

# 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 97  
Place: Washington, D.C.  
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.         )  
11   - - - - -

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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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1 APPEARANCES:  
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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 that, as in *Blessing*,  
18 the language of the statute, Mr. Chief Justice,  
19 is directed to the rights -- the -- the  
20 obligation of the nursing facility to take care  
21 of the entire system and not focus on any  
22 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 think you have a stronger argument on "promote,"  
5 though, than you have on "protect."

6 MR. ROBBINS: Yes.

7 CHIEF JUSTICE ROBERTS: And -- and the  
8 -- the statute uses both and then, you know,  
9 lists a variety of rights. And it seems to me  
10 that if you're supposed to protect those rights  
11 and you're the person who's responsible for  
12 conferring -- living up to those rights, that --  
13 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'm  
17 not inclined to think so, though, to be sure, I  
18 think our -- the stronger of our two Gonzaga  
19 arguments is the middle -- is the Sea Clammers  
20 preclusion argument. That's our -- that's our  
21 first submission with respect to Question 2.

22 What I would say with respect to the  
23 Chief -- Your Honor's question, it is a mistake,  
24 I think, to pick out the particular clauses that  
25 embody these two rights and divorce them from



1 the rest of the statute. Pennhurst, after all,  
2 enjoins the Court to look at the whole statute.

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

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

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

23 JUSTICE KAVANAUGH: Except --

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

25 JUSTICE KAVANAUGH: Go ahead.

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

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

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

18                   JUSTICE KAGAN: Well, it's true that  
19                   the nursing home is involved in this because the  
20                   nursing home is the entity that's supposed to  
21                   respect the individual rights that are laid out.  
22                   I mean, you have to think that any individual  
23                   right imposes a correlative duty on somebody.  
24                   And, here, it's the nursing home that is  
25                   supposed to make sure that those rights are not

1 violated.

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

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

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

17 MR. ROBBINS: Yes.

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

20 MR. ROBBINS: Yes. Precise --

21 JUSTICE KAVANAUGH: I mean, that --

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

24 JUSTICE KAVANAUGH: Residents' rights  
25 too.

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

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

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

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

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

23           MR. ROBBINS: Well, the first argument  
24 is that it should extend the principle in  
25 Gonzaga to take account of the state of

1 third-party beneficiary law at the time 1983 was  
2 enacted. That is our answer on Question 1.

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

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

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

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

24 JUSTICE KAVANAUGH: Private judicial  
25 remedies or private administrative remedies?

1                   MR. ROBBINS: Private administrative  
2 remedies.

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

8                   MR. ROBBINS: That's right.

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

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

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

23                   It seems to me Fitzgerald --

24                   JUSTICE KAVANAUGH: Can you get -- I'm  
25 sorry to interrupt. I don't want to take too

1 much time.

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

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

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

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

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

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

23 JUSTICE KAGAN: Because I had thought  
24 that we looked for some understanding of  
25 incompatibility, that we looked for some ways in

1 which the other private remedy was in conflict  
2 or in -- at least in tension with 1983.

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

8 And if you gave a 1983 suit, it would  
9 be a way of evading all those requirements so  
10 that you could see that there was some kind of  
11 tension between the remedial scheme and 1983.  
12 But I don't see any of that here.

13 MR. ROBBINS: But I -- respectfully,  
14 Justice Kagan, I don't think that's the way this  
15 Court has thought about the preclusiveness of  
16 remedies.

17 I don't contend that 1983 is somehow  
18 flatly inconsistent with the -- with the  
19 comprehensive remedies provided under (h)(8) and  
20 --

21 JUSTICE KAGAN: Or even in tension  
22 with or even that 1983 would -- would give you  
23 an out and -- and -- and -- and so you could  
24 escape the requirements of a different remedial  
25 scheme.



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

13           I would contend that private  
14 litigation, which, of course, is not constrained  
15 in that way, is, in fact, antithetical to the  
16 discretion that states and the Secretary have.

17           But I also quarrel with the premise,  
18 Your Honor. I do not think I have to show that  
19 1983 is -- is -- is at odds or even in tension  
20 with the -- with the elaborate administrative  
21 proceedings provisions given here.

22           JUSTICE KAGAN: Well, aren't we trying  
23 to figure out -- I mean, this is a matter of  
24 statutory interpretation -- we're trying to  
25 figure out whether Congress meant to preclude

1 the 1983 suit.

2 And it can't be the case that Congress  
3 would mean to preclude the 1983 suit by doing  
4 any old thing. I mean, other administrative  
5 remedies can be perfectly complementary --

6 MR. ROBBINS: Yes.

7 JUSTICE KAGAN: -- with a 1983 suit.  
8 So we have to be looking for something more than  
9 that Congress has provided some other remedial  
10 avenues.

11 MR. ROBBINS: Well, I -- I -- I think  
12 in this case it's quite comprehensive. And  
13 what's striking about this case, of course, is  
14 that Mr. Talevski availed himself of all of  
15 those provisions, got the relief he wanted, and  
16 then came back to court for money.

17 So it -- this is a case where the --  
18 where the actual regulations did a terrific job.  
19 But, again, let me just finish why I quarrel  
20 with Your Honor's premise.

21 To me, if I -- when -- as I read the  
22 body of law that was started with Sea Clammers  
23 and goes through Robinson and then up to City of  
24 Palos Verdes, what the Court has said is we  
25 usually begin with the assumption that the

1 provision of one remedy excludes the others.

2 JUSTICE KAGAN: I don't think that  
3 that's the presumption here. I think, once  
4 there has been found to be a statute with the  
5 character of giving rights, the presumption  
6 actually is in favor of 1983 because that's what  
7 1983 is supposed to address.

8 And we're looking to see whether  
9 another statute negates that presumption by  
10 doing something particular, that suggests that  
11 Congress wouldn't have wanted the 1983 to go  
12 forward -- 1983 suit to go forward at the same  
13 time.

14 So we need something more than another  
15 scheme that does something. We need a sense  
16 that that other scheme was meant to be  
17 exclusive, that it was -- that --

18 MR. ROBBINS: Well --

19 JUSTICE KAGAN: -- that it -- it -- it  
20 would have been thought to be incompatible with  
21 1983.

22 MR. ROBBINS: Well, I -- I would take  
23 a page from the Solicitor General's argument, of  
24 course, that it -- it is surpassingly odd to  
25 imagine that we would have more exacting

1 obligations on the very thin slice of state  
2 nursing homes that get federal money under this  
3 program. I'm going to leave that argument to  
4 them, and I hope they make it.

5 JUSTICE JACKSON: Mr. Robbins, can I  
6 just give you -- are you finished with this?  
7 I'm sorry.

8 MR. ROBBINS: Well, if -- if I might,  
9 just --

10 JUSTICE JACKSON: Yes.

11 MR. ROBBINS: I -- I don't -- I  
12 certainly agree, there's no disputing that the  
13 presumption that Your Honor called my attention  
14 to is correct.

15 If the statute -- if there is an  
16 enforceable right, which -- with which, of  
17 course, I quarrel, but, if there is, it is true  
18 that there's a presumption that 1983 kicks in,  
19 unless, of course, you take my view of the first  
20 question presented, which is that, as a general  
21 matter, 1983 did not permit third-party  
22 beneficiaries to be --

23 JUSTICE JACKSON: That -- that's what  
24 I wanted to talk about.

25 MR. ROBBINS: Yeah. And I do want to

1 come to that.

2 JUSTICE JACKSON: Okay.

3 MR. ROBBINS: But the fact that the  
4 burden shifts to us to prove that -- that this  
5 -- that Congress intended to foreclose it,  
6 that's all well and good. The question is, what  
7 do you do to discharge that burden?

8 And in case after case, this Court has  
9 said that when Congress actually provides for a  
10 remedy, we usually begin with the premise that  
11 that's -- that that -- you know, I always get  
12 the Latin wrong, but I think it's *exclusio unius*  
13 or something to that effect -- that's in the  
14 case law. And it exists notwithstanding the  
15 fact that it becomes our burden to sustain --  
16 that -- to -- our burden to show that 1983 is  
17 not available. One --

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 MR. ROBBINS: Okay.

21 CHIEF JUSTICE ROBERTS: I just have  
22 one last question. On the alternative remedy  
23 for grievances, does it matter that what you  
24 rely on the most is an administrative regulation  
25 rather than the statutory language? Because,

1 obviously, the statutory language, you can  
2 analyze that as what the state had -- was on  
3 notice about or -- or not, but I don't know that  
4 that's true with respect to subsequent  
5 regulations.

6 MR. ROBBINS: Well, I think our view  
7 is that if a regulation fairly interprets the  
8 statute, then that counts towards the same  
9 preclusive effect that the statute would.

10 Nobody contests that proposition in  
11 front of the Court today. Nobody says that a  
12 regulation can't have the same preclusive  
13 effect.

14 CHIEF JUSTICE ROBERTS: Well, I -- I  
15 -- I would contest that proposition since the  
16 whole premise is that the state has to be on  
17 unambiguous, clear notice. But how can that be  
18 with respect to a regulation that hasn't even  
19 been issued at the time of the statute?

20 MR. ROBBINS: Well, I -- I'm not sure  
21 that the contract metaphor -- I mean, this Court  
22 has said in case after case that the contract  
23 metaphor is to -- is to limit the scope, not to  
24 expand the scope.

25 I'm not sure why a state would need to

1 know that a 1983 -- I'm not sure why the -- the  
2 state would need to know what the regulations  
3 are --

4 CHIEF JUSTICE ROBERTS: Well, because  
5 --

6 MR. ROBBINS: -- all about.

7 CHIEF JUSTICE ROBERTS: -- you're  
8 talking about contract. The regulations can go  
9 two different ways. One could be a -- a  
10 regulation that expands the obligations of the  
11 state, rather than the one at issue here.

12 MR. ROBBINS: Yes. No, I -- I -- I --  
13 I recognize that. But, I guess, if what we're  
14 talking about is what the states clearly  
15 understood as a condition, I would then recur to  
16 my central argument on Question 1, which is that  
17 no state would have thought that a private party  
18 could enforce the contract that consists of  
19 FNHRA because it doesn't advert in any way to  
20 the right of a private party to bring a lawsuit.

21 JUSTICE JACKSON: But isn't that a  
22 shift from --

23 CHIEF JUSTICE ROBERTS: Thank you.  
24 Justice Thomas?

25 JUSTICE THOMAS: Nothing, Chief.

1 CHIEF JUSTICE ROBERTS: Justice Alito?

2 JUSTICE ALITO: Well, Respondent  
3 relies on the Savings Clause, and you -- you  
4 responded only very briefly to that in the reply  
5 brief, so I wanted to give you another chance to  
6 talk about it.

7 The Savings Clause says the remedies  
8 provided under this subsection are in addition  
9 to those otherwise available under -- for  
10 federal law and shall not be construed as  
11 limiting such other remedies.

12 Why doesn't that apply directly here?  
13 It doesn't say -- the provision does not say  
14 that the right that is asserted must arise from  
15 some source other than the law at issue. It --  
16 it supplements remedies.

17 MR. ROBBINS: Yes.

18 JUSTICE ALITO: It says that this does  
19 not take away remedies. And 1983 provides a  
20 remedy.

21 MR. ROBBINS: Yes. I appreciate it,  
22 Justice Alito, and let me -- let me provide two  
23 -- two answers on that.

24 The first is both in Rancho Palos  
25 Verdes and in I want to say at least one other



1 of the -- this Court's cases, maybe it's -- it's  
2 Robinson, the Court has said that when we  
3 refer -- when a savings -- so-called Savings  
4 Clause refers to federal law or federal statute,  
5 it is referring to statutes other than the very  
6 one that contains the Savings Clause. That's  
7 our first submission.

8 But I'd like to follow on to that  
9 because I think, if -- if that's correct, the  
10 Savings Clause is our friend, not theirs, and  
11 the reason is this: It says in essence the  
12 rights in this section, (h)(8), which I have  
13 invoked as preclusive, the rights contained in  
14 (h)(h) -- (h)(8) are in addition to those in  
15 statute -- in federal statutes.

16 If "federal statutes" means all  
17 statutes other than FNHRA itself, then that  
18 seems to me pretty strong evidence that there  
19 are no other remedies except those found in, for  
20 example, the Americans with Disabilities Act or  
21 the Rehabilitation Act of '73.

22 That is to say, the Savings Clause  
23 says are -- these rights are for any other  
24 federal -- are in addition to other federal  
25 statutes. That seems to me to preclude the

1 argument that they are relying on, which is an  
2 argument that 1983, married with FNHRA, gives  
3 them certain rights.

4 I think the fair reading of the  
5 Savings Clause is against that combination,  
6 precisely because its reference to statutes is  
7 to statutes other than FNHRA, and without FNHRA,  
8 they've got no 1983 claim in this case.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Sotomayor?

11 JUSTICE ALITO: No, that's okay.  
12 That's fine.

13 JUSTICE SOTOMAYOR: Counsel, do you  
14 dispute the amici legal historians' point that  
15 the prevailing rule in American common law in  
16 the 1870s, before 1983 was passed --

17 MR. ROBBINS: Yes.

18 JUSTICE SOTOMAYOR: -- permitted  
19 third-party beneficiaries to sue?

20 MR. ROBBINS: I absolutely do. And  
21 I'm so glad you --

22 JUSTICE SOTOMAYOR: So that's --  
23 that's just a matter of our reading of history.  
24 If we disagree with you --

25 MR. ROBBINS: Well --

1 JUSTICE SOTOMAYOR: -- what -- what --  
2 what's left?

3 MR. ROBBINS: Well, can I just perhaps  
4 answer the question by suggesting where they got  
5 it wrong and where instead we -- the Court may  
6 wish to be looking?

7 JUSTICE SOTOMAYOR: Okay.

8 MR. ROBBINS: What they are saying --  
9 well, they quote a particular secondary article  
10 in which --

11 JUSTICE SOTOMAYOR: Seems to be more  
12 than --

13 MR. ROBBINS: -- somebody actually  
14 went to the trouble --

15 JUSTICE SOTOMAYOR: There was more  
16 than one, but let's keep going.

17 MR. ROBBINS: In which somebody  
18 actually went to the trouble of adding up all  
19 the cases and then saying 72 percent of these  
20 were allowed and 62 percent of these were  
21 allowed. But, if you look at Footnote 22 of the  
22 principal source they rely on, you will see that  
23 the author cut out from his sample all the  
24 so-called incidental beneficiary cases, which  
25 are the ones we say are most like a Spending

1 Clause statute.

2           In other words, the game was rigged.  
3 It -- the -- the -- the denominator was  
4 gerrymandered to gin up very high numbers, but,  
5 if you go back and look at all of the  
6 government-to-government contract cases, and  
7 I've looked at a fair bit of them, you will find  
8 that unless the government contract called out  
9 the plaintiff, for example, Schnaier, the  
10 Schnaier case from 1918 in New York, or the  
11 Little -- the Little case that it cites from  
12 1880, in those cases, they said -- you know,  
13 these were the water company and fire company  
14 cases of the 19th Century -- generally speaking,  
15 if your house burned down because the water  
16 company didn't put enough water in the hydrants,  
17 you were out of luck.

18           JUSTICE SOTOMAYOR: But none of those  
19 contracts --

20           MR. ROBBINS: I'm sorry?

21           JUSTICE SOTOMAYOR: The incidental  
22 contracts are different than the ones you even  
23 admit if you call out the plaintiff. Isn't that  
24 what Blessing and Gonzaga are saying?

25           MR. ROBBINS: No. I --

1 JUSTICE SOTOMAYOR: If the contract is  
2 giving a right to a particular class of people,  
3 that is a third-party beneficiary.

4 MR. ROBBINS: No. I -- I -- I  
5 respectfully suggest that it is not because, if  
6 you look at the cases I've just described, what  
7 you will find is that the contract had a -- for  
8 example, Schnaier is a -- is a water company  
9 case, and it said, in substance, if you don't  
10 deliver the water, you will be liable to anyone  
11 who is injured. In the Little case from 1880 --

12 JUSTICE SOTOMAYOR: But that's what  
13 1983 says. If I confer a government right on  
14 you, the state is going to be liable if it  
15 violates the law -- that right.

16 MR. ROBBINS: No. Well, actually,  
17 what it says is if it violates a right secured  
18 by law. And what is --

19 JUSTICE SOTOMAYOR: Exactly.

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

21 JUSTICE SOTOMAYOR: And if I have a  
22 right under the law to a certain thing that the  
23 -- the government has contracted with a provider  
24 to give me, 1983 says I can go to court.

25 MR. ROBBINS: Well, I -- I don't think

1 it's quite that simple. I think what is secured  
2 by law depends, among other things, on how 1983  
3 would have been understood at the time it was  
4 enacted.

5           And at that time, you could not sue on  
6 a government-to-government contract unless --  
7 and this is the general state of the law, as  
8 Cummings directs us to look at, not little  
9 outliers from the regression curve but the main  
10 curve that -- that joins most of the cases.

11           What you will find, Justice Sotomayor,  
12 is that when somebody had the right to sue,  
13 somebody's house burns down or somebody who  
14 doesn't get a benefit from a government  
15 contract, the contract said you will be liable  
16 to third parties if you breach this contract.

17           JUSTICE SOTOMAYOR: Except that, as  
18 Justice Alito pointed out, this Spending Clause  
19 provision provides that all other remedies of  
20 law, i.e., 1983, are not superseded.

21           MR. ROBBINS: No, I -- I -- I didn't  
22 take Justice Alito to be agreeing with that  
23 proposition, but -- and I certainly do not agree  
24 with that proposition.

25           The language of the -- of the Savings

1 Clause says these are in addition to laws  
2 provided by statute, Constitution, and common  
3 law. And this Court has said in several cases  
4 that the reference to statutes is to statutes  
5 other than the very statute containing the  
6 Savings Clause.

7 That means other than FNHRA. And if  
8 it means other than FNHRA, which is the way I  
9 read it and the way this Court has read it more  
10 than once, then they have no claim because --

11 JUSTICE SOTOMAYOR: Okay, counsel, I  
12 understand.

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

15 CHIEF JUSTICE ROBERTS: Justice Kagan?  
16 Justice Gorsuch?

17 Justice Kavanaugh?

18 JUSTICE KAVANAUGH: If I understand  
19 your position on preclusion, the implied  
20 preclusion, you're saying, if there is a private  
21 judicial remedy in the statute, then that would  
22 ordinarily mean no 1983 suit. Correct so far?

23 MR. ROBBINS: I -- I certainly agree  
24 with that.

25 JUSTICE KAVANAUGH: Okay. And then

1 you're saying, if there's a private  
2 administrative remedy in the statute, that also,  
3 usually and here, precludes 1983, correct?

4 MR. ROBBINS: Correct.

5 JUSTICE KAVANAUGH: Okay. Some of the  
6 language supports you in the cases, some  
7 doesn't. The three cases where we've held that  
8 have involved private judicial remedies,  
9 however.

10 MR. ROBBINS: Correct. That is  
11 correct. But --

12 JUSTICE KAVANAUGH: So the -- the --  
13 the issue here, I think, that if we get to this  
14 issue we'd have to nail down, is exactly under  
15 what circumstances the private administrative  
16 remedy in the statute precludes 1983. Does that  
17 sound like the question?

18 MR. ROBBINS: That does sound like the  
19 question. On the other hand, with all respect,  
20 I --

21 JUSTICE KAVANAUGH: And the government  
22 has a whole different theory. I get that.

23 MR. ROBBINS: Yes.

24 JUSTICE KAVANAUGH: We'll get to that.

25 MR. ROBBINS: The government has a



1 different --

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

4 MR. ROBBINS: Fair enough. But, on --  
5 on that proposition, I don't think I can do  
6 better than to cite this Court's cases that have  
7 said -- that have told us where the dividing  
8 line is. And --

9 JUSTICE KAVANAUGH: Right. But even  
10 those, like if you look -- and then I won't  
11 belabor it too much -- but Rancho Palos Verdes  
12 says: "In all the cases in which we have held  
13 that 1983 is available, we have emphasized that  
14 the statute at issue did not provide a private  
15 judicial remedy."

16 MR. ROBBINS: Yes, they did say that  
17 as well.

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

21 MR. ROBBINS: Fair enough. But they  
22 go on to also say the -- the so-called dividing  
23 line point.

24 JUSTICE KAVANAUGH: Yes, that helps  
25 you. I agree.

1 MR. ROBBINS: And -- and -- and it  
2 helps me --

3 JUSTICE KAVANAUGH: I think I'm done.  
4 Okay.

5 MR. ROBBINS: Okay.

6 JUSTICE KAVANAUGH: Thank you.

7 MR. ROBBINS: Okay.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Barrett?

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

13 If you have -- and I think this  
14 dovetails with Justice Sotomayor's questions.  
15 It is true that in Spending Clause legislation  
16 we have focused on the contract analogy. And  
17 so, as the Chief Justice was pointing out, we  
18 want to know when a state accepts the funds if  
19 it was on notice of its obligations.

20 MR. ROBBINS: Right.

21 JUSTICE BARRETT: In the 1983 context,  
22 I would have thought that the question is does  
23 this statute create rights, the Blessing/Gonzaga  
24 question, arguably just the Gonzaga question,  
25 after Gonzaga, but, if so, then you referred to

1 1983 and the scope of that cause of action is  
2 dictated by 1983.

3 The question about third-party  
4 beneficiaries and the scope of the cause of  
5 action I would have thought arose only when  
6 we're talking about implied causes of action,  
7 like Cummings last term, for example.

8 If you're talking about it against a  
9 private party, if you're wanting to know what a  
10 private party might have signed up for and  
11 you're talking about an implied cause of action  
12 from the statute itself, then it might make  
13 sense to ask whether a third-party beneficiary  
14 was entitled to sue or whether punitive damages  
15 would have been available for this kind of  
16 breach.

17 MR. ROBBINS: Right.

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

21 MR. ROBBINS: Well, let me take a  
22 crack at it. It is -- I think the principle  
23 here is the same without regard to whether we're  
24 talking about purely implied rights of action or  
25 1983 claims.

1           And, here, I take the guidance from  
2           Gonzaga, which said that while it's true that  
3           you don't have to show an intent to create a  
4           private remedy, because 1983 already does that,  
5           you do have to make the same inquiry about  
6           whether this is a right secured by law.

7           And what we're saying is that whether  
8           a right is secured by law depends, among other  
9           things, on whether or not, at the time 1983 was  
10          enacted, what the common law principles were.  
11          And it carries the old soil with it.

12          And this is a point I -- I -- I want  
13          to make sure I leave the Court with. The  
14          question whether they have a -- I'm sorry, Mr.  
15          Talevski and his family have an enforceable  
16          right turns on the marriage of two statutes:  
17          1983, which brings with it whatever limitations  
18          are part of 1983's history and context and  
19          language, and the rights contained in the  
20          statute that provides the substantive rights.

21          And it's the combination of those two  
22          statutes and whatever old soil they bring with  
23          them which is why, among other things, the S --  
24          the Solicitor General's argument, that why are  
25          we looking at 19th Century principles when FNHRA

1 was only enacted in 1987, well, it's not as if,  
2 you know, the -- the --

3 JUSTICE BARRETT: I think you've  
4 answered my question.

5 MR. ROBBINS: Okay. Thank you.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Jackson?

8 JUSTICE JACKSON: Yes, but that was my  
9 question too. So let's -- let's explore a  
10 little bit.

11 I mean, I -- I don't understand your  
12 suggestion that an express cause of action,  
13 which I think we can all agree is what 1983 is,  
14 that says that you can sue to vindicate  
15 individual rights that are created by the  
16 Constitution or laws of the United States, I --  
17 I don't understand why that carries with it  
18 common law that preceded it under circumstances  
19 in which you couldn't sue.

20 So you -- you seem to be suggesting  
21 that there isn't a -- that this isn't a  
22 situation in which Congress was actually  
23 providing a cause of action where there wasn't  
24 one before.

25 MR. ROBBINS: Right.

1                   JUSTICE JACKSON: Which, when you look  
2 at the actual history of 1983, that was  
3 precisely what Congress was doing. It was a  
4 part -- it, 1983 -- of the Ku Klux Klan Act  
5 where Congress had looked at the situation of  
6 states not giving forum, not giving a cause of  
7 action to people who were being terrorized and,  
8 instead of adopting and incorporating those  
9 principles and saying here's this new law and  
10 we're going to incorporate the common law of  
11 excluding you from the court, in fact, Congress  
12 created the right in order to allow people to go  
13 to court.

14                   So, while there might be situations in  
15 which we carry old soil into our interpretation,  
16 I don't understand how you can interpret a -- an  
17 express grant of authority to go to court to  
18 enforce rights created by law, consistent with  
19 the opposite situation at common law, and say we  
20 have to limit the current right because, in  
21 common law, you didn't have that right.

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

25                   JUSTICE JACKSON: Well, let me just

1 ask you this -- this way.

2 MR. ROBBINS: Yes.

3 JUSTICE JACKSON: How do we have  
4 authority to do that? Aren't -- wouldn't that  
5 just be us rewriting the statute?

6 MR. ROBBINS: No.

7 JUSTICE JACKSON: You're not saying  
8 that "laws" is ambiguous in the statute, are  
9 you?

10 MR. ROBBINS: I am not.

11 JUSTICE JACKSON: All right. So,  
12 usually, we only get to step in and look at  
13 common law or whatnot to assist in the  
14 interpretation of a statute.

15 MR. ROBBINS: I agree.

16 JUSTICE JACKSON: But, if you agree  
17 that this is unambiguous, that Congress was  
18 giving people the right to enforce, you know,  
19 laws that gave them certain rights, and if you  
20 agree that -- that FNHRA is a law, maybe you  
21 don't --

22 MR. ROBBINS: I do.

23 JUSTICE JACKSON: Okay. Then it seems  
24 to me odd to suggest that we as a Court can  
25 reinterpret the word "law" in Section 1983 to

1 carve anything out.

2 MR. ROBBINS: An old professor of mine  
3 wrote a book in which he said no answer is what  
4 the wrong question begets. Whether or not  
5 "laws" is supple enough to include 1983 or  
6 FNHRA, that's the wrong question, respectfully.

7 The right question is, what are the --  
8 what rights are secured by law within the  
9 meaning of 1983? And this Court has  
10 consistently held that when it comes to Spending  
11 Clause statutes, the common law of contracts  
12 gives us the clearest window into what 1983  
13 covered.

14 JUSTICE JACKSON: But that -- isn't  
15 that only -- isn't that only if there was some  
16 ambiguity about what rights are being secured by  
17 the term "laws"? And isn't your answer one that  
18 has to reference what Congress would have  
19 intended?

20 What I don't understand is why your  
21 argument -- why you've come to the conclusion  
22 that when Congress wrote laws in 1983 it was  
23 thinking, oh, but not the laws that we enact  
24 pursuant to our Spending Clause power. Those  
25 are not the ones --



1 MR. ROBBINS: Yeah.

2 JUSTICE JACKSON: -- we intend to be  
3 secured by this. I see no evidence of that  
4 anywhere.

5 MR. ROBBINS: I'm not contending that  
6 there is affirmative evidence that the -- that  
7 the 1871 -- the Congress that enacted 1983 in --  
8 in -- in 1871 actually had third-party  
9 beneficiary principles in mind.

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

12 MR. ROBBINS: No, it is not. The --  
13 the way this Court has talked about common law  
14 principles is that it is presumed that Congress  
15 adopts common law principles, Justice Jackson,  
16 unless there is affirmative evidence that they  
17 did not.

18 JUSTICE JACKSON: And the explicit  
19 language of the statute is not affirmative  
20 evidence to the extent that it conflicts with  
21 the -- the state of the common law.

22 MR. ROBBINS: Oh, I -- well, if -- if  
23 I thought there was text that actually  
24 foreclosed the adoption of common law  
25 principles, I would be the first to agree with

1 you, Your Honor.

2 But I find no such evidence that FNHRA  
3 or 1983 abrogates the common law against which  
4 1983 was enacted. And when we ask the question  
5 what rights are secured by law, I contend that  
6 it is the marriage of these two statutes, 1983,  
7 enacted in 1871 and amended to add laws in '74,  
8 and FNHRA, enacted in 1987, and they both bring  
9 the old soil with them.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 Mr. Fisher.

13 ORAL ARGUMENT OF THOMAS M. FISHER  
14 FOR INDIANA, ET AL., AS AMICI CURIAE,  
15 SUPPORTING THE PETITIONERS

16 MR. FISHER: Mr. Chief Justice, and  
17 may it please the Court:

18 Twenty years after Gonzaga,  
19 Section 1983 Spending Clause cases are  
20 unpredictable, with three consequences of  
21 particular concern for states. First, they  
22 frustrate informed state assessment of Spending  
23 Clause programs. Second, they disrupt state  
24 efforts to administer complex spending programs  
25 using scarce resources. And, third, they --

1 they prevent states from pursuing policies  
2 valued more highly than full federal funding.

3 Fundamentally, private enforcement of  
4 federal spending conditions takes officials off  
5 the political hook for policy decisions and  
6 leaves voters without any elected officials to  
7 blame. Accordingly, the Court should finish  
8 what it started in Gonzaga and hold that federal  
9 spending conditions are not privately  
10 enforceable unless Congress expressly so  
11 provides.

12 I welcome the Court's questions.

13 CHIEF JUSTICE ROBERTS: Well, Gonzaga  
14 I wouldn't say went that far because it didn't,  
15 but it imposed a pretty high bar in terms of the  
16 evidence that was required. Why isn't that  
17 sufficient?

18 MR. FISHER: Well, it held --

19 CHIEF JUSTICE ROBERTS: Unambiguous --  
20 it used words like "unambiguous" and so on and  
21 so forth.

22 MR. FISHER: I think the proof is in  
23 the pudding here, Chief Justice. The lower  
24 courts are unable to come to any kind of  
25 consistent decisionmaking with respect to

1 Medicaid and other Spending Clause programs.  
2 They're all over the map. And I think that,  
3 notwithstanding the -- the use of the term  
4 "unambiguous," lower courts are finding  
5 everything quite ambiguous.

6 And I think that's why we think of it  
7 in terms of, if -- if the Court wants to stick  
8 with a -- a framework such as Gonzaga, maybe the  
9 way to do it is to say: Well, by "unambiguous,"  
10 we mean express right of action. I think that  
11 that's probably the only way to get away from  
12 such a flexible standard and get to a rule that  
13 actually is meaningful.

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

16 MR. FISHER: Well, of course, it's a  
17 -- it's an express right of action, but I -- I  
18 agree with Mr. Robbins that the question is what  
19 did Congress -- what could Congress -- what can  
20 we infer that they thought they were doing at  
21 the time? And I think it's critical that --  
22 well, it's at least very important, if not  
23 critical, that 1983 is -- is properly thought  
24 of, I think, as a tort statute.

25 JUSTICE JACKSON: Yes.

1 MR. FISHER: Not a contract statute.

2 JUSTICE JACKSON: Yes.

3 MR. FISHER: And we're talking here  
4 about contracts, about who can enforce them.  
5 And the kind of -- of entitlement programs that  
6 we deal with today simply weren't around in  
7 1874.

8 JUSTICE JACKSON: No, no, no. But --  
9 but Mr. Robbins says -- you say tort statute,  
10 1983, totally agree with you, that seems to be  
11 what Congress was doing. So why does the common  
12 law of contracts have any role in us trying to  
13 understand what 1983 is about?

14 MR. FISHER: Precisely because this  
15 Court has talked about it in -- in Pennhurst and  
16 in other cases that Spending Clause programs are  
17 in the nature of a contract.

18 JUSTICE JACKSON: Yeah, but you're --  
19 you're skipping ahead. Now -- I'm just talking  
20 about what Congress would have intended at the  
21 time that 1983 was enacted.

22 MR. FISHER: Precisely. And I think  
23 Congress, at the time 1983 was enacted, was  
24 thinking of torts, not third-party contract  
25 enforcement rights, which I think is the proper

1 analogy to this type of case.

2           So I think that that's why there's  
3 such a poor fit between 1983 and Spending  
4 Clause, you know, statutes on their own. They  
5 -- they just don't coincide historically, I  
6 think.

7           JUSTICE BARRETT: Mr. Fisher, why  
8 wouldn't your problem about the lower court  
9 confusion be addressed by our simply saying,  
10 listen, Gonzaga is the more recent case and it  
11 laid down a stricter standard than did Blessing,  
12 and so Gonzaga is where you look?

13           MR. FISHER: With respect, Your Honor,  
14 I think that if -- if the Court were to do that,  
15 we -- states would be back here in case after  
16 case after case asking for clarification. If  
17 Gonzaga didn't do it talking about unambiguous  
18 rights, I don't think another restatement of  
19 that is going to -- is going to do the trick.

20           I think the Court has to be far more  
21 explicit about that. It has to reject certainly  
22 Wilder, which lower courts, including in this  
23 case, continue to cite. And I think it needs to  
24 set forth a -- a very precise rule that lower  
25 courts know that they have to follow, and that

1 would be no implied rights through 1983 and  
2 Spending Clause statutes.

3 JUSTICE SOTOMAYOR: Counsel, your --

4 CHIEF JUSTICE ROBERTS: I thought we  
5 --

6 JUSTICE SOTOMAYOR: I'm sorry, Chief.

7 CHIEF JUSTICE ROBERTS: Just very  
8 briefly. I thought we did drive a wooden stake  
9 through Wilder in Gonzaga and Armstrong. It's  
10 pretty -- pretty explicit.

11 MR. FISHER: I -- I agree. But lower  
12 courts don't. They cite Wilder all the time,  
13 and especially in the context of Medicaid  
14 litigation, we can't get around Wilder.

15 That is the case --

16 JUSTICE SOTOMAYOR: So why don't you  
17 bring us a case where the right is more  
18 ambiguous? This case doesn't seem to present  
19 that confusion that you seem to be referring to.

20 MR. FISHER: Well, regardless of -- of  
21 this particular case, I will submit this --

22 JUSTICE SOTOMAYOR: No, we're not  
23 asked to give advisory opinions.

24 MR. FISHER: Right.

25 JUSTICE SOTOMAYOR: We have a standing

1 precedent.

2 MR. FISHER: Right.

3 JUSTICE SOTOMAYOR: You're asking us  
4 to overrule it. As the Chief said, Gonzaga and  
5 Blessing came after Wilder and they limited its  
6 holding very clearly. You're now asking us to  
7 overturn all these programs.

8 But neither the federal government nor  
9 the states can possibly investigate and remedy  
10 every violation of these rights that are given  
11 to people. 1983 speaks clearly. They have a  
12 judicial remedy. Why shouldn't we just respect  
13 our precedent?

14 MR. FISHER: Well, I think we -- what  
15 we have through spending statutes is a  
16 relationship, a -- a -- that -- that Congress  
17 establishes between states and the federal  
18 government. And I think, in fact, if you look  
19 at something like Medicaid, the only lawful  
20 directive is to the Secretary. And so it's, I  
21 think, important to look at these statutes more  
22 broadly.

23 But I will say also, you know, there  
24 are other cases waiting in the wings if this  
25 Court wants to wait to get to that issue



1 elsewhere. But I don't think that -- that, you  
2 know, it's going to help anybody just to address  
3 FNHRA in this case. I think it's going to help  
4 a lot if the Court gets at the fundamental  
5 question about, you know, generally speaking,  
6 when are Spending Clause statutes privately  
7 enforceable in 1983 cases.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Thomas, anything?

10 Justice Alito?

11 JUSTICE ALITO: Well, when you say  
12 that 1983 is about torts and not about  
13 contracts, do you mean to say that if a  
14 condition of a Spending Clause law was that the  
15 state agrees to be sued under 1983 for rights  
16 conferred by that statute, that that could not  
17 be the basis for a 1983 claim?

18 MR. FISHER: No, I think that's  
19 exactly the sort of thing that -- that we want  
20 Congress to have to say. I think the point is  
21 that, you know, it's not that Congress can't  
22 direct something here and specifically when it's  
23 extending an offer to states and states can  
24 agree with it in an informed way.

25 But just to try to -- without that,

1 try to map onto 1983 what is essentially a  
2 third-party contract relationship I think is  
3 just an ill fit to begin with.

4 JUSTICE ALITO: You -- so you just  
5 want proof beyond a reasonable doubt --

6 MR. FISHER: I --

7 JUSTICE ALITO: -- basically?

8 MR. FISHER: -- I want an express  
9 statement, a clear statement. I think, you  
10 know, there is -- there is a useful analogy here  
11 perhaps even to sovereign immunity, and that's  
12 the kind of thing that we want with respect to  
13 the right of action.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Sotomayor?

16 JUSTICE SOTOMAYOR: No further  
17 questions.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?  
19 Justice Jackson?

20 JUSTICE JACKSON: Yeah, I would just  
21 say that clear statement rules in the Court's  
22 precedents usually exist against the backdrop of  
23 the kinds of rights like sovereign immunity or  
24 habeas or that sort of thing.

25 And so it just seems odd to me that in

1 this situation your position would be that  
2 Congress had to be clearer than saying all laws  
3 and rights created under the Constitution.

4 MR. FISHER: Well, I think it goes  
5 back to that fundamental state/federal  
6 relationship, which is akin in some respects to  
7 sovereign immunity and to that inquiry.

8 Congress can't go beyond its  
9 enumerated powers. It can't direct states to do  
10 particular things. But it can invite states to  
11 do them by extending, you know, an offer and the  
12 states accepting.

13 And I think part of that relationship  
14 and making sure that there is legitimacy to that  
15 broader, you know, exhibition of power is a  
16 clear statement: Here is what you're in for if  
17 you -- if you take this money. Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Mr. Snyder.

21 ORAL ARGUMENT OF BENJAMIN W. SNYDER

22 FOR THE UNITED STATES, AS AMICUS

23 CURIAE, SUPPORTING NEITHER PARTY

24 MR. SNYDER: Mr. Chief Justice, and  
25 may it please the Court:

1           For half a century, this Court has  
2 recognized that Section 1983 means what it says,  
3 providing an express cause of action that by  
4 default applies to rights created by any federal  
5 statute.

6           Petitioners provide no sound basis for  
7 revisiting that precedent.

8           First, they offer no evidence that the  
9 Congress that enacted Section 1983 would have  
10 viewed breach-of-contract suits by third parties  
11 as remotely relevant to the new tort it was  
12 creating.

13           Second, Petitioners can't show that  
14 their rule was the sort of well-settled  
15 background principle that Congress incorporates  
16 into a statute silently.

17           And, finally, Congress has  
18 affirmatively confirmed that some rights created  
19 in the Social Security Act are enforceable  
20 through Section 1983. Disregarding that  
21 ratification would unsettle decades of  
22 legitimate legislative reliance.

23           This Court should accordingly reaffirm  
24 the framework that it applied in *Gonzaga* and  
25 *Blessing*. Applying that framework here,

1       however, we agree that Congress displaced  
2       Section 1983 in FNHRA, and we therefore ask the  
3       Court to reverse on that basis alone.

4                   I welcome the Court's questions.

5                   CHIEF JUSTICE ROBERTS:  So you think  
6       -- the same question I posed to Mr. Robbins.  In  
7       terms of looking to see if there's a  
8       comprehensive remedy, do administrative remedies  
9       provided by the Secretary count?

10                  MR. SNYDER:  So I think we would  
11       articulate the standard, frankly, much like  
12       Justice Kagan did.  We think that they can count  
13       in some circumstances.  We certainly don't think  
14       that they count in all circumstances.

15                  This Court has said that ordinarily a  
16       state administrative remedy is not sufficient to  
17       displace Section 1983.  But, for two reasons, we  
18       think that the remedy that Congress created here  
19       is -- is sufficient to displace 1983.

20                  The first is that it is an extensive  
21       system of remedies that include enforcement  
22       mechanisms by the Secretary himself.  So the  
23       states administer FNHRA in the sense that they  
24       provide surveyors who go out to each facility  
25       each year to make sure that the -- the

1 facilities are in compliance with FNHRA.

2 But there is also an additional  
3 process by which the Secretary can impose  
4 sanctions on each facility. They can impose  
5 civil penalties of up to \$10,000 per day per  
6 violation. They can cut off further Medicaid  
7 funding at the facility. They can require the  
8 installation of new management at the facility.  
9 And they can even order the facility to close.

10 So we think those administrative  
11 mechanisms by the Secretary are significant.

12 CHIEF JUSTICE ROBERTS: I understand  
13 how you -- how administrative remedies that  
14 lessen the burden on the -- on the -- on the  
15 recipient, the states, certainly could be taken  
16 into account.

17 But, if the requirement is that the  
18 states know unambiguously what they're agreeing  
19 to, how can administrative remedies that expand  
20 their liability be taken into account?

21 MR. SNYDER: So --

22 CHIEF JUSTICE ROBERTS: Taken into  
23 account the other way.

24 MR. SNYDER: So, Mr. Chief Justice,  
25 when this Court has talked about the unambiguous

1 requirements in its -- its 1983 cases, it's  
2 really focused on whether the right was set out  
3 unambiguously in the statute. The Court hasn't  
4 talked about that unambiguous requirement in the  
5 second part of the Gonzaga inquiry. So I think  
6 that's a partial answer.

7           The other thing I would say is that  
8 these administrative enforcement mechanisms are  
9 laid out in the statute. Now they're elaborated  
10 on in regulations, but the statute itself  
11 provides for all of the enforcement mechanisms  
12 that I just described, and so the state knows  
13 about those.

14           I -- I -- I don't --

15           CHIEF JUSTICE ROBERTS: Well, I mean,  
16 one of them is that voice grievances. I mean,  
17 that certainly doesn't set out in the statute  
18 any -- any awareness of what type of remedies  
19 are going to be provided in that situation.

20           MR. SNYDER: No, that's true. And so  
21 the remedies that I described are not remedies  
22 for grievances. Grievances tend to be resolved  
23 at the facility level, or a nursing home  
24 resident can also file grievances with the state  
25 long-term care ombudsman, who can help to bring

1 about an amicable resolution of those problems.

2 The remedies that I was describing  
3 come either from complaints, which are more  
4 formal filings with the State Survey Commission  
5 or State Survey Agency or through notice to HHS,  
6 which can then send out a federal survey team if  
7 it -- if it deems that appropriate to impose  
8 those remedies.

9 JUSTICE KAVANAUGH: Is there a --  
10 sorry.

11 MR. SNYDER: So I was going to go back  
12 to the other thing that I think is significant  
13 here and why we think this administrative  
14 enforcement mechanism is sufficient.

15 We think that ordinarily -- Justice  
16 Kagan, you were getting at this -- ordinarily,  
17 when you have a system in which all of the  
18 regulated parties are state actors, and Congress  
19 creates an administrative enforcement mechanism,  
20 it would be unclear whether Congress intended  
21 that administrative mechanism to be exclusive or  
22 if, instead, Congress just assumed that  
23 Section 1983 would provide a background default  
24 rule that would also allow private suits.

25 What's different about this case is



1 that Congress was acting in an area where a  
2 substantial number of the participants are  
3 private parties, and Congress contemplated  
4 providing a private cause of action against  
5 those private parties but left that out of the  
6 ultimate bill it enacted.

7           And so we know that Congress believed  
8 that the administrative enforcement mechanism it  
9 was creating was sufficient for the 90 percent  
10 of nursing home residents who -- who live in  
11 privately operated -- operated facilities, and  
12 we think that's a very strong indication that it  
13 -- it didn't believe that a private cause of  
14 action --

15           JUSTICE KAVANAUGH: That's an unusual  
16 line to draw and would be a new line in the case  
17 law. That's not to say it's not a good line  
18 here. But --

19           MR. SNYDER: I -- so --

20           JUSTICE KAVANAUGH: -- that would be  
21 -- that would be different.

22           MR. SNYDER: I -- I agree with that.  
23 I -- I mean, we think that this case is  
24 different from the other cases that this Court  
25 has considered. The -- the cases in which --

1 JUSTICE KAVANAUGH: Can I -- keep  
2 going.

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

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

8 So state administrative remedies are  
9 different from private administrative remedies  
10 in the statute for purposes of the analysis, or  
11 are they considered the same?

12 MR. SNYDER: So the -- the -- the  
13 statute gives the Secretary --

14 JUSTICE KAVANAUGH: No, I mean, as a  
15 general -- in the 1983 case law in this area,  
16 are state administrative remedies that are  
17 available considered differently from private  
18 administrative remedies? Do you understand the  
19 question?

20 MR. SNYDER: So I -- I'm not sure I  
21 do. I'm trying to -- so I would say that this  
22 Court has said that -- that state administrative  
23 remedies are ordinarily not enough.

24 JUSTICE KAVANAUGH: Yeah.

25 MR. SNYDER: We think that it is

1 significant that some of the administrative  
2 remedies available here are not state but rather  
3 federal. I'm not sure if that's the distinction  
4 you're --

5 JUSTICE KAVANAUGH: That's -- that's  
6 the distinction.

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

8 JUSTICE KAVANAUGH: That is. That is  
9 the distinction.

10 MR. SNYDER: -- we do think that  
11 that's significant. We don't think that every  
12 time there is a federal administrative remedy  
13 that is necessarily preclusive of resort to  
14 Section 1983.

15 JUSTICE KAVANAUGH: Okay. So let me  
16 stop you there just so I can get the analysis  
17 straight.

18 If you didn't have your argument about  
19 the private state nursing homes, so assume you  
20 did not have that argument here, would the  
21 private administrative remedies be enough to  
22 preclude the 1983 suit under our case law in the  
23 view of the government?

24 MR. SNYDER: I think it would be a  
25 much closer question and I think it probably

1 would not be enough. We -- we agree with  
2 Justice Kagan that there needs to be some  
3 incompatibility or some tension. And I'm happy  
4 to talk through --

5 JUSTICE KAVANAUGH: And what do you --  
6 what do you do about the sentence in the case  
7 law that was referred to by the other side that  
8 says the -- the dividing line is private  
9 remedies?

10 MR. SNYDER: So I -- I -- I guess I  
11 haven't -- I didn't take that to be articulating  
12 a very precise line between exactly which ones  
13 are sufficient and which ones aren't.

14 JUSTICE KAVANAUGH: Well, it says:  
15 "The existence of a more restrictive private  
16 remedy for statutory violations has been the  
17 dividing line between those cases in which we  
18 have held" -- you know, then it goes on. That's  
19 in Rancho Palos Verdes.

20 Now later in the opinion it refers to  
21 private judicial. So I'm just trying to figure  
22 this out.

23 MR. SNYDER: So -- so, to the extent  
24 that the Court was talking about the dividing  
25 line between those cases in which it's actually

1 found Section 1983 displaced and the cases where  
2 it hasn't, I think just descriptively the line  
3 is the availability of private judicial  
4 remedies. In each of those three cases, there  
5 was a private judicial remedy.

6 Now, in cases where this Court has  
7 found that Section 1983 was not displaced, the  
8 Court has emphasized the lack of either a  
9 judicial or an administrative mechanism.

10 And so we think the fact that the  
11 Court has asked about the availability of an  
12 administrative mechanism suggests that in some  
13 cases that could be sufficient, and we think  
14 that it's sufficient here.

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

19 MR. SNYDER: Can I do the hypo?

20 JUSTICE ALITO: Yeah, go ahead. Ask  
21 your own.

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

23 JUSTICE ALITO: Yeah.

24 (Laughter.)

25 MR. SNYDER: And -- and our answer is

1 the same in that case. I mean, the -- frankly,  
2 it's -- it's helpful atmospherically that the  
3 number is 90/10. But the thing that's  
4 significant for us is that you're not in the  
5 situation where Congress would have just assumed  
6 that Section 1983 applied for all of the places  
7 in which the right was being established.

8 It -- so it's more of a binary  
9 distinction and the percentage just happens to  
10 be helpful.

11 JUSTICE SOTOMAYOR: So I look at --

12 JUSTICE KAGAN: How low can you go?

13 MR. SNYDER: We got as low as -- as  
14 10 percent of private facilities. And I think  
15 my answer was still there. Below that, Congress  
16 may have just --

17 JUSTICE KAGAN: Ten percent of private  
18 facilities?

19 MR. SNYDER: I don't want to suggest  
20 that that's an incredibly clear line-drawing  
21 problem or line. The -- the thing that we are  
22 getting at is whether Congress would have  
23 assumed that Section 1983 was providing a -- a  
24 backstop in most of the cases.

25 And, here, Congress wouldn't have done

1 that because Congress knew that for a  
2 significant number of the cases where it was  
3 creating rights, there would be no private cause  
4 of action. And so it must have concluded that  
5 the administrative mechanism it was establishing  
6 in FNHRA itself was comprehensive and sufficient  
7 at the federal level to protect those rights.

8 JUSTICE SOTOMAYOR: But why? In  
9 Indiana -- we have an amicus that tells us that  
10 Indiana, the majority of nursing homes are  
11 state-owned and that in Pennsylvania --  
12 immunizes government officials from any recovery  
13 whatsoever.

14 So why should we assume that Congress  
15 wanted to take away a 1983 right as an  
16 additional remedy for a violation of a state  
17 obligation? Given that these other things could  
18 immunize actors, why is this in tension in any  
19 way?

20 MR. SNYDER: So, Justice Sotomayor,  
21 you -- you mentioned the numbers in Indiana.  
22 That's a relatively recent development that CMS  
23 is aware of and is considering, but I don't  
24 think that would have been as --

25 JUSTICE SOTOMAYOR: Well, but it

1 doesn't -- it doesn't destroy the basis of my  
2 question, which is, if what we're looking at is  
3 whether Congress intended these mechanisms to do  
4 away with other remedies, we know it said no  
5 explicitly in the statute. And I take it at its  
6 word.

7           And, secondly, those other remedies  
8 have benefits that are independent from the  
9 privately owned.

10           MR. SNYDER: So a couple of things on  
11 that. One is that within the administrative  
12 enforcement mechanism that Congress created, it  
13 did address this concern about sort of -- I -- I  
14 think the negative characterization would be the  
15 state regulating state entities. And in that  
16 context, Congress said that the Secretary would  
17 have responsibility for certifying state  
18 facilities and gave the Secretary the ability to  
19 impose enforcement remedies at state-operated  
20 facilities. So we think that Congress accounted  
21 for it in that way.

22           You mentioned that Congress said  
23 expressly no in the statute, and I think you  
24 were referring to (h)(8), so I wanted to wanted  
25 to address that provision. We -- we understand



1 that provision to operate in the same way as the  
2 provisions that this Court addressed in Sea  
3 Clammers and Rancho Palos Verdes. Congress, in  
4 that provision, was attempting to ensure that  
5 rights that -- that residents already had  
6 independently of FNHRA would not somehow be  
7 eliminated through the adoption of FNHRA.

8 It spoke specifically to -- sorry.  
9 I'm looking at the language. The -- it  
10 shouldn't be construed as limiting -- sorry --  
11 that the remedies it was creating were in  
12 addition to those otherwise available under  
13 state or federal law.

14 We think that that "otherwise  
15 available" means rights that -- rights and  
16 remedies that the residents would have had  
17 without the adoption of FNHRA. We don't think  
18 that was speaking one way or the other to  
19 whether Congress intended for FNHRA to allow  
20 residents to bring new Section 1983 suits they  
21 hadn't been able to bring before.

22 JUSTICE SOTOMAYOR: It seems to me  
23 that if Congress was explicitly looking to state  
24 regulation that it would want a cause of action  
25 that already existed to apply. By mentioning

1 the state and the obligation for the federal  
2 government to step in and regulate it more, one  
3 would think that 1983 would have a greater  
4 attraction there.

5 MR. SNYDER: So, Justice Sotomayor, we  
6 -- we just draw a difference in -- a different  
7 inference from the way Congress structured the  
8 statute. We also think, to -- to get to the  
9 point of the tension between the administrative  
10 enforcement mechanism that Congress created and  
11 Section 1983 remedies, that Congress  
12 specifically directed the ways in which money  
13 collected through civil penalties are be -- are  
14 to be spent, for example, and focused that on  
15 the -- the welfare of residents more broadly, as  
16 opposed to just going to an individual resident  
17 whose rights had been wronged.

18 And so allowing Section 1983 suits  
19 that would sort of bypass that administrative  
20 enforcement mechanism and lead to funds being  
21 taken out of the nursing home system would be  
22 inconsistent with that congressional choice.

23 I do want to take a moment -- I  
24 haven't gotten any questions on the first  
25 question presented, but I do want to bring up

1 the 1994 statutes, which, to the extent that  
2 there is any doubt about whether Thiboutot was  
3 correctly decided, we think that the two  
4 legislative ratifications that Congress adopted  
5 in 1994 put that to rest. In those statutes,  
6 Congress wrote that "in an action brought to  
7 enforce a provision of the Social Security Act,  
8 such provision is not to be deemed unenforceable  
9 because of its inclusion in a section of the Act  
10 requiring a state plan."

11 I don't think there's any way to read  
12 that legislative text other than as embracing a  
13 -- a congressional expectation that at least  
14 some of the provisions of the Social Security  
15 Act would be enforceable under Section 1983.

16 My friend's approach on the first  
17 question presented would say that no provisions  
18 of the Social Security Act can ever be enforced  
19 under Section 1983. We think that was wrong as  
20 an original matter, but we also don't think that  
21 it can be reconciled with those 1994 statutes.

22 With that, I'm happy to rest on our  
23 brief.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Justice Thomas?

2 JUSTICE ALITO: Well, on your  
3 90 percent argument, I don't know whether this  
4 is apt, but do you happen to know what the  
5 breakdown of public and private covered entities  
6 is under Title IX?

7 MR. SNYDER: I don't. I'm sorry. I  
8 will say to the extent that it's -- it's  
9 relevant, this same question came up in -- in  
10 Gonzalez, which involved -- similarly involved  
11 schools. And Justice Ginsburg asked at argument  
12 about this same sort of problem, that it would  
13 be kind of strange to say that Section 1983 is  
14 available to enforce rights against public  
15 schools but not private schools that are subject  
16 to the same requirements.

17 Now that's not the basis on which the  
18 Court decided it, but, to the extent that  
19 Respondent has -- have suggested that this is a  
20 new idea that is coming up here for the first  
21 time, that's at least some indication that  
22 people have thought about it before.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Sotomayor?

25 Justice Kagan?

1 JUSTICE KAGAN: Well, it does seem  
2 kind of a new idea. I mean, you know, this is a  
3 statutory interpretation question. We're --  
4 we're trying to figure out whether one scheme is  
5 compatible with another scheme. You're not  
6 looking at text. You're not looking at  
7 structure. You're not looking at history.  
8 You're looking at, like, what you think Congress  
9 knew about the market composition. The -- and  
10 that -- that does seem -- Justice Kavanaugh said  
11 unusual. It seems unusual.

12 MR. SNYDER: So, Justice Kagan, the  
13 best analogy we've been able to come up with is  
14 that in -- I'm hesitant to say this, but in this  
15 Court's ACCA cases, the Court has sometimes  
16 looked --

17 JUSTICE KAGAN: You should hesitate to  
18 say that.

19 (Laughter.)

20 MR. SNYDER: But the Court has  
21 sometimes looked at what was the state of play  
22 when Congress adopted -- adopted ACCA. What --  
23 how would it have played out? You know, what  
24 were the -- the state rules of burglary in -- in  
25 -- at the time it was adopted? And we think the

1 analysis is, you know, similar here in that  
2 you're looking at what would Congress have  
3 expected.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Kavanaugh?

6 Justice Barrett?

7 Justice Jackson?

8 Okay. Thank you, counsel.

9 Mr. Tutt.

10 ORAL ARGUMENT OF ANDREW T. TUTT

11 ON BEHALF OF THE RESPONDENT

12 MR. TUTT: Thank you, Mr. Chief  
13 Justice, and may it please the Court:

14 The difference between our position  
15 and the United States's position in this case is  
16 unbelievably narrow. The United States agrees  
17 that this Court should not overrule decades of  
18 precedent holding that rights secured by  
19 Spending Clause laws are enforceable under  
20 Section 1983. And the United States agrees that  
21 FNHRA creates two enforceable rights. And we  
22 are obviously right about those points.

23 The only point of departure is that  
24 the United States believes that Congress showed  
25 a clear intention to preclude access to 1983 by

1 extending FNHRA rights to residents of private  
2 nursing homes, even though they're not able to  
3 use 1983 to enforce those rights because 1983  
4 only permits suits against government actors.

5           That gets the statute backwards.  
6 FNHRA's text and context show that when Congress  
7 enacted the statute in 1987, it wanted to  
8 preserve access to all available remedies for  
9 FNHRA violations to the greatest extent  
10 possible.

11           Thus, as no one disputes, Congress  
12 expressly preserved the ability of nursing home  
13 residents to sue to enforce their FNHRA rights  
14 in private lawsuits under state tort law. And,  
15 as the United States concedes, Congress  
16 expressly preserved the ability of the Attorney  
17 General to enforce these rights under CRIPA,  
18 which is just Section 1983 for the Attorney  
19 General.

20           We think it is equally clear that  
21 Congress wanted to preserve access to  
22 Section 1983 for two reasons. First, the  
23 statute says it. The statute's Savings Clause,  
24 on Joint Appendix 123, means what it says. The  
25 Savings Clause says that other remedies will

1 also be available to enforce FNHRA. The  
2 legislative history confirms that that is the  
3 correct reading of the text.

4 Second, Congress had good reason to  
5 preserve 1983 specifically for residents of  
6 government nursing homes. Congress knew that  
7 sovereign immunity often makes it more difficult  
8 or impossible to sue government nursing homes.  
9 Congress also understood that when states own  
10 the nursing homes, FNHRA's scheme, which depends  
11 on states to enforce FNHRA's requirements, falls  
12 apart.

13 And Congress enacted FNHRA against a  
14 background of numerous laws, like CRIPA, RLUIPA,  
15 RFRA, and Section 1983 itself, that specifically  
16 hold governments to a higher standard to protect  
17 rights than private institutions.

18 Finally, I would also like to  
19 reiterate that, even aside from all of the  
20 above, the actual standard in this Court's cases  
21 for finding implied preclusion is exceptionally  
22 high. It requires incompatibility between the  
23 remedies in the statute and Section 1983. There  
24 is no incompatibility here.

25 I welcome the Court's questions.



1 CHIEF JUSTICE ROBERTS: You -- you  
2 said -- you -- you quoted the provision  
3 referenced in the Joint Appendix about other  
4 remedies. Mr. Robbins told us that the "other"  
5 means other than the particular statute at  
6 issue. What -- what is your response to that?

7 MR. TUTT: I don't think it makes  
8 sense grammatically. It says the remedies  
9 provided under this subsection shall be in  
10 addition to those otherwise available under --  
11 under state and federal law.

12 And so it's talking about the remedies  
13 in the statute that are for FNHRA violations.  
14 So these are taking funds away or they're actual  
15 remedies as the word "remedy" is used. It's not  
16 a -- it's not a sort of term of art.

17 If you compare that with the Savings  
18 Clause in Sea Clammers, it said the right to  
19 pursue other relief. And the Court found that  
20 provision ambiguous, then looked to the  
21 legislative history.

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

24 MR. TUTT: Yes. Well, it had -- the  
25 way it's structured grammatically, it actually

1 says the right to pursue other relief, and so  
2 under other statutes.

3 So it's that the -- when the Congress  
4 used that in the Savings Clause, the Court  
5 deemed that provision ambiguous. But the  
6 statute also had strong indicia of true  
7 incompatibility with 1983.

8 It had citizens suit provisions that  
9 limited the available relief under federal law.  
10 So, if you brought -- if you made 1983  
11 available, that Savings Clause was going to be  
12 doing a lot of work in the Sea Clammers case  
13 because it was going to be basically eliminating  
14 the private citizens suit provision. There was  
15 a true incompatibility because people would  
16 always use 1983.

17 CHIEF JUSTICE ROBERTS: That's a  
18 respect in which you depart from the Solicitor  
19 General?

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

21 JUSTICE JACKSON: Can I ask, wouldn't  
22 you have a stronger argument if the residents  
23 weren't given sort of individual administrative  
24 rights in this -- in this world? Maybe they  
25 aren't. And maybe I'm not reading the statute

1 correctly. But I understood that Congress has a  
2 scheme now for allowing -- for requiring states  
3 to have plans that allow individual residents  
4 who have rights that they feel are being denied  
5 to have hearings, to have appeals, to cause the  
6 investigation of complaints.

7 And so I'm wondering whether the  
8 incompatibility might be coming from allowing  
9 people to bring 1983 suits in lieu of following  
10 the very sort of comprehensive administrative  
11 processes that Congress has put in the statute.

12 MR. TUTT: Your Honor, I would -- I  
13 would just -- I have several answers to that  
14 question.

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

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

22 JUSTICE JACKSON: But I'm not sure  
23 that's an answer. You're just saying people  
24 don't use 1983.

25 MR. TUTT: They don't use it in lieu

1 -- yes, Your Honor. I'm saying they don't use  
2 it in lieu of the administrative remedies  
3 because the administrative remedies are supposed  
4 to be lightweight, easy to use, fast remedies  
5 that ultimately restore the status quo. That's  
6 the nature of many of the remedies in tension.

7 JUSTICE JACKSON: But I guess the  
8 question is, why isn't that what Congress  
9 intended rather than giving people the -- the  
10 opportunity to get damages?

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

22 MR. TUTT: Your Honor, I want to  
23 emphasize how the Savings Clause fits into this  
24 argument, because I think, even if you don't  
25 think it's an independent basis for ruling for

1 us and gets us all the way there, it -- it tells  
2 us what Congress's intent was on this very  
3 question because it preserved state tort  
4 actions, state private damages actions for  
5 individuals against nursing homes that violate  
6 these rights.

7           And this is in the actual legislative  
8 history even more clearly than in the text of  
9 the statute. So it confirms the text.

10           So that's -- that's how I understand.  
11 If they are -- if they are still permitting  
12 people to enforce these rights in private  
13 damages suits, just under state law, then why  
14 would they not also want to make available the  
15 remedy that very clearly applies in this exact  
16 situation, which is a remedy that permits you to  
17 sue for the deprivation of any rights secured by  
18 the laws?

19           JUSTICE JACKSON: And you don't think  
20 the answer is found in the fact that there's  
21 just -- you know, if they allow this federal  
22 right to go forward, it's really not going to be  
23 something that all of the people can avail  
24 themselves of or all of the people in nursing  
25 homes because of the idea that only a few of

1       them are state-run?

2                   MR. TUTT:  Your Honor, we don't know,  
3       for instance, whether, even though 10 percent of  
4       nursing homes were public, whether the worst  
5       nursing homes were those 10 percent.

6                   We don't know anything about what  
7       Congress knew, in fact, about the state of play  
8       in the nursing home industry.  We don't know if  
9       Congress expected that in 10 years' time it  
10      would be flipped around and would be 10 percent  
11      private and 90 percent public.

12                   And it actually cashes out in this  
13      case because Indiana has made more than  
14      90 percent of its nursing homes public.  So it  
15      is the exact flip reverse of the rest of the  
16      nation.

17                   And for the individuals in those  
18      nursing homes who confront very draconian  
19      limitations on their ability to actually enforce  
20      these rights under state law, against state-run  
21      nursing facilities, it is really Section 1983  
22      that is filling the gap and making those rights  
23      real for those people.

24                   Congress doesn't create rights with  
25      the expectation that, generally, with the

1 expectation that someone else will come in and  
2 enforce those rights on your behalf.

3           The way that the Solicitor General  
4 thinks this scheme should work and -- and HHC is  
5 that you are given rights. You are told of  
6 these rights orally and in writing on admission  
7 to the nursing home. They say you have the  
8 right to be free from restraints. And your  
9 family reads this and then, if you -- you don't  
10 actually have any rights to enforce.

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

13           JUSTICE KAVANAUGH: Well --

14           JUSTICE ALITO: Aren't the --

15           JUSTICE KAVANAUGH: -- what's wrong  
16 with an administrative process, though, if it's  
17 comprehensive and works? And -- and so that's  
18 A.

19           And then, B, you know, we have twice  
20 said, and I know you'll want to put this in  
21 context, but we have twice said the existence of  
22 a more restrictive private remedy for statutory  
23 violations has been the dividing line.

24           And so take those two.

25           MR. TUTT: Well, Your Honor, the --

1 the more restrictive private remedy language, as  
2 I read those cases, I thought it was referring  
3 to judicial -- federal judicial remedies. I  
4 thought that they were being used  
5 interchangeably, both because, especially if you  
6 read the Fitzgerald opinion, it says, you know,  
7 they would have circumvented required procedures  
8 prior to filing suit in sort of sentences that  
9 are right next to each other.

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

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

25 MR. TUTT: Well, it will to a -- it



1 will to a certain extent, but it would also then  
2 -- if you adopt, for instance, the -- the United  
3 States's position --

4 JUSTICE KAVANAUGH: Put that aside.

5 MR. TUTT: Okay.

6 JUSTICE KAVANAUGH: Just the -- the  
7 private remedy point.

8 MR. TUTT: On the private remedy  
9 point, these are really the opposite of  
10 comprehensive remedies. These are minimal  
11 state-level administrative remedies. They --  
12 they -- they are the equivalent of saying that  
13 the nursing home should make sure that if your  
14 rights are violated, it at least has some kind  
15 of process for you telling on the person who is  
16 abusing you.

17 The -- the -- the nursing home is  
18 required to then inform the state regulator, and  
19 then maybe the state regulator will take action.

20 In this very case, HHC continues to  
21 say that -- that we got all the relief that we  
22 were seeking. We got none of the relief that we  
23 were seeking. We didn't even -- we didn't even  
24 use any kind of grievance process. A private  
25 neurologist had to be hired to taper the drugs.

1 There was no -- there was sort of no remedy from  
2 the nursing home for the actual chemical  
3 restraints that were applied to Mr. Talevski.

4 JUSTICE KAVANAUGH: What about the  
5 point that the Secretary can come in then, you  
6 know, in circumstances where there's been  
7 deprivation?

8 MR. TUTT: Your Honor, there may be a  
9 process for getting to the Health and Human  
10 Services Secretary to actually get enforcement  
11 for rights violations by nursing homes.

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

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

1                   So, empirically, these suits are  
2 brought actually mostly as injunctive actions to  
3 remedy systemic, egregious policies of actually  
4 violating the federal rights in FNHRA. So those  
5 are the kinds of suits that, as we understand  
6 it, are being brought.

7                   JUSTICE KAVANAUGH: Can I ask you then  
8 -- go ahead.

9                   CHIEF JUSTICE ROBERTS: I was just  
10 going to say the -- your friend says that the  
11 policies were filed -- were followed, the  
12 alternative remedies, and that Mr. Talevski no  
13 longer had to take the medication and was  
14 entitled to return to the facility if he wished  
15 to do so.

16                   MR. TUTT: Your Honor, with respect to  
17 the first question, as -- as pleaded in the  
18 complaint, he didn't -- didn't get that with  
19 respect to the chemical restraints. Instead, a  
20 private neurologist was hired and worked with  
21 the nursing home to have the -- the drugs  
22 removed.

23                   With respect to the transfer, they won  
24 the administrative proceeding -- proceeding, and  
25 the nursing home still refused his readmission.

1 And they pleaded with the state regulator -- and  
2 perhaps HHC can address this on rebuttal -- but  
3 they were told you need to go to a state court  
4 and sue for a state injunction to force the  
5 nursing home to actually take action on the  
6 administrative order from the ALJ that you just  
7 won. So that was the -- that was how this  
8 actually played out in practice.

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

20 And it is very difficult to think of  
21 this as a comprehensive remedial scheme when the  
22 remedy for being involuntarily evicted from your  
23 home by a nursing home is to go back to that  
24 place where you fear retaliation potentially,  
25 where if -- if you were involuntarily

1 transferred in, for instance, the context of  
2 this case because you were being abused, you  
3 don't want to go back.

4 So the only available remedy isn't  
5 even the remedy that you would want.

6 JUSTICE KAVANAUGH: Can I -- can I ask  
7 you then about -- so that's responsive to the  
8 one theory that you have to deal with on the  
9 comprehensive -- on the administrative scheme.

10 The SG has, as you're well aware, an  
11 entirely different theory for why it's  
12 implicitly precluded, and I think I still think  
13 that theory is unusual, but I'd like to hear  
14 your response to that.

15 And if you know, what would be the  
16 implications of that theory for all sorts of --  
17 Justice Alito alluded to that, but for other  
18 cases? You may not know the answer to that,  
19 but, if you know anything about that, I'd be  
20 interested.

21 MR. TUTT: Well, Your Honor, I -- I  
22 know that there are many Spending Clause  
23 programs where the -- where the entitlements --  
24 where there are rights-creating statutes that  
25 create rights that run against both private and

1 public actors. And the Court has never drawn  
2 this line that somehow, if the right also runs  
3 against a private actor, it's a second-class  
4 right, even when you're in a public facility.

5 I mean, in the -- for any person who  
6 goes to a public nursing home, they don't go and  
7 research sort of whether or not the private  
8 nursing homes also have a bill of rights. And  
9 so they read that bill of rights on a public  
10 nursing home's walls and they think: I've got  
11 these rights. And, usually, when you have  
12 rights against the government, you think I must  
13 have some kind of remedy. That -- that's one  
14 answer.

15 The other answer I want to give is  
16 it's just an incredibly unadministrable test  
17 that they're asking the Court to adopt, which  
18 would require, again, the Court to weigh policy  
19 considerations that it doesn't undertake in  
20 ordinary statutory interpretation analysis.

21 The Court actually has rules of  
22 statutory interpretation that resolve cases like  
23 this about implied repeal or implied preclusion.  
24 And those -- those are typically the way that  
25 the Court addresses this kind of situation

1 because it doesn't want to get into empirical  
2 judgments about who is abusing -- you know, who  
3 is the worst actor, who -- who are these rights  
4 actually being created to protect, et cetera.

5 I mean, this Court's cases, Gonzaga  
6 especially, make it very clear what Congress has  
7 to do to create rights. And this is the rare  
8 statute that meets those incredibly exacting  
9 standards for creating rights.

10 JUSTICE ALITO: What do you make of  
11 the statement in Gonzaga that the standard for  
12 determining whether an individual statutory  
13 right exists is "no less and no more than what  
14 is required for Congress to create new rights  
15 enforceable under an implied private right of  
16 action"?

17 MR. TUTT: We don't -- we don't  
18 disagree that that is the standard that we have  
19 to meet, but we do think that we meet it. We  
20 just don't have to meet that second step of the  
21 analysis. But we do have to show that there is  
22 a right as good as the right created in Title IX  
23 or the right created in Title VI, and we think  
24 we have that.

25 JUSTICE ALITO: Well, could you have

1 sued under an implied private right of action?

2 MR. TUTT: Individuals -- when the  
3 regulations were in force before FNHRA was  
4 enacted, individuals attempted to bring suit,  
5 and I can't recall off the top of my head  
6 whether they were successful. I think that  
7 there were mixed results on whether this was  
8 actually brought under a private right of  
9 action. I -- or implied right of action.  
10 Obviously, under the Court's current case law,  
11 it could not be brought as an implied cause of  
12 action, we don't believe.

13 But we do believe that it meets the  
14 test of Gonzaga. And it just fits like a glove  
15 with Section 1983, which is that it says you  
16 have these rights. These rights must be  
17 protected, the right to be free from chemical  
18 restraint. And then it fits in with  
19 Section 1983.

20 JUSTICE GORSUCH: Counsel --

21 JUSTICE ALITO: What would you make of  
22 -- what would you make of the argument that the  
23 rights to which 1983 refers in general are  
24 different from the kind of rights that a person  
25 may assert under Spending Clause legislation?



1 Because usually -- 1983 talks about rights  
2 secured by the Constitution and the laws, and,  
3 usually, in those instances, the laws in  
4 themselves confer the right. But Spending  
5 Clause legislation doesn't confer a right in and  
6 of itself. It's dependent on the recipient of  
7 the money agreeing.

8 So would that -- does that make it  
9 necessary for you to show that, at the time of  
10 the adoption of 1983, it was generally  
11 understood that this type of right fell within  
12 the understanding of the rights to which 1983  
13 refers?

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

24 But, even if you disagree with all of  
25 that, these are actually the kinds of rights

1 that Section 1983 was enacted to protect, rights  
2 to bodily integrity and autonomy, fundamental  
3 rights, you know, if you map this onto the  
4 rights protected by the Constitution.

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

21 JUSTICE THOMAS: Mr. Tutt, if you  
22 don't use the Spending Clause analogy, what  
23 would be the basis or the authority for creating  
24 the right in the first instance?

25 MR. TUTT: Your Honor, this -- this

1 Court -- I think that the rights in this case  
2 could be -- could be conferred under the Court's  
3 broad spend -- Commerce Clause jurisprudence.

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

6 MR. TUTT: Yes.

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

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

23 We don't say that -- that this isn't  
24 the kind of law that the state has to enter  
25 into, the agreement, knowingly and voluntarily

1 and have clear notice and unambiguous notice.  
2 We don't disagree with any of those things,  
3 which are, we think, the things that are key to  
4 the constitutionality of Spending Clause  
5 legislation.

6           The HHC wants to take that analogy one  
7 step further and say that the Congress that  
8 enacted 1983 must have thought that that analogy  
9 that hadn't yet even really been explored by  
10 this Court would further extend to how 1983  
11 would be interpreted. And we don't -- we don't  
12 see -- I hope I'm being responsive.

13           JUSTICE THOMAS: Well, I think the  
14 problem is that it's one thing to have the  
15 contract analogy as a basis. And then, as you  
16 play it out, you say: Well, if you -- if you  
17 continue that, you say, well, who is this  
18 contract between? And that's been the basis.

19           It's the state is receiving the money,  
20 for example, under these conditions, so the  
21 national government can require them to do  
22 certain things. Then the next step would be:  
23 Does it also give a right to a third-party  
24 beneficiary to vindicate some of those rights?

25           That's the way we have done it. Now

1 you're saying it's okay to have the contract  
2 analogy at the formation stage, but you can drop  
3 it along the way if it becomes inconvenient on  
4 the back end, that is, on the rights vindication  
5 stage -- at the rights vindication stage.

6 So I don't know if we've ever done  
7 that, and I don't know if you can -- you can do  
8 that and still have the constitutional  
9 justification for it.

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

17 JUSTICE THOMAS: Okay. I agree. But  
18 is the beneficiary here a party to that  
19 contract? That's -- that's the rub.

20 MR. TUTT: Your Honor -- Your Honor,  
21 we -- we don't dispute that the -- that Mr.  
22 Talevski was the beneficiary of this contract.  
23 We don't -- we don't dispute that if you -- if  
24 you want to think of it that way, but it's not  
25 material for purposes of the -- the analysis

1 because Section 1983 says that he has the right  
2 to sue and the state promised that he would have  
3 the right to sue by entering into the agreement  
4 with the federal government to take.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel. Anything further?

7 JUSTICE THOMAS: No.

8 CHIEF JUSTICE ROBERTS: Justice Alito?  
9 Justice Kagan?  
10 Justice Gorsuch?  
11 Justice Barrett?

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

24 MR. TUTT: I think that -- I think  
25 that that would be one way to understand the --

1 the question and that -- that we don't -- we  
2 don't think that it did matter to Congress  
3 because there's nothing in the text of  
4 Section 1983 that -- that could be read to sort  
5 of care about the provenance of the rights  
6 you're trying to assert.

7 Thank you, Your Honor.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Mr. Robbins, rebuttal?

11 REBUTTAL ARGUMENT OF LAWRENCE S. ROBBINS  
12 ON BEHALF OF THE PETITIONERS

13 MR. ROBBINS: Thank you, Mr. Chief  
14 Justice.

15 I'd like to open with Justice Thomas's  
16 question to Mr. Tutt just a moment ago. What is  
17 unique about the Spending Clause is that it  
18 allows Congress to do things it could not  
19 otherwise constitutionally do.

20 I submit that, obviously, this  
21 question is not presented today but that the  
22 micromanaging of nursing care facilities in  
23 Marion, Indiana, is not something which Congress  
24 could have done under its Commerce Clause  
25 authority or under its Section 5 Fourteenth

1 Amendment authority. The reason it can do these  
2 things is because the state has consented to it.

3 So the question of consent is crucial  
4 to the constitutionality of the statute itself,  
5 and that entails certain common law principles.  
6 You don't -- the -- the 1871 Congress did not  
7 have to imagine that Pennhurst would someday  
8 come down.

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

17 And the answer to that question is  
18 that the common law, generally speaking,  
19 prohibited individuals from bringing third-party  
20 beneficiary claims on government contract cases.

21 By the way -- and this goes back,  
22 Justice Sotomayor's question, that you asked  
23 me -- you said, well, what about these legal  
24 history professors who say the law was  
25 different? I contend that they misread the law



1 by, as I say, gerrymandering the denominator,  
2 but, even if it were as murky as the law  
3 professors suggest that it was, the burden is  
4 not on us, I suggest, to show that the law was  
5 clear on our side.

6 The burden is on the plaintiff, who's  
7 asking that a certain right be created and  
8 enforced to show that it was settled in their  
9 direction. You have not heard any argument this  
10 morning that even remotely suggests that that's  
11 true.

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

22 But the statute goes on to say that  
23 all other arguments are preserved. It doesn't  
24 expand or decrease any other basis for saying  
25 that a right is unenforceable. And what's more,

1 it preserves even the outcome in the decision in  
2 Suter.

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

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel. The case is submitted.

7 (Whereupon, at 1:27 p.m., the case was  
8 submitted.)

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## Official - Subject to Final Review

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