 facility each year to make sure that the -- the  
14 facilities are in compliance with FNHRA.

15 But there is also an additional  
16 process by which the Secretary can impose  
17 sanctions on each facility. They can impose  
18 civil penalties of up to \$10,000 per day per  
19 violation. They can cut off further Medicaid  
20 funding at the facility. They can require the  
21 installation of new management at the facility.  
22 And they can even order the facility to close.

23 So we think those administrative  
24 mechanisms by the Secretary are significant.

25 CHIEF JUSTICE ROBERTS: I understand

1     how you -- how administrative remedies that  
2     lessen the burden on the -- on the -- on the  
3     recipient, the states, certainly could be taken  
4     into account.

5                     But, if the requirement is that the  
6     states know unambiguously what they're agreeing  
7     to, how can administrative remedies that expand  
8     their liability be taken into account?

9                     MR. SNYDER:    So --

10                    CHIEF JUSTICE ROBERTS:  Taken into  
11     account the other way.

12                    MR. SNYDER:    So, Mr. Chief Justice,  
13     when this Court has talked about the unambiguous  
14     requirements in its -- its 1983 cases, it's  
15     really focused on whether the right was set out  
16     unambiguously in the statute.  The Court hasn't  
17     talked about that unambiguous requirement in the  
18     second part of the Gonzaga inquiry.  So I think  
19     that's a partial answer.

20                    The other thing I would say is that  
21     these administrative enforcement mechanisms are  
22     laid out in the statute.  Now they're elaborated  
23     on in regulations, but the statute itself  
24     provides for all of the enforcement mechanisms  
25     that I just described, and so the state knows

1 about those.

2 I -- I -- I don't --

3 CHIEF JUSTICE ROBERTS: Well, I mean,  
4 one of them is that voice grievances. I mean,  
5 that certainly doesn't set out in the statute  
6 any -- any awareness of what type of remedies  
7 are going to be provided in that situation.

8 MR. SNYDER: No, that's true. And so  
9 the -- the remedies that I described are not  
10 remedies for grievances. Grievances tend to be  
11 resolved at the facility level, or a nursing  
12 home resident can also file grievances with the  
13 state long-term care ombudsman, who can help to  
14 bring about an amicable resolution of those  
15 problems.

16 The remedies that I was describing  
17 come either from complaints, which are more  
18 formal filings with the state survey commission  
19 or State Survey Agency or through notice to HHS,  
20 which can then send out a federal survey team if  
21 it -- if it deems that appropriate to impose  
22 those remedies.

23 JUSTICE KAVANAUGH: Is there a dis --  
24 sorry. Are you --

25 MR. SNYDER: So I was going to go back



1 to the other thing that I think is significant  
2 here and why we think this administrative  
3 enforcement mechanism is sufficient.

4           We think that ordinarily -- Justice  
5 Kagan, you were getting at this -- ordinarily,  
6 when you have a system in which all of the  
7 regulated parties are state actors, and Congress  
8 creates an administrative enforcement mechanism,  
9 it would be unclear whether Congress intended  
10 that administrative mechanism to be exclusive or  
11 if, instead, Congress just assumed that  
12 Section 1983 would provide a background default  
13 rule that would also allow private suits.

14           What's different about this case is  
15 that Congress was acting in an area where a  
16 substantial number of the participants are  
17 private parties, and Congress contemplated  
18 providing a private cause of action against  
19 those private parties but left that out of the  
20 ultimate bill it enacted.

21           And so we know that Congress believed  
22 that the administrative enforcement mechanism it  
23 was creating was sufficient for the 90 percent  
24 of nursing home residents who -- who live in  
25 privately operated -- operated facilities, and

1 we think that's a very strong indication that it  
2 -- it didn't believe that a private cause of  
3 action --

4 JUSTICE KAVANAUGH: That's an unusual  
5 line to draw and would be a new line in the case  
6 law. That's not to say it's not a good line  
7 here. But --

8 MR. SNYDER: I -- so --

9 JUSTICE KAVANAUGH: -- that would be  
10 -- that would be different.

11 MR. SNYDER: I -- I agree with that.  
12 I -- I mean, we think that this case is  
13 different from the other cases that this Court  
14 has considered. The -- the cases in which --

15 JUSTICE KAVANAUGH: Can I -- keep  
16 going.

17 MR. SNYDER: I -- I don't know that I  
18 was going to say anything valuable.

19 JUSTICE KAVANAUGH: Okay. Well, on  
20 the point about administrative remedies, I'm  
21 trying to get this sorted out, as you heard.

22 So state administrative remedies are  
23 different from private administrative remedies  
24 in the statute for purposes of the analysis, or  
25 are they considered the same?

1           MR. SNYDER: So the -- the -- the  
2 statute gives the Secretary --

3           JUSTICE KAVANAUGH: No, I mean, as a  
4 -- in the 1983 case law in this area, are state  
5 administrative remedies that are available  
6 considered differently from private  
7 administrative remedies? Do you understand the  
8 question?

9           MR. SNYDER: So I -- I'm not sure I  
10 do. I'm trying to -- so I would say that this  
11 Court has said that -- that state administrative  
12 remedies are ordinarily not enough.

13           JUSTICE KAVANAUGH: Yeah.

14           MR. SNYDER: We think that it is  
15 significant that some of the administrative  
16 remedies available here are not state but rather  
17 federal. I'm not sure if that's the distinction  
18 you're --

19           JUSTICE KAVANAUGH: That's -- that's  
20 the distinction.

21           MR. SNYDER: -- you're drawing. So --

22           JUSTICE KAVANAUGH: That is. That is  
23 the distinction.

24           MR. SNYDER: -- we do think that  
25 that's significant. We don't think that every

1 time there is a federal administrative remedy  
2 that is necessarily preclusive of resort to  
3 Section 1983.

4 JUSTICE KAVANAUGH: Okay. So let me  
5 stop you there just so I can get the analysis  
6 straight.

7 If you didn't have your argument about  
8 the private state nursing homes, so assume you  
9 did not have that argument here, would the  
10 private administrative remedies be enough to  
11 preclude the 1983 suit under our case law in the  
12 view of the government?

13 MR. SNYDER: I think it would be a  
14 much closer question and I think it probably  
15 would not be enough. We -- we agree with  
16 Justice Kagan that there needs to be some  
17 incompatibility or some tension. And I'm happy  
18 to talk through --

19 JUSTICE KAVANAUGH: And what do you --  
20 what do you do about the sentence in the case  
21 law that was referred to by the other side that  
22 says the -- the dividing line is private  
23 remedies?

24 MR. SNYDER: So I -- I -- I guess I  
25 haven't -- I didn't take that to be articulating

1 a very precise line between exactly which ones  
2 are sufficient and which ones aren't.

3 JUSTICE KAVANAUGH: Well, it says:  
4 "The existence of a more restrictive private  
5 remedy for statutory violations has been the  
6 dividing line between those cases in which we  
7 have held" -- you know, then it goes on. That's  
8 in Rancho Palos Verdes.

9 Now later in the opinion it refers to  
10 private judicial. So I'm just trying to figure  
11 this out.

12 MR. SNYDER: So -- so, to the extent  
13 that the Court was talking about the dividing  
14 line between those cases in which it's actually  
15 found Section 1983 displaced and the cases where  
16 it hasn't, I think just descriptively the line  
17 is the availability of private judicial  
18 remedies. In each of those three cases, there  
19 was a private judicial remedy.

20 Now, in cases where this Court has  
21 found that Section 1983 was not displaced, the  
22 Court has emphasized the lack of either a  
23 judicial or an administrative mechanism.

24 And so we think the fact that the  
25 Court has asked about the availability of an

1 administrative mechanism suggests that in some  
2 cases that could be sufficient, and we think  
3 that it's sufficient here.

4 JUSTICE ALITO: When you rely on the  
5 fact that 90 percent of the nursing homes are  
6 private, I'm sure you anticipate what's going to  
7 come next. So --

8 MR. SNYDER: Can I do the hypo?

9 JUSTICE ALITO: Yeah, go ahead. Ask  
10 your own.

11 MR. SNYDER: So what if it's 50/50?

12 JUSTICE ALITO: Yeah.

13 (Laughter.)

14 MR. SNYDER: And -- and our answer is  
15 the same in that case. I mean, the -- frankly,  
16 it's -- it's helpful atmospherically that the  
17 number is 90/10. But the thing that's  
18 significant for us is that you're not in the  
19 situation where Congress would have just assumed  
20 that Section 1983 applied for all of the places  
21 in which the right was being established.

22 It -- so it's more of a binary  
23 distinction and the percentage just happens to  
24 be helpful.

25 JUSTICE SOTOMAYOR: So I look at --

1 JUSTICE KAGAN: How low can you go?

2 MR. SNYDER: We got as low as -- as  
3 10 percent of private facilities. And I think  
4 my answer was still there. Below that, Congress  
5 may have just --

6 JUSTICE KAGAN: Ten percent of private  
7 facilities?

8 MR. SNYDER: I don't want to suggest  
9 that that's an incredibly clear line-drawing  
10 problem or line. The -- the thing that we are  
11 getting at is whether Congress would have  
12 assumed that Section 1983 was providing a -- a  
13 backstop in most of the cases.

14 And, here, Congress wouldn't have done  
15 that because Congress knew that for a  
16 significant number of the cases where it was  
17 creating rights, there would be no private cause  
18 of action. And so it must have concluded that  
19 the administrative mechanism it was establishing  
20 in FNHRA itself was comprehensive and sufficient  
21 at the federal level to protect those rights.

22 JUSTICE SOTOMAYOR: But why? In  
23 Indiana -- we have an amicus that tells us that  
24 Indiana, the majority of nursing homes are  
25 state-owned and that in Pennsylvania --

1 immunizes government officials from any recovery  
2 whatsoever.

3           So why should we assume that Congress  
4 wanted to take away a 1983 right as an  
5 additional remedy for a violation of a state  
6 obligation? Given that these other things could  
7 immunize actors, why is this in tension in any  
8 way?

9           MR. SNYDER: So, Justice Sotomayor,  
10 you -- you mentioned the numbers in Indiana.  
11 That's a relatively recent development that CMS  
12 is aware of and is considering, but I don't  
13 think that would have been as --

14           JUSTICE SOTOMAYOR: Well, but it -- it  
15 doesn't -- it doesn't destroy the basis of my  
16 question, which is, if what we're looking at is  
17 whether Congress intended these mechanisms to do  
18 away with other remedies, we know it said no  
19 explicitly in the statute. And I take it at its  
20 word.

21           And, secondly, those other remedies  
22 have benefits that are independent from the  
23 privately owned.

24           MR. SNYDER: So a couple of things on  
25 that. One is that within the administrative



1 enforcement mechanism that Congress created, it  
2 did address this concern about sort of -- I -- I  
3 think the negative characterization would be the  
4 state regulating state entities. And in that  
5 context, Congress said that the Secretary would  
6 have responsibility for certifying state  
7 facilities and gave the Secretary the ability to  
8 impose enforcement remedies at state-operated  
9 facilities. So we think that Congress accounted  
10 for it in that way.

11           You mentioned that Congress said  
12 expressly no in the statute, and I think you  
13 were referring to (h)(8), so I wanted to wanted  
14 to address that provision. We -- we understand  
15 that provision to operate in the same way as the  
16 provisions that this Court addressed in Sea  
17 Clammers and Rancho Palos Verdes. Congress, in  
18 that provision, was attempting to ensure that  
19 rights that -- that residents already had  
20 independently of FNHRA would not somehow be  
21 eliminated through the adoption of FNHRA.

22           It spoke specifically to -- sorry.  
23 I'm looking at the language. The -- it  
24 shouldn't be construed as limiting -- sorry --  
25 that the remedies it was creating were in

1 addition to those otherwise available under  
2 state or federal law.

3 We think that that "otherwise  
4 available" means rights that -- rights and  
5 remedies that the residents would have had  
6 without the adoption of FNHRA. We don't think  
7 that was speaking one way or the other to  
8 whether Congress intended for FNHRA to allow  
9 residents to bring new Section 1983 suits they  
10 hadn't been able to bring before.

11 JUSTICE SOTOMAYOR: It seems to me  
12 that if Congress was explicitly looking to state  
13 regulation that it would want a cause of action  
14 that already existed to apply. By mentioning  
15 the state and the obligation for the federal  
16 government to step in and regulate it more, one  
17 would think then that 1983 would have a greater  
18 attraction there.

19 MR. SNYDER: So, Justice Sotomayor, we  
20 -- we just draw a difference in -- a different  
21 inference from the way Congress structured the  
22 statute. We also think, to -- to get to the  
23 point of the tension between the administrative  
24 enforcement mechanism that Congress created and  
25 Section 1983 remedies, that Congress

1 specifically directed the ways in which money  
2 collected through civil penalties are be -- are  
3 to be spent, for example, and focused that on  
4 the -- the welfare of residents more broadly, as  
5 opposed to just going to an individual resident  
6 whose rights had been wronged.

7           And so allowing Section 1983 suits  
8 that would sort of bypass that administrative  
9 enforcement mechanism and lead to funds being  
10 taken out of the nursing home system would be  
11 inconsistent with that congressional choice.

12           I do want to take a moment -- I  
13 haven't gotten any questions on the first  
14 question presented, but I do want to bring up  
15 the 1994 statutes, which, to the extent that  
16 there is any doubt about whether Thiboutot was  
17 correctly decided, we think that the two  
18 legislative ratifications that Congress adopted  
19 in 1994 put that to rest. In those statutes,  
20 Congress wrote that "in an action brought to  
21 enforce a provision of the Social Security Act,  
22 such provision is not to be deemed unenforceable  
23 because of its inclusion in a section of the Act  
24 requiring a state plan."

25           I don't think there's any way to read

1 that legislative text other than as embracing a  
2 -- a congressional expectation that at least  
3 some of the provisions of the Social Security  
4 Act would be enforceable under Section 1983.

5 My friend's approach on the first  
6 question presented would say that no provisions  
7 of the Social Security Act can ever be enforced  
8 under Section 1983. We think that was wrong as  
9 an original matter, but we also don't think that  
10 it can be reconciled with those 1994 statutes.

11 With that, I'm happy to rest on our  
12 brief.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Justice Thomas?

16 JUSTICE ALITO: Well, on your  
17 90 percent argument, I don't know whether this  
18 is apt, but do you happen to know what the  
19 breakdown of public and private covered entities  
20 is under Title IX?

21 MR. SNYDER: I don't. I'm sorry. I  
22 will say to the extent that it's -- it's  
23 relevant, this same question came up in -- in  
24 Gonzalez, which involved -- similarly involved  
25 schools. And Justice Ginsburg asked at argument

1 about this same sort of problem, that it would  
2 be kind of strange to say that Section 1983 is  
3 available to enforce rights against public  
4 schools but not private schools that are subject  
5 to the same requirements.

6 Now that's not the basis on which the  
7 Court decided it, but, to the extent that  
8 Respondent has -- have suggested that this is a  
9 new idea that is coming up here for the first  
10 time, that's at least some indication that  
11 people have thought about it before.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Sotomayor?

14 Justice Kagan?

15 JUSTICE KAGAN: Well, it does seem  
16 kind of a new idea. I mean, you know, this is a  
17 statutory interpretation question. We're --  
18 we're trying to figure out whether one scheme is  
19 compatible with another scheme. You're not  
20 looking at text. You're not looking at  
21 structure. You're not looking at history.  
22 You're looking at, like, what you think Congress  
23 knew about the market composition. The -- and  
24 that -- that does seem -- Justice Kavanaugh said  
25 unusual. It seems unusual.

1                   MR. SNYDER:  So, Justice Kagan, the  
2                   best analogy we've been able to come up with is  
3                   that in -- I'm hesitant to say this, but in this  
4                   Court's ACCA cases, the Court has sometimes  
5                   looked --

6                   JUSTICE KAGAN:  You should hesitate to  
7                   say that.

8                   (Laughter.)

9                   MR. SNYDER:  But the Court has  
10                  sometimes looked at what was the state of play  
11                  when Congress adopted -- adopted ACCA.  What --  
12                  how would it have played out?  You know, what  
13                  were the -- the state rules of burglary in -- in  
14                  -- at the time it was adopted?  And we think the  
15                  analysis is, you know, similar here in that  
16                  you're looking at what would Congress have  
17                  expected.

18                  CHIEF JUSTICE ROBERTS:  Justice  
19                  Kavanaugh?

20                  Justice Barrett?

21                  Justice Jackson?

22                  Okay.  Thank you, counsel.

23                  Mr. Tutt.

24

25

1 ORAL ARGUMENT OF ANDREW T. TUTT

2 ON BEHALF OF THE RESPONDENT

3 MR. TUTT: Thank you, Mr. Chief

4 Justice, and may it please the Court:

5 The difference between our position  
6 and the United States's position in this case is  
7 unbelievably narrow. The United States agrees  
8 that this Court should not overrule decades of  
9 precedent holding that rights secured by  
10 Spending Clause laws are enforceable under  
11 Section 1983. And the United States agrees that  
12 FNHRA creates two enforceable rights. And we  
13 are obviously right about those points.

14 The only point of departure is that  
15 the United States believes that Congress showed  
16 a clear intention to preclude access to 1983 by  
17 extending FNHRA rights to residents of private  
18 nursing homes, even though they're not able to  
19 use 1983 to enforce those rights because 1983  
20 only permits suits against government actors.

21 That gets the statute backwards.  
22 FNHRA's text and context show that when Congress  
23 enacted the statute in 1987, it wanted to  
24 preserve access to all available remedies for  
25 FNHRA violations to the greatest extent

1 possible.

2           Thus, as no one disputes, Congress  
3 expressly preserved the ability of nursing home  
4 residents to sue to enforce their FNHRA rights  
5 in private lawsuits under state tort law. And,  
6 as the United States concedes, Congress  
7 expressly preserved the ability of the Attorney  
8 General to enforce these rights under CRIPA,  
9 which is just Section 1983 for the Attorney  
10 General.

11           We think it is equally clear that  
12 Congress wanted to preserve access to  
13 Section 1983 for two reasons. First, the  
14 statute says it. The statute's Savings Clause,  
15 on Joint Appendix 123, means what it says. The  
16 Savings Clause says that other remedies will  
17 also be available to enforce FNHRA. The  
18 legislative history confirms that that is the  
19 correct reading of the text.

20           Second, Congress had good reason to  
21 preserve 1983 specifically for residents of  
22 government nursing homes. Congress knew that  
23 sovereign immunity often makes it more difficult  
24 or impossible to sue government nursing homes.  
25 Congress also understood that when states own



1 the nursing homes, FNHRA's scheme, which depends  
2 on states to enforce FNHRA's requirements, falls  
3 apart.

4 And Congress enacted FNHRA against a  
5 background of numerous laws, like CRIPA, RLUIPA,  
6 RFRA, and Section 1983 itself, that specifically  
7 hold governments to a higher standard to protect  
8 rights than private institutions.

9 Finally, I would also like to  
10 reiterate that, even aside from all of the  
11 above, the actual standard in this Court's cases  
12 for finding implied preclusion is exceptionally  
13 high. It requires incompatibility between the  
14 remedies in the statute and Section 1983. There  
15 is no incompatibility here.

16 I welcome the Court's questions.

17 CHIEF JUSTICE ROBERTS: You -- you  
18 said -- you -- you quoted the provision  
19 referenced in the Joint Appendix about other  
20 remedies. Mr. Robbins told us that the "other"  
21 means other than the particular statute at  
22 issue. What -- what is your response to that?

23 MR. TUTT: I don't think it makes  
24 sense grammatically. It says "the remedies  
25 provided under this subsection shall be in

1 addition to those otherwise available under" --  
2 "under state and federal law.

3 "And so it's talking about the  
4 remedies in the statute that are for FNHRA  
5 violations. So these are taking funds away or  
6 they're actual remedies as the word "remedy" is  
7 used. It's not a -- it's not a sort of term of  
8 art.

9 If you compare that with the Savings  
10 Clause in Sea Clammers, it said the right to  
11 pursue other relief. And the Court found that  
12 provision ambiguous, then looked to the  
13 legislative history.

14 CHIEF JUSTICE ROBERTS: You're drawing  
15 a line between other remedies and other relief?

16 MR. TUTT: Yes. The -- well, it had  
17 -- the way it's structured grammatically, it  
18 actually says the right to pursue other relief,  
19 and so under other statutes.

20 So it's that the -- when the Congress  
21 used that in the Savings Clause, the Court  
22 deemed that provision ambiguous. But the  
23 statute also had strong indicia of true  
24 incompatibility with 1983.

25 It had citizens suit provisions that

1 limited the available relief under federal law.  
2 So, if you brought -- if you made 1983  
3 available, that Savings Clause was going to be  
4 doing a lot of work in the Sea Clammers case  
5 because it was going to be basically eliminating  
6 the private citizens suit provision. There was  
7 a true incompatibility because people would  
8 always use 1983.

9 CHIEF JUSTICE ROBERTS: That's a  
10 respect in which you depart from the Solicitor  
11 General?

12 MR. TUTT: Yes, Your Honor, yes.

13 JUSTICE JACKSON: Can I ask, wouldn't  
14 you have a stronger argument if the residents  
15 weren't given sort of individual administrative  
16 rights in this -- in this world? Maybe they  
17 aren't. And maybe I'm not reading the statute  
18 correctly. But I understood that Congress has a  
19 scheme now for allowing -- for requiring states  
20 to have plans that allow individual residents  
21 who have rights that they feel are being denied  
22 to have hearings, to have appeals, to cause the  
23 investigation of complaints.

24 And so I'm wondering whether the  
25 incompatibility might be coming from allowing

1 people to bring 1983 suits in lieu of following  
2 the very sort of comprehensive administrative  
3 processes that Congress has put in the statute.

4 MR. TUTT: Your Honor, I would -- I  
5 would just -- I have several answers to that  
6 question.

7 First, I would point you to the  
8 experience of Pennsylvania. So Pennsylvania  
9 actually has had it clearly the law that FNHRA  
10 is enforceable under 1983 for 10 years.

11 There have been a total of 44 lawsuits  
12 over those 10 years. So you're looking at four  
13 to five lawsuits per year. So --

14 JUSTICE JACKSON: But I'm not sure  
15 that's an answer. You're just saying people  
16 don't use 1983.

17 MR. TUTT: They don't use it in lieu  
18 -- yes, Your Honor. I'm saying they don't use  
19 it in lieu of the administrative remedies  
20 because the administrative remedies are supposed  
21 to be lightweight, easy to use, fast remedies  
22 that ultimately restore the status quo. That's  
23 the nature of many of the remedies in tension.

24 JUSTICE JACKSON: But I guess the  
25 question is, why isn't that what Congress

1 intended rather than giving people the -- the  
2 opportunity to get damages?

3 And I'm looking at the administrative  
4 remedies and I see that in some sections of them  
5 there are even civil penalties that can be  
6 extracted in the context of administration, and  
7 Congress doesn't say that money that you get  
8 goes to the victims of, you know, nursing home  
9 failures and -- and neglect, so it didn't seem  
10 as though Congress really was focused on making  
11 sure that individuals in the context of these  
12 nursing homes were getting paid or getting money  
13 in compensation.

14 MR. TUTT: Your Honor, I want to  
15 emphasize how the Savings Clause fits into this  
16 argument, because I think, even if you don't  
17 think it's an independent basis for ruling for  
18 us and gets us all the way there, it -- it tells  
19 us what Congress's intent was on this very  
20 question because it preserved state tort  
21 actions, state private damages actions for  
22 individuals against nursing homes that violate  
23 these rights.

24 And this is in the actual legislative  
25 history even more clearly than in the text of

1 the statute. So it confirms the text.

2 So that's -- that's how I understand.  
3 If they are -- if they are still permitting  
4 people to enforce these rights in private  
5 damages suits, just under state law, then why  
6 would they not also want to make available the  
7 remedy that very clearly applies in this exact  
8 situation, which is a remedy that permits you to  
9 sue for the deprivation of any rights secured by  
10 the laws?

11 JUSTICE JACKSON: And you don't think  
12 the answer is found in the fact that there's  
13 just -- you know, if they allow this federal  
14 right to go forward, it's really not going to be  
15 something that all of the people can avail  
16 themselves of or all of the people in nursing  
17 homes because of the idea that only a few of  
18 them are state-run?

19 MR. TUTT: Your Honor, we don't know,  
20 for instance, whether, even though 10 percent of  
21 nursing homes were public, whether the worst  
22 nursing homes were those 10 percent.

23 We don't know anything about what  
24 Congress knew, in fact, about the state of play  
25 in the nursing home industry. We don't know if

1 Congress expected that in 10 years' time it  
2 would be flipped around and would be 10 percent  
3 private and 90 percent public.

4 And it actually cashes out in this  
5 case because Indiana has made more than  
6 90 percent of its nursing homes public. So it  
7 is the exact flip reverse of the rest of the  
8 nation.

9 And for the individuals in those  
10 nursing homes who confront very draconian  
11 limitations on their ability to actually enforce  
12 these rights under state law, against state-run  
13 nursing facilities, it is really Section 1983  
14 that is filling the gap and making those rights  
15 real for those people.

16 Congress doesn't create rights with  
17 the expectation that, generally, with the  
18 expectation that someone else will come in and  
19 enforce those rights on your behalf.

20 The way that the Solicitor General  
21 thinks this scheme should work and -- and HHC is  
22 that you are given rights. You are told of  
23 these rights orally and in writing on admission  
24 to the nursing home. They say you have the  
25 right to be free from restraints. And your

1 family reads this and then, if you -- you don't  
2 actually have any rights to enforce.

3 You don't -- you -- the best that you  
4 can do is you can go to an administrative --

5 JUSTICE KAVANAUGH: Well --

6 JUSTICE ALITO: Aren't the --

7 JUSTICE KAVANAUGH: -- what's wrong  
8 with an administrative process, though, if it's  
9 comprehensive and works? And -- and so that's  
10 A.

11 And then, B, you know, we have twice  
12 said, and I know you'll want to put this in  
13 context, but we have twice said the existence of  
14 a more restrictive private remedy for statutory  
15 violations has been the dividing line.

16 And so take those two.

17 MR. TUTT: Well, Your Honor, the --  
18 the more restrictive private remedy language, as  
19 I read those cases, I thought it was referring  
20 to judicial -- federal judicial remedies. I  
21 thought that they were being used  
22 interchangeably, both because, especially if you  
23 read the Fitzgerald opinion, it says, you know,  
24 they would have circumvented and required  
25 procedures prior to filing suit in sort of



1 sentences that are right next to each other.

2           So -- so the way I understand private  
3 remedies is it really means federal judicial  
4 remedies. And that makes sense in the broader  
5 context of statutory interpretation, which is  
6 this Court doesn't want to get into the business  
7 of trying to mind read Congress about what did  
8 it know about the nursing home industry -- when  
9 it's not evident from the face of the statute --  
10 what did it know about the policy considerations  
11 of should people in the public nursing homes  
12 have --

13           JUSTICE KAVANAUGH: Well, if we -- if  
14 we're clear in the opinion deciding this case  
15 about this exact point, then at least Congress  
16 going forward will know what the deal is.

17           MR. TUTT: Well, it will to a -- it  
18 will to a certain extent, but it would also then  
19 -- if you adopt, for instance, the -- the United  
20 States's position --

21           JUSTICE KAVANAUGH: Put that aside.

22           MR. TUTT: Okay.

23           JUSTICE KAVANAUGH: Just the -- the  
24 private remedy point.

25           MR. TUTT: On the private remedy

1 point, these are really the opposite of  
2 comprehensive remedies. These are minimal  
3 state-level administrative remedies. They --  
4 they -- they are the equivalent of saying that  
5 the nursing home should make sure that if your  
6 rights are violated, it at least has some kind  
7 of process for you telling on the person who is  
8 abusing you.

9 The -- the -- the nursing home is  
10 required to then inform the state regulator, and  
11 then maybe the state regulator will take action.

12 In this very case, HHC continues to  
13 say that -- that we got all the relief that we  
14 were seeking. We got none of the relief that we  
15 were seeking. We didn't even -- we didn't even  
16 use any kind of grievance process. A private  
17 neurologist had to be hired to taper the drugs.  
18 There was no -- there was sort of no remedy from  
19 the nursing home for the actual chemical  
20 restraints that were applied to Mr. Talevski.

21 JUSTICE KAVANAUGH: What about the  
22 point that the Secretary can come in then, you  
23 know, in circumstances where there's been  
24 deprivations?

25 MR. TUTT: Your Honor, there may be a

1 process for getting to the Health and Human  
2 Services Secretary to actually get enforcement  
3 for rights violations by nursing homes.

4 If there was, I promise you this  
5 family would have preserved -- pursued it.

6 But, as far as I know, it was -- there  
7 was no process available. So, I mean, this  
8 family was crying out for help and using every  
9 possible lever at their disposal. Section 1983  
10 was the last resort. They went to seven medical  
11 malpractice attorneys and were turned away  
12 because the claim wasn't worth enough money in  
13 Indiana. It -- this is -- this is a life-saver  
14 for people who cannot actually make effective  
15 use of the administrative scheme, and that is  
16 how 1983 functions, and it is, as we understand  
17 it, how it has functioned in Pennsylvania.

18 So, empirically, these suits are  
19 brought actually mostly as injunctive actions to  
20 remedy systemic, egregious policies of actually  
21 violating the federal rights in FNHRA. So those  
22 are the kinds of suits that, as we understand  
23 it, are being brought.

24 JUSTICE KAVANAUGH: Can I ask --

25 CHIEF JUSTICE ROBERTS: Counsel --

1 JUSTICE KAVANAUGH: -- you then -- go  
2 ahead.

3 CHIEF JUSTICE ROBERTS: I was just  
4 going to say the -- your friend says that the  
5 policies were filed -- were followed, the  
6 alternative remedies, and that Mr. Talevski no  
7 longer had to take the medication and was  
8 entitled to return to the facility if he wished  
9 to do so.

10 MR. TUTT: Your Honor, with respect to  
11 the first question, as -- as pleaded in the  
12 complaint, he didn't -- didn't get that with  
13 respect to the chemical restraints. Instead, a  
14 private neurologist was hired and worked with  
15 the nursing home to have the -- the drugs  
16 removed.

17 With respect to the transfer, they won  
18 the administrative proceeding -- proceeding, and  
19 the nursing home still refused his readmission.  
20 And they pleaded with the state regulator -- and  
21 perhaps HHC can address this on rebuttal -- but  
22 it -- they were told you need to go to a state  
23 court and sue for a state injunction to force  
24 the nursing home to actually take action on the  
25 administrative order from the ALJ that you just

1 won. So that was the -- that was how this  
2 actually played out in practice.

3 And, of course, in the Anderson case  
4 in the Ninth Circuit, this was so -- this was  
5 considered to be such a systematic problem in  
6 the state of California that a suit was actually  
7 brought against the State of California to order  
8 the State of California to actually force the  
9 ALJ orders to be presumptively enforceable  
10 because nursing homes would be told under the  
11 state-level administrative process that they  
12 needed to take someone back and then they  
13 wouldn't.

14 And it is very difficult to think of  
15 this as a comprehensive remedial scheme when the  
16 remedy for being involuntarily evicted from your  
17 home by a nursing home is to go back to that  
18 place where you fear retaliation potentially,  
19 where if -- if you were involuntarily  
20 transferred in, for instance, the context of  
21 this case because you were being abused, you  
22 don't want to go back.

23 So the only available remedy isn't  
24 even the remedy that you would want.

25 JUSTICE KAVANAUGH: Can I -- can I ask

1 you then about -- so that's responsive to the  
2 one theory that you have to deal with on the  
3 comprehensive -- on the administrative scheme.

4 The SG has, as you're well aware, an  
5 entirely different theory for why it's  
6 implicitly precluded, and I think I still think  
7 that theory is unusual, but I'd like to hear  
8 your response to that.

9 And if you know, what would be the  
10 implications of that theory for all sorts of --  
11 Justice Alito alluded to that, but for other  
12 cases? You may not know the answer to that,  
13 but, if you know anything about that, I'd be  
14 interested.

15 MR. TUTT: Well, Your Honor, I -- I  
16 know that there are many Spending Clause  
17 programs where the -- where the entitlements --  
18 where there are rights-creating statutes that  
19 create rights that run against both private and  
20 public actors. And the Court has never drawn  
21 this line that somehow, if the right also runs  
22 against a private actor, it's a second-class  
23 right, even when you're in a public facility.

24 I mean, in the -- for any person who  
25 goes to a public nursing home, they don't go and

1 research sort of whether or not the private  
2 nursing homes also have a bill of rights. And  
3 so they read that bill of rights on a public  
4 nursing home's walls and they think: I've got  
5 these rights. And, usually, when you have  
6 rights against the government, you think I must  
7 have some kind of remedy. That -- that's one  
8 answer.

9           The other answer I want to give is  
10 it's just an incredibly unadministrable test  
11 that they're asking the Court to adopt, which  
12 would require, again, the Court to weigh policy  
13 considerations that it doesn't undertake in  
14 ordinary statutory interpretation analysis.

15           The Court actually has rules of  
16 statutory interpretation that resolve cases like  
17 this about implied repeal or implied preclusion.  
18 And those -- those are typically the way that  
19 the Court addresses this kind of situation  
20 because it doesn't want to get into empirical  
21 judgments about who is abusing -- you know, who  
22 is the worst actor, who -- who are these rights  
23 actually being created to protect, et cetera.

24           I mean, this Court's cases, Gonzaga  
25 especially, make it very clear what Congress has

1 to do to create rights. And this is the rare  
2 statute that meets those incredibly exacting  
3 standards for creating rights.

4 JUSTICE ALITO: What do you make of  
5 the statement in Gonzaga that the standard for  
6 determining whether an individual statutory  
7 right exists is "no less and no more than what  
8 is required for Congress to create new rights  
9 enforceable under an implied private right of  
10 action"?

11 MR. TUTT: We don't -- we don't  
12 disagree that that is the standard that we have  
13 to meet, but we do think that we meet it. We  
14 just don't have to meet that second step of the  
15 analysis. But we do have to show that there is  
16 a right as good as the right created in Title IX  
17 or the right created in Title VI, and we think  
18 we have that.

19 JUSTICE ALITO: Well, could you have  
20 sued under an implied private right of action?

21 MR. TUTT: Individuals -- when the  
22 regulations were in force before FNHRA was  
23 enacted, individuals attempted to bring suit,  
24 and I can't recall off the top of my head  
25 whether they were successful. I think that



1       there were mixed results on whether this was  
2       actually brought under a private right of  
3       action. I -- obvious -- or implied right of  
4       action. Obviously, under the Court's current  
5       case law, it could not be brought as an implied  
6       cause of action, we don't believe.

7                 But we do believe that it meets the  
8       test of Gonzaga. And it just fits like a glove  
9       with Section 1983, which is that it says you  
10      have these rights. These rights must be  
11      protected, the right to be free from chemical  
12      restraint. And then it fits in with  
13      Section 1983.

14                JUSTICE GORSUCH: Counsel --

15                JUSTICE ALITO: What -- what would you  
16      make of -- what would you make of the argument  
17      that the rights to which 1983 refers in general  
18      are different from the kind of rights that a  
19      person may assert under Spending Clause  
20      legislation? Because usually -- 1983 talks  
21      about rights secured by the Constitution and the  
22      laws, and, usually, in those instances, the laws  
23      in themselves confer the right. But Spending  
24      Clause legislation doesn't confer a right in and  
25      of itself. It's dependent on the recipient of

1 the money agreeing.

2           So would that -- does that make it  
3 necessary for you to show that, at the time of  
4 the adoption of 1983, it was generally  
5 understood that this type of right fell within  
6 the understanding of the rights to which 1983  
7 refers?

8           MR. TUTT: I -- I don't think so, and  
9 I'll give you a few answers. The -- the most  
10 important is that 1983 refers to new -- new  
11 statutes. You know, Justice Scalia in Blessing  
12 talked about the fact that new rights created in  
13 new statutes would still be presumptively  
14 enforceable under Section 1983. No one would  
15 dispute that. And we take the statute for what  
16 the words meant at the time, not necessarily for  
17 the scope of rights that would be protected.

18           But, even if you disagree with all of  
19 that, these are actually the kinds of rights  
20 that Section 1983 was enacted to protect, rights  
21 to bodily integrity and autonomy, fundamental  
22 rights, you know, if you map this onto the  
23 rights protected by the Constitution.

24           So, if you're asking if this kind of  
25 tort would be the kind of right that you could

1 enforce, I think the answer is an emphatic yes.  
2 If you're -- if you're asking about contract  
3 law, I don't think that the contract law analogy  
4 makes sense for numerous reasons. Most  
5 obviously, Spending Clause legislation like this  
6 didn't exist, and the -- and the kind of analogy  
7 to Spending Clause legislation didn't emerge  
8 until the 20th Century. So there's just no  
9 reliable way to even know that Congress would  
10 have thought that by using the spending power,  
11 as opposed to its commerce power, when enacting  
12 a rights-creating statute, it was making a  
13 fundamentally different decision with respect to  
14 its ratification of 1983.

15 JUSTICE THOMAS: Mr. Tutt, if you  
16 don't use the Spending Clause analogy, what  
17 would be the basis or the authority for creating  
18 the right in the first instance?

19 MR. TUTT: Your Honor, this -- this  
20 Court -- I think that the rights in this case  
21 could be -- could be conferred under the Court's  
22 broad spend -- Commerce Clause jurisprudence.

23 JUSTICE THOMAS: Well, let me back --  
24 I think I may have misstated that.

25 MR. TUTT: Yes.

1 JUSTICE THOMAS: If you don't use the  
2 contract analysis -- analogy, all these Spending  
3 Clause cases have been defended on that basis,  
4 so you would have to now create a new theory.  
5 That was a basis for saying they were  
6 constitutional. If you eliminate that, what  
7 does that leave you with?

8 MR. TUTT: Well, Your Honor, we -- we  
9 don't -- I think there's two steps to the  
10 question that you're asking me. The first is,  
11 if we don't use the Spending Clause -- the  
12 contract analogy, what test would we use to  
13 understand the constitutionality of Spending  
14 Clause legislation? But we don't actually  
15 dispute the -- the contract analogy for purposes  
16 of the constitutionality of these kinds of laws.

17 We don't say that -- that this isn't  
18 the kind of law that the state has to enter  
19 into, the agreement, knowingly and voluntarily  
20 and have clear notice -- we -- and unambiguous  
21 notice. We don't disagree with any of those  
22 things, which are, we think, the things that are  
23 key to the constitutionality of Spending Clause  
24 legislation.

25 The HHC wants to take that analogy one

1 step further and say that the Congress that  
2 enacted 1983 must have thought that that analogy  
3 that hadn't yet even really been explored by  
4 this Court would further extend to how 1983  
5 would be interpreted. And we don't -- we don't  
6 see -- I hope I'm being responsive.

7 JUSTICE THOMAS: Well, I think the  
8 problem is that it's one thing to have the  
9 contract analogy as a basis. And then, as you  
10 play it out, you say: Well, if you -- if you  
11 continue that, you say, well, who is this  
12 contract between? And that's been the basis.

13 It's the state is receiving the money,  
14 for example, under these conditions, so the  
15 national government can require them to do  
16 certain things. Then the next step would be:  
17 Does it also give a right to a third-party  
18 beneficiary to vindicate some of those rights?

19 That's the way we have done it. Now  
20 you're saying it's okay to have the contract  
21 analogy at the formation stage, but you can drop  
22 it along the way if it becomes inconvenient on  
23 the back end, that is, on the rights vindication  
24 stage -- at the rights vindication stage.

25 So I don't know if we've ever done

1 that, and I don't know if you can -- you can do  
2 that and still have the constitutional  
3 justification for it.

4 MR. TUTT: Well, Your -- Your Honor, I  
5 would just go back to Pennhurst, which really  
6 started this -- this off, and it applied the  
7 contract analogy but said that the rights are  
8 part of the contract. So, to the degree that  
9 you have individuals who are suing, it's because  
10 Section 1983 is part of the contract.

11 JUSTICE THOMAS: Okay. I agree. But  
12 is the beneficiary here a party to that  
13 contract? That's -- that's the rub.

14 MR. TUTT: Your Honor -- Your Honor,  
15 we -- we don't dispute that the -- the -- that  
16 Mr. Talevski was the beneficiary of this  
17 contract. We don't -- we don't dispute that if  
18 you -- if you want to think of it that way, but  
19 it's not material for purposes of the -- the  
20 analysis because Section 1983 says that he has  
21 the right to sue and the state promised that he  
22 would have the right to sue by entering into the  
23 agreement with the federal government to take.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel. Anything further?

1 JUSTICE THOMAS: No.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

3 Justice Kagan?

4 Justice Gorsuch?

5 Justice Barrett?

6 JUSTICE JACKSON: Just really quickly,  
7 wouldn't we have to believe that how the right  
8 came into being mattered to Congress? I mean,  
9 in response to both Justices Thomas and Alito,  
10 in order to get to the position of saying  
11 Spending Clause legislation is sort of carved  
12 out of 1983 because it confers these sort of  
13 conditional rights and doesn't confer them  
14 directly, doesn't that reduce to saying: We  
15 understand that how a right came into being  
16 mattered to Congress in order to reach that  
17 result?

18 MR. TUTT: I think that -- I think  
19 that that would be one way to understand the --  
20 the question and that -- that we don't -- we  
21 don't think that it did matter to Congress  
22 because there's nothing in the text of  
23 Section 1983 that -- that could be read to sort  
24 of care about the provenance of the rights  
25 you're trying to assert.

1 Thank you, Your Honor.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Mr. Robbins, rebuttal?

5 REBUTTAL ARGUMENT OF LAWRENCE S. ROBBINS

6 ON BEHALF OF THE PETITIONERS

7 MR. ROBBINS: Thank you, Mr. Chief  
8 Justice.

9 I -- I'd like to open with Justice  
10 Thomas's question to Mr. Tutt just a moment ago.  
11 What is unique about the Spending Clause is that  
12 it allows Congress to do things it could not  
13 otherwise constitutionally do.

14 I submit that, obviously, this  
15 question is not presented today but that the  
16 micromanaging of nursing care facilities in  
17 Marion, Indiana, is not something which Congress  
18 could have done under its Commerce Clause  
19 authority or under its Section 5 Fourteenth  
20 Amendment authority. The reason it can do these  
21 things is because the state has consented to it.

22 So the question of consent is crucial  
23 to the constitutionality of the statute itself,  
24 and that entails certain common law principles.  
25 You don't -- the -- the -- the 1871 Congress did



1 not have to imagine that Pennhurst would someday  
2 come down.

3           It's not as if Spending Clause  
4 statutes only became contractual by nature  
5 because the Court in 1981 in Pennhurst said that  
6 it was. It was always -- those statutes were  
7 always contractual in nature. And it therefore  
8 bears critically on the marriage of 1983 and  
9 FNHRA that we ask the question: What did 1983  
10 mean when it was enacted?

11           And the answer to that question is  
12 that the common law, generally speaking,  
13 prohibited individuals from bringing third-party  
14 beneficiary claims on government contract cases.

15           By the way -- and this goes back,  
16 Justice Sotomayor's question, that you asked  
17 me -- you said, well, what about these legal  
18 history professors who say the law was  
19 different? I contend that they've misread the  
20 law by, as I say, gerrymandering the  
21 denominator, but, even if it were as murky as  
22 the law professors suggest that it was, the  
23 burden is not on us, I suggest, to show that the  
24 law was clear on our side.

25           The burden is on the plaintiff, who's

1 asking that a certain right be created and  
2 enforced to show that it was settled in their  
3 direction. You have not heard any argument this  
4 morning that even remotely suggests that that's  
5 true.

6 Now how about ratification? That is a  
7 red herring if there ever was one. The language  
8 in the statute that overruled Suter, this  
9 Court's Suter decision, made, I thought,  
10 painfully clear that it was doing very little.  
11 All it said was we are -- we no longer will  
12 tolerate -- we no longer will -- you may no  
13 longer claim that a right is unenforceable  
14 because it is embedded in a provision that  
15 requires a state plan.

16 But the statute goes on to say that  
17 all other arguments are preserved. It doesn't  
18 expand or decrease any other basis for saying  
19 that a right is unenforceable. And what's more,  
20 it preserves even the outcome in the decision in  
21 Suter.

22 I see that my red light is on, and I  
23 appreciate the Court's indulgence.

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

1                   (Whereupon, at 1:27 p.m., the case was  
2 submitted.)  
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## Official

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