SUPREME COURT OF THE UNITED STATES

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

Pages: 1 through 98 Place: Washington, D.C. Date: November 8, 2022

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1 IN THE SUPREME COURT OF THE UNITED STATES 2 3 HEALTH AND HOSPITAL CORPORATION) 4 OF MARION COUNTY, ET AL.,) 5 Petitioners,)) No. 21-806 6 v. 7 IVANKA TALEVSKI, PERSONAL) REPRESENTATIVE OF THE ESTATE OF 8) 9 GORGI TALEVSKI, DECEASED,) 10 Respondent.) 11 _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ 12 13 Washington, D.C. 14 Tuesday, November 8, 2022 15 The above-entitled matter came on for 16 17 oral argument before the Supreme Court of the United States at 11:53 a.m. 18 19 20 21 22 23 24 25

1 APPEARANCES:

2	LAWRENCE S. ROBBINS, ESQUIRE, New York, New York; on
3	behalf of the Petitioners.
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5	Indiana; for Indiana, et al., as amici curiae,
б	supporting the Petitioners.
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9	for the United States, as amicus curiae,
10	supporting neither party.
11	ANDREW T. TUTT, ESQUIRE, Washington, D.C.; on behalf
12	of the Respondent.
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1 PROCEEDINGS 2 (11:53 a.m.) 3 CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 21-806, Health and 4 Hospital Corporation of Marion County versus 5 6 Talevski. 7 Mr. Robbins. ORAL ARGUMENT OF LAWRENCE S. ROBBINS 8 ON BEHALF OF THE PETITIONERS 9 10 MR. ROBBINS: Thank you, Mr. Chief 11 Justice, and may it please the Court: 12 The key to Spending Clause statutes, 13 this Court said in Arlington Central School 14 District, "is what the states are clearly told 15 regarding the conditions that go along with the 16 acceptance of federal funds." 17 Among the most costly conditions that 18 may go along with the acceptance of federal 19 funds is exposure to private litigation under Section 1983. This Court made that precise 20 point in Barnes against Gorman, in which it said 21 2.2 with respect to a school that "without doubt, 23 the scope of potential damages liability is one 24 of the most significant factors a school" -- or, 25 as in this case, a nursing facility -- "would

consider in deciding whether to receive federal
 funds."

3 States are therefore entitled, in our view, to clear notice that they will be subject 4 to such private lawsuits if they expect -- if 5 6 they accept Spending Clause money. Such a clear 7 notice rule comports with the federalism and separation-of-powers principles at stake in 8 these cases, and it accords as well with the 9 common law treatment of third-party beneficiary 10 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 rights that Respondent invokes under FNHRA do 21 2.2 not give rise to Section 1983 claims. 23 First, FNHRA and its implementing regulations provide a comprehensive suite of 24 25 remedies, including a more restrictive private

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

Second, the two rights Respondent 5 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 to nursing facilities that receive federal 10 11 money. And the command to protect and promote 12 those rights are, as in Blessing, system-wide 13 commands, not an unambiguous assurance of 14 individual entitlement.

15 CHIEF JUSTICE ROBERTS: What do you 16 mean -- what do you mean by "system commands"? 17 MR. ROBBINS: In the -- that, as in 18 Blessing, the language of the statute, Mr. Chief 19 Justice, is directed to the rights of -- the --20 the -- the obligation of the nursing facility to 21 take care of the entire system and not focus on 2.2 any particular individual.

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

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1 system in which you promote and protect a 2 certain right. 3 CHIEF JUSTICE ROBERTS: No, I -- I --I -- I think you have a stronger argument on 4 "promote," though, than you have on "protect." 5 6 MR. ROBBINS: Yes. 7 CHIEF JUSTICE ROBERTS: And -- and the -- the -- the statute uses both and then, you 8 9 know, lists a variety of rights. And it seems to me that if you're supposed to protect those 10 11 rights and you're the person who's responsible 12 for conferring -- living up to those rights, 13 that -- that seems to me that it ought to be 14 sufficiently direct under -- under Blessing or 15 Gonzaga or any of the others. 16 MR. ROBBINS: Well -- well, I -- I --17 I'm not inclined to think so, though, to be 18 sure, I think our -- the stronger of our two 19 Gonzaga arguments is the middle -- is the Sea 20 Clammers preclusion argument. That's our --21 that's our first submission with respect to the 2.2 Question 2. 23 What I would say with respect to the 24 Chief -- Your Honor's question, it is a mistake, 25 I think, to pick out the particular clauses that

1 embody these two rights and divorce them from 2 the rest of the statute. Pennhurst, after all, 3 enjoins the Court to look at the whole statute. And when you do that, when you look at 4 the whole statute, the entirety of the FNHRA 5 6 amendments, what you're going to see is that the 7 core of it, contained in subsections (b), (c), and (d), are a series of commands to the nursing 8 9 home to regulate and manage its facility in a 10 particular way. 11 (c) refers to the nursing home's 12 ability -- responsibility to protect and promote 13 certain rights. That's true. (b), on the other 14 hand, talks about administrative obligations, as 15 does (d), whereas (e) and (f) are directed, 16 respectively, to the states and to the federal 17 government, to the Secretary. 18 That is to say, each one of the 19 substantive sections of these amendments is 20 directed to the particular office or officer 21 that has the duty to promote the underlying 2.2 obligations. And so I would say that even 23 though it's true --24 JUSTICE KAVANAUGH: Except --25 JUSTICE KAGAN: Well, that's true --

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1 JUSTICE KAVANAUGH: Go ahead. 2 JUSTICE KAGAN: I guess I'm just not 3 sure, Mr. Robbins, what that -- what that gets you. It's a big statute. It does a lot of 4 things. But one of the things it does is to say 5 6 every nursing facility has to ensure that 7 individual rights are respected and lays out in considerable detail what those rights are and 8 9 say it's your job to see that those rights are 10 fulfilled. 11 MR. ROBBINS: Yeah. Well, again, it 12 is our view that, taken as a whole, this -these are directions to the nursing facilities. 13 14 Even subsection (c), which is the -- the one in 15 which these rights can be found, begins with the 16 command: the nursing home shall. 17 And -- and so, you know, if you're 18 asking the question --19 JUSTICE KAGAN: Well, it's true that 20 the nursing home is involved in this because the 21 nursing home is the entity that's supposed to 2.2 respect the individual rights that are laid out. 23 I mean, you have to think that any individual 24 right imposes a correlative duty on somebody. 25 And, here, it's the nursing home that is

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1 supposed to make sure that those rights are not 2 violated. 3 MR. ROBBINS: I -- I don't disagree with that at all, Justice Kagan. What I do 4 think, however, is that -- and, again, this is 5 6 on the assumption now that we're talking about 7 the Gonzaga inquiry. My threshold argument is based on the 8 common law at the time Section 1983 was enacted 9 10 and on federalism and separation-of-powers 11 principles. But, if we are now in the guts of 12 Question 2, I would suggest that the individual 13 patient is not the unambiguous focus of this 14 statute. 15 JUSTICE KAVANAUGH: It says rights. I 16 mean, it says rights. It's very uncomfortable 17 fact for you is that --18 MR. ROBBINS: Yes. 19 JUSTICE KAVANAUGH: -- the statute 20 says rights over and over again. 21 MR. ROBBINS: Yes. Precise --2.2 JUSTICE KAVANAUGH: I mean, that --23 MR. ROBBINS: And -- and no less so 24 did --25 JUSTICE KAVANAUGH: Residents' rights

1 too. 2 MR. ROBBINS: Yes, of course, it says 3 This Court has twice faced that precise rights. 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 7 Rehab Act of '73. That wasn't enough. The Chief -- then 8 9 Chief Justice Rehnquist said for the Court that 10 we don't pick out little words like "rights," a 11 point repeated by this Court in 2002 in Footnote 12 7 of Gonzaga. 13 The mere fact that the word "right" is 14 sprinkled through the statute -- obviously, I 15 don't dispute that -- is not enough to get you 16 over the unambiguous focus hurdle. 17 But let me be clear. Of the three 18 arguments I'm making today, I promote two ahead 19 of that, and on -- on those points, I think 20 there is not a --21 JUSTICE KAVANAUGH: What's your --2.2 what's your first argument then? That we should 23 overrule the precedent, right? MR. ROBBINS: Well, the first argument 24 25 is that it should extend the principle in

1 Gonzaga to take account of the sate -- the state 2 of third-party beneficiary law at the time 1983 3 was enacted. That is our answer on Question 1. 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 7 remedies provided in subsection (h)(8) provides 8 a comprehensive --9 JUSTICE KAVANAUGH: But, in Sea 10 Clammers, there's a citizens suit provision, 11 right? 12 MR. ROBBINS: Indeed. But this Court has twice now taken account of the Sea Clammer 13 14 and its progeny and twice, once in Rancho Palos 15 Verdes and once in Fitzgerald, has said that the 16 dividing line between what is preclusive and 17 what is not is whether there is a private remedy, not a private judicial remedy, much less 18 a private federal court remedy, a private 19 20 judicial remedy. 21 That's what this Court has twice said 2.2 is the dividing line in that body of law. There 23 is no question, no even fair debating that there is a set of private remedies, which is --24 25 JUSTICE KAVANAUGH: Private judicial

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1 remedies or private administrative remedies? MR. ROBBINS: Private administrative 2 3 remedies. JUSTICE KAVANAUGH: Okay. And we've 4 said that the existence of a state 5 6 administrative remedy does not ordinarily 7 reclose -- foreclose resort to 1983. The 8 Solicitor General quotes that --9 MR. ROBBINS: That's right. 10 JUSTICE KAVANAUGH: -- portion as 11 well. And I just want you to respond to that. 12 How do we -- how do we address that? MR. ROBBINS: Well, first off, these 13 14 are -- these are not simply state remedies. 15 They are remedies that both the Secretary can 16 enforce, including the right to bring a 17 grievance to the Secretary and a grievance to 18 state officials. 19 But I would -- I -- I -- I would say, 20 Justice Kavanaugh, that the -- you know, I 21 really do insist on the dividing line that this 2.2 Court has articulated more recently than the --23 than the language that you've quoted. 24 It seems to me Fitzgerald --25 JUSTICE KAVANAUGH: Can you get -- I'm

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1 sorry to interrupt. I don't want to take too 2 much time. 3 MR. ROBBINS: No, that's fine. JUSTICE KAVANAUGH: But that's a key 4 point for me on the comprehensive scheme 5 6 argument, which is what exactly is the dividing 7 line? I mean, I've got the cases. I've read the cases. What do you think is exact 8 9 formulation of the dividing line? 10 MR. ROBBINS: I think, if I'm reading 11 the two cases I've just cited correctly, and I 12 think I'm quoting -- citing the -- the language almost verbatim, in fact, I think it uses the 13 14 phrase "the dividing line" if I'm not mistaken 15 in both Fitzgerald and Rancho Palos Verdes. 16 And what the Court has said is, if 17 there is a private remedy -- in fact, in one of the cases, I can't now recall, it actually says 18 19 judicial or administrative. 20 JUSTICE KAGAN: You think any private 21 remedy at all is --MR. ROBBINS: No, no, I -- I -- I -- I 2.2 23 don't think so. I mean --24 JUSTICE KAGAN: Because I had thought 25 that we looked for some understanding of

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      incompatibility, that we looked for some ways in
 2
      which the other private remedy was in conflict
 3
      or in -- at least in tension with 1983.
 4
                So, in those cases that you're citing,
      those cases all had remedial schemes which had
 5
 6
      various requirements. They forced you to give
7
      notice, they required you to file at a certain
8
      time, things like that.
9
                And if you gave a 1983 suit, it would
10
      be of a -- a way of evading all those
11
      requirements so that you could see that there
12
      was some kind of tension between the remedial
13
      scheme and 1983.
                MR. ROBBINS: I -- I -- I --
14
15
                JUSTICE KAGAN: But I don't see any of
16
      that here.
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                MR. ROBBINS: But I -- respectfully,
18
      Justice Kagan, I don't think that's the way this
19
      Court has thought about the preclusiveness of
20
      remedies.
21
                I don't contend that 1983 is somehow
2.2
      flatly inconsistent with the exist -- with the
23
      comprehensive remedies provided under (h)(8) and
24
25
                JUSTICE KAGAN: Or even in tension
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1 with or even that --2 MR. ROBBINS: But --3 JUSTICE KAGAN: -- 1983 would pro -would give you an out --4 5 MR. ROBBINS: No --JUSTICE KAGAN: -- and -- and -- and 6 7 -- and so you could escape the requirements of a different remedial scheme. 8 MR. ROBBINS: Well, I think there are 9 respects in which that's true here. For 10 11 example, there are provisions that require that 12 that the Secretary -- as I recall, there are provisions that require -- that -- that give, 13 14 for example, the states discretion as to whether 15 they're going to exercise any of their remedies, 16 including because, for example, they're --17 they're managing the facility, they're looking it over and they -- they don't want to terminate 18 19 a -- a funding or they want to take some more --20 lesser step. 21 I would contend that private 2.2 litigation, which, of course, is not constrained 23 in that way, is, in fact, antithetical to the 24 discretion that states and the Secretary have. 25 But I also quarrel with the premise,

1 Your Honor. I do not think I have to show that 2 1983 is -- and I -- is -- is at odds or even in tension with the -- with the elaborate 3 administrative proceedings provisions given 4 5 here. JUSTICE KAGAN: Well, aren't we trying 6 7 to figure out -- I mean, this is a matter of statutory interpretation -- we're trying to 8 9 figure out whether Congress meant to preclude the 1983 suit. 10 11 And it can't be the case that Congress 12 would mean to preclude the 1983 suit by doing any old thing. I mean, other administrative 13 14 remedies can be perfectly complementary --15 MR. ROBBINS: Yes. 16 JUSTICE KAGAN: -- with a 1983 suit. 17 MR. ROBBINS: I -- I under --18 JUSTICE KAGAN: So we have to be looking for something more than that Congress 19 20 has provided some other remedial avenues. 21 MR. ROBBINS: Well, I -- I -- I think 2.2 in this case it's quite comprehensive. And 23 what's striking about this case, of course, is that Mr. Talevski availed himself of all of 24 25 those provisions, got the relief he wanted, and

1 then came back to court for money. 2 So it -- this is a case where the --3 where the actual regulations did a terrific job. But, again, let me just finish why I quarrel 4 with Your Honor's premise. 5 6 To me, if I -- when -- as I read the 7 body of law that was started with Sea Clammers 8 and goes through Robinson and then up to City of 9 Palos Verdes, what the Court has said is we 10 usually begin with the assumption that the 11 provision of one remedy excludes the others. 12 JUSTICE KAGAN: I don't think that 13 that's the presumption here. I think, once 14 there has been found to be a statute with the 15 character of giving rights, the presumption 16 actually is in favor of 1983 because that's what 17 1983 is supposed to address. 18 And we're looking to see whether 19 another statute negates that presumption by 20 doing something particular, that suggests that 21 Congress wouldn't have wanted nine -- the 1983 2.2 to go forward -- 1983 suit to go forward at the 23 same time. 24 So we need something more than another 25 scheme that does something. We need a sense

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1 that that other scheme was meant to be 2 exclusive, that it was -- that --3 MR. ROBBINS: Well --JUSTICE KAGAN: -- that it -- it -- it 4 5 would have been thought to be incompatible with 1983. 6 7 MR. ROBBINS: Well, I -- I -- I would take a page from the Solicitor General's 8 9 argument, of course, that it would -- it is 10 surpassingly odd to imagine that we would have 11 more exacting obligations on the very thin slice 12 of state nursing homes that get federal money 13 under this program. I'm going to leave that 14 argument to them, and I hope they make it. 15 JUSTICE JACKSON: Mr. Robbins, can I 16 just give you -- and are you finished with this? 17 I'm sorry. 18 MR. ROBBINS: Well, if -- if I might, 19 just --20 JUSTICE JACKSON: Yes. 21 MR. ROBBINS: I -- I don't -- I 22 certainly agree, there's no disputing that the 23 presumption that Your Honor called my attention 24 to is correct. 25 If the statute -- if there is an

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1 enforceable right, which -- with which, of 2 course, I quarrel, but, if there is, it is true 3 that there's a presumption that 1983 kicks in, unless, of course, you take my view of the first 4 question presented, which is that, as a general 5 6 matter, 1983 did not permit third-party 7 beneficiaries to be --8 JUSTICE JACKSON: That -- that's what I wanted to talk about. 9 10 MR. ROBBINS: Yeah. And I do want to 11 come to that. 12 JUSTICE JACKSON: Okay. 13 MR. ROBBINS: But the fact that the 14 burden shifts to us to prove that -- that this -- that Congress intended to foreclose it, 15 16 that's all well and good. The question is, what 17 do you do to discharge that burden? 18 And in case after case, this Court has 19 said that when Congress actually provides for a 20 remedy, we usually begin with the premise that 21 that's -- that that -- you know, I always get 2.2 the Latin wrong, but I think it's exclusio unius 23 or something to that effect -- that's in the case law. And it exists notwithstanding the 24 25 fact that it becomes our burden to sustain --

1 that -- that -- to -- to -- our burden to show 2 that 1983 is not available. One --3 CHIEF JUSTICE ROBERTS: Thank you, counsel. 4 MR. ROBBINS: Okay. 5 6 CHIEF JUSTICE ROBERTS: I just have 7 one last question. On the alternative remedy for grievances, does it matter that what you 8 9 rely on the most is an administrative regulation 10 rather than the statutory language? Because, 11 obviously, the statutory language, you can 12 analyze that as what the state had -- was on notice about or -- or not, but I don't know that 13 14 that's true with respect to subsequent 15 regulations. 16 MR. ROBBINS: Well, I -- I think our 17 view is that if a regulation fairly interprets the statute, then that counts towards the same 18 19 preclusive effect that the statute would. 20 Nobody contests that proposition in 21 front of the Court today. Nobody says that a 22 regulation can't have the same preclusive 23 effect. 24 CHIEF JUSTICE ROBERTS: Well, I -- I 25 -- I would contest that proposition since the

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whole premise is that the state has to be on 1 2 unambiguous, clear notice. But how can that be 3 with respect to a regulation that hasn't even 4 been issued at the time of the statute? MR. ROBBINS: Well, I -- I'm not sure 5 6 that the contract metaphor -- I mean, this Court 7 has said in case after case that the contract metaphor is to -- is to limit the scope, not to 8 9 expand the scope. 10 I'm not sure why a state would need to 11 know that a 1983 -- I'm not sure why the -- the 12 state would need to know what the regulations 13 are --14 CHIEF JUSTICE ROBERTS: Well, because 15 _ _ 16 MR. ROBBINS: -- all about. 17 CHIEF JUSTICE ROBERTS: -- you're 18 talking about contract. The regulations can go 19 two different ways. One could be a -- a 20 regulation that expands the obligations of the 21 state, rather than the one at issue here. 2.2 MR. ROBBINS: Yes. No, I -- I -- I --23 I recognize that. But, I guess, if what we're 24 talking about is what the states clearly 25 understood as a condition, I would then recur to

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1 my central argument on Question 1, which is that 2 no state would have thought that a private party could enforce the contract that consists of 3 FNHRA because it doesn't advert in any way to 4 the right of a private party to bring a lawsuit. 5 6 JUSTICE JACKSON: But isn't that a 7 shift from --8 CHIEF JUSTICE ROBERTS: Thank you. Justice Thomas? 9 10 JUSTICE THOMAS: Nothing, Chief. 11 CHIEF JUSTICE ROBERTS: Justice Alito? 12 JUSTICE ALITO: Well, Respondent 13 relies on the Savings Clause, and you -- you 14 responded only very briefly to that in the reply 15 brief, so I wanted to give you another chance to 16 talk about it. 17 The Savings Clause says "the remedies provided under this subsection are in addition 18 19 to those otherwise available under" -- "for federal law and shall not be construed as 20 21 limiting such other remedies." 2.2 Why doesn't that apply directly here? 23 It doesn't say -- the provision does not say 24 that the right that is asserted must arise from 25 some source other than the law at issue. It --

1 it supplements remedies. 2 MR. ROBBINS: Yes. JUSTICE ALITO: It says that this does 3 not take away remedies. And 1983 provides a 4 5 remedy. 6 MR. ROBBINS: Yes. I appreciate it, 7 Justice Alito, and let me -- let me provide two -- two answers on that. 8 The first is both in Rancho Palos 9 Verdes and in I want to say at least one other 10 of the -- this Court's cases, maybe it's -- it's 11 12 Robinson, the Court has said that when we refer -- when a savings -- so-called Savings 13 Clause refers to federal law or federal statute, 14 15 it is referring to statutes other than the very 16 one that contains the Savings Clause. That's 17 our first submission. 18 But I'd like to follow on to that 19 because I think, if it -- if that's correct, the 20 Savings Clause is our friend, not theirs, and 21 the reason is this: It says in essence the 22 rights in this section, (h)(8), which I have 23 invoked as preclusive, the rights contained in (h)(h) -- (h)(8) are in addition to those in 24 25 statute -- in federal statutes.

1 If "federal statutes" means all statutes other than FNHRA itself, then that 2 3 seems to me pretty strong evidence that there are no other remedies except those found in, for 4 example, the Americans with Disabilities Act or 5 the Rehabilitation Act of '73. 6 7 That is to say, the Savings Clause says are -- these rights are for any other 8 federal -- are in addition to other federal 9 statutes. That seems to me to preclude the 10 11 argument that they are relying on, which is an 12 argument that 1983, married with FNHRA, gives 13 them certain rights. I think the fair reading of the 14 15 Savings Clause is against that combination, 16 precisely because its reference to statutes is 17 to statutes other than FNHRA, and without FNHRA, 18 they've got no 1983 claim in this case. 19 CHIEF JUSTICE ROBERTS: Justice 20 Sotomayor? 21 JUSTICE ALITO: No, that's okay. 2.2 That's fine. 23 JUSTICE SOTOMAYOR: Counsel, do you dispute the amici legal historians' point that 24 25 the prevailing rule in American common law in

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1 the 1870s, before 1983 was passed --2 MR. ROBBINS: Yes. 3 JUSTICE SOTOMAYOR: -- permitted 4 third-party beneficiaries to sue? 5 MR. ROBBINS: I absolutely do. And 6 I'm so glad you --7 JUSTICE SOTOMAYOR: So that's -- so 8 that's just a matter of our reading of history. 9 If we disagree with you --10 MR. ROBBINS: Well --JUSTICE SOTOMAYOR: -- what -- what --11 12 what's left? MR. ROBBINS: Well, can -- can -- can 13 14 I just perhaps answer the question by suggesting 15 where they got it wrong and where instead we --16 the Court may wish to be looking? 17 JUSTICE SOTOMAYOR: Okay. 18 MR. ROBBINS: What they are saying --19 well, they -- they quote a particular secondary article in which --20 21 JUSTICE SOTOMAYOR: Seems to be more 2.2 than --23 MR. ROBBINS: -- somebody actually 24 went to the trouble --25 JUSTICE SOTOMAYOR: There was more

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1 than one, but let's keep going.

2	MR. ROBBINS: In which somebody
3	actually went to the trouble of adding up all
4	the cases and then saying 72 percent of these
5	were allowed and 62 percent of these were
6	allowed. But, if you look at Footnote 22 of the
7	principal source they rely on, you will see that
8	the author cut out from his sample all the
9	so-called "incidental beneficiary cases," which
10	are the ones we say are most like a Spending
11	Clause statute.
12	In other words, the game was rigged.
13	It the the the the denominator was
14	gerrymandered to gin up very high numbers, but,
15	if you go back and look at all of the
16	government-to-government contract cases, and
17	I've looked at a fair bit of them, you will find
18	that unless the government contract called out
19	the plaintiff, for example, Schnaier, the
20	Schnaier case from 1918 in New York, or the
21	Little the Little case that it cites from
22	1880, in those cases, they said you know,
23	these were the water company and fire company
24	cases of the 19th century generally speaking,
25	if your house burned down because the water

1 company didn't put enough water in the hydrants, 2 you were out of luck. 3 JUSTICE SOTOMAYOR: But none of those 4 contracts --5 MR. ROBBINS: I'm sorry? JUSTICE SOTOMAYOR: The incidental 6 7 contracts are different than the ones you even 8 admit if you call out the plaintiff. Isn't that 9 what Blessing and Gonzaga are saying? 10 MR. ROBBINS: No. I -- I --11 JUSTICE SOTOMAYOR: If the contract is 12 giving a right to a particular class of people, 13 that is a third-party beneficiary. MR. ROBBINS: No. I -- I -- I 14 15 respectfully suggest that it is not because, if you look at the cases I've just described, what 16 17 you will find is that the contract had a -- for 18 example, Schnaier is a -- is a water company 19 case, and it said, in substance, if you don't deliver the water, you will be liable to anyone 20 who is injured. In the Little case from 1880 --21 2.2 JUSTICE SOTOMAYOR: But that's what 23 1983 says. If I confer a government right on 24 you, the state is going to be liable if it violates the law -- that right. 25

1 MR. ROBBINS: No. Well, actually, 2 what it says is if it violates a right secured 3 by law. And what is --4 JUSTICE SOTOMAYOR: Exactly. MR. ROBBINS: -- and what is --5 JUSTICE SOTOMAYOR: And if I have a 6 7 right under the law to a certain thing that the -- the government has contracted with a provider 8 9 to give me, 1983 says I can go to court. 10 MR. ROBBINS: Well, I -- I don't think 11 it's quite that simple. I think what is secured 12 by law depends, among other things, on how 1983 would have been understood at the time it was 13 14 enacted. 15 And at that time, you could not sue on 16 a government-to-government contract unless --17 and this is the general state of the law, as 18 Cummings directs us to look at, not little 19 outliers from the regression curve but the main 20 curve that -- that joins most of the cases. 21 What you will find, Justice Sotomayor, 2.2 is that when somebody had the right to sue, somebody's house burns down or somebody who 23 24 doesn't get a benefit from a government 25 contract, the contract said you will be liable

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1 to third parties if you breach this contract. 2 JUSTICE SOTOMAYOR: Except that, as 3 Justice Alito pointed out, this Spending Clause provision provides that all other remedies of 4 law, i.e., 1983, are not superseded. 5 MR. ROBBINS: No, I -- I -- I didn't 6 7 take Justice Alito to be agreeing with that 8 proposition, but -- and I certainly do not agree with that proposition. 9 10 The language of the -- of the Savings 11 Clause says these are in addition to laws 12 provided by statute, Constitution, and common And this Court has said in several cases 13 law. 14 that the reference to statutes is to statutes 15 other than the very statute containing the 16 Savings Clause. 17 That means other than FNHRA. And if 18 it means other than FNHRA, which is the way I read it and the way this Court has read it more 19 20 than once, then they have no claim because --21 JUSTICE SOTOMAYOR: Okay, counsel, I 2.2 understand. 23 MR. ROBBINS: -- you can't -- because 24 FNHRA is not a statute other than FNHRA itself. 25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 Justice Gorsuch? 2 Justice Kavanaugh? JUSTICE KAVANAUGH: If I understand 3 your position on the preclusion, the implied 4 preclusion, you're saying, if there is a private 5 6 judicial remedy in the statute, then that would 7 ordinarily mean no 1983 suit. Correct so far? 8 MR. ROBBINS: I -- I certainly agree with that. 9 10 JUSTICE KAVANAUGH: Okay. And then 11 you're saying, if there's a private 12 administrative remedy in the statute, that also, usually and here, precludes 1983, correct? 13 14 MR. ROBBINS: Correct. 15 JUSTICE KAVANAUGH: Okay. Some of the language supports you in the cases, some 16 17 doesn't. The three cases where we've held that 18 have involved private judicial remedies, 19 however. 20 MR. ROBBINS: Correct. That is 21 correct. But the --2.2 JUSTICE KAVANAUGH: So the -- the --23 the issue here, I think, that if we get to this 24 issue we'd have to nail down, is exactly under 25 what circumstances the private administrative

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1 remedy in the statute precludes 1983. Does that 2 sound like the question? 3 MR. ROBBINS: That does sound like the question. On the other hand, with all respect, 4 5 I --6 JUSTICE KAVANAUGH: And the government 7 has a whole different theory. I get that. 8 MR. ROBBINS: Yes. 9 JUSTICE KAVANAUGH: We'll get to that. 10 MR. ROBBINS: The government has a 11 different --12 JUSTICE KAVANAUGH: But let's not -- I 13 don't want to get to that now. Just on --14 MR. ROBBINS: Fair enough. But, on --15 on that proposition, I don't think I can do 16 better than to cite this Court's cases that have 17 said -- that have told us where the dividing 18 line is. And if --19 JUSTICE KAVANAUGH: Right. But even 20 those, like if you look -- and then I won't belabor it too much -- but Rancho Palos Verdes 21 22 says: "In all the cases in which we have held 23 that 1983 is available, we have emphasized that 24 the statute at issue did not provide a private 25 judicial remedy."

MR. ROBBINS: Yes, they did say that 1 2 as well. 3 JUSTICE KAVANAUGH: "Or, in most of 4 the cases" -- that's key, "most" is a key word 5 there -- "even a private administrative remedy." 6 MR. ROBBINS: Fair enough. But they 7 go on to also say the -- the so-called "dividing line point." 8 JUSTICE KAVANAUGH: Yes, that helps 9 10 you. I agree. 11 MR. ROBBINS: And -- and -- and it 12 helps me --13 JUSTICE KAVANAUGH: I think I'm done. 14 Okay. 15 MR. ROBBINS: Okay. 16 JUSTICE KAVANAUGH: Thank you. 17 MR. ROBBINS: Okay. 18 CHIEF JUSTICE ROBERTS: Justice 19 Barrett? JUSTICE BARRETT: I'm a little bit 20 21 surprised, I guess, by the focus on the 22 third-party beneficiary point, and this is why. 23 If you have -- and I think this dovetails with Justice Sotomayor's questions. 24 25 It is true that in Spending Clause legislation

1 we have focused on the contract analogy. And 2 so, as the Chief Justice was pointing out, we want to know when a state accepts the funds if 3 it was on notice of its obligations. 4 MR. ROBBINS: Right. 5 JUSTICE BARRETT: In the 1983 context, 6 7 I would have thought that the question is does 8 this statute create rights, the Blessing/Gonzaga 9 question, arguably just the Gonzaga question, 10 after Gonzaga, but, if so, then you're referred 11 to 1983 and the scope of that cause of action is 12 dictated by 1983. 13 The question about third-party 14 beneficiaries and the scope of the cause of 15 action I would have thought arose only when 16 we're talking about implied causes of action, 17 like Cummings last term, for example. 18 If you're talking about it against a 19 private party, if you're wanting to know what a 20 private party might have signed up for and 21 you're talking about an implied cause of action 2.2 from the statute itself, then it might make 23 sense to ask whether a third-party beneficiary 24 was entitled to sue or whether punitive damages 25 would have been available for this kind of

1 breach. 2 MR. ROBBINS: Right. 3 JUSTICE BARRETT: I just don't see the connecting of the dots in your situation where 4 we're talking about resort to 1983. 5 MR. ROBBINS: Well, let me take a 6 7 crack at it. It is -- I think the principle here is the same without regard to whether we're 8 9 talking about purely implied rights of action or 10 1983 claims. 11 And, here, I take the guidance from 12 Gonzaga, which said that while it's true that 13 you don't have to show an intent to create a 14 private remedy, because 1983 already does that, 15 you do have to make the same inquiry about 16 whether this is a right secured by law. 17 And what we're saying is that whether 18 a right is secured by law depends, among other 19 things, on whether or not, at the time 1983 was 20 enacted, the -- what the common law principles 21 were. And it carries the old soil with it. 2.2 And this is a point I -- I -- I want 23 to make sure I leave the Court with. The 24 question whether they have a -- I'm sorry, Mr. 25 Talevski and his family have an enforceable

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right turns on the marriage of two statutes: 1 1983, which brings with it whatever limitations 2 3 are part of 1983's history and context and 4 language, and the rights contained in the statute that provides the substantive rights. 5 And it's the combination of those two 6 7 statutes and whatever old soil they bring with them which is why, among other things, the S --8 9 the Solicitor General's argument, that why are 10 we looking at 19th century principles when FNHRA was only enacted in 1987, well, it's not as if, 11 12 you know, the -- the --13 JUSTICE BARRETT: I think you've 14 answered my question. 15 MR. ROBBINS: Okay. Thank you. 16 CHIEF JUSTICE ROBERTS: Justice 17 Jackson? 18 JUSTICE JACKSON: Yes, but that was my 19 question too. So let's -- let's explore a little bit. 20 21 I mean, I -- I don't understand your 22 suggestion that an express cause of action, 23 which I think we can all agree is what 1983 is, 24 that says that you can sue to vindicate 25 individual rights that are created by the

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1	Constitution or laws of the United States, I
2	I don't understand why that carries with it
3	common law that preceded it under circumstances
4	in which you couldn't sue.
5	So you you seem to be suggesting
б	that there isn't a that this isn't a
7	situation in which Congress was actually
8	providing a cause of action where there wasn't
9	one before.
10	MR. ROBBINS: Right.
11	JUSTICE JACKSON: Which, when you look
12	at the actual history of 1983, that was
13	precisely what Congress was doing. It was a
14	part it, 1983 of the Ku Klux Klan Act
15	where Congress had looked at the situation of
16	states not giving forum, not giving a cause of
17	action to people who were being terrorized and,
18	instead of adopting and incorporating those
19	principles and saying here's this new law and
20	we're going to incorporate the common law of
21	excluding you from the court, in fact, Congress
22	created the right in order to allow people to go
23	to court.
24	So, while there might be situations in
25	which we carry old soil into our interpretation,

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1 I don't understand how you can interpret a -- an 2 express grant of authority to go to court to 3 enforce rights created by law, consistent with 4 the opposite situation at common law, and say we 5 have to limit the current right because, in 6 common law, you didn't have that right. 7 MR. ROBBINS: Okay. Well, I -- I have a number of parts of answers that I'd like to be 8 9 able to give, and I don't --10 JUSTICE JACKSON: Well, let me just 11 ask you this -- this way. 12 MR. ROBBINS: Yes. 13 JUSTICE JACKSON: How do we have 14 authority to do that? Aren't -- wouldn't that 15 just be us rewriting the statute? 16 MR. ROBBINS: No. 17 JUSTICE JACKSON: You're not saying that "laws" is ambiguous in the statute, are 18 19 you? 20 MR. ROBBINS: I am not. 21 JUSTICE JACKSON: All right. So if 22 it's -- usually, we only get to step in and look 23 at common law or whatnot to assist in the 24 interpretation of a statute. 25 MR. ROBBINS: I agree.

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JUSTICE JACKSON: But, if you agree 1 2 that this is unambiguous, that Congress was 3 giving people the right to enforce, you know, laws that gave them certain rights, and if you 4 agree that -- that FNHRA is a law, maybe you 5 6 don't --7 MR. ROBBINS: I do. 8 JUSTICE JACKSON: Okay. Then it seems to me odd to suggest that we as a Court can 9 reinterpret the word "law" in Section 1983 to 10 11 carve anything out. 12 MR. ROBBINS: An old professor of mine wrote a book in which he said: No answer is 13 14 what the wrong question begets. Whether or not 15 "laws" is supple enough to include 1983 or 16 FNHRA, that's the wrong question, respectfully. 17 The right question is, what are the --18 what rights are secured by law within the 19 meaning of 1983? And this Court has 20 consistently held that when it comes to Spending Clause statutes, the common law of contracts 21 2.2 gives us the clearest window into what 1983 23 covered. JUSTICE JACKSON: But that -- isn't 24 25 that only -- isn't that only if there was some

1 ambiguity about what rights are being secured by 2 the term "laws"? And isn't your answer one that 3 has to reference what Congress would have 4 intended? What I don't understand is why your 5 6 argument -- why you've come to the conclusion 7 that when Congress wrote laws in 1983 it was thinking, oh, but not the laws that we enact 8 9 pursuant to our Spending Clause power. Those 10 are not the ones --11 MR. ROBBINS: Yeah. 12 JUSTICE JACKSON: -- we intend to be 13 secured by this. I see no evidence of that 14 anywhere. 15 MR. ROBBINS: I -- I -- I'm not 16 contending that there is affirmative evidence 17 that the -- that the 1871 -- the Congress that enacted 1983 in -- in -- in 1871 actually had 18 19 third-party beneficiary principles in mind. JUSTICE JACKSON: But isn't that what 20 21 you have to have in order for --2.2 MR. ROBBINS: No, it is not. The --23 the way this Court has talked about common law 24 principles is that it is presumed that Congress 25 adopts common law principles, Justice Jackson,

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1 unless there is affirmative evidence that they 2 did not. 3 JUSTICE JACKSON: And the explicit 4 language of the statute is not affirmative evidence to the extent that it conflicts with 5 the -- the state of the common law. 6 7 MR. ROBBINS: Oh, I -- well, if -- if 8 I thought there was text that actually 9 foreclosed the adoption of common law 10 principles, I would be the first to agree with 11 you, Your Honor. 12 But I find no such evidence that FNHRA 13 or 1983 abrogates the common law against which 14 1983 was enacted. And when we ask the question 15 what rights are secured by law, I contend that 16 it is the marriage of these two statutes, 1983, 17 enacted in 1871 and amended to add laws in '74, 18 and FNHRA, enacted in 1987, and they both bring 19 the old soil with them. 20 CHIEF JUSTICE ROBERTS: Thank you, 21 counsel. 2.2 Mr. Fisher. 23 24 25

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

1 CHIEF JUSTICE ROBERTS: Well, Gonzaga 2 I -- I wouldn't say went that far because it 3 didn't, but it imposed a pretty high bar in terms of the evidence that was required. Why 4 isn't that sufficient? 5 MR. FISHER: Well, it held --6 7 CHIEF JUSTICE ROBERTS: Unambiguous -it used words like "unambiguous" and so on and 8 so forth. 9 10 MR. FISHER: I think the proof is in 11 the pudding here, Chief Justice. The lower 12 courts are unable to come to any kind of consistent decision-making with respect to 13 14 Medicaid and other Spending Clause programs. 15 They're all over the map. And I think that, 16 notwithstanding the -- the use of the term 17 "unambiguous," lower courts are finding everything quite ambiguous. 18 19 And I think that's why we think of it 20 in terms of, if -- if the Court wants to stick 21 with a -- a framework such as Gonzaga, maybe the 2.2 way to do it is to say: Well, by "unambiguous," we mean express right of action. I think that 23 24 that's probably the only way to get away from 25 such a flexible standard and get to a rule that

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1 actually is meaningful.

2	JUSTICE JACKSON: You don't read 1983
3	as being an express right of action?
4	MR. FISHER: Well, of course, it's a
5	it's an express right of action, but I I
6	agree with Mr. Robbins that the question is:
7	What did Congress what could Congress what
8	can we infer that they thought they were doing
9	at the time? And I think it's critical that
10	well, it it's at least very important, if not
11	critical, that 1983 is is properly thought
12	of, I think, as a tort statute.
13	JUSTICE JACKSON: Yes.
14	MR. FISHER: Not a contract statute.
15	JUSTICE JACKSON: Yes.
16	MR. FISHER: And we're talking here
17	about contracts, about who can enforce them.
18	And the kind of of entitlement programs that
19	we deal with today simply weren't around in
20	1874.
21	JUSTICE JACKSON: No, no, no. But
22	but Mr. Robbins says you say tort statute,
23	1983, totally agree with you, that seems to be
24	what Congress was doing. So why does the common
25	law of contracts have any role in us trying to

understand what 1983 is about? MR. FISHER: Precisely because this Court has talked about it in -- in Pennhurst and

16 such a poor fit between 1983 and Spending Clause 17 on -- you know, statutes on their own. They --18 they just don't coincide historically, I think. 19 JUSTICE BARRETT: Mr. Fisher, why 20 wouldn't your problem about the lower court 21 confusion be addressed by our simply saying: 2.2 Listen, Gonzaga is the more recent case and it 23 laid down a stricter standard than did Blessing, 24 and so Gonzaga is where you look? 25 MR. FISHER: With respect, Your Honor,

in other cases that Spending Clause programs are 4 in the nature of a contract. 5 6 JUSTICE JACKSON: Yeah, but you're --7 you're skipping ahead. Now I -- I'm just 8 talking about what Congress would have intended at the time that 1983 was enacted. 9 10 MR. FISHER: Precisely. And I think 11 Congress, at the time 1983 was enacted, was 12 thinking of torts, not third-party contract enforcement rights, which I think is the proper 13 14 analogy to this type of case. 15 So I think that that's why there's

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1	I think that if if the Court were to do that,
2	we states would be back here in case after
3	case after case asking for clarification. If
4	Gonzaga didn't do it talking about unambiguous
5	rights, I don't think another restatement of
6	that is going to is going to do the trick.
7	I think the Court has to be far more
8	explicit about that. It has to reject certainly
9	Wilder, which lower courts, including in this
10	case, continue to cite. And I think it needs to
11	set forth a a a very precise rule that
12	lower courts know that they have to follow, and
13	that would be no implied rights through 1983 and
14	Spending Clause statutes.
15	JUSTICE SOTOMAYOR: Counsel, your
16	CHIEF JUSTICE ROBERTS: I thought we
17	
18	JUSTICE SOTOMAYOR: I'm sorry, Chief.
19	CHIEF JUSTICE ROBERTS: Just very
20	briefly. I thought we did drive a wooden stake
21	through Wilder in Gonzaga and Armstrong. It's
22	pretty pretty explicit.
23	MR. FISHER: I I agree. But lower
24	acurate deput. There give Wildow all the time
	courts don't. They cite Wilder all the time,

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1 litigation, we can't get around Wilder. 2 That is the case --3 JUSTICE SOTOMAYOR: So why don't you 4 bring us a case where the right is more 5 ambiguous? This case doesn't seem to present 6 that confusion that you seem to be referring to. 7 MR. FISHER: Well, regardless of -- of this particular case, I will submit this --8 9 JUSTICE SOTOMAYOR: No, we're not asked to give advisory opinions. 10 11 MR. FISHER: Right. 12 JUSTICE SOTOMAYOR: We have a standing 13 precedent. 14 MR. FISHER: Right. 15 JUSTICE SOTOMAYOR: You're asking us 16 to overrule it. As the Chief said, Gonzaga and 17 Blessing came after Wilder and they limited its 18 holding very clearly. You're now asking us to 19 overturn all these programs. 20 But neither the federal government nor 21 the states can possibly investigate and remedy 22 every violation of these rights that are given 23 to people. 1983 speaks clearly. They have a judicial remedy. Why shouldn't we just respect 24 25 our precedent?

MR. FISHER: Well, I think we -- what 1 2 we have through spending statutes is a 3 relationship, a -- a -- that -- that Congress establishes between states and the federal 4 government. And I think, in fact, if you look 5 6 at something like Medicaid, the only lawful 7 directive is to the Secretary. And so it's, I think, important to look at these statutes more 8 9 broadly. 10 But I will say also, you know, there 11 are other cases waiting in the wings if this 12 Court wants to wait to get to that issue 13 elsewhere. But I don't think that -- that, you 14 know, it's going to help anybody just to address 15 FNHRA in this case. I think it's going to help 16 a lot if the Court gets at the fundamental 17 question about, you know, generally speaking, 18 when are Spending Clause statutes privately 19 enforceable in 1983 cases. CHIEF JUSTICE ROBERTS: Justice 20 Thomas, anything? 21 2.2 Justice Alito? 23 JUSTICE ALITO: Well, when you say that 1983 is about torts and not about 24 contracts, do you mean to say that: If a 25

1	condition of a Spending Clause law was that the
2	state agrees to be sued under 1983 for rights
3	conferred by that statute, that that could not
4	be the basis for a 1983 claim?
5	MR. FISHER: No, I think that's
б	exactly the sort of thing that that we want
7	Congress to have to say. I think the point is
8	that, you know, it's not that Congress can't
9	direct something here and specifically when it's
10	extending an offer to states and states can
11	agree with it in an informed way.
12	But just to try to without that,
13	try to map onto 1983 what is essentially a
14	third-party contract relationship I think is
15	just an ill fit to begin with.
16	JUSTICE ALITO: You you so you
17	just want proof beyond a reasonable doubt
18	MR. FISHER: I
19	JUSTICE ALITO: basically?
20	MR. FISHER: I want an express
21	statement, a clear statement. I think, you
22	know, there is there is a useful analogy here
23	perhaps even to sovereign immunity, and that's
24	the kind of thing that we want with respect to
25	the right of action.

1 CHIEF JUSTICE ROBERTS: Justice 2 Sotomayor? 3 JUSTICE SOTOMAYOR: No further 4 questions. CHIEF JUSTICE ROBERTS: Justice Kagan? 5 6 Justice Jackson? 7 JUSTICE JACKSON: Yeah, I would just say that clear statement rules in the Court's 8 9 precedents usually exist against the backdrop of the kinds of rights like sovereign immunity or 10 11 habeas or that sort of thing. 12 And so it just seems odd to me that in this situation your position would be that 13 14 Congress had to be clearer than saying all laws 15 and rights created under the Constitution. 16 MR. FISHER: Well, I think it goes 17 back to that fundamental state/federal 18 relationship, which is akin in some respects to 19 sovereign immunity and to that inquiry. 20 Congress can't go beyond its It can't direct states to do 21 enumerated powers. 22 particular things. But it can invite states to 23 do them by extending, you know, an offer and the states accepting. 24 25 And I think part of that relationship

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1 and making sure that there is legitimacy to that 2 broader, you know, exhibition of power is a 3 clear statement: Here is what you're in for if you -- if you take this money. Thank you. 4 CHIEF JUSTICE ROBERTS: 5 Thank you, 6 counsel. 7 Mr. Snyder. ORAL ARGUMENT OF BENJAMIN W. SNYDER 8 9 FOR THE UNITED STATES, AS AMICUS 10 CURIAE, SUPPORTING NEITHER PARTY MR. SNYDER: Mr. Chief Justice, and 11 12 may it please the Court: 13 For half a century, this Court has 14 recognized that Section 1983 means what it says, 15 providing an express cause of action that by 16 default applies to rights created by any federal 17 statute. 18 Petitioners provide no sound basis for 19 revisiting that precedent. 20 First, they offer no evidence that the Congress that enacted Section 1983 would have 21 2.2 viewed breach-of-contract suits by third parties 23 as remotely relevant to the new tort it was 24 creating. 25 Second, Petitioners can't show that

1 their rule was the sort of well-settled 2 background principle that Congress incorporates 3 into a statute silently. And, finally, Congress has 4 affirmatively confirmed that some rights created 5 6 in the Social Security Act are enforceable 7 through Section 1983. Disregarding that ratification would unsettle decades of 8 9 legitimate legislative reliance. 10 This Court should accordingly reaffirm 11 the framework that it applied in Gonzaga and 12 Blessing. Applying that framework here, 13 however, we agree that Congress displaced Section 1983 in FNHRA, and we therefore ask the 14 15 Court to reverse on that basis alone. 16 I welcome the Court's questions. 17 CHIEF JUSTICE ROBERTS: So you think -- the same question I posed to Mr. Robbins. 18 In terms of looking to see if there's a 19 comprehensive remedy, do administrative remedies 20 21 provided by the Secretary count? MR. SNYDER: So I think we would 2.2 23 articulate the standard, frankly, much like 24 Justice Kagan did. We think that they can count 25 in some circumstances. We certainly don't think

1 that they count in all circumstances.

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

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

15 But there is also an additional process by which the Secretary can impose 16 17 sanctions on each facility. They can impose 18 civil penalties of up to \$10,000 per day per 19 violation. They can cut off further Medicaid funding at the facility. They can require the 20 21 installation of new management at the facility. 2.2 And they can even order the facility to close. So we think those administrative 23 24 mechanisms by the Secretary are significant. 25 CHIEF JUSTICE ROBERTS: I understand

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1 how you -- how administrative remedies that 2 lessen the burden on the -- on the -- on the 3 recipient, the states, certainly could be taken into account. 4 But, if the requirement is that the 5 6 states know unambiguously what they're agreeing 7 to, how can administrative remedies that expand their liability be taken into account? 8 9 MR. SNYDER: So --CHIEF JUSTICE ROBERTS: Taken into 10 11 account the other way. 12 MR. SNYDER: So, Mr. Chief Justice, when this Court has talked about the unambiguous 13 14 requirements in its -- its 1983 cases, it's 15 really focused on whether the right was set out 16 unambiguously in the statute. The Court hasn't 17 talked about that unambiguous requirement in the 18 second part of the Gonzaga inquiry. So I think 19 that's a partial answer. 20 The other thing I would say is that 21 these administrative enforcement mechanisms are 2.2 laid out in the statute. Now they're elaborated 23 on in regulations, but the statute itself provides for all of the enforcement mechanisms 24 25 that I just described, and so the state knows

1 about those. 2 I -- I -- I don't --3 CHIEF JUSTICE ROBERTS: Well, I mean, one of them is that voice grievances. I mean, 4 that certainly doesn't set out in the statute 5 6 any -- any awareness of what type of remedies 7 are going to be provided in that situation. MR. SNYDER: No, that's true. And so 8 the -- the remedies that I described are not 9 10 remedies for grievances. Grievances tend to be 11 resolved at the facility level, or a nursing 12 home resident can also file grievances with the 13 state long-term care ombudsman, who can help to 14 bring about an amicable resolution of those 15 problems. 16 The remedies that I was describing 17 come either from complaints, which are more 18 formal filings with the state survey commission or State Survey Agency or through notice to HHS, 19 20 which can then send out a federal survey team if 21 it -- if it deems that appropriate to impose 2.2 those remedies. JUSTICE KAVANAUGH: Is there a dis --23 24 sorry. Are you --25 MR. SNYDER: So I was going to go back

to the other thing that I think is significant 1 2 here and why we think this administrative enforcement mechanism is sufficient. 3 We think that ordinarily -- Justice 4 Kagan, you were getting at this -- ordinarily, 5 6 when you have a system in which all of the 7 regulated parties are state actors, and Congress creates an administrative enforcement mechanism, 8 9 it would be unclear whether Congress intended that administrative mechanism to be exclusive or 10 11 if, instead, Congress just assumed that 12 Section 1983 would provide a background default rule that would also allow private suits. 13 What's different about this case is 14 15 that Congress was acting in an area where a 16 substantial number of the participants are 17 private parties, and Congress contemplated providing a private cause of action against 18 19 those private parties but left that out of the ultimate bill it enacted. 20 21 And so we know that Congress believed 2.2 that the administrative enforcement mechanism it 23 was creating was sufficient for the 90 percent of nursing home residents who -- who live in 24

25 privately operated -- operated facilities, and

1 we think that's a very strong indication that it 2 -- it didn't believe that a private cause of action --3 JUSTICE KAVANAUGH: That's an unusual 4 line to draw and would be a new line in the case 5 6 law. That's not to say it's not a good line 7 here. But --MR. SNYDER: I -- so --8 9 JUSTICE KAVANAUGH: -- that would be -- that would be different. 10 11 MR. SNYDER: I -- I agree with that. 12 I -- I mean, we think that this case is different from the other cases that this Court 13 14 has considered. The -- the cases in which --15 JUSTICE KAVANAUGH: Can I -- keep 16 qoing. 17 MR. SNYDER: I -- I don't know that I 18 was going to say anything valuable. 19 JUSTICE KAVANAUGH: Okay. Well, on 20 the point about administrative remedies, I'm trying to get this sorted out, as you heard. 21 2.2 So state administrative remedies are 23 different from private administrative remedies 24 in the statute for purposes of the analysis, or 25 are they considered the same?

1 MR. SNYDER: So the -- the -- the 2 statute gives the Secretary --3 JUSTICE KAVANAUGH: No, I mean, as a 4 -- in the 1983 case law in this area, are state administrative remedies that are available 5 considered differently from private 6 7 administrative remedies? Do you understand the 8 question? 9 MR. SNYDER: So I -- I'm not sure I do. I'm trying to -- so I would say that this 10 Court has said that -- that state administrative 11 12 remedies are ordinarily not enough. 13 JUSTICE KAVANAUGH: Yeah. 14 MR. SNYDER: We think that it is 15 significant that some of the administrative 16 remedies available here are not state but rather federal. I'm not sure if that's the distinction 17 you're --18 19 JUSTICE KAVANAUGH: That's -- that's 20 the distinction. 21 MR. SNYDER: -- you're drawing. So --2.2 JUSTICE KAVANAUGH: That is. That is the distinction. 23 24 MR. SNYDER: -- we do think that 25 that's significant. We don't think that every

1 time there is a federal administrative remedy 2 that is necessarily preclusive of resort to 3 Section 1983. 4 JUSTICE KAVANAUGH: Okay. So let me

5 stop you there just so I can get the analysis 6 straight.

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

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

19JUSTICE KAVANAUGH: And what do you --20what do you do about the sentence in the case21law that was referred to by the other side that22says the -- the dividing line is private23remedies?24MR. SNYDER: So I -- I -- I guess I25haven't -- I didn't take that to be articulating

1 a very precise line between exactly which ones 2 are sufficient and which ones aren't. JUSTICE KAVANAUGH: Well, it says: 3 "The existence of a more restrictive private 4 remedy for statutory violations has been the 5 dividing line between those cases in which we 6 7 have held" -- you know, then it goes on. That's in Rancho Palos Verdes. 8 9 Now later in the opinion it refers to 10 private judicial. So I'm just trying to figure 11 this out. 12 MR. SNYDER: So -- so, to the extent that the Court was talking about the dividing 13 line between those cases in which it's actually 14 15 found Section 1983 displaced and the cases where 16 it hasn't, I think just descriptively the line 17 is the availability of private judicial 18 remedies. In each of those three cases, there 19 was a private judicial remedy. 20 Now, in cases where this Court has found that Section 1983 was not displaced, the 21 2.2 Court has emphasized the lack of either a 23 judicial or an administrative mechanism. And so we think the fact that the 24 25 Court has asked about the availability of an

1 administrative mechanism suggests that in some 2 cases that could be sufficient, and we think 3 that it's sufficient here. JUSTICE ALITO: When you rely on the 4 fact that 90 percent of the nursing homes are 5 6 private, I'm sure you anticipate what's going to 7 come next. So --8 MR. SNYDER: Can I do the hypo? 9 JUSTICE ALITO: Yeah, go ahead. Ask 10 your own. MR. SNYDER: So what if it's 50/50? 11 12 JUSTICE ALITO: Yeah. 13 (Laughter.) 14 MR. SNYDER: And -- and our answer is 15 the same in that case. I mean, the -- frankly, 16 it's -- it's helpful atmospherically that the 17 number is 90/10. But the thing that's 18 significant for us is that you're not in the 19 situation where Congress would have just assumed 20 that Section 1983 applied for all of the places 21 in which the right was being established. 2.2 It -- so it's more of a binary 23 distinction and the percentage just happens to 24 be helpful. 25 JUSTICE SOTOMAYOR: So I look at --

1 JUSTICE KAGAN: How low can you go? 2 MR. SNYDER: We got as low as -- as 3 10 percent of private facilities. And I think my answer was still there. Below that, Congress 4 may have just --5 6 JUSTICE KAGAN: Ten percent of private facilities? 7 MR. SNYDER: I don't want to suggest 8 9 that that's an incredibly clear line-drawing problem or line. The -- the thing that we are 10 11 getting at is whether Congress would have 12 assumed that Section 1983 was providing a -- a 13 backstop in most of the cases. 14 And, here, Congress wouldn't have done 15 that because Congress knew that for a 16 significant number of the cases where it was 17 creating rights, there would be no private cause 18 of action. And so it must have concluded that 19 the administrative mechanism it was establishing in FNHRA itself was comprehensive and sufficient 20 21 at the federal level to protect those rights. 2.2 JUSTICE SOTOMAYOR: But why? In Indiana -- we have an amicus that tells us that 23 Indiana, the majority of nursing homes are 24 25 state-owned and that in Pennsylvania --

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immunizes government officials from any recovery 1 2 whatsoever. 3 So why should we assume that Congress wanted to take away a 1983 right as an 4 additional remedy for a violation of a state 5 obligation? Given that these other things could 6 7 immunize actors, why is this in tension in any 8 way? 9 MR. SNYDER: So, Justice Sotomayor, you -- you mentioned the numbers in Indiana. 10 11 That's a relatively recent development that CMS 12 is aware of and is considering, but I don't think that would have been as --13 14 JUSTICE SOTOMAYOR: Well, but it -- it 15 doesn't -- it doesn't destroy the basis of my 16 question, which is, if what we're looking at is 17 whether Congress intended these mechanisms to do 18 away with other remedies, we know it said no explicitly in the statute. And I take it at its 19 word. 20 21 And, secondly, those other remedies 2.2 have benefits that are independent from the 23 privately owned. MR. SNYDER: So a couple of things on 24 25 that. One is that within the administrative

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

11 You mentioned that Congress said 12 expressly no in the statute, and I think you were referring to (h)(8), so I wanted to wanted 13 14 to address that provision. We -- we understand 15 that provision to operate in the same way as the 16 provisions that this Court addressed in Sea 17 Clammers and Rancho Palos Verdes. Congress, in 18 that provision, was attempting to ensure that 19 rights that -- that residents already had 20 independently of FNHRA would not somehow be 21 eliminated through the adoption of FNHRA. 2.2 It spoke specifically to -- sorry. 23 I'm looking at the language. The -- it 24 shouldn't be construed as limiting -- sorry --25 that the remedies it was creating were in

addition to those otherwise available under
 state or federal law.

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

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

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

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

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

12 I do want to take a moment -- I 13 haven't gotten any questions on the first 14 question presented, but I do want to bring up 15 the 1994 statutes, which, to the extent that 16 there is any doubt about whether Thiboutot was 17 correctly decided, we think that the two 18 legislative ratifications that Congress adopted 19 in 1994 put that to rest. In those statutes, 20 Congress wrote that "in an action brought to 21 enforce a provision of the Social Security Act, 2.2 such provision is not to be deemed unenforceable because of its inclusion in a section of the Act 23 24 requiring a state plan."

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

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1	that legislative text other than as embracing a
2	a congressional expectation that at least
3	some of the provisions of the Social Security
4	Act would be enforceable under Section 1983.
5	My friend's approach on the first
6	question presented would say that no provisions
7	of the Social Security Act can ever be enforced
8	under Section 1983. We think that was wrong as
9	an original matter, but we also don't think that
10	it can be reconciled with those 1994 statutes.
11	With that, I'm happy to rest on our
12	brief.
13	CHIEF JUSTICE ROBERTS: Thank you,
14	counsel.
15	Justice Thomas?
16	JUSTICE ALITO: Well, on your
17	90 percent argument, I don't know whether this
18	is apt, but do you happen to know what the
19	breakdown of public and private covered entities
20	is under Title IX?
21	MR. SNYDER: I don't. I'm sorry. I
22	will say to the extent that it's it's
23	relevant, this same question came up in in
24	Gonzalez, which involved similarly involved
25	schools. And Justice Ginsburg asked at argument

1	about this same sort of problem, that it would
2	be kind of strange to say that Section 1983 is
3	available to enforce rights against public
4	schools but not private schools that are subject
5	to the same requirements.
6	Now that's not the basis on which the
7	Court decided it, but, to the extent that
8	Respondent has have suggested that this is a
9	new idea that is coming up here for the first
10	time, that's at least some indication that
11	people have thought about it before.
12	CHIEF JUSTICE ROBERTS: Justice
13	Sotomayor?
14	Justice Kagan?
15	JUSTICE KAGAN: Well, it does seem
16	kind of a new idea. I mean, you know, this is a
17	statutory interpretation question. We're
18	we're trying to figure out whether one scheme is
19	compatible with another scheme. You're not
20	looking at text. You're not looking at
21	structure. You're not looking at history.
22	You're looking at, like, what you think Congress
23	knew about the market composition. The and
24	that that does seem Justice Kavanaugh said
25	unusual. It seems unusual.

1 MR. SNYDER: So, Justice Kagan, the 2 best analogy we've been able to come up with is 3 that in -- I'm hesitant to say this, but in this 4 Court's ACCA cases, the Court has sometimes 5 looked --6 JUSTICE KAGAN: You should hesitate to 7 say that. 8 (Laughter.) MR. SNYDER: But the Court has 9 sometimes looked at what was the state of play 10 when Congress adopted -- adopted ACCA. What --11 12 how would it have played out? You know, what were the -- the state rules of burglary in -- in 13 14 -- at the time it was adopted? And we think the 15 analysis is, you know, similar here in that 16 you're looking at what would Congress have 17 expected. 18 CHIEF JUSTICE ROBERTS: Justice 19 Kavanauqh? 20 Justice Barrett? 21 Justice Jackson? 22 Okay. Thank you, counsel. 23 Mr. Tutt. 24 25

1	ORAL ARGUMENT OF ANDREW T. TUTT
2	ON BEHALF OF THE RESPONDENT
3	MR. TUTT: Thank you, Mr. Chief
4	Justice, and may it please the Court:
5	The difference between our position
6	and the United States's position in this case is
7	unbelievably narrow. The United States agrees
8	that this Court should not overrule decades of
9	precedent holding that rights secured by
10	Spending Clause laws are enforceable under
11	Section 1983. And the United States agrees that
12	FNHRA creates two enforceable rights. And we
13	are obviously right about those points.
14	The only point of departure is that
15	the United States believes that Congress showed
16	a clear intention to preclude access to 1983 by
17	extending FNHRA rights to residents of private
18	nursing homes, even though they're not able to
19	use 1983 to enforce those rights because 1983
20	only permits suits against government actors.
21	That gets the statute backwards.
22	FNHRA's text and context show that when Congress
23	enacted the statute in 1987, it wanted to
24	preserve access to all available remedies for
25	FNHRA violations to the greatest extent

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1	possible	

2	Thus, as no one disputes, Congress
3	expressly preserved the ability of nursing home
4	residents to sue to enforce their FNHRA rights
5	in private lawsuits under state tort law. And,
6	as the United States concedes, Congress
7	expressly preserved the ability of the Attorney
8	General to enforce these rights under CRIPA,
9	which is just Section 1983 for the Attorney
10	General.
11	We think it is equally clear that
12	Congress wanted to preserve access to
13	Section 1983 for two reasons. First, the
14	statute says it. The statute's Savings Clause,
15	on Joint Appendix 123, means what it says. The
16	Savings Clause says that other remedies will
17	also be available to enforce FNHRA. The
18	legislative history confirms that that is the
19	correct reading of the text.
20	Second, Congress had good reason to
21	preserve 1983 specifically for residents of
22	government nursing homes. Congress knew that
23	sovereign immunity often makes it more difficult
24	or impossible to sue government nursing homes.
25	Congress also understood that when states own

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

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

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

16 I welcome the Court's questions. 17 CHIEF JUSTICE ROBERTS: You -- you 18 said -- you -- you quoted the provision 19 referenced in the Joint Appendix about other remedies. Mr. Robbins told us that the "other" 20 21 means other than the particular statute at 2.2 issue. What -- what is your response to that? 23 MR. TUTT: I don't think it makes sense grammatically. It says "the remedies 24 25 provided under this subsection shall be in

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addition to those otherwise available under" --"under state and federal law. "And so it's talking about the remedies in the statute that are for FNHRA violations. So these are taking funds away or they're actual remedies as the word "remedy" is used. It's not a -- it's not a sort of term of art. If you compare that with the Savings Clause in Sea Clammers, it said the right to pursue other relief. And the Court found that provision ambiguous, then looked to the legislative history. CHIEF JUSTICE ROBERTS: You're drawing a line between other remedies and other relief? MR. TUTT: Yes. The -- well, it had -- the way it's structured grammatically, it actually says the right to pursue other relief, and so under other statutes. So it's that the -- when the Congress used that in the Savings Clause, the Court deemed that provision ambiguous. But the statute also had strong indicia of true

25 It had citizens suit provisions that

incompatibility with 1983.

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limited the available relief under federal law. 1 2 So, if you brought -- if you made 1983 3 available, that Savings Clause was going to be doing a lot of work in the Sea Clammers case 4 because it was going to be basically eliminating 5 6 the private citizens suit provision. There was 7 a true incompatibility because people would always use 1983. 8 9 CHIEF JUSTICE ROBERTS: That's a 10 respect in which you depart from the Solicitor 11 General? 12 MR. TUTT: Yes, Your Honor, yes. 13 JUSTICE JACKSON: Can I ask, wouldn't 14 you have a stronger argument if the residents 15 weren't given sort of individual administrative 16 rights in this -- in this world? Maybe they 17 aren't. And maybe I'm not reading the statute 18 correctly. But I understood that Congress has a 19 scheme now for allowing -- for requiring states 20 to have plans that allow individual residents 21 who have rights that they feel are being denied 2.2 to have hearings, to have appeals, to cause the 23 investigation of complaints. 24 And so I'm wondering whether the 25 incompatibility might be coming from allowing

1 people to bring 1983 suits in lieu of following the very sort of comprehensive administrative 2 3 processes that Congress has put in the statute. MR. TUTT: Your Honor, I would -- I 4 would just -- I have several answers to that 5 6 question. 7 First, I would point you to the experience of Pennsylvania. So Pennsylvania 8 9 actually has had it clearly the law that FNHRA 10 is enforceable under 1983 for 10 years. 11 There have been a total of 44 lawsuits 12 over those 10 years. So you're looking at four 13 to five lawsuits per year. So --14 JUSTICE JACKSON: But I'm not sure 15 that's an answer. You're just saying people 16 don't use 1983. MR. TUTT: They don't use it in lieu 17 18 -- yes, Your Honor. I'm saying they don't use 19 it in lieu of the administrative remedies because the administrative remedies are supposed 20 21 to be lightweight, easy to use, fast remedies 2.2 that ultimately restore the status quo. That's 23 the nature of many of the remedies in tension. 24 JUSTICE JACKSON: But I quess the 25 question is, why isn't that what Congress

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

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

14 MR. TUTT: Your Honor, I want to 15 emphasize how the Savings Clause fits into this 16 argument, because I think, even if you don't 17 think it's an independent basis for ruling for 18 us and gets us all the way there, it -- it tells 19 us what Congress's intent was on this very 20 question because it preserved state tort 21 actions, state private damages actions for 2.2 individuals against nursing homes that violate 23 these rights.

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

the statute. So it confirms the text. 1 2 So that's -- that's how I understand. 3 If they are -- if they are still permitting people to enforce these rights in private 4 damages suits, just under state law, then why 5 6 would they not also want to make available the 7 remedy that very clearly applies in this exact situation, which is a remedy that permits you to 8 9 sue for the deprivation of any rights secured by the laws? 10 11 JUSTICE JACKSON: And you don't think 12 the answer is found in the fact that there's just -- you know, if they allow this federal 13 14 right to go forward, it's really not going to be 15 something that all of the people can avail 16 themselves of or all of the people in nursing 17 homes because of the idea that only a few of 18 them are state-run? 19 MR. TUTT: Your Honor, we don't know, 20 for instance, whether, even though 10 percent of nursing homes were public, whether the worst 21 2.2 nursing homes were those 10 percent. 23 We don't know anything about what 24 Congress knew, in fact, about the state of play in the nursing home industry. We don't know if 25

1 Congress expected that in 10 years' time it 2 would be flipped around and would be 10 percent 3 private and 90 percent public. And it actually cashes out in this 4 case because Indiana has made more than 5 90 percent of its nursing homes public. So it 6 7 is the exact flip reverse of the rest of the nation. 8 And for the individuals in those 9 10 nursing homes who confront very draconian 11 limitations on their ability to actually enforce 12 these rights under state law, against state-run nursing facilities, it is really Section 1983 13 14 that is filling the gap and making those rights 15 real for those people. 16 Congress doesn't create rights with 17 the expectation that, generally, with the 18 expectation that someone else will come in and enforce those rights on your behalf. 19 20 The way that the Solicitor General 21 thinks this scheme should work and -- and HHC is 2.2 that you are given rights. You are told of 23 these rights orally and in writing on admission 24 to the nursing home. They say you have the 25 right to be free from restraints. And your

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1 family reads this and then, if you -- you don't 2 actually have any rights to enforce. 3 You don't -- you -- the best that you can do is you can go to an administrative --4 JUSTICE KAVANAUGH: Well --5 JUSTICE ALITO: Aren't the --6 7 JUSTICE KAVANAUGH: -- what's wrong 8 with an administrative process, though, if it's 9 comprehensive and works? And -- and so that's 10 Α. 11 And then, B, you know, we have twice 12 said, and I know you'll want to put this in context, but we have twice said the existence of 13 14 a more restrictive private remedy for statutory 15 violations has been the dividing line. 16 And so take those two. 17 MR. TUTT: Well, Your Honor, the --18 the more restrictive private remedy language, as 19 I read those cases, I thought it was referring 20 to judicial -- federal judicial remedies. Ι 21 thought that they were being used 2.2 interchangeably, both because, especially if you 23 read the Fitzgerald opinion, it says, you know, 24 they would have circumvented and required 25 procedures prior to filing suit in sort of

1 sentences that are right next to each other. 2 So -- so the way I understand private 3 remedies is it really means federal judicial remedies. And that makes sense in the broader 4 context of statutory interpretation, which is 5 6 this Court doesn't want to get into the business 7 of trying to mind read Congress about what did it know about the nursing home industry -- when 8 it's not evident from the face of the statute --9 what did it know about the policy considerations 10 11 of should people in the public nursing homes 12 have --JUSTICE KAVANAUGH: Well, if we -- if 13 14 we're clear in the opinion deciding this case 15 about this exact point, then at least Congress 16 going forward will know what the deal is. 17 MR. TUTT: Well, it will to a -- it 18 will to a certain extent, but it would also then 19 -- if you adopt, for instance, the -- the United States's position --20 21 JUSTICE KAVANAUGH: Put that aside. 2.2 MR. TUTT: Okay. 23 JUSTICE KAVANAUGH: Just the -- the 24 private remedy point. 25 MR. TUTT: On the private remedy

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

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

12 In this very case, HHC continues to 13 say that -- that we got all the relief that we 14 were seeking. We got none of the relief that we 15 were seeking. We didn't even -- we didn't even 16 use any kind of grievance process. A private 17 neurologist had to be hired to taper the drugs. 18 There was no -- there was sort of no remedy from 19 the nursing home for the actual chemical 20 restraints that were applied to Mr. Talevski. 21 JUSTICE KAVANAUGH: What about the 2.2 point that the Secretary can come in then, you 23 know, in circumstances where there's been 24 deprivations? 25 MR. TUTT: Your Honor, there may be a

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1 process for getting to the Health and Human 2 Services Secretary to actually get enforcement for rights violations by nursing homes. 3 If there was, I promise you this 4 family would have preserved -- pursued it. 5 6 But, as far as I know, it was -- there 7 was no process available. So, I mean, this 8 family was crying out for help and using every 9 possible lever at their disposal. Section 1983 10 was the last resort. They went to seven medical 11 malpractice attorneys and were turned away 12 because the claim wasn't worth enough money in Indiana. It -- this is -- this is a life-saver 13 14 for people who cannot actually make effective 15 use of the administrative scheme, and that is 16 how 1983 functions, and it is, as we understand 17 it, how it has functioned in Pennsylvania. 18 So, empirically, these suits are 19 brought actually mostly as injunctive actions to 20 remedy systemic, egregious policies of actually violating the federal rights in FNHRA. So those 21 2.2 are the kinds of suits that, as we understand 23 it, are being brought. 24 JUSTICE KAVANAUGH: Can I ask --25 CHIEF JUSTICE ROBERTS: Counsel --

1 JUSTICE KAVANAUGH: -- you then -- go 2 ahead. 3 CHIEF JUSTICE ROBERTS: I was just going to say the -- your friend says that the 4 policies were filed -- were followed, the 5 alternative remedies, and that Mr. Talevski no 6 7 longer had to take the medication and was entitled to return to the facility if he wished 8 to do so. 9 10 MR. TUTT: Your Honor, with respect to 11 the first question, as -- as pleaded in the 12 complaint, he didn't -- didn't get that with 13 respect to the chemical restraints. Instead, a 14 private neurologist was hired and worked with 15 the nursing home to have the -- the drugs 16 removed. 17 With respect to the transfer, they won 18 the administrative proceeding -- proceeding, and 19 the nursing home still refused his readmission. 20 And they pleaded with the state regulator -- and perhaps HHC can address this on rebuttal -- but 21 2.2 it -- they were told you need to go to a state 23 court and sue for a state injunction to force 24 the nursing home to actually take action on the 25 administrative order from the ALJ that you just

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

3 And, of course, in the Anderson case in the Ninth Circuit, this was so -- this was 4 considered to be such a systematic problem in 5 the state of California that a suit was actually 6 7 brought against the State of California to order the State of California to actually force the 8 ALJ orders to be presumptively enforceable 9 10 because nursing homes would be told under the 11 state-level administrative process that they 12 needed to take someone back and then they 13 wouldn't. 14 And it is very difficult to think of

15 this as a comprehensive remedial scheme when the 16 remedy for being involuntarily evicted from your 17 home by a nursing home is to go back to that 18 place where you fear retaliation potentially, 19 where if -- if you were involuntarily 20 transferred in, for instance, the context of 21 this case because you were being abused, you 2.2 don't want to go back. 23 So the only available remedy isn't 24 even the remedy that you would want.

25 JUSTICE KAVANAUGH: Can I -- can I ask

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1 you then about -- so that's responsive to the 2 one theory that you have to deal with on the 3 comprehensive -- on the administrative scheme. The SG has, as you're well aware, an 4 entirely different theory for why it's 5 implicitly precluded, and I think I still think 6 7 that theory is unusual, but I'd like to hear 8 your response to that. And if you know, what would be the 9 10 implications of that theory for all sorts of --11 Justice Alito alluded to that, but for other 12 cases? You may not know the answer to that, 13 but, if you know anything about that, I'd be 14 interested. 15 MR. TUTT: Well, Your Honor, I -- I 16 know that there are many Spending Clause 17 programs where the -- where the entitlements --18 where there are rights-creating statutes that 19 create rights that run against both private and 20 public actors. And the Court has never drawn 21 this line that somehow, if the right also runs 2.2 against a private actor, it's a second-class right, even when you're in a public facility. 23 I mean, in the -- for any person who 24 25 goes to a public nursing home, they don't go and

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

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

15 The Court actually has rules of 16 statutory interpretation that resolve cases like 17 this about implied repeal or implied preclusion. And those -- those are typically the way that 18 19 the Court addresses this kind of situation 20 because it doesn't want to get into empirical 21 judgments about who is abusing -- you know, who 2.2 is the worst actor, who -- who are these rights 23 actually being created to protect, et cetera. 24 I mean, this Court's cases, Gonzaga 25 especially, make it very clear what Congress has

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

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

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

JUSTICE ALITO: Well, could you have sued under an implied private right of action? MR. TUTT: Individuals -- when the regulations were in force before FNHRA was enacted, individuals attempted to bring suit, and I can't recall off the top of my head whether they were successful. I think that

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1	there were mixed results on whether this was
2	actually brought under a private right of
3	action. I obvious or implied right of
4	action. Obviously, under the Court's current
5	case law, it could not be brought as an implied
6	cause of action, we don't believe.
7	But we do believe that it meets the
8	test of Gonzaga. And it just fits like a glove
9	with Section 1983, which is that it says you
10	have these rights. These rights must be
11	protected, the right to be free from chemical
12	restraint. And then it fits in with
13	Section 1983.
14	JUSTICE GORSUCH: Counsel
15	JUSTICE ALITO: What what would you
16	make of what would you make of the argument
17	that the rights to which 1983 refers in general
18	are different from the kind of rights that a
19	person may assert under Spending Clause
20	legislation? Because usually 1983 talks
21	about rights secured by the Constitution and the
22	laws, and, usually, in those instances, the laws
23	in themselves confer the right. But Spending
24	Clause legislation doesn't confer a right in and
25	of itself. It's dependent on the recipient of

1 the money agreeing.

2 So would that -- does that make it 3 necessary for you to show that, at the time of the adoption of 1983, it was generally 4 understood that this type of right fell within 5 the understanding of the rights to which 1983 6 7 refers? MR. TUTT: I -- I don't think so, and 8 9 I'll give you a few answers. The -- the most important is that 1983 refers to new -- new 10 11 statutes. You know, Justice Scalia in Blessing 12 talked about the fact that new rights created in 13 new statutes would still be presumptively 14 enforceable under Section 1983. No one would 15 dispute that. And we take the statute for what 16 the words meant at the time, not necessarily for 17 the scope of rights that would be protected. 18 But, even if you disagree with all of 19 that, these are actually the kinds of rights

20 that Section 1983 was enacted to protect, rights 21 to bodily integrity and autonomy, fundamental 22 rights, you know, if you map this onto the 23 rights protected by the Constitution. 24 So, if you're asking if this kind of 25 tort would be the kind of right that you could

1	enforce, I think the answer is an emphatic yes.
2	If you're if you're asking about contract
3	law, I don't think that the contract law analogy
4	makes sense for numerous reasons. Most
5	obviously, Spending Clause legislation like this
6	didn't exist, and the and the kind of analogy
7	to Spending Clause legislation didn't emerge
8	until the 20th Century. So there's just no
9	reliable way to even know that Congress would
10	have thought that by using the spending power,
11	as opposed to its commerce power, when enacting
12	a rights-creating statute, it was making a
13	fundamentally different decision with respect to
14	its ratification of 1983.
15	JUSTICE THOMAS: Mr. Tutt, if you
16	don't use the Spending Clause analogy, what
17	would be the basis or the authority for creating
18	the right in the first instance?
19	MR. TUTT: Your Honor, this this
20	Court I think that the rights in this case
21	could be could be conferred under the Court's
22	broad spend Commerce Clause jurisprudence.
23	JUSTICE THOMAS: Well, let me back
24	I think I may have misstated that.
25	MR. TUTT: Yes.

1 JUSTICE THOMAS: If you don't use the 2 contract analysis -- analogy, all these Spending 3 Clause cases have been defended on that basis, so you would have to now create a new theory. 4 That was a basis for saying they were 5 6 constitutional. If you eliminate that, what 7 does that leave you with? MR. TUTT: Well, Your Honor, we -- we 8 9 don't -- I think there's two steps to the 10 question that you're asking me. The first is, 11 if we don't use the Spending Clause -- the 12 contract analogy, what test would we use to understand the constitutionality of Spending 13 14 Clause legislation? But we don't actually 15 dispute the -- the contract analogy for purposes 16 of the constitutionality of these kinds of laws. 17 We don't say that -- that this isn't 18 the kind of law that the state has to enter 19 into, the agreement, knowingly and voluntarily and have clear notice -- we -- and unambiguous 20 21 notice. We don't disagree with any of those 2.2 things, which are, we think, the things that are 23 key to the constitutionality of Spending Clause 24 legislation.

25

The HHC wants to take that analogy one

1 step further and say that the Congress that 2 enacted 1983 must have thought that that analogy that hadn't yet even really been explored by 3 this Court would further extend to how 1983 4 would be interpreted. And we don't -- we don't 5 6 see -- I hope I'm being responsive. 7 JUSTICE THOMAS: Well, I think the problem is that it's one thing to have the 8 9 contract analogy as a basis. And then, as you play it out, you say: Well, if you -- if you 10 11 continue that, you say, well, who is this 12 contract between? And that's been the basis. 13 It's the state is receiving the money, 14 for example, under these conditions, so the 15 national government can require them to do 16 certain things. Then the next step would be: 17 Does it also give a right to a third-party beneficiary to vindicate some of those rights? 18 19 That's the way we have done it. Now 20 you're saying it's okay to have the contract 21 analogy at the formation stage, but you can drop 2.2 it along the way if it becomes inconvenient on 23 the back end, that is, on the rights vindication 24 stage -- at the rights vindication stage. 25 So I don't know if we've ever done

1 that, and I don't know if you can -- you can do 2 that and still have the constitutional 3 justification for it. MR. TUTT: Well, Your -- Your Honor, I 4 would just go back to Pennhurst, which really 5 started this -- this off, and it applied the 6 7 contract analogy but said that the rights are part of the contract. So, to the degree that 8 9 you have individuals who are suing, it's because Section 1983 is part of the contract. 10 11 JUSTICE THOMAS: Okay. I agree. But 12 is the beneficiary here a party to that contract? That's -- that's the rub. 13 14 MR. TUTT: Your Honor -- Your Honor, 15 we -- we don't dispute that the -- the -- that 16 Mr. Talevski was the beneficiary of this 17 contract. We don't -- we don't dispute that if you -- if you want to think of it that way, but 18 19 it's not material for purposes of the -- the 20 analysis because Section 1983 says that he has 21 the right to sue and the state promised that he 2.2 would have the right to sue by entering into the 23 agreement with the federal government to take. 24 CHIEF JUSTICE ROBERTS: Thank you, 25 counsel. Anything further?

1 JUSTICE THOMAS: No.

2 CHIEF JUSTICE ROBERTS: Justice Alito?3 Justice Kagan?

4 Justice Gorsuch?

5 Justice Barrett?

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

18 MR. TUTT: I think that -- I think 19 that that would be one way to understand the --20 the question and that -- that we don't -- we 21 don't think that it did matter to Congress 2.2 because there's nothing in the text of 23 Section 1983 that -- that could be read to sort 24 of care about the provenance of the rights 25 you're trying to assert.

1 Thank you, Your Honor. 2 CHIEF JUSTICE ROBERTS: Thank you, 3 counsel. Mr. Robbins, rebuttal? 4 REBUTTAL ARGUMENT OF LAWRENCE S. ROBBINS 5 ON BEHALF OF THE PETITIONERS 6 7 MR. ROBBINS: Thank you, Mr. Chief Justice. 8 9 I -- I'd like to open with Justice 10 Thomas's question to Mr. Tutt just a moment ago. 11 What is unique about the Spending Clause is that 12 it allows Congress to do things it could not otherwise constitutionally do. 13 14 I submit that, obviously, this 15 question is not presented today but that the 16 micromanaging of nursing care facilities in 17 Marion, Indiana, is not something which Congress 18 could have done under its Commerce Clause 19 authority or under its Section 5 Fourteenth 20 Amendment authority. The reason it can do these 21 things is because the state has consented to it. 2.2 So the question of consent is crucial 23 to the constitutionality of the statute itself, 24 and that entails certain common law principles. 25 You don't -- the -- the -- the 1871 Congress did

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not have to imagine that Pennhurst would someday
 come down.
 It's not as if Spending Clause
 statutes only became contractual by nature

5 because the Court in 1981 in Pennhurst said that 6 it was. It was always -- those statutes were 7 always contractual in nature. And it therefore 8 bears critically on the marriage of 1983 and 9 FNHRA that we ask the question: What did 1983 10 mean when it was enacted?

11 And the answer to that question is 12 that the common law, generally speaking, 13 prohibited individuals from bringing third-party 14 beneficiary claims on government contract cases. 15 By the way -- and this goes back, 16 Justice Sotomayor's question, that you asked 17 me -- you said, well, what about these legal history professors who say the law was 18 19 different? I contend that they've misread the 20 law by, as I say, gerrymandering the 21 denominator, but, even if it were as murky as 2.2 the law professors suggest that it was, the burden is not on us, I suggest, to show that the 23 law was clear on our side. 24

25 The burden is on the plaintiff, who's

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

Now how about ratification? That is a 6 7 red herring if there ever was one. The language in the statute that overruled Suter, this 8 9 Court's Suter decision, made, I thought, 10 painfully clear that it was doing very little. 11 All it said was we are -- we no longer will tolerate -- we no longer will -- you may no 12 longer claim that a right is unenforceable 13 14 because it is embedded in a provision that 15 requires a state plan. 16 But the statute goes on to say that

all other arguments are preserved. It doesn't expand or decrease any other basis for saying that a right is unenforceable. And what's more, it preserves even the outcome in the decision in Suter.

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

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

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