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P R O C E E D I N G S

(10:15 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 23-1275, Medina versus Planned Parenthood South Atlantic.

Mr. Bursch.

ORAL ARGUMENT OF JOHN J. BURSCH

ON BEHALF OF THE PETITIONER

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

In our federalist system, the legitimacy of Congress's exercise of its spending power depends on a state's knowing acceptance of funding conditions. As even Respondents concede, an individual focus and mandatory language are not enough.

Gonzaga held that clear rights-creating language is critical to creating private rights. Congress did not use clear rights-creating language in the "any qualified provider" provision. Consider its text and structure.

First, it does not use the word "right" or its functional equivalent, nor does it use words with a deeply rooted

1 rights-creating pedigree like the Fifth
2 Amendment's "no person shall." That lack should
3 be dispositive.

4 Second, the provision speaks merely of
5 obtaining a benefit from a third party, unlike
6 traditional rights-creating language, which
7 confers a right directly.

8 Third, it would allow the regulated
9 entity, here, a state, to define the scope of
10 the alleged right it is not allowed to violate
11 by deciding which providers are qualified.

12 Fourth, the provision does not reside
13 in a bill of rights. It's one of 87 items on a
14 list of plan contents that the Secretary must
15 look for before approving a plan.

16 Fifth, it is unusual to find a right
17 in a substantial compliance regime where a
18 sizable minority of beneficiaries may fail to
19 receive the offered benefit.

20 And, finally, Congress knows how to
21 clearly confer a private right to choose a
22 provider because it did so in FNHRA's analogous
23 provision, which appears in a separate bill of
24 rights and uses rights-creating language
25 connected to the beneficiary and directed to the

1 regulated entity, a facility. It says a nursing
2 facility must protect and promote the rights of
3 each resident, including the right to choose a
4 personal attending physician.

5 Congress did none of that here, and
6 the Court should not read the "any qualified
7 provider" provision as though Congress did.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: You seem to put quite
10 a bit of weight on the use of the word "right"
11 over, I think, 20 times in Talevski and the
12 absence of the word "right" in this case.

13 Do you think "right" is absolutely
14 necessary in order to determine whether or not
15 there -- a right has been created under this
16 provision?

17 MR. BURSCH: I think, if Congress
18 wants to be clear, "right" is the best word, but
19 we would take its functional equivalent, so, for
20 example, "entitlement" or "privilege," other
21 words that are functionally equivalent to
22 "right," or, of course, the traditional "no
23 person shall," like the Fifth Amendment.

24 But this Court made clear in Talevski
25 that this is a high bar. It's atypical. And

1 so, if a state is going to be on clear notice,
2 which it has to be to know what contract it's
3 agreeing to, it needs to be really clear.

4 JUSTICE SOTOMAYOR: So --

5 JUSTICE THOMAS: So how would you
6 amend this statute to be clear about a right?

7 MR. BURSCHE: There's a number of
8 things that Congress could have done. For
9 starters, it could have set it apart in a
10 separate bill of rights, like it did in Talevski
11 with its provider choice provision. It could
12 have used rights-creating language; for example,
13 a beneficiary has a right to designate her
14 provider. It could have taken the
15 qualifications of the provider away from the
16 state, the regulator, and instead made it a
17 federal issue. Or it could have even done
18 something like -- like Congress did in
19 1396a(a)(84)(B), which, if you move all the way
20 down the list to near the end, it took the
21 regulated entity, the state, it used a
22 rights-creating "shall," and it put them
23 together in the provision.

24 But none of those indicators of a
25 clear statement is present in this provision.

1 JUSTICE SOTOMAYOR: You're not quite
2 calling it a magic word, but you're coming very
3 close. And an example was raised in one of the
4 briefs that says the IRS must provide that any
5 individual may obtain a refund of overpaid
6 taxes. It seems hard to believe that that
7 sentence on its face does not create a right for
8 an individual to have a refund of overpaid
9 taxes.

10 MR. BURSCHE: Justice Sotomayor, let me
11 address the magic words premise and then the IRS
12 hypothetical.

13 With respect to the premise, I'm not
14 going to fight the Court if you say that these
15 are magic words because that's really what --

16 JUSTICE SOTOMAYOR: No, you would like
17 us to, but assume that I don't want to.

18 MR. BURSCHE: Yeah. That -- that's a
19 clear statement rule. That's what states need.

20 But, in the IRS hypothetical, there's
21 a number of problems with that. First, as we
22 point out on page 9 of our reply, it could be
23 clearer. But more important, the IRS provision
24 is not a Spending Clause provision. It's not
25 this conversation between a state and the

1 Secretary of Health and Human Services about
2 what must be done.

3 JUSTICE SOTOMAYOR: It seems a little
4 bit odd to think that a problem that motivated
5 Congress to pass this provision was that states
6 were limiting the choices people had. Some
7 states were saying only state facilities would
8 provide the benefit. Other states were
9 identifying a more limited subset of providers.

10 It seems hard to understand that
11 states didn't understand that they had to
12 give -- provide individuals the right to choose
13 a provider.

14 MR. BURSCH: Justice Sotomayor,
15 certainly, a state would understand it has to
16 provide a benefit, but absent clear
17 rights-creating language, it wouldn't know that
18 it had to honor a right.

19 And I can make that same statement
20 about what's important to people or what's
21 significant about dozens of other provisions in
22 1396a, if you're talking about equal protection
23 or the right to services. How about being
24 reinstated on the Medicaid program after you've
25 been in prison?

1 There are countless things in that
2 statute which people would consider important
3 and vital, fundamental. None of those words
4 actually appear in the --

5 JUSTICE SOTOMAYOR: It doesn't seem --

6 MR. BURSCH: -- "any qualified
7 provider" provision.

8 JUSTICE SOTOMAYOR: It -- in your --
9 in your brief, you had eight provisions of the
10 Act that were part of this same list of rights,
11 and you said, if we recognize a private cause of
12 action here, these eight are open to dispute.

13 I looked at the eight very carefully,
14 and there hasn't been much of a dispute among
15 the circuits. There hasn't even been a
16 challenge.

17 You mentioned one of them because it's
18 hard to see how a state can't understand it --
19 there hasn't even been a challenge to it --
20 about providing Medicaid to juveniles in prison.
21 And there's been no dispute over that because no
22 one doubts that the state knows what it has to
23 do and it does it.

24 The others, again, none of them have
25 disputes. Some uniformly, courts have said,

1 don't create private rights, and others they
2 have said they do. Where they say they do, to
3 me, it's a simple issue. You have to provide a
4 fair hearing before the state agency of any
5 individual who claims coverage. Most states
6 have a hearing of some sort.

7 But -- so I don't understand why that
8 makes -- is important here.

9 MR. BURSCH: It's the difference
10 between a benefit and a right and whether this
11 Court is going to hold the line it stated in
12 Talevski that this is going to be atypical when
13 Congress creates a right without using the
14 so-called magic words that we then try to
15 document.

16 JUSTICE JACKSON: Can I --

17 JUSTICE KAGAN: Well, could -- could
18 we talk about, Mr. Bursch, the difference
19 between a benefit and a right? I mean, I assume
20 from your answer to Justice Sotomayor that you
21 agree that the state has an obligation here, is
22 that correct?

23 MR. BURSCH: To provide benefits on
24 the plan. But, significantly, it's --

25 JUSTICE KAGAN: The state has an

1 obligation to provide this particular thing,
2 right, which is the state has an obligation to
3 ensure that a person -- I don't even know how to
4 say this lang -- without saying "right" -- has a
5 right to choose their doctor.

6 That's what this provision is. It's
7 impossible to even say the thing without using
8 the word "right."

9 Has a benefit to choose their doctor?
10 The state has to ensure that individuals have a
11 benefit to choose their doctor?

12 The state has to ensure that
13 individuals have a right to choose their doctor.
14 That's what this provision is.

15 MR. BURSCH: Well, that -- that
16 language that you're focused on, "may obtain,"
17 is not clear rights-creating language for four
18 reasons.

19 JUSTICE KAGAN: I -- I don't want four
20 reasons. I want you to answer my question. The
21 obligation is to ensure that individuals can
22 choose their doctor, and when we speak of that,
23 the obligation is to -- I mean, there's a
24 correlative right. There's an obligation,
25 there's a right, and the right is the right to

1 choose your doctor.

2 MR. BURSCH: Justice Kagan, I won't go
3 through my list. There's many reasons why that
4 analysis is wrong. But simply because we
5 understand colloquially that something might be
6 a right doesn't mean that Congress has put a
7 state on clear notice that it could be sued in
8 federal court under 1983 and subjected to
9 liability and attorney fee shifting if it
10 doesn't follow that provision, particularly in a
11 substantial compliance regime.

12 JUSTICE KAGAN: Well, here's what the
13 state knows. The state knows it has an
14 obligation. The state knows that that
15 obligation runs to individuals and that
16 individuals are specifically discussed in the
17 statute. And the state knows the content of
18 that obligation, which is that every individual
19 has a right to choose their doctor.

20 So what doesn't the state know that's
21 important here?

22 MR. BURSCH: Whether it's going to be
23 sued in federal court. In other words --

24 JUSTICE KAGAN: Well, if -- if --
25 if -- if you know that you have an obligation

1 and you know that the individual has a right to
2 choose their doctor, that suggests that there's
3 some kind of enforcement.

4 MR. BURSCH: Gonzaga makes clear that
5 there's a difference between a duty to provide a
6 benefit and a right that subjects you to 1983
7 liability.

8 We would expect a provision like this
9 to use "individual" because, of course, a doctor
10 treats an individual. But the -- the word
11 "individual" can't be rights-creating. It
12 appears more than 400 times just in 1396a.
13 That's hardly atypical.

14 In addition --

15 CHIEF JUSTICE ROBERTS: One of the --
16 one of the -- one of the benefits provided by
17 the Act is that you may choose your own doctor.

18 If a person thinks that's not being
19 provided, what remedies do they have?

20 MR. BURSCH: They have a very specific
21 remedy. If they are denied benefits, there's an
22 administrative appeal process that they can go
23 through. But there is a separate remedy for
24 providers who are disqualified. They also have
25 an administrative appeal that could go through

1 the state court system, and that could come to
2 this Court if necessary.

3 And it makes sense that Congress would
4 create the appeal right for the disqualification
5 in the provider, not the beneficiary --

6 JUSTICE SOTOMAYOR: I'm sorry.

7 MR. BURSCH: -- because --

8 JUSTICE SOTOMAYOR: I'm sorry. The
9 Medicaid recipient can only sue a denial for
10 services that were actually rendered.

11 MR. BURSCH: Yes.

12 JUSTICE SOTOMAYOR: If a doctor can't
13 render them, then they can't sue under that.

14 MR. BURSCH: That's correct.

15 JUSTICE SOTOMAYOR: And the
16 requirement of an administrative review process
17 is not actually required by the Act. It is
18 something that a state can choose to give, and
19 they can choose its limits.

20 Here, they can only challenge --
21 providers can only challenge a certain subset of
22 disqualifications via South Carolina's
23 administrative review process. They can only
24 challenge a disqualification because of a -- of
25 a criminal conviction or abuse.

1 So the providers here did go through
2 the administrative process, and they were told
3 they can't sue for this here.

4 MR. BURSCH: Justice Sotomayor, that
5 is what they put in their brief. That is
6 absolutely not what that regulation says.

7 126-404 says that those particular
8 things that you mentioned, like a criminal
9 conviction or recouping payments --

10 JUSTICE SOTOMAYOR: So why were they
11 denied here?

12 MR. BURSCH: Well, can I finish?

13 JUSTICE SOTOMAYOR: They're not --
14 well, go ahead.

15 MR. BURSCH: Yeah. So, first of all,
16 those things that you mentioned, that gives them
17 advance review before consequences take place.
18 But the regulations make absolutely clear that
19 they could raise anything that they wanted in
20 their administrative appeal.

21 And the reality is they haven't
22 pursued their administrative appeal yet. They
23 went straight to court. They recruited a
24 beneficiary. They filed their 1983 suit.

25 The state responded to that with a

1 brief in opposition to a preliminary injunction
2 motion and said: Hey, your -- your remedy,
3 which you agreed in your contract was your
4 exclusive remedy, is to go through the
5 administrative appeal that we offer you, and --

6 JUSTICE JACKSON: So, Mr. Bursch, can
7 I just ask you, to what extent is the
8 administrative appeal scheme relevant to the
9 first step of this inquiry?

10 What I'm a little worried about is
11 that your argument seems to be conflating what
12 had traditionally been understood and what we
13 reaffirmed in Talevski as two different steps of
14 the analysis in 1983, and the first relates to
15 to what extent is this provision unambiguously
16 rights-creating, and then the second step asks
17 whether Congress has created some sort of
18 alternative remedy or what is the enforcement
19 scheme such that we might believe that 1983 is
20 not available.

21 So can you just help me to understand
22 whether you're now suggesting that we evaluate
23 whether this is rights-creating, as we talked
24 about, in the first step relative to an
25 understanding of what Congress has done with

1 respect to enforcement?

2 MR. BURSCH: To be clear, Justice
3 Jackson, we are not making a step 2 Sea Clammers
4 argument. Never have, are not making it here.

5 But, as this Court made clear in
6 Gonzaga, that the remedies available can
7 buttress the interpretation of whether there is
8 clear rights-creating language in step 1. And
9 that's what you said in the Suter decision in
10 Footnote 11 as well.

11 And so we're -- we're using the
12 provider's remedy and the lack of any
13 beneficiary remedy to be able to challenge --

14 JUSTICE JACKSON: But that does
15 seem --

16 MR. BURSCH: -- that provider's
17 disqualification.

18 JUSTICE JACKSON: -- awfully
19 confusing. I mean, I -- you know, there isn't a
20 whole lot of indication that lower courts are --
21 are -- are confused about this.

22 I -- I -- I looked very carefully at
23 Judge Wilkinson's opinion. He lays out very
24 clearly how this works and what we've said
25 repeatedly. And I guess my concern is that the

1 kinds of things -- and I appreciate you had a
2 long list of reasons why you think this isn't
3 rights-creating -- but one of them had to do
4 with the nature of this -- you know, the
5 enforcement mechanism, and I just see that as a
6 step 2 concern, and I'm worried about us getting
7 people confused if we start putting those
8 considerations into the first analysis.

9 MR. BURSCH: Well, I think the
10 analysis is distinct. If you're making a step 2
11 analysis, the argument is that the remedies are
12 so comprehensive that it bars the ability to go
13 to federal court.

14 In step 1, just like in Gonzaga, just
15 like in Suter, the Court is entitled to consider
16 remedies like the fact that the disqualified
17 provider has an administrative appeal to
18 determine whether there is a right to go to
19 court.

20 And I would note that one of the
21 reasons it's significant Congress gave that
22 administrative appeal to the disqualified
23 provider and not to the beneficiary is because
24 the -- the provider is the one who has all the
25 information.

1 Under Respondents' theory, if a
2 provider commits malpractice and they're
3 disqualified for that reason, there's still a
4 beneficiary right to go to federal court and
5 bring a 1983 action.

6 And that makes no sense because what
7 does a beneficiary know about a provider's
8 medical malpractice involving other patients?

9 JUSTICE JACKSON: All right. Well,
10 can I get -- can I just turn your attention back
11 to what I understand to be the classic kind of
12 step 1 inquiry here --

13 MR. BURSCH: Yes.

14 JUSTICE JACKSON: -- and -- and -- and
15 get us back to Justice Kagan's point about an --
16 the state being aware of an obligation to do
17 this. And I note that, although you suggest
18 that it would be easier if the word "right" was
19 in the statute -- sorry, in -- in this
20 particular statute, 1983 itself talks about
21 rights, privileges, and immunities.

22 So, even if we were to have a magic
23 words test, it seems to me to be too narrow to
24 just say that Congress has to say "rights"
25 because we have in the 1983 concept in -- in the

1 actual text of the statute "rights, privileges,
2 and immunities secured by the Constitution and
3 laws."

4 So, with an understanding of what 1983
5 was about, can you speak to why an obligation of
6 this nature that runs to an individual in the
7 way that Justice Kagan described doesn't get us
8 sort of in the realm of rights, privileges, and
9 obligations secured by the law?

10 MR. BURSCH: Yeah. Two thoughts on
11 that, Justice Jackson.

12 JUSTICE JACKSON: Yes.

13 MR. BURSCH: First, we're not limiting
14 this to "right." As I mentioned earlier,
15 "entitlement," "privilege" -- I would even spot
16 you "immunity" because that's in Section 1983 --
17 I think any of those have the same
18 rights-creating -- rights-creating pedigree.

19 But -- but it is a high bar. An
20 obligation is not enough. Telling a state that
21 it has an obligation to do something or -- or
22 that it -- it must provide something isn't the
23 same as saying you have the ability to sue them
24 in federal court and have 1983 fee-shifting
25 opportunities, liability and fee shifting.

1 JUSTICE KAGAN: Well, it's not any old
2 obligation. I mean, you're absolutely right, of
3 course, that not any old obligation would be
4 enough here. It's an obligation that runs to
5 the individual beneficiary and that concerns an
6 individual beneficiary's entitlement to choose
7 something, and, once you're at that, you're at a
8 right.

9 And, you know, if the word -- if the
10 language in the statute said "right," as it did
11 in Talevski, you would still say: Oh, well, the
12 state doesn't know that it -- that right is
13 enforceable.

14 What this language does is the same
15 thing that the "rights" language does. It says:
16 You have an entitlement. It's your option to
17 choose a doctor.

18 Now, you know, we've never said: Oh,
19 and the statute has to say "and this can be
20 enforced in court."

21 MR. BURSCH: May I respond, Mr. --

22 CHIEF JUSTICE ROBERTS: Yes. Sure.

23 MR. BURSCH: Justice Kagan, what you
24 said in Talevski is that you need
25 rights-creating language with an unmistakable

1 focus on the benefitted class. So the fact that
2 you identify individuals and that there --
3 there's a benefit there --

4 JUSTICE KAGAN: This is an
5 unmistakable focus on the benefitted class.

6 MR. BURSCH: But there's --

7 JUSTICE KAGAN: The benefitted class
8 is Medicaid beneficiaries who have the right to
9 go see the doctor of their choice. That's what
10 this provision is.

11 MR. BURSCH: But, Justice Kagan, it's
12 missing the connective tissue to the
13 rights-creating language. You need clear
14 rights-creating language that the beneficiaries
15 are subject to and that is directed to the
16 regulated entity, here, a state. And all of
17 that connective tissue is missing because there
18 are no clearly rights-creating words in this
19 statute.

20 If you would lower the bar, those
21 provisions that we -- we mention in our brief
22 are just the start. That's already 10 percent
23 of Section 1396a. The atypical high bar that
24 you articulated in Talevski would be abandoned
25 and courts will continue discovering rights in

1 all kinds of statutes.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas?

5 Justice Alito?

6 Anything? Anything further?

7 Justice Gorsuch?

8 JUSTICE GORSUCH: On the
9 administrative review process --

10 MR. BURSCH: Yes.

11 JUSTICE GORSUCH: -- your friends on
12 the other side say it would be futile because
13 it's controlled by the state. Thoughts?

14 MR. BURSCH: The state gives a full de
15 novo review to a disqualification decision.
16 That's clear on their website. It's clear in
17 the administrative rules that govern that
18 proceeding.

19 JUSTICE GORUSCH: Yeah, but they --

20 MR. BURSCH: They have counsel --

21 JUSTICE GORSUCH: -- they also report
22 to the governor, right?

23 MR. BURSCH: They do, but let's say
24 you get a bad decision there. You've got an
25 appeal right to the state courts and you've got

1 an appeal right to this Court. So it's a -- a
2 remedy that is fulsome and allows them to make
3 any argument they want.

4 JUSTICE GORSUCH: You -- you
5 emphasized Gonzaga and Talevski. But we have
6 other cases too, Wilder, Wright, Blessing.
7 Thoughts about our jurisprudence in this area?

8 MR. BURSCHE: I -- I do. Obviously,
9 Gonzaga and Armstrong have cast a lot of shade
10 on decisions like Wilder, Wright, and Blessing.
11 And I noted that, in the Talevski decision, this
12 Court did not use any of those cases to reach
13 its conclusion in that case.

14 But the problem is that the lower
15 courts are still in a state of confusion about
16 what the status of those cases are. So, for
17 example, in Talevski, I believe Mr. Chief
18 Justice asked a -- a question to counsel or
19 observed, haven't we put a stake in Wilder?

20 Well, outside the walls of this
21 courtroom, lower courts have not gotten that
22 message yet. Otherwise, Judge Wilder in his
23 concurrence would not have said, well, we're
24 still bound by Wilder and Wright and Blessing
25 until this Court says that those are actually

1 dead cases that we should no longer follow.

2 The problem with a case like Wilder is
3 that the standard it applies is so low. Wilder
4 says the inquiry turns on whether the provision
5 was intended to benefit the putative plaintiff.
6 Well, that kind of sounds like the test that
7 Justice Kagan is propounding this morning, where
8 you don't need rights-creating language.

9 But, if that's the case, there is no
10 high bar, there is no atypical case, then the
11 federal Spending Clause statutes are replete
12 with private rights that can be enforced in
13 federal court.

14 CHIEF JUSTICE ROBERTS: Justice Kagan?

15 JUSTICE KAGAN: I think you gave me
16 the option already.

17 CHIEF JUSTICE ROBERTS: Oh, I'm sorry.

18 (Laughter.)

19 CHIEF JUSTICE ROBERTS: Justice
20 Kavanaugh?

21 JUSTICE KAVANAUGH: Thank you.

22 We're here, obviously, because of the
23 confusion in the lower courts, which has been --
24 we're on kind of a 45-year odyssey.

25 MR. BURSCH: Yes.

1 JUSTICE KAVANAUGH: And it's not the
2 fault of any one judge, but, collectively, this
3 Court has failed to give guidance, obviously,
4 that lower courts can follow, that states,
5 providers, and beneficiaries can follow. So one
6 of my goals coming out of this will be to
7 provide that clarity.

8 Your word "right" or its functional
9 equivalent, that "or its functional equivalent"
10 strikes me, as some of the questions have
11 revealed --

12 MR. BURSCH: Mm-hmm.

13 JUSTICE KAVANAUGH: -- potentially
14 lacking the clarity that I hope we can provide
15 one way or the other going forward.

16 So don't you think it would be better
17 to actually tell us the words that are
18 rights-creating rather than having something
19 like "or its functional equivalent," which could
20 be another decade of litigation?

21 MR. BURSCH: Yeah, that's certainly
22 possible because you'd have to keep that to a
23 pretty small class. I wouldn't be able to
24 really do any better than Justice Alito's
25 partial concurrence in Talevski, where he

1 describes it as explicit rights-creating
2 language.

3 And the list I would give you is
4 "rights," "entitlement," "privilege," and
5 "immunities." When you're -- you're using the
6 word --

7 JUSTICE KAVANAUGH: And that's it?

8 MR. BURSCH: You could define it as
9 that universe. You know, I don't think that's a
10 magic word, but if it is --

11 JUSTICE KAVANAUGH: Well --

12 MR. BURSCH: -- then it's a clear
13 instruction to Congress and we all know.

14 JUSTICE KAVANAUGH: -- I'm not
15 allergic to magic words because magic words, if
16 they represent the principle, will provide the
17 clarity that will avoid the litigation that is a
18 huge waste of resources for states, courts,
19 providers, beneficiaries, and Congress. So --

20 MR. BURSCH: Right, right. Exactly.
21 And so, when Justice Kagan was bringing up the
22 "may obtain" phrase -- if I could just, you
23 know, quickly talk about that -- "may" obviously
24 has its own ambiguity. It's not even clearly
25 mandatory, much less having a -- a

1 rights-creating pedigree.

2 When you pair it with the word
3 "obtain," "may obtain," it's even less
4 rights-creating because it's not giving anything
5 directly to anyone in explicit terms. It's odd
6 that that alleged rights scope is defined by the
7 state, which is the gatekeeper to determine who
8 is a qualified provider.

9 And then, of course, all of this is
10 subject to the substantial compliance provision.
11 And so, so long as this is in the plan, the
12 state can administer it any way it wants, and if
13 the Secretary doesn't complain if they don't
14 honor any of the provisions, any one of the
15 provisions, then there -- there's no penalty for
16 that.

17 So you can see how quickly, once you
18 move away from those core words like "right,"
19 "entitlement," "privilege," "immunity," that
20 it's easy to cascade and find rights in any
21 provision that mentions individuals and a
22 benefit. Like, that -- that's the problem I
23 think you're trying to solve.

24 And if this Court doesn't toe the
25 line, if it doesn't have the high bar, the

1 atypical, not 10 percent of 1396a, you're going
2 to be seeing these cases for the next decade
3 easy. I mean, every term we could have a fight
4 about this.

5 JUSTICE KAVANAUGH: And your
6 response -- you've said this, but I just want to
7 get it nailed down. Your response to the idea
8 that those words, those terms you've given us,
9 create an artificial divide between provisions?

10 MR. BURSCHE: Well, it's not artificial
11 because, if we step back and think about this,
12 this is a state entering into a contract and it
13 knows that it has to provide benefits. We've
14 talked about that.

15 The question is whether it's on notice
16 that there is a private right that can be
17 enforced in a Section 1983 action with attorney
18 fee shifting, where all of a sudden money is
19 flowing into attorneys' pockets instead of into
20 the beneficiaries', who are supposed to be
21 getting the benefits of the congressional
22 appropriation.

23 So, if you don't limit it to those few
24 words, then all of a sudden you're -- you've
25 got -- the floodgates are open. And I know

1 their contention is, well, there is no real
2 floodgates. Well, you know, we've cited circuit
3 case after circuit case about all kinds of
4 different provisions.

5 In the context of the "any qualified
6 provider" provision alone, we're talking about
7 9,000 providers who have been disqualified
8 across the country, any one of whom, if you rule
9 in favor of Respondents, can recruit a
10 beneficiary and go to federal court and then
11 line their pockets with the attorneys' fees.

12 So -- so I think your instinct to try
13 to keep this as clearly defined and as narrowly
14 defined as possible is consistent with putting
15 the state on notice, which is the whole purpose
16 of the Spending Clause exercise.

17 JUSTICE KAVANAUGH: And last point, on
18 the clarity, you -- you think we need to say
19 something specific and explicit about Wilder and
20 Blessing, I gather.

21 MR. BURSCH: I -- I -- I didn't think
22 you did after Talevski, but when this case was
23 GVR'ed and Judge Richardson says what are we
24 supposed to do as lower courts, lower court
25 judges, when the Court doesn't say explicitly

1 don't file -- follow Wilder or Blessing or
2 Wright anymore, I think you do need to be more
3 clear. If you really want to put a stake in
4 those cases, you're going to have to do it in
5 writing, just like you did with Lemon.

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 JUSTICE BARRETT: I'm going to ask you
10 a little bit about Justice Jackson's question
11 about how the availability of alternative
12 remedies in a Sea Clammers sense might bear on
13 step 1.

14 MR. BURSCHE: Mm-hmm.

15 JUSTICE BARRETT: Is it totally
16 irrelevant or would it affect the bar in some
17 way? And this is -- this is how I'm thinking
18 about it.

19 If you do have some alternative
20 scheme, and it -- and it might -- under Sea
21 Clammers, you might say, listen, that scheme
22 isn't complete enough, that Congress was
23 directing something only to that. But wouldn't
24 the presence of a scheme cut against -- I mean,
25 would it adjust the bar, the amount of clarity

1 that has to be showed at step 1? Because, if
2 there is some scheme, some method, mechanism by
3 which the beneficiary can challenge the state's
4 denial of her ability to seek the provider of
5 her choice, I guess it doesn't seem like it's
6 completely sealed off as a different question.

7 Do you agree, or how should I think
8 about it?

9 MR. BURSCH: Yeah, I agree. And I
10 think that's exactly what the Court did in
11 Gonzaga, where it said that the available
12 remedy -- there, you could go to the -- the
13 federal government and register a complaint --
14 buttressed the analysis that there was no clear
15 right created in that FERPA provision.

16 And I think it's the same thing here,
17 where you've got a provider remedy and you've
18 also got a beneficiary remedy that does not
19 involve reinstating the provider. That's
20 exactly the kind of clarity that should make the
21 bar even higher. So, when you --

22 JUSTICE BARRETT: Well, but the
23 beneficiary remedy, as Justice Sotomayor pointed
24 out, that's if your claim is denied, right? So
25 then that's the beneficiary taking the risk,

1 going to the provider she wants to see, and then
2 potentially having to pay out of pocket, right?

3 MR. BURSCH: Well, it's a little bit
4 different than that. If she's denied up front,
5 say she applies to be a Medicaid recipient and
6 she's turned down, she could appeal that
7 decision. It's really about the status of her
8 ability to get Medicaid benefits or whether a
9 particular procedure is covered.

10 But it's significant, we think, that
11 Congress gave the beneficiary the right to
12 challenge what the beneficiary has personal
13 knowledge of, her care, and it gave the provider
14 the right what the provider is familiar with,
15 the reasons why they were disqualified.

16 JUSTICE BARRETT: Well, but,
17 Mr. Bursch, I mean, like, don't you think -- you
18 know, if I want to go see Dr. Jones, and
19 Dr. Jones, that's the provider of my choice, and
20 the state has disqualified Dr. Jones, and, as
21 Justice Kagan points out, you know, the statute
22 says "may obtain the benefits," there's no
23 mechanism, am I right, for the beneficiary to
24 say, well, you're divide -- you're depriving me
25 of my ability -- we won't call it right; we

1 won't use the loaded word -- but my ability to
2 see the provider of my choice, and nobody is
3 disputing that Dr. Jones can provide the
4 services in a competent way that I want to have.

5 MR. BURSCH: Well, in a sense, what --
6 what all that means is that the beneficiary
7 doesn't have the ability to whip out a magic
8 wand and then just hit on the head the doctor
9 that they want and then they must be qualified
10 under Medicaid.

11 This is getting a little bit more into
12 the question of what's qualified. But that's
13 not the right.

14 The -- the way that the statute
15 conceptualizes this is it's like when I go to
16 Blue Cross and Blue Shield and I don't get to
17 pick any doctor that I want. If I want to go to
18 Johns Hopkins, I can't request a doctor unless
19 they're on the list.

20 And -- and this "any qualified
21 provider" provision works the same way. The
22 state decides who the providers are who are
23 qualified and you get to choose among them.
24 And -- and they decided that Planned Parenthood
25 was unqualified for many reasons, chiefly

1 because they're the nation's largest abortion
2 provider.

3 JUSTICE BARRETT: What about
4 substantial compliance? So do you conceive of
5 substantial client -- compliance as giving the
6 state a little bit of wiggle room to maybe not
7 be entirely in compliance? And, if so, how does
8 that really affect the step 1, the -- the
9 Gonzaga analysis?

10 MR. BURSCH: Yeah, absolutely. So
11 substantial compliance says that everything has
12 to be in the plan, but when the state
13 administers the plan, it doesn't have to meet
14 100 percent of every jot and tittle in the
15 statute.

16 And if they start to deviate in any
17 way, they -- they don't enforce this provision
18 or they modify this provision, there -- there's
19 experimental flexibility in there. And the
20 Secretary is the one who makes the call. He or
21 she says: You've gotten so far out of whack,
22 I'm going to withhold some or even all of your
23 funding. But, as long as the Secretary's happy,
24 they can continue on their path and --

25 JUSTICE BARRETT: But how does that

1 bear on whether it's rights-creating language?

2 MR. BURSCH: Thank you for that
3 follow-up question, Justice Barrett.

4 It's because, if -- if you have a
5 right, it's something that can't be taken away.
6 And so, in a context where the state can not be
7 following or administering that provision at all
8 and the Secretary can say no harm, no foul,
9 that's the exact opposite of a right.

10 And that's why this structure, in
11 addition to the language, makes it so clear that
12 this is not a right.

13 JUSTICE BARRETT: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Jackson?

16 JUSTICE JACKSON: So was there an
17 administrative appeal process in the Talevski
18 scenario?

19 MR. BURSCH: In the Talevski scenario,
20 there was an ability for someone to register a
21 complaint with the federal government.

22 JUSTICE JACKSON: So there was a
23 process there and --

24 MR. BURSCH: Yes.

25 JUSTICE JACKSON: -- yet we still held

1 that there was rights-creating language.

2 MR. BURSCH: Oh, sure.

3 JUSTICE JACKSON: Right.

4 MR. BURSCH: Because you had a
5 separate bill of rights that mentioned the word
6 "rights" two dozen times, and that
7 rights-creating language --

8 JUSTICE JACKSON: So it's -- it's not
9 about whether or not there's actually an appeal
10 process. It's about, again, your magic words.
11 You have to say "rights" pretty much.

12 MR. BURSCH: Well, I don't -- I don't
13 want to offend any justice. We're -- we're
14 fine with -- we're fine with a magic words test
15 if you want to do that because then it would be
16 clear.

17 JUSTICE JACKSON: Right. But I'm just
18 trying --

19 MR. BURSCH: But there are -- there
20 are some other words --

21 JUSTICE JACKSON: -- I'm trying to --
22 I'm trying to evaluate the import of the
23 separate appeal process. You're saying, in a
24 situation in which Congress has used the word
25 "right" --

1 MR. BURSCH: Right.

2 JUSTICE JACKSON: -- it doesn't
3 matter.

4 MR. BURSCH: It -- it's just one of
5 many factors.

6 And so, in Talevski, you had a
7 separate provision. It was a bill of rights.
8 You had the word "right."

9 JUSTICE JACKSON: Yeah.

10 MR. BURSCH: And, most importantly,
11 there was the connective tissue where that
12 rights-creating language, the -- the
13 beneficiaries were the subject of that --

14 JUSTICE JACKSON: Yeah.

15 MR. BURSCH: -- and then the states
16 were directed to follow that, the -- I'm sorry,
17 the nursing facilities, you know, the regulated
18 entities.

19 JUSTICE JACKSON: All right. Let me
20 ask you about clarity and Justice Kavanaugh's
21 argument.

22 So you -- you -- you indicate that you
23 believe that lower courts need greater clarity.
24 But we took this case on the basis of a
25 pre-Talevski split. So, as we sit here today,

1 we actually don't have any idea what the lower
2 courts in the main are doing post-Talevski.

3 And I'm looking at Judge Wilkinson's
4 opinion in this case, and he seems to have a
5 pretty good sense of what our cases mean. I
6 mean, he goes through all the cases, summarizes
7 the evolution of our case law from Wilder to
8 Blessing to Gonzaga to Talevski. He explains in
9 a very nuanced way how each case refined the
10 test for Section 1983 enforceability.

11 And I understand you disagree with how
12 he's applied what the test is in this situation,
13 but is there any part of his summary of the
14 cases and where we are in terms of the evolution
15 of the law that you disagree with?

16 MR. BURSCH: A number of things, as
17 you might expect.

18 JUSTICE JACKSON: Please.

19 MR. BURSCH: First, Judge Wilkinson
20 cites Blessing, he cites Wilder, cases that this
21 Court did not rely on in Talevski. But, as
22 Judge Richardson points out in his
23 concurrence --

24 JUSTICE JACKSON: No, he cites and
25 explains how we've moved. So now he -- he had

1 this case, this case that we are looking at
2 today, both before and after Talevski.

3 Before, he says: 1983,
4 rights-creating language, you're fine. Talevski
5 comes down. We GVR, which we standard --
6 standard practice when there's an intervening
7 opinion. He reads Talevski, and he says: Ah,
8 this actually confirms what I understand the law
9 to be, and he explains very clearly how we get
10 here, what the analysis is, and what the test is
11 today. So --

12 MR. BURSCH: Yeah. Two -- two --

13 JUSTICE JACKSON: -- I -- I -- I guess
14 I don't understand what -- what the remaining
15 confusion is.

16 And, certainly, we're only two years
17 out from Talevski, so there is no confirmation
18 that lower courts are still confused about what
19 they're supposed to be doing now.

20 MR. BURSCH: Two very specific
21 responses to that, Justice Jackson.

22 First, he did not eschew the cases
23 that this Court was no longer using. That's the
24 confusion we were just talking about. But, more
25 important, he didn't understand the clear or

1 explicit or unambiguous rights-creating language
2 component of the test. It's exactly what
3 Justice Kavanaugh was describing. He looks --

4 JUSTICE JACKSON: So you just disagree
5 with what he says, but it's not like we need to
6 go back and revisit the old cases. We've
7 arrived at this point. You think he's getting
8 it wrong. I totally understand that.

9 But it just seems to me odd that we
10 would, you know, wind back the clock many, many
11 years and talk about what these old cases said
12 when we've all agreed that we've evolved to this
13 current point.

14 MR. BURSCH: I -- I don't think you
15 need to go back other than to make clear to help
16 judges like Judge Richardson to know what cases
17 are still good law or not.

18 But what we're talking about --

19 JUSTICE JACKSON: All right. Let me
20 ask you another question. To what extent --

21 MR. BURSCH: Could I just finish?

22 JUSTICE JACKSON: Yes, please.

23 MR. BURSCH: Yeah. But the important
24 thing is Judge Wilkinson doesn't get the
25 explicit rights-creating language. It's not

1 just a misapplication. It's a misunderstanding
2 of the test.

3 When -- when he looks at 1396a and
4 sees that a plan must include these things so
5 the Secretary can approve it, he thinks that
6 that's a directive to the state, and it's not.

7 He looks at words like "may obtain" or
8 the fact that the statute references
9 "individual" and thinks that's clear
10 rights-creating language when it's not.

11 JUSTICE JACKSON: All right. So you
12 disagree with him.

13 Let me ask you about the part of your
14 list of things related to whether or not this is
15 rights-created language that relates to the fact
16 that this is part of state plan requirements.

17 MR. BURSCH: Yes.

18 JUSTICE JACKSON: I think you say, you
19 know, that's one indicia of it not being
20 rights-created. But I -- I guess I'm looking at
21 Section 1320a-2 in the statute which applies to
22 the Medicare Act, where -- which Congress
23 enacted in response to our decision in Suter,
24 which had said a similar thing.

25 MR. BURSCH: Yes.

1 JUSTICE JACKSON: Suter had held that
2 a Social Security Act provision was not
3 privately enforceable because it appeared in a
4 list of state plan requirements.

5 And, in response to that, Congress
6 enacted a statute that specifically says: "A
7 provision is not deemed unenforceable because of
8 its inclusion in a section of this chapter
9 requiring a state plan or specifying the
10 contents of a state plan."

11 MR. BURSCH: Yes.

12 JUSTICE JACKSON: And that provision
13 is applicable to the Medicare statute. So, if
14 we take into account or give any weight to the
15 fact that this is in the listing of a state
16 plan, aren't we doing exactly what Congress has
17 told us we're not supposed to do?

18 MR. BURSCH: No, because the -- the
19 key phrase in that statutory first sentence that
20 you read is "because of." And we know that's
21 a -- a but-for.

22 And so what that means is, when a
23 provision is simply on a -- a list, that can't
24 be the standalone reason why it doesn't create
25 rights. But, as the plurality then --

1 JUSTICE JACKSON: But that's a reason
2 we can take into account as to why?

3 MR. BURSCH: Just like the plurality
4 in Armstrong, absolutely, 20 years after that
5 statute was adopted.

6 And -- and we're not just relying on
7 the list --

8 JUSTICE JACKSON: So how would
9 Congress have made it clear that we're not
10 supposed to do that?

11 MR. BURSCH: That it would --

12 JUSTICE JACKSON: It would have to --
13 the statute would have to say: You can never
14 look at this as a factor in determining whether
15 or not --

16 MR. BURSCH: Yes.

17 JUSTICE JACKSON: Yes.

18 MR. BURSCH: I mean, that -- that's
19 very different than "because of."

20 JUSTICE JACKSON: All right.

21 MR. BURSCH: And -- and so, of course,
22 we're not just relying on the 87 list. We're
23 relying on the fact that this is --

24 JUSTICE JACKSON: Sure. You have a
25 whole list.

1 MR. BURSCH: Yes.

2 JUSTICE JACKSON: I'm just trying to
3 understand the extent to which this factor is
4 consistent with the will of Congress.

5 MR. BURSCH: Right.

6 JUSTICE JACKSON: Thank you.

7 MR. BURSCH: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 MR. BURSCH: Thank you, Mr. Chief
11 Justice.

12 CHIEF JUSTICE ROBERTS: Mr. Hawkins.

13 ORAL ARGUMENT OF KYLE D. HAWKINS

14 FOR THE UNITED STATES, AS AMICUS CURIAE,
15 SUPPORTING THE PETITIONER

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

18 The text, context, and structure of
19 (a)(23) confirm that it does not create a
20 private right. Starting with the text, (a)(23)
21 lacks the unambiguously rights-creating language
22 we saw in the FNHRA statute in Talevski, which
23 used the word "right" nearly two dozen times in
24 its own bill of rights.

25 And read in context, (a)(23) is part

1 of a conversation between the federal government
2 and the states. It's buried deep among 86
3 administrative provisions, arranged in no
4 discernible order, and directed to a plan
5 administrator and the HHS Secretary.

6 Structurally, it's part of a
7 substantial compliance regime, which, as Gonzaga
8 recognized, shows a concern with compliance only
9 in the aggregate. That's not usually how we
10 think of rights.

11 On top of that, (a)(23) compliance can
12 be waived by the federal government, which makes
13 the creation of a right all the more
14 implausible.

15 Finally, (a)(23) includes multiple
16 enforcement mechanisms of its own, including
17 state administrative remedies subject to
18 judicial review and the denial of funding.

19 Talevski emphasized that
20 rights-creating statutes are atypical. But this
21 is a run-of-the-mill Spending Clause statute,
22 and holding otherwise would invite line-drawing
23 problems.

24 I welcome the Court's questions.

25 JUSTICE THOMAS: What do you think is

1 left of Wilder and Blessing after Talevski and
2 Gonzaga?

3 MR. HAWKINS: Well, Justice Thomas, we
4 think that the star footnote in the Armstrong
5 decision effectively overruled Wilder. It
6 specifically said that Wilder was repudiated.
7 We think that's functionally the equivalent of
8 saying overruled. And it didn't mention Wright
9 by name, but we think Wright and Blessing are no
10 longer good law either.

11 I heard my friend, counsel for
12 Petitioner, note the confusion in the concurring
13 opinion below about those cases, but I thought
14 it would have been clearer after Armstrong.

15 JUSTICE KAGAN: Mr. Hawkins, you
16 talked a lot about the structure of this statute
17 and the fact that this is one of 87 and so
18 forth. And we heard that argument some years
19 back in the Suter case from the government, and
20 the Court accepted it and Congress did not.

21 Congress came right back and passed an
22 amendment and said: The fact that this is
23 listed in this big 87-item list should not be
24 thought to have anything to say with whether
25 something in that list is a right. Not

1 everything in that list is a right, but the fact
2 that it's in that list is -- is pretty
3 irrelevant to the question of whether something
4 is a right.

5 MR. HAWKINS: Well, respectfully,
6 Justice Kagan, I don't think we read 1320a-2
7 quite the same way. I think we're effectively
8 aligned with Petitioner on this, that the
9 "because of" language is creating a but-for
10 requirement. It's saying that the sole reason
11 cannot be that it appears in this list of plan
12 requirements. And we think that's the best
13 reading because that's consistent with Gonzaga
14 and the sort of construction of Congress.

15 JUSTICE KAGAN: Yeah, I would have
16 thought that if Congress goes to the trouble of
17 passing this statute, what Congress was looking
18 at was, like, oh, you know, we agree with their
19 result in Suter, but, if we look at their
20 reasoning -- I mean, it was a very kind of
21 nuanced way to react to our decision.

22 We look at their reasoning, and if
23 their reasoning is that it was on this list, we
24 want to say that that should be no part of
25 anybody's reasoning because we think that there

1 are things on this list that are rights, and we
2 want to make sure that in the future, when those
3 other things come up, that the Court doesn't do
4 the exact same thing.

5 That was the whole point of the Suter
6 fix.

7 MR. HAWKINS: Well, Your Honor, we
8 think that the best reading of it is that
9 Congress said we don't want that to be the only
10 reason that courts say --

11 JUSTICE SOTOMAYOR: But that wasn't
12 the only reason in Suter. There was a central
13 argument in Suter that the standards set forth
14 were not intelligible, which is part of our
15 review. So I'm not sure how we can read the
16 Suter fix as -- as a "don't use this only" fix
17 approach.

18 MR. HAWKINS: Well, Your Honor,
19 1320a-2 also notes that it's not disagreeing
20 with the outcome in Suter. And I -- and I think
21 the best way to interpret that is saying this
22 can't be the sole reason.

23 And I think I heard my friend mention
24 the Armstrong plurality. I mean, I think it's
25 worth noting that 1320a-2 was briefed in that

1 case, and the Armstrong plurality nevertheless
2 reached the conclusion that it did that the
3 inclusion in this plan list was a relevant
4 consideration. And, as I said earlier, I think
5 that does flow fairly from Gonzaga.

6 JUSTICE SOTOMAYOR: Now, for 20 years,
7 the government took the position that the "free
8 choice of provider" provision was enforceable
9 via Section 1983. You now say that Talevski
10 made you change your mind.

11 But I'm confused by that. I thought
12 Talevski just reiterate that Gonzaga analysis
13 governs step 1. So you took the position -- the
14 same position after Gonzaga. Did you need a hit
15 over the head or --

16 MR. HAWKINS: Well, respectfully, Your
17 Honor, I think we note in our brief that with
18 the change --

19 JUSTICE SOTOMAYOR: Meaning did you
20 need for us to say it a second time before you
21 understood it or --

22 MR. HAWKINS: Your Honor, as we note
23 in our brief, with the change in administration,
24 the federal government re-evaluated its position
25 in this case, and we believe that the view we're

1 advancing today is the best reading of the
2 statute.

3 JUSTICE SOTOMAYOR: Now the government
4 takes the position, as have many, that for
5 Spending Clause legislation, that the remedy is
6 only that of Congress -- of the agency
7 withholding money from someone who violates its
8 provisions.

9 It does seem awfully odd to think that
10 that is a remedy at all because what you would
11 be doing would be depriving thousands of other
12 Medicaid recipients of coverage in a particular
13 state over the fact that an individual has been
14 denied something that the provision says they're
15 entitled to.

16 Is there much sense in that?

17 MR. HAWKINS: Well --

18 JUSTICE SOTOMAYOR: If you have
19 something, as Justice Kagan said, is an
20 individual obtaining a privilege of choosing its
21 provider, why would we say that because it's
22 Spending Clause, somehow the only remedy is
23 suspension of benefits?

24 MR. HAWKINS: Well, Your Honor, I -- I
25 guess a couple things. I mean, first, that's

1 been the basic Spending Clause framework since
2 at least Pennhurst and maybe going even farther
3 back. That's -- that's typically how any
4 Spending Clause statute works.

5 JUSTICE SOTOMAYOR: Yes, but --

6 MR. HAWKINS: The -- the --

7 JUSTICE SOTOMAYOR: -- the question is
8 you don't disagree that there's no magic word
9 formulation for a right. And I assume in your
10 brief that you accepted that "may obtain"
11 formulation could confer rights depending on the
12 circumstances. And, here, you say the
13 circumstances don't.

14 But why can't or why shouldn't we take
15 into account that the Act itself doesn't provide
16 a mechanism for redress by the recipient or by
17 the provider that the states are free to put in
18 state administrative remedies, but they don't
19 have to by the Act?

20 So wouldn't a circumstance like that
21 inform someone that it's a right that the
22 individual should be able to enforce in court?

23 MR. HAWKINS: Well, I -- I guess there
24 were a few parts to that, Your Honor. Let me
25 see if I can hit all of them.

1 First, you mentioned the -- the "may
2 obtain" language. What we're trying to indicate
3 in our brief is that we don't want to foreclose
4 the possibility that somewhere someday Congress
5 could enact a statute that used a phrasing like
6 that to create a right. I mean, it's difficult
7 to predict the future.

8 JUSTICE SOTOMAYOR: The bill of rights
9 does it all the -- doesn't it?

10 MR. HAWKINS: Sorry, Your Honor. The?

11 JUSTICE SOTOMAYOR: The bill of rights
12 itself does it?

13 MR. HAWKINS: So I --

14 JUSTICE SOTOMAYOR: "No person shall"
15 and then it says --

16 MR. HAWKINS: Oh --

17 JUSTICE SOTOMAYOR: -- "no state may,"
18 a person -- you know.

19 MR. HAWKINS: The -- the bill of
20 rights doesn't use the phrase "may obtain."

21 JUSTICE SOTOMAYOR: No, but it --

22 MR. HAWKINS: I think that --

23 JUSTICE KAGAN: Well, Mr. Hawkins,
24 "may obtain" in this language is just to say --
25 I mean, a person doesn't have to go see a

1 doctor. It's the person may go see a doctor,
2 but it's of their choice.

3 The "may" has nothing to do with the
4 question that we're talking about now. The
5 "may" is just like you don't have to see anybody
6 if you don't want to.

7 MR. HAWKINS: I respectfully don't
8 think that's the best reading of the statute. I
9 mean, we're looking for unambiguous
10 rights-creating language, and I think that our
11 problem with "may" is that it's inherently
12 ambiguous. It's usually used to create
13 permission. And I think --

14 JUSTICE KAGAN: It depends on the
15 context.

16 MR. HAWKINS: -- there's a difference
17 between permission and a right.

18 JUSTICE KAGAN: I mean, the "may" is
19 just you may see a doctor. You -- you know, we
20 don't expect that -- you know, we're not forcing
21 people to see doctors. So that's the way the
22 "may" functions in the sentence.

23 MR. HAWKINS: Well, if that's right,
24 Your Honor, I think that would be unique. I
25 mean, I -- in Respondents' brief, I don't think

1 I saw one example of any federal statute
2 anywhere that creates a right using the phrase
3 "may obtain." It's just not something that has
4 that sort of -- I think I heard my friend say,
5 like, a rights-creating pedigree.

6 JUSTICE KAGAN: Can I ask about this
7 idea that you have to say "right" or
8 "entitlement" or -- what was the other words
9 that -- "privilege." "Privilege" is sort of not
10 a right, but, okay, "right," "entitlement," or
11 "privilege?"

12 I mean, this is kind of changing the
13 rules midstream, isn't it? Congress wrote this
14 statute a while ago. And if we come in now and
15 say you have to use one of these three words, I
16 mean, that's good going forward for the -- for
17 the statutes Congress wants to write in the
18 future, but it's not a fair way to interpret
19 statutes that Congress passed many moons ago and
20 that then Congress amended by way of the Suter
21 fix to say: You know, by the way, that list of
22 requirements for the state plan, we think that
23 there are some rights in there.

24 MR. HAWKINS: May I answer the
25 question, Mr. Chief Justice?

1 CHIEF JUSTICE ROBERTS: Yes.

2 MR. HAWKINS: Yeah. So I think this
3 came up in Alexander versus Sandoval. I think
4 it's page 288 of that opinion. The Court
5 recognizes that its -- we evaluate older
6 congressional laws through modern
7 jurisprudential lenses. I believe Justice
8 Stevens's dissent objected to that, but the
9 majority nevertheless concluded that that's the
10 appropriate framework to evaluate congressional
11 statutes. And, indeed, I believe that happens
12 in other contexts with statutes going back much
13 farther.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas?

17 Justice Alito, anything?

18 Justice Kagan?

19 Justice Kavanaugh?

20 JUSTICE KAVANAUGH: I just want to
21 isolate the role of the alternative enforcement
22 mechanism in your analysis. Could a -- could a
23 term be rights-enforcing if there's no
24 alternative enforcement mechanism but the same
25 term be not rights-enforcing if there is an

1 alternative enforcement mechanism?

2 MR. HAWKINS: Justice Kavanaugh, I
3 guess I'm trying to think of a -- an example
4 where -- where that would be true. I -- I guess
5 I have to answer the question yes because it's
6 hard to know how that would play out in any
7 given statute.

8 I mean, we know from Talevski that we
9 look at terms as they're situated in structure
10 and context. So we're always taking structure
11 and context into account. And so it's --

12 JUSTICE KAVANAUGH: So are you saying
13 that a statute without an alternative
14 enforcement mechanism is problem -- more
15 problematic in your analysis? I think that is
16 what you're saying.

17 MR. HAWKINS: Well, we do -- the -- we
18 do think that the alternative enforcement
19 mechanisms here -- I think "buttress" is the
20 word that's used in Gonzaga -- buttress --

21 JUSTICE KAVANAUGH: Well, that's why
22 I'm trying to isolate the role in your analysis.
23 And -- and maybe --

24 MR. HAWKINS: Yeah.

25 JUSTICE KAVANAUGH: -- maybe you're

1 saying you can't -- you can't do that.

2 MR. HAWKINS: Yeah. So -- so I -- I
3 do think that it's relevant. I don't know that
4 it would move the needle here in this particular
5 case. So, if there were no back-end remedies
6 for providers who are excluded, I still think
7 we're missing the clear, unmistakable
8 rights-creating language directed at a specific
9 party that has specific duties as to specific
10 people, and since we're missing all of that, I
11 don't think the back-end remedies matter. But I
12 think the fact that we do have the back end here
13 reinforces our conclusion on the front end.

14 JUSTICE KAVANAUGH: Do you agree with
15 Petitioner's counsel on the universe of terms
16 that you think are usually or always
17 rights-creating?

18 MR. HAWKINS: Well, Your Honor, I
19 don't know that I've got a specific
20 comprehensive list. I mean, I think I heard my
21 friend say the word "right." I think I heard
22 "entitlement."

23 JUSTICE KAVANAUGH: "Privilege."

24 MR. HAWKINS: I think I heard
25 "privilege."

1 JUSTICE KAVANAUGH: And "immunity."

2 MR. HAWKINS: Yeah, those all sound
3 right.

4 JUSTICE KAVANAUGH: Well, if you -- if
5 you don't, you -- you come up here and you say,
6 you know: We're concerned about line-drawing
7 problems. But you're not -- what -- what's the
8 line exactly? You want us to do a line. Well,
9 tell -- tell me what the line is.

10 MR. HAWKINS: Sure. I think -- I
11 think those three words would count.

12 I think, you know, looking at Title VI
13 and Title IX, you know, no person shall be
14 subject to discrimination, I think that gets the
15 job done as well.

16 Maybe a helpful way to think about it,
17 Justice Kavanaugh, is we're looking for words
18 that have a real rights-creating pedigree in our
19 nation's history and legal traditions. I think
20 the words that --

21 JUSTICE KAVANAUGH: Well, I think
22 Justice Kagan's raised good points about how,
23 once you, you know, open it up like that,
24 it's -- there are going to be line-drawing
25 problems. You're not going to solve the issue

1 that you -- you came here to solve.

2 MR. HAWKINS: Well, Your Honor, I -- I
3 don't know that there's a way to avoid
4 line-drawing problems without saying that we
5 need the word "right" and exclusively "right"
6 and nothing else. And I -- I don't think --

7 JUSTICE KAVANAUGH: Okay. Well,
8 you -- you -- right at the beginning, you said
9 you wanted to avoid line-drawing problems,
10 but --

11 MR. HAWKINS: Well, I -- I -- I think
12 that the Court could avoid a lot of the
13 difficult cases by making clear, as it said in
14 Talevski, that we're looking for atypical
15 language with this clear rights-creating
16 pedigree.

17 The mine-run of cases are not going to
18 clear that bar. There may be a few that do.

19 JUSTICE KAVANAUGH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 JUSTICE BARRETT: You might not know
23 the answer to this, but I'm just wondering about
24 the consequences of saying that this cause of
25 action can be brought under 1983 here.

1 I mean, so both you and your friend
2 have talked about the possibility that many
3 other statutes and many other provisions then
4 might be understood to be enforceable through a
5 private cause of action.

6 But what about this one? I mean,
7 how -- I mean, so, here -- we're -- we're here
8 because of Planned Parenthood not being a
9 qualified provider in South Carolina. But would
10 people -- like, would this open the floodgates
11 of people bringing 1983 suits because they can't
12 see the provider of their choice, or is this
13 kind of a pretty unusual circumstance?

14 MR. HAWKINS: Well, Your Honor, it's
15 hard to say it's unusual. There have been a
16 number of lawsuits in a number of states about
17 (a)(23) in specific. I -- I think it's the most
18 litigated provision within 1396a.

19 JUSTICE BARRETT: Is it all about
20 abortion providers?

21 MR. HAWKINS: No, I don't believe so.
22 I believe there have been other instances. I
23 believe -- I'm worried about misspeaking. I
24 think one out of the Seventh Circuit didn't
25 involve abortion providers. It was in another

1 context.

2 We're -- we're not resting on any
3 particular floodgates argument.

4 JUSTICE BARRETT: Oh, I -- I -- I
5 didn't mean to suggest that you were. I was
6 just wondering.

7 MR. HAWKINS: Okay.

8 JUSTICE BARRETT: Okay. Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Jackson?

11 JUSTICE JACKSON: Yeah, three quick
12 points.

13 Just clarifying in your response to
14 Justice Sotomayor about what motivated the
15 government's change of position here, I heard
16 you say it's the change in administration that
17 caused the change in position, not necessarily
18 anything new or different in Talevski.

19 Is that right?

20 MR. HAWKINS: Well, Your Honor, we
21 think that the Talevski approach in -- in Your
22 Honor's opinion for the Court gives us more
23 confidence in the position that we're
24 advocating.

25 JUSTICE JACKSON: I understand. But

1 you don't see daylight between what Talevski was
2 saying and what Gonzaga said, which is what the
3 Bush administration and many, many other prior
4 administrations relied upon in reaching the
5 opposite conclusion here, right?

6 MR. HAWKINS: So I think Talevski does
7 a couple of things that maybe reinforce what
8 Gonzaga said in a way that helps think through
9 the issue more clearly.

10 I mean, number one, Talevski
11 emphasizes that these statutes are atypical, and
12 so we're looking for the atypical situation, not
13 the run-of-the-mill situation.

14 And -- and, second, in -- in Your
15 Honor's opinion for the Court -- I think it's in
16 Part 3-2 -- it's noteworthy that it begins
17 looking at the overall placement of the text
18 within the structure, within the statutory
19 structure. And we think that that's an
20 indication that it really is important to marry
21 text, context, and structure all together.

22 And when we do that here, it's -- it's
23 not just about looking at words in isolation but
24 looking at the big picture.

25 JUSTICE JACKSON: All right. Can you

1 point me to the section in your brief that
2 endorses any particular words or bright-line
3 rule?

4 I -- I was kind of struck because I
5 thought that was the difference between you and
6 Petitioner when I read your brief. I didn't
7 take the United States to be adopting that kind
8 of test. So --

9 MR. HAWKINS: Well, I --

10 JUSTICE JACKSON: -- are you saying
11 something different here at the podium than you
12 were in your brief?

13 MR. HAWKINS: Oh, I -- I -- I don't
14 think I mean to, Justice Jackson.

15 JUSTICE JACKSON: So the United States
16 is on fours with -- all fours with the idea that
17 we need to tell Congress exactly the words that
18 have to be used in order to create rights?

19 MR. HAWKINS: Well, I -- I think what
20 we've argued in our brief and what I'm -- I
21 certainly mean to argue today is that we're
22 looking for unmistakable rights-creating
23 language.

24 I think that's what we say in our
25 brief. And, in our conversation this morning,

1 we've elucidated some ways that Congress could
2 do that, and I think that's consistent what what
3 we've been saying.

4 JUSTICE JACKSON: All right. Finally,
5 has, to your knowledge, HHS ever withheld
6 Medicaid funding for -- from a state for
7 violating this free-choice provider provision?

8 I mean, to the extent that we're
9 talking about, you know, ways of enforcing this
10 particular provision, it would be helpful to
11 know if there is an actual alternative here.

12 MR. HAWKINS: Your Honor, we don't
13 know of any instance in which funding has been
14 withheld in connection with (a)(23). We note in
15 our brief that we have denied plan modifications
16 for failure to comply with (a)(23). But, as to
17 funding, we don't have an example of that
18 happening.

19 I wouldn't read too much into that.
20 Again, this is a substantial compliance regime.
21 We've been concerned with compliance in the
22 aggregate. And the lack of funding denials, I
23 think, suggests that states are complying in the
24 aggregate.

25 JUSTICE JACKSON: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 MR. HAWKINS: Thank you, Your Honor.

4 CHIEF JUSTICE ROBERTS: Ms. Saharsky.

5 ORAL ARGUMENT OF NICOLE A. SAHARSKY

6 ON BEHALF OF THE RESPONDENTS

7 MS. SAHARSKY: Mr. Chief Justice, and
8 may it please the Court:

9 As this case comes to the Court, it is
10 established that South Carolina violated the
11 statute by denying Julie Edwards her choice of a
12 qualified and willing provider. The only
13 question is whether she can do something about
14 it, to sue under Section 1983.

15 She can for four reasons. First, look
16 at the text. It refers to individuals, any
17 individual eligible for medical assistance. It
18 gives them a right to choose their own doctor.
19 They "may obtain such assistance from any
20 qualified and willing provider." And it's
21 mandatory. The state must do it as part of the
22 federal state bargain. This language satisfies
23 the standard that the Court set out in Gonzaga
24 and Talevski. It uses mandatory,
25 individual-centric, rights-creating language.

1 The only thing it doesn't do is use the word
2 "right." And this Court has repeatedly said
3 that magic words aren't required.

4 Second, look at the context. Congress
5 took this language from Medicare, which uses the
6 same operative text. That text makes clear that
7 it gives an individual the right to choose a
8 provider. It's titled Free Choice by Patient
9 Guaranteed. The family planning provision,
10 which comes right after the language at issue,
11 confirms that this is a protected choice. The
12 state "shall not restrict the choice."

13 Three, there's no doubt about what
14 Congress was trying to do here. It enacted this
15 statute because states were artificially
16 limiting the providers in Medicaid. And that's
17 the same thing that the state is doing now. And
18 Congress made this an individual right because
19 it recognized that when the state does that, it
20 hurts individual patients. It is the
21 individual's right. It is not the provider's
22 right.

23 And, fourth, there is no alternative
24 federal remedy. There is no way for individuals
25 to challenge the state's decision to deny them

1 their provider of choice. There's no federal
2 cause of action. There's no administrative
3 remedy.

4 Congress expected that an individual
5 would be able to sue in the rare instance when a
6 state is keeping a needy patient away from a
7 qualified and willing provider. If the
8 individual can't sue, this provision will be
9 meaningless.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: Do you think that
12 rights-creating language under the -- under the
13 enumerated powers is different from the language
14 required under the Spending Clause?

15 MS. SAHARSKY: Well, so the Court has
16 spend said in -- in Spending Clause cases that
17 the Court -- that Congress has to speak
18 unambiguously. But, at the same time, there's
19 many cases in which the Court has -- has
20 required clear statements from Congress, and it
21 has said: We don't require magic words from
22 that. Our job is to figure out what did
23 Congress intend. So we look at the words in
24 what Congress -- that Congress enacted and
25 figure out what Congress intended.

1 And I think the -- the way that you
2 can tell that the word "right" is just a magic
3 words test here, I think, from my -- my friends
4 on the other side and why you don't need it is
5 because the statute here would do the exact same
6 thing if it said the word "right" as opposed to
7 what it says now.

8 JUSTICE THOMAS: So how would this --
9 if -- if it's more demanding under the Spending
10 Clause, how would this statute differ under the
11 Commerce Clause? What language would you use if
12 it were -- if this right were created under --
13 under the Commerce Clause?

14 MS. SAHARSKY: Well, I think it
15 creates a right either way. I think there's --
16 Congress can write statutes --

17 JUSTICE THOMAS: Well, I'm talking
18 about the language. If it's more demanding and
19 it's atypical, what language that we have --
20 what language that we have here you would not
21 need in the Commerce Clause?

22 MS. SAHARSKY: Well, this -- first,
23 it's talking about a state obligation, and it's
24 something the state must do to participate. So
25 it starts by saying that it's a mandatory

1 obligation.

2 Second, it says that the -- there's --
3 any individual may -- may obtain care from
4 their -- from any qualified and willing
5 provider. So it's the combination of "any
6 individual" "may obtain care from any qualified
7 and willing provider."

8 It's -- it's a -- it disables the
9 state from doing something the state might
10 otherwise want to do, like we -- you know, we
11 want to take this provider out of Medicaid for a
12 reason that's unrelated to medical
13 qualifications, which is what the state is doing
14 here. And so it's just -- the combination of
15 this language makes clear what this provision is
16 doing.

17 I don't think anyone disagrees what --
18 what this provision is about. Maybe there's
19 some --

20 JUSTICE THOMAS: But do you think that
21 language is more exacting than would be required
22 under the Commerce Clause?

23 MS. SAHARSKY: I don't -- I -- I --
24 I'm -- I'm not certain. I think the Court has
25 said that the -- that in the -- in the Spending

1 Clause context, that -- that Congress needs to
2 speak clearly.

3 My point is just that Congress has
4 spoken clearly here because it has used what
5 this Court requires. The Court says we want to
6 look to see if there's individual-centric
7 rights-creating language that imposes a
8 mandatory obligation. The Court has never said
9 it has to say the word "right" or it has to be
10 magic words or anything like that.

11 And just to pick up on this -- this
12 idea that -- you know, we heard maybe for the
13 first time today that there are only certain
14 magic words that count. You know, there are
15 some real problems with that from a
16 separation-of-powers perspective. Congress
17 writes statutes. It's this Court's job to -- to
18 interpret them and figure out what Congress
19 intended.

20 And, here, it's not like Congress just
21 wrote this statute, you know, 50 years ago and
22 nothing has happened. Congress has come back
23 when this Court has interpreted this statute in
24 a way that the Court thought -- that Congress
25 thought was inappropriate with the Suter fix.

1 And that's a case where, as one of the factors
2 that was considered for whether language created
3 an individual right, not the sole factor, but as
4 one of the factors, this Court said in the Suter
5 decision we see that it's part of the state plan
6 requirements.

7 And Congress came back with language
8 that I think was quoted by one of the justices
9 that said, you know, no, that can't be a reason
10 why --

11 CHIEF JUSTICE ROBERTS: Counsel --

12 MS. SAHARSKY: -- because --

13 CHIEF JUSTICE ROBERTS: I'm sorry.

14 Finish your sentence, please.

15 MS. SAHARSKY: It -- it just can't be
16 a reason why.

17 CHIEF JUSTICE ROBERTS: Okay. Do you
18 think our opinions in Talevski and Gonzaga
19 narrowed Wilder in any way?

20 MS. SAHARSKY: Well, the Court didn't
21 mention Wilder.

22 CHIEF JUSTICE ROBERTS: Is that a way?

23 MS. SAHARSKY: The concurrence did.

24 CHIEF JUSTICE ROBERTS: Is that a way?

25 MS. SAHARSKY: Well, I -- I think the

1 Court made clear in Blessing -- in -- in -- in
2 Gonzaga that the -- that to the extent that
3 Wilder could be read in a certain way, which is
4 to readily imply individual rights and not to
5 require unambiguous rights-conferring language,
6 Gonzaga says don't read Wilder that way. And so
7 I thought that was clear in Gonzaga. And then,
8 in Talevski, the Court said we are using our
9 established test, which was settled in Gonzaga.

10 So I think that Gonzaga is the one
11 that explained that to the extent that Talev --
12 that Wilder had this -- didn't require an
13 unambiguous conferral of an individual -- an
14 individual right, that that was wrong.

15 At the same time, the Court has
16 re-upped certain reasoning in the Wilder
17 decision, including in the Rancho Palos Verdes
18 decision, about HHS enforcement because one of
19 the things -- not just looking at the text of
20 the statute, but in what is now known as
21 Talevski step 2, one of the things that the
22 Court said in Wilder, it said the possibility of
23 HHS enforcement is not the kind of comprehensive
24 enforcement scheme, and then the Court cited
25 that again in the Rancho Palos Verdes decision.

1 And so, you know, the Court has, I
2 think, used that -- that reasoning in Wilder.
3 That's the only reasoning that the Fourth
4 Circuit cited below. We think that's good
5 reasoning. But, even if you think -- even if
6 you act like Wilder doesn't exist, we think it
7 gets you to the same result in this case because
8 we're basing our argument on the requirements
9 set out in Gonzaga and in Talevski.

10 Just to go back to --

11 JUSTICE KAVANAUGH: How do you -- I --
12 I think the difficulty arises because of trying
13 to draw the distinction between benefits and
14 rights, and Gonzaga draws this line and that's
15 trying to make sense of prior precedent, and
16 it's very elusive, and I think that's why
17 there's a search for how can we draw the line.

18 What guidance would you give us on how
19 to do that going -- going forward or how to set
20 out a principle that's not going to be just eye
21 of the beholder?

22 MS. SAHARSKY: Right. Rights-creating
23 language confers an individual entitlement.
24 It's for an individual and it is a protection,
25 an entitlement, to something. Benefits --

1 language that addresses benefits or creates
2 benefits, which is often policy or practice
3 language, is aggregate language like -- that
4 refers to a policy or practice that has an
5 effect on, a beneficial effect on, individuals,
6 but it's not focused on protecting some
7 particular right or entitlement of the
8 individuals.

9 And, if we look at the language here,
10 here's how we know that it's not a benefit but
11 protecting a right. It says that the -- the
12 individual may obtain care from any qualified
13 and willing provider. So that stops the state
14 from doing something.

15 It's not just, oh, you know, you
16 should have a list of a lot of providers and try
17 to get as many providers as possible on the
18 list. It's that Congress saw that there was a
19 particular problem, you know, happening out in
20 the world in terms of providers being excluded
21 from Medicaid for -- arbitrarily, same thing
22 that's happening here, and the -- the Congress
23 said no to that.

24 So it's the "may obtain from any
25 qualified and willing provider," "any," which

1 says that this is something that stops the state
2 and that this is something that has to be
3 followed.

4 JUSTICE KAVANAUGH: To go back to the
5 first part of your answer, something that's
6 mandatory and is a benefit seems like a right,
7 or how would you distinguish a mandatory benefit
8 from a right?

9 MS. SAHARSKY: So I would look to
10 Gonzaga, for example. So you could have
11 something that is mandatory that -- that was
12 about educational privacy, like that you must
13 have a policy or practice about individual
14 consent for educational records. But that just
15 isn't written in the circumstances of an
16 individual being able to enforce a particular
17 right.

18 And so that was where there were
19 individuals who were benefitted by these
20 policies that were required, but it wasn't
21 saying an individual gets to do a particular
22 thing and the state has to protect that and the
23 state can't stop them from doing that.

24 JUSTICE GORSUCH: Well, just to follow
25 up on that, Ms. Saharsky, one can imagine a

1 statute written as an individual benefit that's
2 mandatory on the states but isn't a
3 right-creating -- I mean, we -- I think we can
4 agree on that.

5 MS. SAHARSKY: Sure. I think there
6 are a lot of provisions --

7 JUSTICE GORSUCH: So --

8 MS. SAHARSKY: -- in the state plan
9 requirements that are like that.

10 JUSTICE GORSUCH: Yeah.

11 MS. SAHARSKY: They all create rights.

12 JUSTICE GORSUCH: Right. So -- so
13 they focus on the individual and says that
14 person's entitled or shall receive a benefit.
15 But it could be limited to state compliance
16 substantially with the overall scheme. I mean,
17 that's -- that's an imaginable scenario.

18 MS. SAHARSKY: So I don't think that
19 the language in the state plan requirements that
20 has -- there's no other place --

21 JUSTICE GORSUCH: I'm --

22 MS. SAHARSKY: -- in the state plan
23 requirements that says "any individual may
24 obtain" like the language here.

25 JUSTICE GORSUCH: So, once --

1 MS. SAHARSKY: There's nothing.

2 JUSTICE GORSUCH: -- once its focus is
3 on the individual -- I'm just trying to --

4 MS. SAHARSKY: Right.

5 JUSTICE GORSUCH: -- drill down on
6 Justice Kavanaugh's, you know, bright line.
7 Once it focuses on the individual and says
8 you're entitled to some benefit, that's --
9 that's the line you'd have us draw?

10 MS. SAHARSKY: I think the Court in
11 Gonzaga and Talevski set out three requirements.
12 First, it has to be mandatory. Second, it has
13 to be individual-focused. And, third, it has to
14 use rights-creating language.

15 JUSTICE GORSUCH: Well, yeah, yeah.

16 MS. SAHARSKY: And we focused on what
17 the --

18 JUSTICE GORSUCH: Yeah.

19 MS. SAHARSKY: I think our dialogue --
20 right.

21 JUSTICE GORSUCH: That third one's the
22 tricky one, right?

23 MS. SAHARSKY: One hundred percent.
24 And I think that's where we're talking about
25 an -- an individual entitlement that the state

1 has to provide something or that the state
2 cannot do something to someone like "no state
3 shall" -- we talked about the discrimination --

4 JUSTICE GORSUCH: Sure. But --

5 MS. SAHARSKY: -- language that's in,
6 like, Title VI.

7 JUSTICE GORSUCH: -- what I'm trying
8 to drill down on is it seems to me Congress
9 could hypothetically say an individual should be
10 entitled to these benefits but not want to
11 create a right of enforcement but allow it to be
12 subject to the state's overall substantial
13 compliance with a larger rubric.

14 I mean, that's imaginable, isn't it?

15 MS. SAHARSKY: The Court -- Congress
16 could write statutes in a lot of different
17 ways --

18 JUSTICE GORSUCH: Yeah.

19 MS. SAHARSKY: -- that would provide a
20 benefit that would be not like the statute here.
21 So let me just hone in on the particular thing
22 at issue in this case. Let's say that it said a
23 state plan shall include a policy to allow
24 participants to choose their provider to the
25 extent practicable. Or --

1 JUSTICE GORSUCH: Well, I see to the
2 extent practicable. But take that out. Then
3 what? What would be the answer there?

4 MS. SAHARSKY: So I think, in that
5 case, if it's -- you know, it talks about a
6 policy. So Gonzaga suggested that that's more
7 of an aggregate focus. And so I think the
8 question would be, you know, to allow
9 participants, that doesn't use the same, what we
10 call rights-creating language, like "may obtain
11 from any." So we think the "may obtain from
12 any" --

13 JUSTICE GORSUCH: So that would be
14 different.

15 MS. SAHARSKY: -- language is
16 stronger.

17 JUSTICE GORSUCH: So -- so a statute
18 that says states shall create a policy that
19 allows individuals to choose their doctors would
20 not be a rights-creating statute?

21 MS. SAHARSKY: I think it would be a
22 more difficult case because it doesn't say the
23 "any qualified and willing provider." I just
24 think that would be a potentially more difficult
25 case. Or --

1 JUSTICE GORSUCH: Well, what if --
2 what if it did? What if it said states shall
3 create a policy to allow individuals to pick a
4 provider? Would that be rights-creating?

5 MS. SAHARSKY: Well, it still doesn't
6 say "from any qualified and willing provider."
7 And I think it's the "any qualified and willing"
8 that makes clear that if a provider is medically
9 qualified, that the state can't take the
10 provider out of Medicaid for a different reason
11 because that was the problem that Congress was
12 addressing in the first place.

13 But the -- the point is, is that
14 Congress has flexibility in how it writes
15 statutes. It sometimes says in statutes, like,
16 this provision does not create any individually
17 enforceable rights if --

18 JUSTICE GORSUCH: Well, that's a magic
19 words requirement the other direction, isn't it?

20 MS. SAHARSKY: It's not a magic --
21 I -- I -- I don't think it makes sense -- I -- I
22 respectfully suggest that this Court --

23 JUSTICE GORSUCH: I mean, is that
24 what --

25 MS. SAHARSKY: -- should not think of

1 it in terms of magic words. And, in all of the
2 Court's cases that have required clear
3 statements in other contexts, the Court has
4 said, look, it's not magic words; we don't tell
5 Congress how to write statutes.

6 JUSTICE GORSUCH: So it doesn't need
7 to do that either. So -- okay. All right.
8 Thank you.

9 MS. SAHARSKY: I mean, that's the same
10 thing that Judge Wilkinson said. He said:
11 We're just trying to interpret what Congress did
12 here. Like, what -- what were they -- what were
13 they focused on? What were they trying to do?
14 Would they think that an individual could
15 enforce this in the way --

16 JUSTICE KAVANAUGH: Well, I don't know
17 that it -- I'm sorry. Keep going.

18 MS. SAHARSKY: No.

19 JUSTICE KAVANAUGH: I don't think
20 "magic words" is the proper term. Just what
21 words convey rights, unambiguously convey
22 rights-creating language?

23 When we take a step back -- and maybe
24 this is what's the broader separation-of-powers
25 concern. The broader separation-of-powers

1 concern is Congress creates rights of action and
2 remedies, not the Court.

3 And in Gonzaga -- and that wasn't
4 really the view in the '70s and '80s. And, in
5 Gonzaga, the Court specifically linked this
6 issue -- this issue with the implied rights of
7 action case law. And since Gonzaga, in that
8 other implied rights of action, we have really
9 tightened up, whether it's Bivens or otherwise,
10 and said essentially that far and no further.

11 And I'm wondering how we should square
12 Gonzaga's linkage of those two lines of cases if
13 we said something like that here or how you
14 think we should just deal with the fact that we
15 no longer really engage in the process of
16 creating implied rights of action or implying --
17 inferring rights of action because we leave it
18 to Congress.

19 MS. SAHARSKY: Okay. So this is not
20 an implied right of action case, as you pointed
21 out, because there is an express cause of action
22 under Section 1983. And we accept from Gonzaga
23 and Talevski that where this Court is is that it
24 is a high bar to find that Congress put in place
25 an individually enforceable right.

1 What we're saying is that this
2 provision meets the bar. We don't think that
3 there are a lot of others, if any, in the state
4 plan requirements that would meet that high bar,
5 but this language here, "may obtain from any
6 qualified and willing provider," does.

7 I mean, this is a very individual
8 choice that Congress was trying to protect.
9 It's individuals who are hurt. I don't think
10 anyone disputes what this provision does, that
11 it allows them to choose -- an individual
12 Medicaid provider to choose from any qualified
13 and willing provider.

14 And I guess that -- just the thing I
15 would say about how to write this, and I, of
16 course, understand that the Court wants to
17 provide guidance, there's just different ways
18 Congress could have said this and they're all --
19 they all get to the same place.

20 So we have what Congress said here,
21 you know, any -- any individual may obtain care
22 from any qualified and willing provider. If it
23 said any individual has a right to obtain care
24 from any qualified and willing provider, it does
25 the same thing. It's the exact same effect,

1 like, out in the world in terms of placing the
2 limitation on the state.

3 It could also say, I think the state
4 would agree or maybe it used to agree, any
5 individual has the freedom to choose from any
6 qualified and willing provider or no person
7 shall be denied the free choice of any qualified
8 and willing provider. It's just, you know,
9 Congress can write these in different ways, and,
10 you know, Judge Wilkinson said, I think very
11 reasonably, we as the federal courts can't limit
12 Congress to a thin thesaurus of our own design.

13 And this Court, of course, wants to
14 provide guidance in terms of what the standard
15 is in *Talevski* and in *Gonzaga*, but what we're
16 telling you here is that this statute meets that
17 requirement. And I might just speak briefly
18 about the other state plan requirements because
19 I understand that the state has, like, raised
20 this specter of how there are 86 other state
21 plan requirements and what if they're all
22 individually enforceable and there could be so
23 much litigation.

24 JUSTICE ALITO: Well, before you get
25 to that, would you agree with the proposition

1 that what we need to find in order to say that a
2 provision in Spending Clause legislation enables
3 enforcement by a private party under 1983,
4 something that's quite extraordinary, because
5 the norm for -- let's start out, if you back up,
6 Spending Clause legislation is an agreement
7 between the state and the federal government.
8 Yeah, it's an offer the state can't refuse, but,
9 nevertheless, that's the form of it.

10 And the -- the standard mechanism for
11 the enforcement of that is for the counterparty,
12 the federal government, to take some action if
13 the state doesn't meet up to its obligation.
14 And the state -- part of the obligation that may
15 be imposed under Spending Clause legislation is
16 something that is helpful in some way to an
17 individual.

18 Now, if we say, whenever Congress uses
19 the word "individual," the suit can be brought
20 under 1983, then all sorts of provisions could
21 give rise to 1983 liability. So would you agree
22 we need something that's out of the ordinary,
23 that signals to the federal court this is not
24 just something that -- that the state must do.
25 This is something that allows the individual to

1 go into court and get enforcement.

2 MS. SAHARSKY: Yes. Let me say three
3 things about that.

4 First, we don't think that just a mere
5 reference to an individual gives an individually
6 enforceable right. It's -- here, it's any
7 individual may obtain from any qualified and
8 willing provider.

9 Two, we also don't think that the fact
10 that it's a mandatory obligation on the states
11 creates an individually enforceable right
12 because, as you pointed out, once the state
13 agrees to the bargain, these are all things it
14 has to do, even if it's just a policy or
15 practice that benefits an individual.

16 JUSTICE ALITO: So just to make --

17 MS. SAHARSKY: And then --

18 JUSTICE ALITO: This is helpful. So
19 individual's not enough. Mandatory is not
20 enough. You need something more. And what is
21 that more here that tips this or makes this
22 really atypical, not typical?

23 MS. SAHARSKY: "May obtain from any
24 qualified and willing provider." That's the
25 rights-creating language, the third ingredient

1 that this Court has talked about.

2 The "may obtain" in this -- in this
3 context, I think, is a natural way for Congress
4 to talk about obtaining healthcare because you
5 don't have to get it. It's just, if you need
6 healthcare, you may obtain it.

7 JUSTICE ALITO: But what Congress
8 made --

9 MS. SAHARSKY: And there's this --

10 JUSTICE ALITO: I'm sorry, go ahead.

11 MS. SAHARSKY: Well, I was just going
12 to say, you know, there's a suggestion, I think,
13 from the state that, like, "may" is not strong
14 enough language, but "may" is used in a lot of
15 contexts to reflect, like, a protected choice or
16 a right.

17 There are a lot of judicial review
18 provisions, for example, like of the Federal
19 Trade Commission orders or the SEC orders, that
20 say any person may obtain judicial review of
21 such order by filing in a court of appeals.

22 There's also "may" language used in
23 the Constitution which I think is pretty
24 powerful, you know, "The judicial Power of the
25 United States, shall be vested in one supreme

1 Court, and in such inferior Courts as the
2 Congress may from time to time ordain and
3 establish."

4 Now that's a little bit different in
5 that it's a power of Congress as opposed to
6 rights-creating language from an individual, but
7 my point is just this idea that "may" is, like,
8 too wimpy of language, I -- I just don't think
9 is a -- a good line to draw.

10 JUSTICE ALITO: Well, the problem --
11 the problem is that Congress may well have had
12 in mind -- maybe it's likely that what they had
13 in mind is simply that this is something that
14 the state has to do but not that this is
15 something that allows an individual to sue in
16 court. So don't we need something more than
17 that?

18 MS. SAHARSKY: Well, there's the
19 reference to the individual, and there's an
20 entitlement to the individual. And then we have
21 on top of it what is called the Suter fix, which
22 is Congress coming back to this Court after the
23 decision in Suter versus Artist M and saying
24 some of these plan requirements are -- we -- we
25 expect will be individually enforceable. The

1 fact that it's a state plan requirement doesn't
2 make it not individually enforceable.

3 So then the question is, you know, is
4 this one of them? And that's where we get to, I
5 think, the discussion of the other 80-some state
6 plan requirements.

7 Now there have not been lawsuits to
8 try to figure out whether all of these other
9 requirements are individually enforceable
10 because the vast majority of them obviously
11 aren't. I think that the most that the state
12 and the federal government suggest is that there
13 are nine -- eight or nine other provisions that,
14 you know, one might look at to see are they
15 sufficiently clear language that they could be
16 individually enforceable.

17 Most of them, like most of the other
18 provisions, have been never litigated in the
19 court of appeals. There -- there are a few that
20 have. But, you know, there has not been a flood
21 of litigation here, really, under this provision
22 or any of these other provisions.

23 And, you know, this has been the
24 longstanding position of the federal government.
25 The first decision on this issue with this

1 statute was, you know, Judge Sutton's opinion
2 for the Sixth Circuit more than 20 years ago.
3 Like, if the flood of lawsuits was supposed to
4 happen, you know, we would expect to see it.

5 And, you know, the only other thing
6 I -- I might say there is that I -- I think it's
7 wrong to suggest that, like, Medicaid --
8 individuals on Medicaid are, like, you know,
9 seeking to -- to file lawsuits to try to get
10 attorneys' fees or some kind of financial
11 benefit.

12 They're not getting damages from the
13 state under Section 1983. This Court already
14 has precedents, like, saying that that generally
15 can't happen when a state official's acting in
16 their individual capacity. What they're seeking
17 is declaratory and injunctive relief.

18 That's what all these cases that led
19 to the circuit split are about: getting
20 declaratory and injunctive relief when a state
21 has for reasons unrelated to medical competency
22 just kicked out a provider and the individual
23 said you've denied me my right to a provider of
24 choice and I just want some healthcare. These
25 aren't people getting rich. You know, they're

1 just trying to get healthcare here.

2 JUSTICE BARRETT: Ms. Saharsky, can I
3 ask you a question that kind of steps back to
4 the legal standard? So I just want to put aside
5 for a second whether you satisfy the standard.

6 You have framed your argument in terms
7 of Gonzaga and Talevski, and I agree that those
8 are the relevant cases. But, you know, Judge
9 Richardson asked for help. I mean, I -- I guess
10 I feel like it's been clear that we've -- that
11 Blessing and Wilder have been eclipsed. Judge
12 Richardson says, you know, can you please just
13 explicitly say so?

14 Do you agree that they've been
15 explicitly eclipsed by Gonzaga and Talevski and
16 do you have a problem with our just saying that?

17 MS. SAHARSKY: The Court --

18 JUSTICE BARRETT: I mean, you framed
19 your argument in terms of Gonzaga and Talevski,
20 so just, you know --

21 MS. SAHARSKY: Right. To the extent
22 the Court thinks there should be additional
23 clarity on that, the Court absolutely should
24 provide it. And we don't see an issue with the
25 discussion that we've had here today about the

1 way in which the Court in Gonzaga said: Look,
2 if those decisions had been read a certain way,
3 that is a wrong reading, like, don't do that.

4 So, you know, whether you would need
5 to overrule Wilder or not, that -- that -- that
6 provision's not even on the books anymore.

7 JUSTICE BARRETT: Right.

8 MS. SAHARSKY: So that seems like a
9 bit much, particularly when there's pretty
10 strong statutory stare decisis considerations.
11 But, certainly, the analysis set out in Gonzaga
12 focuses on whether there's unambiguous conferral
13 of an individual right and to me makes pretty
14 clear you can't just look at three factors in,
15 you know, Blessing and --

16 JUSTICE BARRETT: I entirely agree. I
17 mean, so -- and -- and I agree that we're only
18 talking about the analytical framework, that
19 we're not talking about the results of
20 particular cases. It just seems like it already
21 was pretty clear, but maybe we should just say
22 it. And it sounds like you're okay with that,
23 saying Gonzaga and Talevski are -- are -- set
24 out the framework that we need to follow.

25 MS. SAHARSKY: Yes. I thought that

1 was clear. If the Court wants to make it more
2 clear, that seems right. I think the Fourth
3 Circuit here, like many of the other courts of
4 appeals, Judge Wilkinson tried very hard to,
5 like, trace this Court's case law and talk about
6 how those decisions had been limited. His
7 analysis seemed right to us and was, you know,
8 very careful in doing that.

9 But, to the extent that the Court
10 thinks that there needs to be more clarity here,
11 please, you know, go ahead and provide it.

12 JUSTICE BARRETT: Well, we can save
13 him --

14 MS. SAHARSKY: But just --

15 JUSTICE BARRETT: -- several pages,
16 right, so he doesn't have to trace the case law,
17 he can just cut straight to the chase.

18 MS. SAHARSKY: Sure. I think the one
19 thing that we don't think the Court should do is
20 adopt some kind of magic words test. We just
21 don't think that that's appropriate from a
22 separation-of-powers perspective to Congress.
23 It's not really fair to the -- the Congress
24 that -- that, you know, wrote these statutes.
25 And it -- you know, it -- it takes away from

1 what the central inquiry, I think, is supposed
2 to be here, which is so Congress enacted a
3 statute, and we're supposed to figure out, like,
4 does it want individuals to be able to enforce
5 that.

6 And, you know, here, starting with
7 what we call Talevski step 1, you know, we think
8 it's pretty clear from this language that it
9 confers rights on individuals. I mean, if it's
10 not doing that, like -- like, what is it doing?

11 CHIEF JUSTICE ROBERTS: Well, you
12 know --

13 MS. SAHARSKY: It clearly is giving --

14 CHIEF JUSTICE ROBERTS: -- we -- we
15 could say -- say it again, what we said in
16 Gonzaga and Talevski, or we say -- or we could
17 say we meant it when we said it.

18 (Laughter.)

19 MS. SAHARSKY: Yes, although I -- I
20 don't think it's right to think that the courts
21 of appeals aren't getting the message. I think
22 they're getting the message, and let me just
23 give you a few examples.

24 First of all, you have Judge
25 Wilkinson's opinion for the Fourth Circuit here,

1 and he says many times I understand that Gonzaga
2 provides the test. I understand that it has to
3 be unambiguous language. I understand that we
4 cannot find individual rights in these statutes
5 willy-nilly. We need to be absolutely sure
6 about it.

7 But all three of the judges on this
8 panel, including the concurring Judge
9 Richardson, found that this statute
10 unambiguously confers individual rights, that it
11 is guaranteeing an individual the right to their
12 provider of choice.

13 And then, if you look at, you know,
14 other cases, there -- as I said, there haven't
15 been a lot of cases where people have litigated
16 provisions, other -- other state plan
17 requirements, but, you know, the -- the courts
18 of appeals have, like, routinely said no, these
19 things are not individually enforceable. We
20 give -- you know, we gave one of the
21 requirements -- one of them in our brief, an
22 example, you know, in Section (a)(32), which is
23 about paying only the provider and not third
24 parties. You know, there are -- there are many
25 other provisions.

1 But, if you're looking for some kind
2 of, you know, issue here in the courts of
3 appeals, like, the courts of appeals aren't
4 getting the message, you know, frankly, that's
5 just not true. It's just that this is a
6 situation where we're talking about an intensely
7 personal right that Congress wanted to protect.

8 I mean, there aren't that many things
9 that are -- are more important than, you know,
10 being able to choose your doctor, the person
11 that you see when you're at your most
12 vulnerable, facing, you know, some of the most
13 significant, you know, challenges to your life
14 and your health.

15 And Congress said a long time ago, you
16 know, this is something we want to protect. We
17 want people on Medicaid, who are insured through
18 Medicaid, to have the same right that people who
19 have private insurance enjoy because it's so
20 foundational to -- to individual -- individual
21 dignity and individual autonomy, and it makes
22 sense to -- to -- for Congress to have said
23 that.

24 I guess the -- a couple other things
25 that have been discussed that I -- I just wanted

1 to make sure that we address. You know, we
2 understand that there needs to be clear notice
3 provided to the states here about their end of
4 the bargain. But, you know, as I said, I don't
5 think that there's a disagreement about what
6 this provision does. I -- I think everyone
7 agrees that it's -- you know, you have the right
8 to -- to any qualified and willing provider.

9 Now the state has an argument that
10 they think they have an unfettered right to
11 define "qualified" as being something other than
12 professional qualifications and medical
13 qualifications. That is some -- an argument
14 that was made and rejected below in a long
15 discussion by the Fourth Circuit. The Court
16 denied cert on that.

17 But just to maybe give the Court some
18 confidence in -- in the Fourth Circuit's
19 decision, you know, if this were a case in which
20 there were a real question about medical
21 competence, like is this provider qualified to
22 be a medical provider in the state, the Fourth
23 Circuit said, of course, the state would get a
24 healthy dose of deference in those
25 circumstances. The Fourth Circuit said that

1 multiple times in its opinion.

2 But the Fourth Circuit also said, you
3 know, this is an easy case. There has never
4 been an argument through the long history of
5 this litigation that Planned Parenthood is
6 unqualified medically, professionally
7 unqualified. It is only that there is something
8 that Planned Parenthood is doing outside of
9 Medicaid that the state wants to disqualify it
10 from the program.

11 And so, if it -- if it were a real
12 case about qualifications, you know, it's
13 something where the state would get deference.
14 But it's absolutely wrong under the scheme here
15 to say that the state can just deem any
16 requirement it wants, you know, that a
17 provider's unqualified -- too many people work
18 at the provider have blue eyes or they support
19 green energy or -- or whatever else.

20 JUSTICE KAGAN: Ms. Saharsky, if every
21 state thought that, right, we would have every
22 state deciding what their various, you know,
23 policy justifications -- you -- you know, it
24 could be people who do provide abortions, people
25 who don't provide abortions, people who do

1 provide contraception, people who don't provide
2 contraception, people who do do gender
3 transition treatment, people who don't, and, you
4 know, every state could split up the world by
5 providers like that, right?

6 Is -- that does not seem --

7 MS. SAHARSKY: Right. That --

8 JUSTICE KAGAN: -- what this statute
9 is all about, is allowing states to do that and
10 then giving individuals no ability to come back
11 and say that's wrong, I'm entitled to see my
12 provider of choice regardless of what they think
13 about contraception or abortion or gender
14 transition treatment.

15 MS. SAHARSKY: That is absolutely
16 right. I think, if one accepted the full
17 argument that the state makes, including on the
18 question for which the Court denied cert, it
19 would be that a state can just say a provider is
20 disqualified for any reason unrelated to medical
21 competency, and that could cause a whole host of
22 problems, but the main problem, as you
23 identified, is that it would make the free
24 choice of provider provision not mean anything
25 because Congress --

1 JUSTICE BARRETT: But isn't that the
2 real problem here? Like, isn't that -- I mean,
3 if you really kind of boil down the dispute, the
4 real problem is that Planned Parenthood was
5 considered not a qualified provider. If -- if
6 you take it out of that -- and -- and -- you
7 know, there's a -- a dispute about that, as you
8 were saying with Justice Kagan. But, if we take
9 it out of that, that you've disqualified a
10 provider because of non-Medicaid services that
11 they provide, be it gender transition,
12 contraception, abortion, whatever, that's a
13 different issue, right, than can you imagine if
14 the state in an area that we would all agree
15 that the state gets a healthy dose of deference,
16 like, let's say, you know, a doctor had
17 malpractice -- a certain number of malpractice
18 suits or had violated, you know, standards in
19 some other way.

20 Does it make sense in that
21 circumstance for plaintiffs to have a -- for
22 Congress to have wanted plaintiffs to have a
23 right to come in and sue to say, well, you
24 shouldn't -- that -- that's my provider of
25 choice; he may have violated these standards --

1 and then litigate the qualifications of that
2 provider who might have been disqualified for
3 reasons that are within the state's authority?
4 Does it make sense that Congress would have
5 wanted the patient to litigate that issue?

6 MS. SAHARSKY: Well, the Congress
7 wanted the patient to have the ability to see
8 their -- their provider of choice if it's a
9 qualified and willing provider. And so that's a
10 limitation that Congress put on the statute.

11 And, you know, as I said, if it were a
12 case in which the state asserted that it was
13 about a medical qualification, then the -- the
14 statute does say, you know, qualified to provide
15 the services at issue. And so, as the Fourth
16 Circuit said, a court would interpret it --
17 interpret, you know, what does that mean? It
18 means professionally qualified, medically
19 qualified. And, in those circumstances, the
20 state would get deference.

21 But, you know, those cases haven't
22 arisen. That's not happening. And I think the
23 reason for it, if I can just finish --

24 CHIEF JUSTICE ROBERTS: Sure.

25 MS. SAHARSKY: -- is pretty simple,

1 which is states aren't for the most part keeping
2 needy patients away from qualified and willing
3 providers. It's just not happening.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Thomas?

7 Justice Alito?

8 Justice Sotomayor?

9 JUSTICE SOTOMAYOR: I don't want to
10 get -- I -- I do want to have you address the
11 substantial compliance issue. The other side
12 says, when it's a substantial compliance issue,
13 that brings into -- always brings everything
14 into question as to whether a right was granted.
15 That's the only way you could read that
16 argument. But do you have another way to
17 address it?

18 And, number two, Mr. Bursch said that
19 you were wrong that providers could challenge
20 this in their review mechanism. Could you
21 explain why they can't? He says you were
22 reading 126-400(E) wrong.

23 MS. SAHARSKY: So let me start with
24 the substantial compliance question. I think
25 the state's argument is wrong for three reasons.

1 One, that is flatly inconsistent with
2 Talevski if you said that because Talevski was
3 also a substantial compliance regime.

4 Two, it is inconsistent with
5 Congress's judgment in the Suter fix because
6 those state plan provisions that Congress was
7 saying could confer individual rights also all
8 are substantial compliance provisions.

9 And, three, just to provide the
10 reasoning for it, the question of substantial
11 compliance is a different question from whether
12 the statute creates a right. There is a right
13 and then there are mechanisms for enforcement of
14 that right. Substantial compliance limits HHS's
15 mechanism for enforcement.

16 I think, understandably, Congress said
17 this is a blunt instrument where it's going to
18 be cutting off healthcare to people that are
19 saying that they were denied healthcare, so
20 we're only going to have Congress be able -- or
21 have HHS be able to do that in situations where
22 they're not even in substantial compliance.

23 But I think that shows that the 1983
24 remedy was expected here because it would be a
25 scalpel to that blunt -- blunt instrument, a

1 more tailored remedy, to be able to say these
2 people have been denied healthcare, and they can
3 get that healthcare to get that declaratory and
4 injunctive relief. So that's substantial
5 compliance.

6 The second is about enforcement
7 proceedings. So I'll just say off the bat there
8 I think there is agreement that there is no
9 individual enforcement proceeding that can
10 challenge the denial of a provider of choice.
11 There's only a claimed denial proceeding that is
12 available in a state administrative proceeding.

13 But you asked about provider
14 proceedings. So the statute itself, Medicaid,
15 does not require the state to have a provider
16 proceeding, but a federal regulation, so not a
17 judgment by Congress but federal law, a federal
18 regulation does require that type of
19 challenge -- the state to have a -- a procedure
20 for the provider to challenge. The grounds of
21 that are -- are pretty limited to provider
22 competency, as we discussed. You know, you can
23 look at the grounds in -- in the provision
24 that -- that you mentioned.

25 And, here, the state admitted that

1 that process was futile. And you don't just
2 need to take my word for it. Both the district
3 court and the court of appeals found that. On
4 pages 101A, Note 4 of the Petition Appendix, is
5 the court of appeals, and then the district
6 court, Petition Appendix 137A to 138A.

7 And this came after a colloquy that
8 the state's lawyer had with the district court,
9 who said: What is the -- what is the hearing
10 officer in the state procedure for the provider
11 supposed to do here because the governor's made
12 this determination? Can they offer any relief?
13 And the state attorney said no.

14 And the only other thing I would say
15 is, you know, I don't think it really matters
16 whether the provider has a remedy here because
17 it's the individual's right that Congress was
18 protecting. Congress wrote this in individual
19 terms because those are the folks that were
20 denied, you know, healthcare when providers were
21 cut out of Medicaid before the statute was
22 enacted. And Congress said, you know, we --
23 they're the ones being hurt, so we need to do
24 something that, you know, allows them to be able
25 to see their provider of choice.

1 JUSTICE SOTOMAYOR: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 Justice Gorsuch?

4 Justice Kavanaugh?

5 JUSTICE KAVANAUGH: On the alternative
6 enforcement mechanism, though, we did say in
7 Gonzaga that that is -- is relevant. The fact
8 that there is one buttresses the conclusion that
9 those provisions fail to confer enforceable
10 rights was the language in Gonzaga.

11 So do you agree with that language?

12 MS. SAHARSKY: Well, I think there's a
13 question about what "buttress" means. You know,
14 this Court explained it later in Talevski as
15 there being step 1 and step 2. And that
16 explanation makes a lot of sense to me because
17 the first question is look at the text at issue
18 and does it confer a right.

19 And then the way the Court explains
20 step 2 is, well, okay, so we have this right,
21 but there's all these other ways of enforcing
22 it. So we would have thought that that -- those
23 other ways of enforcing it make us think that
24 there's not a Section 1983 remedy.

25 So, you know, I think the Court

1 explained those as separate in Talevski, and
2 that -- that seemed to me to be a -- a correct
3 clarification. I -- I -- I read, if you read
4 all of the Gonzaga, you know, opinion together
5 with the "buttress" language, you know, the
6 Court also does it in two steps. It says, you
7 know, this language doesn't say anything about
8 individuals. It's all about policy and
9 practice. That's not going to create any
10 rights.

11 And then it says this buttress
12 language, like, by the way, you've got this
13 other problem too, which is this, like,
14 enforcement mechanism where there's a federal
15 hearing board where an individual can go and get
16 a hearing on their own particular complaint.

17 So, to me, that's kind of still the
18 two-step thing. I don't exactly know what
19 buttress means, but I also don't really think it
20 matters here because this is nothing like the
21 Gonzaga ability to get, you know, a -- a hearing
22 before a federal hearing board where an
23 individual can bring a suit.

24 There's no individual cause of action.
25 There's no individual administrative remedy. I

1 mean, it's just so far away from, you know, Sea
2 Clammers and those cases that said, you know,
3 there is enough of an enforcement scheme that
4 means that there shouldn't be individual
5 enforcement.

6 Like, if -- if this provision is not
7 enforceable under Section 1983, individuals --
8 it's -- it's not going to be enforced. I mean,
9 this provision will become meaningless. HHS has
10 never cut off funding.

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

14 Justice Jackson?

15 JUSTICE JACKSON: So let me just
16 clarify that Congress adopted this provision in
17 response to a specific problem. That's my
18 understanding, which is that in the first two
19 years of the Medicaid program, some states were
20 trying to steer their Medicaid beneficiaries to
21 certain providers and away from others.

22 Is that your understanding of what
23 Congress was responding to when it enacted this
24 provision?

25 MS. SAHARSKY: Yes.

1 JUSTICE JACKSON: So, to the extent
2 that the state is arguing here that this
3 provision is merely meant to serve as a
4 directive to the Secretary, I -- I feel like
5 that might be inconsistent with the
6 understanding that the primary target of the
7 statute was not the Secretary, it was the states
8 who were restricting people's rights or
9 restricting people's choices of healthcare
10 provider.

11 MS. SAHARSKY: Correct. It is like
12 the statute at issue in Talevski that it speaks
13 both of the individuals who have the rights, the
14 rights-bearers, and the people that might
15 infringe those rights, which in Talevski was,
16 you know, the nursing homes and here is the
17 state. So it has both components: the
18 individuals who have the rights and the people
19 that might not, you know, protect those rights,
20 but it tells the state, you know, you -- you
21 have to protect this right to any qualified and
22 willing provider.

23 JUSTICE JACKSON: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Rebuttal, Mr. Bursch.

2 REBUTTAL ARGUMENT OF JOHN J. BURSCH

3 ON BEHALF OF THE PETITIONER

4 MR. BURSCH: Thank you, Mr. Chief Justice.

5 In the Spending Clause context, private
6 rights are the exception, not the rule. That's why
7 Congress must use explicit rights-creating language,
8 words with a rights-creating pedigree.

9 Justice Kavanaugh noted that the clear
10 lines dissolve quickly if you don't require that
11 explicit words, and this argument proves that.

12 Justice Kagan started describing our
13 provision as a right to choose a doctor. The
14 word "right" doesn't appear in the statute.

15 Justice Sotomayor at one point called
16 it a privilege of choosing your doctor. The
17 word "privilege" doesn't appear in the statute.

18 Justice Jackson called it a free
19 choice of provider provision. The words "free"
20 and "choice" don't appear anywhere in the
21 statute.

22 My friend, Ms. Saharsky, said the
23 provision is mandatory because the state must do
24 these things. That's not what it says. It says
25 that the plan must provide these things. In a

1 substantial compliance context, that's a
2 distinction that makes a difference.

3 My friend also said twice that the
4 statute would do the exact same thing if it used
5 the word "right." But that's absolutely wrong.
6 If the statute said "right," it would put the
7 state on notice that it could be subjected to
8 1983 lawsuits.

9 My friend also says that requiring
10 explicit rights-creating language is a
11 separation-of-powers problem. That's not
12 correct. The absence of that language is a
13 federalism problem because it doesn't give clear
14 notice to the states.

15 To the extent there's a
16 separation-of-powers implication, it's because
17 not requiring clear rights-creating language
18 disperses the Secretary's discretionary
19 authority to federal district courts all across
20 the country.

21 A couple quick points. Our reply
22 brief, pages 22 to 23, explain why the
23 Respondents are wrong about their understanding
24 of Regulation 16-404. Page 22 gives the
25 statutory citation that contemplates the

1 provider administrative appeals. And Reply 23
2 explains that the administrative appeal remedy
3 is not futile and our counsel did not admit that
4 below.

5 My friend admitted to Justice Gorsuch
6 that a statute can require the provision of a
7 benefit yet not have rights-creating language.
8 That's this case.

9 And the fact that the 12 of us can
10 have such a robust conversation about whether
11 this statute is mandatory or not, whether it's
12 rights-creating or not, demonstrates that the
13 rights-creating language is ambiguous, not clear
14 and explicit. And if there is any ambiguity in
15 this context, the state has to win because it's
16 not being put on notice of when it might be
17 sued.

18 At the end of the day, putting states
19 on clear notice requires explicit
20 rights-creating language, as this Court has
21 said. Because the "any qualified provider"
22 provision lacks that language, we ask that you
23 reverse. Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 The case is submitted.
2 (Whereupon, at 11:49 a.m., the case
3 was submitted.)
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