

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

EUNICE MEDINA, DIRECTOR,)
SOUTH CAROLINA DEPARTMENT OF)
HEALTH AND HUMAN SERVICES,)
) Petitioner,)
) v.) No. 23-1275
PLANNED PARENTHOOD SOUTH ATLANTIC,)
ET AL.,)
) Respondents.)

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12
 13 Washington, D.C.
 14 Wednesday, April 2, 2025

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 16 The above-entitled matter came on for
 17 oral argument before the Supreme Court of the
 18 United States at 10:15 a.m.

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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 rights-creating pedigree like the Fifth Amendment's "no person shall."

1 That lack should be dispositive.

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

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

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

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

18 And, finally, Congress knows how to
19 clearly confer a private right to choose a
20 provider because it did so in FNHRA's analogous
21 provision, which appears in a separate bill of
22 rights and uses rights-creating language
23 connected to the beneficiary and directed to the
24 regulated entity, a facility. It says a nursing
25 facility must protect and promote the rights of

1 each resident, including the right to choose a
2 personal attending physician.

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

6 I welcome the Court's questions.

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

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

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

22 But this Court made clear in Talevski
23 that this is a high bar. It's atypical. And
24 so, if a state is going to be on clear notice,
25 which it has to be to know what contract it's

1 agreeing to, it needs to be really clear.

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

4 MR. BURSCH: There's a number of
5 things that Congress could have done. For
6 starters, it could have set it apart in a
7 separate bill of rights, like it did in Talevski
8 with its provider choice provision. It could
9 have used rights-creating language; for example,
10 a beneficiary has a right to designate her
11 provider. It could have taken the
12 qualifications of the provider away from the
13 state, the regulator, and instead made it a
14 federal issue.

15 Or it could have even done something
16 like -- like Congress did in 1396a(a)(84)(B),
17 which, if you move all the way down the list to
18 near the end, it took the regulated entity, the
19 state, it used a rights-creating "shall," and it
20 put them together in the provision. But none of
21 those indicators of a clear statement is present
22 in this provision.

23 JUSTICE SOTOMAYOR: You're not quite
24 calling it a magic word, but you're coming very
25 close. And an example was raised in one of the

1 briefs that says the IRS must provide that any
2 individual may obtain a refund of overpaid
3 taxes. It seems hard to believe that that
4 sentence on its face does not create a right for
5 an individual to have a refund of overpaid
6 taxes.

7 MR. BURSCH: Justice Sotomayor, let me
8 address the magic words premise and then the IRS
9 hypothetical.

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

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

15 MR. BURSCH: Yeah. That -- that's a
16 clear statement rule. That's what states need.

17 But, in the IRS hypothetical, there's
18 a number of problems with that. First, as we
19 point out on page 9 of our reply, it could be
20 clearer, but more important, the IRS provision
21 is not a Spending Clause provision. It's not
22 this conversation between a state and the
23 Secretary of Health and Human Services about
24 what must be done.

25 JUSTICE SOTOMAYOR: It seems a little

1 bit odd to think that a problem that motivated
2 Congress to pass this provision was that states
3 were limiting the choices people had. Some
4 states were saying only state facilities would
5 provide the benefit. Other states were
6 identifying a more limited subset of providers.

7 It seems hard to understand that
8 states didn't understand that they had to give
9 provider -- individuals the right to choose a
10 provider.

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

16 And I can make that same statement
17 about what's important to people or what's
18 significant about dozens of other provisions in
19 1396a, if you're talking about equal protection
20 or the right to services. How about being
21 reinstated on the Medicaid program after you've
22 been in prison? There are countless things in
23 that statute which people would consider
24 important and vital, fundamental. None of those
25 words actually appear in the --

1 JUSTICE SOTOMAYOR: It doesn't seem --

2 MR. BURSCHE: -- "any qualified
3 provider" provision.

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

9 I looked at the eight very carefully,
10 and there hasn't been much of a dispute among
11 the circuits. There hasn't even been a
12 challenge.

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

20 The others, again, none of them have
21 disputes. Some uniformly, courts have said,
22 don't create private rights, and others they
23 have said they do. Where they say they do, to
24 me, it's a simple issue. You have to provide a
25 fair hearing before the state agency of any

1 individual who claims coverage. Most states
2 have a hearing of some sort.

3 But -- so I don't understand why that
4 makes -- is important here.

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

12 JUSTICE JACKSON: Can I --

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

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

21 JUSTICE KAGAN: The state has an
22 obligation to provide this particular thing,
23 right, which is the state has an obligation to
24 ensure that a person -- I don't even know how to
25 say this lang -- without saying "right" -- has a

1 right to choose their doctor.

2 That's what this provision is. It's
3 impossible to even say the thing without using
4 the word "right."

5 Has a benefit to choose their doctor?
6 The state has to ensure that individuals have a
7 benefit to choose their doctor?

8 The state has to ensure that
9 individuals have a right to choose their doctor.
10 That's what this provision is.

11 MR. BURSCH: Well, that -- that
12 language that you're focused on, "may obtain,"
13 is not clear rights-creating language for four
14 reasons.

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

23 MR. BURSCH: Justice Kagan, I won't go
24 through my list. There's many reasons why that
25 analysis is wrong. But simply because we

1 understand colloquially that something might be
2 a right doesn't mean that Congress has put a
3 state on clear notice that it could be sued in
4 federal court under 1983 and subjected to
5 liability and attorney fee shifting if it
6 doesn't follow that provision, particularly in a
7 substantial compliance regime.

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

16 So what doesn't the state know that's
17 important here?

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

20 JUSTICE KAGAN: Well, if -- if --
21 if -- if you know that you have an obligation
22 and you know that the individual has a right to
23 choose their doctor, that suggests that there's
24 some kind of enforcement.

25 MR. BURSCH: Gonzaga makes clear that

1 there's a difference between a duty to provide a
2 benefit and a right that subjects you to 1983
3 liability.

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

10 In addition --

11 CHIEF JUSTICE ROBERTS: One of the --
12 one of the -- one of the benefits provided by
13 the Act is that you may choose your own doctor.

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

16 MR. BURSCH: They have a very specific
17 remedy. If they are denied benefits, there's an
18 administrative appeal process that they can go
19 through. But there is a separate remedy for
20 providers who are disqualified. They also have
21 an administrative appeal that could go through
22 the state court system, and that could come to
23 this Court if necessary.

24 And it makes sense that Congress would
25 create the appeal right for the disqualification

1 in the provider, not the beneficiary --

2 JUSTICE SOTOMAYOR: I'm sorry.

3 MR. BURSCH: -- because --

4 JUSTICE SOTOMAYOR: I'm sorry. The
5 Medicaid recipient can only sue a denial for
6 services that were actually rendered.

7 MR. BURSCH: Yes.

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

10 MR. BURSCH: That's correct.

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

16 Here, they can only challenge --
17 providers can only challenge a certain subset of
18 disqualifications via South Carolina's
19 administrative review process. They can only
20 challenge a disqualification because of a -- of
21 a criminal conviction or abuse.

22 So the providers here did go through
23 the administrative process, and they were told
24 they can't sue for this here.

25 MR. BURSCH: Justice Sotomayor, that

1 is what they put in their brief. That is
2 absolutely not what that regulation says.

3 126-404 says that those particular
4 things that you mentioned, like a criminal
5 conviction or recouping payments --

6 JUSTICE SOTOMAYOR: So why were they
7 denied here?

8 MR. BURSCH: Well, can I finish?

9 JUSTICE SOTOMAYOR: They're not --
10 well, go ahead.

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

17 And the reality is they haven't
18 pursued their administrative appeal yet. They
19 went straight to court. They recruited a
20 beneficiary. They filed their 1983 suit.

21 The state responded to that with a
22 brief in opposition to a preliminary injunction
23 motion and said: Hey, your -- your remedy,
24 which you agreed in your contract was your
25 exclusive remedy, is to go through the

1 administrative appeal that we offer you, and --

2 JUSTICE JACKSON: So, Mr. Bursch, can
3 I just ask you, to what extent is the
4 administrative appeal scheme relevant to the
5 first step of this inquiry?

6 What I'm a little worried about is
7 that your argument seems to be conflating what
8 had traditionally been understood and what we
9 reaffirmed in Talevski as two different steps of
10 the analysis in 1983.

11 And the first relates to to what
12 extent is this provision unambiguously
13 rights-creating, and then the second step asks
14 whether Congress has created some sort of
15 alternative remedy or what is the enforcement
16 scheme such that we might believe that 1983 is
17 not available.

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

24 MR. BURSCH: To be clear, Justice
25 Jackson, we are not making a step 2 Sea Clammers

1 argument. Never have, are not making it here.

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

8 And so we're -- we're using the
9 provider's remedy and the lack of any
10 beneficiary remedy to be able to challenge that
11 provider's disqualification.

12 JUSTICE JACKSON: But that does seem
13 awfully confusing. I mean, I -- you know, there
14 isn't a whole lot of indication that lower
15 courts are -- are -- are confused about this.

16 I -- I -- I looked very carefully at
17 Judge Wilkinson's opinion. He lays out very
18 clearly how this works and what we've said
19 repeatedly. And I guess my concern is that the
20 kinds of things -- and I appreciate you had a
21 long list of reasons why you think this isn't
22 rights-creating -- but one of them had to do
23 with the nature of this -- you know, the
24 enforcement mechanism.

25 And I just see that as a step 2

1 concern, and I'm worried about us getting people
2 confused if we start putting those
3 considerations into the first analysis.

4 MR. BURSCH: Well, I think the
5 analysis is distinct. If you're making a step 2
6 analysis, the argument is that the remedies are
7 so comprehensive that it bars the ability to go
8 to federal court.

9 In step 1, just like in Gonzaga, just
10 like in Suter, the Court is entitled to consider
11 remedies like the fact that the disqualified
12 provider has an administrative appeal to
13 determine whether there is a right to go to
14 court.

15 And I would note that one of the
16 reasons it's significant Congress gave that
17 administrative appeal to the disqualified
18 provider and not to the beneficiary is because
19 the -- the provider is the one who has all the
20 information.

21 Under Respondents' theory, if a
22 provider commits malpractice and they're
23 disqualified for that reason, there's still a
24 beneficiary right to go to federal court and
25 bring a 1983 action.

1 And that makes no sense because what
2 does a beneficiary know about a provider's
3 medical malpractice involving other patients?

4 JUSTICE JACKSON: All right. Well,
5 can I get -- can I just turn your attention back
6 to what I understand to be the classic kind of
7 step 1 inquiry here --

8 MR. BURSCH: Yes.

9 JUSTICE JACKSON: -- and -- and -- and
10 get us back to Justice Kagan's point about the
11 state being aware of an obligation to do this.

12 And I note that, although you suggest
13 that it would be easier if the word "right" was
14 in the statute -- sorry, in -- in this
15 particular statute, 1983 itself talks about
16 rights, privileges, and immunities.

17 So, even if we were to have a magic
18 words test, it seems to me to be too narrow to
19 just say that Congress has to say "rights"
20 because we have in the 1983 concept in -- in the
21 actual text of the statute "rights, privileges,
22 and immunities secured by the Constitution and
23 laws."

24 So, with an understanding of what 1983
25 was about, can you speak to why an obligation of

1 this nature that runs to an individual in the
2 way that Justice Kagan described doesn't get us
3 sort of in the realm of rights, privileges, and
4 obligations secured by the law?

5 MR. BURSCH: Yeah. Two thoughts on
6 that, Justice Jackson.

7 JUSTICE JACKSON: Yes.

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

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

21 JUSTICE KAGAN: Well, it's not any old
22 obligation. I mean, you're absolutely right, of
23 course, that not any old obligation would be
24 enough here. It's an obligation that runs to
25 the individual beneficiary and that concerns an

1 individual beneficiary's entitlement to choose
2 something, and once you're at that, you're at a
3 right.

4 And, you know, if the word -- if the
5 language in the statute said "right," as it did
6 in Talevski, you would still say: Oh, well, the
7 state doesn't know that it -- that right is
8 enforceable.

9 What this language does is the same
10 thing that the "rights" language does. It says:
11 You have an entitlement. It's your option to
12 choose a doctor.

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

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

17 CHIEF JUSTICE ROBERTS: Yes. Sure.

18 MR. BURSCH: Justice Kagan, what you
19 said in Talevski is that you need
20 rights-creating language with an unmistakable
21 focus on the benefitted class. So the fact that
22 you identify individuals and that they are --
23 there's a benefit there --

24 JUSTICE KAGAN: This is an
25 unmistakable focus on the benefitted class.

1 MR. BURSCH: But there's --

2 JUSTICE KAGAN: The benefitted class
3 is Medicaid beneficiaries who have the right to
4 go see the doctor of their choice. That's what
5 this provision is.

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

15 If you would lower the bar, those
16 provisions that we -- we mention in our brief
17 are just the start. That's already 10 percent
18 of Section 1396a. The atypical high bar that
19 you articulated in Talevski would be abandoned
20 and courts will continue discovering rights in
21 all kinds of statutes.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Thomas?

25 Justice Alito?

1 Anything? Anything further?

2 Justice Gorsuch?

3 JUSTICE GORSUCH: On the
4 administrative review process --

5 MR. BURSCH: Yes.

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

9 MR. BURSCH: The state gives a full de
10 novo review to a disqualification decision.
11 That's clear on their website. It's clear in
12 the administrative rules that govern that
13 proceeding.

14 JUSTICE GORUSCH: Yeah, but they --

15 MR. BURSCH: They have counsel --

16 JUSTICE GORSUCH: -- they also report
17 to the governor, right?

18 MR. BURSCH: They do, but let's say
19 you get a bad decision there. You've got an
20 appeal right to the state courts and you've got
21 an appeal right to this Court. So it's a -- a
22 remedy that is fulsome and allows them to make
23 any argument they want.

24 JUSTICE GORSUCH: You -- you
25 emphasized Gonzaga and Talevski, but we have

1 other cases too, Wilder, Wright, Blessing.
2 Thoughts about our jurisprudence in this area?

3 MR. BURSCH: I -- I do. Obviously,
4 Gonzaga and Armstrong have cast a lot of shade
5 on decisions like Wilder, Wright, and Blessing.
6 And I noted that in the Talevski decision, this
7 Court did not use any of those cases to reach
8 its conclusion in that case.

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

15 Well, outside the walls of this
16 courtroom, lower courts have not gotten that
17 message yet. Otherwise, Judge Wilder in his
18 concurrence would not have said, well, we're
19 still bound by Wilder and Wright and Blessing
20 until this Court says that those are actually
21 dead cases that we should no longer follow.

22 The problem with a case like Wilder is
23 that the standard it applies is so low. Wilder
24 says the inquiry turns on whether the provision
25 was intended to benefit the putative plaintiff.

1 Well, that kind of sounds like the test that
2 Justice Kagan is propounding this morning, where
3 you don't need rights-creating language.

4 But, if that's the case, there is no
5 high bar, there is no atypical case, then the
6 federal Spending Clause statutes are replete
7 with private rights that can be enforced in
8 federal court.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?

10 JUSTICE KAGAN: I think you gave me
11 the option already.

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

13 (Laughter.)

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh?

16 JUSTICE KAVANAUGH: Thank you.

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

20 MR. BURSCH: Yes.

21 JUSTICE KAVANAUGH: And it's not the
22 fault of any one judge, but, collectively, this
23 Court has failed to give guidance, obviously,
24 that lower courts can follow, that states,
25 providers, and beneficiaries can follow. So one

1 of my goals coming out of this will be to
2 provide that clarity.

3 Your word "right" or its functional
4 equivalent, that "or its functional equivalent"
5 strikes me, as some of the questions have
6 revealed --

7 MR. BURSCH: Mm-hmm.

8 JUSTICE KAVANAUGH: -- potentially
9 lacking the clarity that I hope we can provide
10 one way or the other going forward.

11 So don't you think it would be better
12 to actually tell us the words that are
13 rights-creating rather than having something
14 like "or its functional equivalent," which could
15 be another decade of litigation?

16 MR. BURSCH: Yeah, that's certainly
17 possible because you'd have to keep that to a
18 pretty small class. I wouldn't be able to
19 really do any better than Justice Alito's
20 partial concurrence in Talevski, where he
21 describes it as explicit rights-creating
22 language.

23 And the list I would give you is
24 "rights," "entitlement," "privilege," and
25 "immunities." When you're -- you're using the

1 word --

2 JUSTICE KAVANAUGH: And that's it?

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

6 JUSTICE KAVANAUGH: Well --

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

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

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

22 When you pair it with the word
23 "obtain," "may obtain," it's even less
24 rights-creating because it's not giving anything
25 directly to anyone in explicit terms. It's odd

1 that that alleged rights scope is defined by the
2 state, which is the gatekeeper to determine who
3 is a qualified provider.

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

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

19 And if this Court doesn't toe the
20 line, if it doesn't have the high bar, the
21 atypical, not 10 percent of 1396a, you're going
22 to be seeing these cases for the next decade
23 easy. I mean, every term we could have --

24 JUSTICE KAVANAUGH: And your
25 response -- you've said this, but I just want to

1 get it nailed down. Your response to the idea
2 that those words, those terms you've given us,
3 create an artificial divide between provisions?

4 MR. BURSCH: Well, it's not artificial
5 because, if we step back and think about this,
6 this is a state entering into a contract and it
7 knows that it has to provide benefits. We've
8 talked about that.

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

17 So, if you don't limit it to those few
18 words, then all of a sudden, you're -- you've
19 got -- the floodgates are open. And I know
20 their contention is, well, there is no real
21 floodgates. Well, you know, we've cited circuit
22 case after circuit case about all kinds of
23 different provisions.

24 In the context of the "any qualified
25 provider" provision alone, we're talking about

1 9,000 providers who have been disqualified
2 across the country, any one of whom, if you rule
3 in favor of Respondents, can recruit a
4 beneficiary and go to federal court and then
5 line their pockets with the attorneys' fees.

6 So -- so I think your instinct to try
7 to keep this as clearly defined and as narrowly
8 defined as possible is consistent with putting
9 the state on notice, which is the whole purpose
10 of this Spending Clause exercise.

11 JUSTICE KAVANAUGH: And last point, on
12 the clarity, you -- you think we need to say
13 something specific and explicit about Wilder and
14 Blessing, I gather.

15 MR. BURSCHE: I -- I -- I didn't think
16 you did after Talevski, but when this case was
17 GVR'ed and Judge Richardson says what are we
18 supposed to do as lower courts, lower court
19 judges, when the Court doesn't say explicitly
20 don't file -- follow Wilder or Blessing or
21 Wright anymore, I think you do need to be more
22 clear. If you really want to put a stake in
23 those cases, you're going to have to do it in
24 writing, just like you did with Lemon.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?

3 JUSTICE BARRETT: I'm going to ask you
4 a little bit about Justice Jackson's question
5 about how the availability of alternative
6 remedies in a Sea Clammers sense might bear on
7 step 1.

8 MR. BURSCH: Mm-hmm.

9 JUSTICE BARRETT: Is it totally
10 irrelevant or would it affect the bar in some
11 way? And this is -- this is how I'm thinking
12 about it.

13 If you do have some alternative
14 scheme, and -- and it might -- under Sea
15 Clammers, you might say, listen, that scheme
16 isn't complete enough, that Congress was
17 directing something only to that. But wouldn't
18 the presence of a scheme cut against -- I mean,
19 would it adjust the bar, the amount of clarity
20 that has to be showed at step 1? Because, if
21 there is some scheme, some method, mechanism by
22 which the beneficiary can challenge the state's
23 denial of her ability to seek the provider of
24 her choice, I guess it doesn't seem like it's
25 completely sealed off as a different question.

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

2 MR. BURSCH: Yeah, I agree. And I
3 think that's exactly what the Court did in
4 Gonzaga, where it said that the available
5 remedy -- there, you could go to the -- the
6 federal government and register a complaint --
7 buttressed the analysis that there was no clear
8 right created in that FERPA provision.

9 And I think it's the same thing here,
10 where you've got a provider remedy and you've
11 also got a beneficiary remedy that does not
12 involve reinstating the provider. That's
13 exactly the kind of clarity that should make the
14 bar even higher. So, when you --

15 JUSTICE BARRETT: Well, but the
16 beneficiary remedy, as Justice Sotomayor pointed
17 out, that's if your claim is denied, right? So
18 then that's the beneficiary taking the risk,
19 going to the provider she wants to see, and then
20 potentially having to pay out of pocket, right?

21 MR. BURSCH: Well, it's a little bit
22 different than that. If she's denied up front,
23 say she applies to be a Medicaid recipient and
24 she's turned down, she could appeal that
25 decision. It's really about the status of her

1 ability to get Medicaid benefits or whether a
2 particular procedure is covered.

3 But it's significant, we think, that
4 Congress gave the beneficiary the right to
5 challenge what the beneficiary has personal
6 knowledge of, her care, and it gave the provider
7 the right what the provider is familiar with,
8 the reasons why they were disqualified.

9 JUSTICE BARRETT: Well, but,
10 Mr. Bursch, I mean, like, don't you think -- you
11 know, if I want to go see Dr. Jones, and
12 Dr. Jones, that's the provider of my choice, and
13 the state has disqualified Dr. Jones, and, as
14 Justice Kagan points out, you know, the statute
15 says "may obtain the benefits," there's no
16 mechanism, am I right, for the beneficiary to
17 say, well, you're divide -- you're depriving me
18 of my ability -- we won't call it right; we
19 won't use the loaded word -- but my ability to
20 see the provider of my choice. And nobody's
21 disputing that Dr. Jones can provide the
22 services in a competent way that I want to have.

23 MR. BURSCH: Well, in a sense, what --
24 what all that means is that the beneficiary
25 doesn't have the ability to whip out a magic

1 wand and then just hit on the head the doctor
2 that they want and then they must be qualified
3 under Medicaid.

4 This is getting a little bit more into
5 the question of what's qualified. But that's
6 not the right.

7 The -- the way that the statute
8 conceptualizes this is it's like when I go to
9 Blue Cross and Blue Shield and I don't get to
10 pick any doctor that I want. If I want to go to
11 Johns Hopkins, I can't request a doctor unless
12 they're on the list.

13 And -- and this "any qualified
14 provider" provision works the same way. The
15 state decides who the providers are who are
16 qualified and you get to choose among them. And
17 -- and they decided that Planned Parenthood was
18 unqualified for many reasons, chiefly because
19 they're the nation's largest abortion provider.

20 JUSTICE BARRETT: What about
21 substantial compliance? So do you conceive of
22 substantial compliance as giving the state a
23 little bit of wiggle room to maybe not be
24 entirely in compliance? And, if so, how does
25 that really affect the step 1, the -- the

1 Gonzaga analysis?

2 MR. BURSCH: Yeah, absolutely. So
3 substantial compliance says that everything has
4 to be in the plan, but when the state
5 administers the plan, it doesn't have to meet
6 100 percent of every jot and tittle in the
7 statute.

8 And if they start to deviate in any
9 way, they -- they don't enforce this provision
10 or they modify this provision, there -- there's
11 experimental flexibility in there. And the
12 Secretary is the one who makes the call. He or
13 she says: You've gotten so far out of whack,
14 I'm going to withhold some or even all of your
15 funding. But, as long as the Secretary's happy,
16 they can continue on their path and --

17 JUSTICE BARRETT: But how does that
18 bear on whether it's rights-creating language?

19 MR. BURSCH: Thank you for that
20 follow-up question, Justice Barrett.

21 It's because, if -- if you have a
22 right, it's something that can't be taken away.
23 And so, in a context where the state can not be
24 following or administering that provision at all
25 and the Secretary can say no harm, no foul,

1 that's the exact opposite of a right.

2 And that's why this structure, in
3 addition to the language, makes it so clear that
4 this is not a right.

5 JUSTICE BARRETT: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Jackson?

8 JUSTICE JACKSON: So was there an
9 administrative appeal process in the Talevski
10 scenario?

11 MR. BURSCH: In the Talevski scenario,
12 there was an ability for someone to register a
13 complaint with the federal government.

14 JUSTICE JACKSON: So there was a
15 process there and --

16 MR. BURSCH: Yes.

17 JUSTICE JACKSON: -- yet we still held
18 that there was rights-creating language.

19 MR. BURSCH: Oh, sure.

20 JUSTICE JACKSON: Right.

21 MR. BURSCH: Because you had a
22 separate bill of rights that mentioned the word
23 "rights" two dozen times, and that
24 rights-creating language --

25 JUSTICE JACKSON: So it's -- it's not

1 about whether or not there's actually an appeal
2 process. It's about, again, your magic words.
3 You have to say "rights" pretty much.

4 MR. BURSCH: Well, I don't -- I don't
5 want to offend any justice. We're -- we're
6 fine with -- we're fine with a magic words test
7 if you want to do that because then it would be
8 clear.

9 JUSTICE JACKSON: Right. But I'm just
10 trying --

11 MR. BURSCH: But there are -- there
12 are some other words --

13 JUSTICE JACKSON: -- I'm trying to --
14 I'm trying to evaluate the import of the
15 separate appeal process. You're saying, in a
16 situation in which Congress has used the word
17 "right" --

18 MR. BURSCH: Right.

19 JUSTICE JACKSON: -- it doesn't
20 matter.

21 MR. BURSCH: It -- it's just one of
22 many factors.

23 And so, in Talevski, you had a
24 separate provision. It was a bill of rights.
25 You had the word "right."

1 JUSTICE JACKSON: Yeah.

2 MR. BURSCH: And most importantly,
3 there was the connective tissue where that
4 rights-creating language, the -- the
5 beneficiaries were the subject of that --

6 JUSTICE JACKSON: Yeah.

7 MR. BURSCH: -- and then the states
8 were directed to follow that, the -- I'm sorry,
9 the nursing facilities, you know, the particular
10 entities --

11 JUSTICE JACKSON: All right. Let me
12 ask you about clarity and Justice Kavanaugh's
13 argument.

14 So you -- you -- you indicate that you
15 believe that lower courts need greater clarity.
16 But we took this case on the basis of a
17 pre-Talevski split. So, as we sit here today,
18 we actually don't have any idea what the lower
19 courts in the main are doing post-Talevski.

20 And I'm looking at Judge Wilkinson's
21 opinion in this case, and he seems to have a
22 pretty good sense of what our cases mean. I
23 mean, he goes through all the cases, summarizes
24 the evolution of our case law from Wilder to
25 Blessing to Gonzaga to Talevski. He explains in

1 a very nuanced way how each case refined the
2 test for Section 1983 enforceability.

3 And I understand you disagree with how
4 he's applied what the test is in this situation,
5 but is there any part of his summary of the
6 cases and where we are in terms of the evolution
7 of the law that you disagree with?

8 MR. BURSCH: A number of things, as
9 you might expect.

10 JUSTICE JACKSON: Please.

11 MR. BURSCH: First, Judge Wilkinson
12 cites Blessing, he cites Wilder, cases that this
13 Court did not rely on in Talevski. But, as
14 Judge Richardson points out in his
15 concurrence --

16 JUSTICE JACKSON: No, he cites and
17 explains how we've moved. So now he -- he had
18 this case, this case that we are looking at
19 today, both before and after Talevski.

20 Before, he says: 1983,
21 rights-creating language, you're fine. Talevski
22 comes down, we GVR, which we standard --
23 standard practice when there's an intervening
24 opinion. He reads Talevski, and he says: Ah,
25 this actually confirms what I understand the law

1 to be, and he explains very clearly how we get
2 here, what the analysis is, and what the test is
3 today. So --

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

5 JUSTICE JACKSON: -- I -- I -- I guess
6 I don't understand what -- what the remaining
7 confusion is.

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

12 MR. BURSCH: Two very specific
13 responses to that, Justice Jackson.

14 First, he did not eschew the cases
15 that this Court was no longer using. That's the
16 confusion we were just talking about. But, more
17 important, he didn't understand the clear or
18 explicit or unambiguous rights-creating language
19 component of the test.

20 It's exactly what Justice Kavanaugh
21 was describing. He looks --

22 JUSTICE JACKSON: So you just disagree
23 with what he says, but it's not like we need to
24 go back and revisit the old cases. We've
25 arrived at this point. You think he's getting

1 it wrong. I totally understand that.

2 But it just seems to me odd that we
3 would, you know, wind back the clock many, many
4 years and talk about what these old cases said
5 when we've all agreed that we've evolved to this
6 current point.

7 MR. BURSCH: I -- I don't think you
8 need to go back other than to make clear to help
9 judges like Judge Richardson to know what cases
10 are still good law or not. But what we're
11 talking about --

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

14 MR. BURSCH: Could I just finish?

15 JUSTICE JACKSON: Yes, please.

16 MR. BURSCH: But -- but the important
17 thing is Judge Wilkinson doesn't get the
18 explicit rights-creating language. It's not
19 just a misapplication. It's a misunderstanding
20 of the test.

21 When -- when he looks at 1396a and
22 sees that a plan must include these things so
23 the Secretary can approve it, he thinks that
24 that's a directive to the state. And it's not.

25 He looks at words like "may obtain" or

1 the fact that the statute references
2 "individual" and thinks that's clear
3 rights-creating language when it's not.

4 JUSTICE JACKSON: All right. So you
5 disagree with him.

6 Let me ask you about the part of your
7 list of things related to whether or not this is
8 right-created language that relates to the fact
9 that this is part of state plan requirements.

10 MR. BURSCH: Yes.

11 JUSTICE JACKSON: I think you say, you
12 know, that's one indicia of it not being
13 rights-created. But I -- I guess I'm looking at
14 Section 1320a-2 in the statute, which applies to
15 the Medicare Act, where -- which Congress
16 enacted in response to our decision in Suter,
17 which had said a similar thing.

18 MR. BURSCH: Yes.

19 JUSTICE JACKSON: Suter had held that
20 a Social Security Act provision was not
21 privately enforceable because it appeared in a
22 list of state plan requirements.

23 And in response to that, Congress
24 enacted a statute that specifically says: "A
25 provision is not deemed unenforceable because of

1 its inclusion in a section of this chapter
2 requiring a state plan or specifying the
3 contents of a state plan."

4 MR. BURSCH: Yes.

5 JUSTICE JACKSON: And that provision
6 is applicable to the Medicare statute. So, if
7 we take into account or give any weight to the
8 fact that this is in the listing of a state
9 plan, aren't we doing exactly what Congress has
10 told us we're not supposed to do?

11 MR. BURSCH: No, because the -- the
12 key phrase in that statutory first sentence that
13 you read is "because of." And we know that's
14 a -- a but-for.

15 And so what that means is, when a
16 provision is simply on a -- a list, that can't
17 be the standalone reason why it doesn't create
18 rights. But, as the plurality then --

19 JUSTICE JACKSON: But that's a reason
20 we can take into account as to why.

21 MR. BURSCH: Just like the plurality
22 in Armstrong, absolutely, 20 years after that
23 statute was adopted.

24 And -- and we're not just relying on
25 the list --

1 JUSTICE JACKSON: So how would
2 Congress have made it clear that we're not
3 supposed to do that?

4 MR. BURSCH: That it would --

5 JUSTICE JACKSON: It would have to --
6 the statute would have to say: You can never
7 look at this as a factor in determining whether
8 or not --

9 MR. BURSCH: Yes.

10 JUSTICE JACKSON: Yes.

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

13 JUSTICE JACKSON: All right.

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

17 JUSTICE JACKSON: Sure. You have a
18 whole list.

19 MR. BURSCH: Yes.

20 JUSTICE JACKSON: I'm just trying to
21 understand the extent to which this factor is
22 consistent with the will of Congress.

23 MR. BURSCH: Right.

24 JUSTICE JACKSON: Thank you.

25 MR. BURSCH: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 MR. BURSCH: Thank you, Chief Justice.

4 CHIEF JUSTICE ROBERTS: Mr. Hawkins.

5 ORAL ARGUMENT OF KYLE D. HAWKINS

6 FOR THE UNITED STATES, AS AMICUS CURIAE,

7 SUPPORTING THE PETITIONER

8 MR. HAWKINS: Mr. Chief Justice, and
9 may it please the Court:

10 The text, context, and structure of
11 (a)(23) confirm that it does not create a
12 private right. Starting with the text, (a)(23)
13 lacks the unambiguously rights-creating language
14 we saw in the FNHRA statute in Talevski, which
15 used the word "right" nearly two dozen times in
16 its own bill of rights.

17 And read in context, (a)(23) is part
18 of a conversation between the federal government
19 and the states. It's buried deep among 86
20 administrative provisions, arranged in no
21 discernible order, and directed to a plan
22 administrator and the HHS Secretary.

23 Structurally, it's part of a
24 substantial compliance regime, which, as Gonzaga
25 recognized, shows a concern with compliance only

1 in the aggregate. That's not usually how we
2 think of rights.

3 On top of that, (a)(23) compliance can
4 be waived by the federal government, which makes
5 the creation of a right all the more
6 implausible.

7 Finally, (a)(23) includes multiple
8 enforcement mechanisms of its own, including
9 state administrative remedies subject to
10 judicial review and the denial of funding.

11 Talevski emphasized that
12 rights-creating statutes are atypical. But this
13 is a run-of-the-mill Spending Clause statute,
14 and holding otherwise would invite line-drawing
15 problems.

16 I welcome the Court's questions.

17 JUSTICE THOMAS: What do you think is
18 left of Wilder and Blessing after Talevski and
19 Gonzaga?

20 MR. HAWKINS: Well, Justice Thomas, we
21 think that the star footnote in the Armstrong
22 decision effectively overruled Wilder. It
23 specifically said that Wilder was repudiated.
24 We think that's functionally the equivalent of
25 saying overruled. And it didn't mention Wright

1 by name, but we think Wright and Blessing are no
2 longer good law either.

3 I heard my friend, counsel for
4 Petitioner, note the confusion in the concurring
5 opinion below about those cases, but I thought
6 it would have been clearer after Armstrong.

7 JUSTICE KAGAN: Mr. Hawkins, you
8 talked a lot about the structure of this statute
9 and the fact that this is one of 87 and so
10 forth. And we heard that argument some years
11 back in the Suter case from the government, and
12 the Court accepted it and Congress did not.

13 Congress came right back and passed an
14 amendment and said: The fact that this is
15 listed in this big 87-item list should not be
16 thought to have anything to say with whether
17 something in that list is a right. Not
18 everything in that list is a right, but the fact
19 that it's in that list is -- is pretty
20 irrelevant to the question of whether something
21 is a right.

22 MR. HAWKINS: Well, respectfully,
23 Justice Kagan, I don't think we read 1320a-2
24 quite the same way. I think we're effectively
25 aligned with Petitioner on this, that the

1 "because of" language is creating a but-for
2 requirement. It's saying that the sole reason
3 cannot be that it appears in this list of plan
4 requirements. And we think that's the best
5 reading because that's consistent with Gonzaga
6 and the sort of construction of Congress.

7 JUSTICE KAGAN: Yeah, I would have
8 thought that if Congress goes to the trouble of
9 passing this statute, what Congress was looking
10 at was, like, oh, you know, we agree with their
11 result in Suter, but if we look at their
12 reasoning -- I mean, it was a very kind of
13 nuanced way to react to our decision.

14 We look at their reasoning, and if
15 their reasoning is that it was on this list, we
16 want to say that that should be no part of
17 anybody's reasoning because we think that there
18 are things on this list that are rights, and we
19 want to make sure that in the future, when those
20 other things come up, that the Court doesn't do
21 the exact same thing.

22 That was the whole point of the Suter
23 fix.

24 MR. HAWKINS: Well, Your Honor, we
25 think that the best reading of it is that

1 Congress said we don't want that to be the only
2 reason that courts --

3 JUSTICE SOTOMAYOR: But that wasn't
4 the only reason in Suter. There was a central
5 argument in Suter that the standards set forth
6 were not intelligible, which is part of our
7 review. So I'm not sure how we can read the
8 Suter fix as -- as a "don't use this only" fix
9 approach.

10 MR. HAWKINS: Well, Your Honor,
11 1320a-2 also notes that it's not disagreeing
12 with the outcome in Suter. And I -- and I think
13 the best way to interpret that is saying this
14 can't be the sole reason.

15 And I think I heard my friend mention
16 the Armstrong plurality. I mean, I think it's
17 worth noting that 1320a-2 was briefed in that
18 case, and the Armstrong plurality nevertheless
19 reached the conclusion that it did, that the
20 inclusion in this plan list was a relevant
21 consideration. And, as I said earlier, I think
22 that does flow fairly from Gonzaga.

23 JUSTICE SOTOMAYOR: Now, for 20 years,
24 the government took the position that the "free
25 choice of provider" provision was enforceable

1 via Section 1983. You now say that Talevski
2 made you change your mind.

3 But I'm confused by that. I thought
4 Talevski just reiterated that Gonzaga analysis
5 governs step 1. So you took the position -- the
6 same position after Gonzaga. Did you need a hit
7 over the head or --

8 MR. HAWKINS: Well, respectfully, Your
9 Honor, I think we note in our brief that with
10 the --

11 JUSTICE SOTOMAYOR: Meaning did you
12 need for us to say it a second time before you
13 understood it or --

14 MR. HAWKINS: Your Honor, as we note
15 in our brief, with the change in administration,
16 the federal government re-evaluated its position
17 in this case, and we believe that the view we're
18 advancing today is the best reading of the
19 statute.

20 JUSTICE SOTOMAYOR: Now the government
21 takes the position, as have many, that for
22 Spending Clause legislation, that the remedy is
23 only that of Congress -- of the agency
24 withholding money from someone who violates its
25 provisions.

1 It does seem awfully odd to think that
2 that is a remedy at all because what you would
3 be doing would be depriving thousands of other
4 Medicaid recipients of coverage in a particular
5 state over the fact that an individual has been
6 denied something that the provision says they're
7 entitled to.

8 Is there much sense in that?

9 MR. HAWKINS: Well --

10 JUSTICE SOTOMAYOR: If you have
11 something, as Justice Kagan said, is an
12 individual obtaining a privilege of choosing its
13 provider, why would we say that because it's
14 Spending Clause, somehow the only remedy is
15 suspension of benefits?

16 MR. HAWKINS: Well, Your Honor, I -- I
17 guess a couple things. I mean, first, that's
18 been the basic Spending Clause framework since
19 at least Pennhurst and maybe going even farther
20 back. That's -- that's typically how any
21 Spending Clause statute works.

22 JUSTICE SOTOMAYOR: Yes, but --

23 MR. HAWKINS: The -- the --

24 JUSTICE SOTOMAYOR: -- the question is
25 you don't disagree that there's no magic word

1 formulation for a right. And I assume in your
2 brief that you accepted that "may obtain"
3 formulation could confer rights depending on the
4 circumstances. And, here, you say the
5 circumstances don't.

6 But why can't or why shouldn't we take
7 into account that the Act itself doesn't provide
8 a mechanism for redress by the recipient or by
9 the provider that the states are free to put in
10 state administrative remedies, but they don't
11 have to by the Act?

12 So wouldn't a circumstance like that
13 inform someone that it's a right that the
14 individual should be able to enforce in court?

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

18 First, you mentioned the -- the "may
19 obtain" language. What we're trying to indicate
20 in our brief is that we don't want to foreclose
21 the possibility that somewhere someday Congress
22 could enact a statute that used a phrasing like
23 that to create a right. I mean, it's difficult
24 to predict the future.

25 JUSTICE SOTOMAYOR: The Bill of Rights

1 does it all the -- doesn't it?

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

3 JUSTICE SOTOMAYOR: The Bill of Rights
4 itself does it?

5 MR. HAWKINS: So I --

6 JUSTICE SOTOMAYOR: "No person shall"
7 and then it says --

8 MR. HAWKINS: Oh --

9 JUSTICE SOTOMAYOR: -- "no state may,"
10 a person -- you know.

11 MR. HAWKINS: The -- the Bill of
12 Rights doesn't use the phrase "may obtain."

13 JUSTICE SOTOMAYOR: No, but it --

14 MR. HAWKINS: I think that --

15 JUSTICE KAGAN: Well, Mr. Hawkins,
16 "may obtain" in this language is just to say --
17 I mean, a person doesn't have to go see a
18 doctor. It's the person may go see a doctor,
19 but it's of their choice.

20 The "may" has nothing to do with the
21 question that we're talking about now. The
22 "may" is just like you don't have to see anybody
23 if you don't want to.

24 MR. HAWKINS: I respectfully don't
25 think that's the best reading of the statute. I

1 mean, we're looking for unambiguous
2 rights-creating language, and I think that our
3 problem with "may" is that it's inherently
4 ambiguous. It's usually used to create
5 permission. And I think --

6 JUSTICE KAGAN: It depends on the
7 context.

8 MR. HAWKINS: -- there's a difference
9 between permission and a right.

10 JUSTICE KAGAN: I mean, the "may" is
11 just you may see a doctor. You -- you know, we
12 don't expect that -- you know, we're not forcing
13 people to see doctors. So that's the way the
14 "may" functions in the sentence.

15 MR. HAWKINS: Well, if that's right,
16 Your Honor, I think that would be unique. I
17 mean, I -- in Respondents' brief, I don't think
18 I saw one example of any federal statute
19 anywhere that creates a right using the phrase
20 "may obtain." It's just not something that has
21 that sort of -- I think I heard my friend say,
22 like, a rights-creating pedigree.

23 JUSTICE KAGAN: Can I ask about this
24 idea that you have to say "right" or
25 "entitlement" or -- what was the other words

1 that -- "privilege." "Privilege" is sort of not
2 a right, but, okay, "right," "entitlement," or
3 "privilege"?

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

16 MR. HAWKINS: May I answer the
17 question, Mr. Chief Justice?

18 CHIEF JUSTICE ROBERTS: Yes.

19 MR. HAWKINS: Yeah. So I think this
20 came up in Alexander versus Sandoval. I think
21 it's page 288 of that opinion. The Court
22 recognizes that its -- we evaluate older
23 congressional laws through modern
24 jurisprudential lenses. I believe Justice
25 Stevens' dissent objected to that, but the

1 majority nevertheless concluded that that's the
2 appropriate framework to evaluate congressional
3 statutes. And, indeed, I believe that happens
4 in other contexts with statutes going back much
5 farther.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas?

9 Justice Alito, anything?

10 Justice Kagan?

11 Justice Kavanaugh?

12 JUSTICE KAVANAUGH: I just want to
13 isolate the role of the alternative enforcement
14 mechanism in your analysis. Could a -- could a
15 term be rights-enforcing if there's no
16 alternative enforcement mechanism but the same
17 term be not rights-enforcing if there is an
18 alternative enforcement mechanism?

19 MR. HAWKINS: Justice Kavanaugh, I
20 guess I'm trying to think of a -- an example
21 where -- where that would be true. I -- I guess
22 I have to answer the question yes because it's
23 hard to know how that would play out in any
24 given statute.

25 I mean, we know from Talevski that we

1 look at terms as they're situated in structure
2 and context. So we're always taking structure
3 and context into account. And so it's --

4 JUSTICE KAVANAUGH: So are you saying
5 that a statute without an alternative
6 enforcement mechanism is problem -- more
7 problematic in your analysis? I think that is
8 what you're saying.

9 MR. HAWKINS: Well, we do -- the -- we
10 do think that the alternative enforcement
11 mechanisms here -- I think "buttress" is the
12 word that's used in Gonzaga -- buttress --

13 JUSTICE KAVANAUGH: Well, that's why
14 I'm trying to isolate the role of -- in your
15 analysis. And -- and maybe --

16 MR. HAWKINS: Yeah.

17 JUSTICE KAVANAUGH: -- maybe you're
18 saying you can't -- you can't do that.

19 MR. HAWKINS: Yeah. So -- so I --
20 I -- I do think that it's relevant. I don't
21 know that it would move the needle here in this
22 particular case.

23 So, if there were no back-end remedies
24 for providers who are excluded, I still think
25 we're missing the clear, unmistakable

1 rights-creating language directed at a specific
2 party that has specific duties as to specific
3 people.

4 And since we're missing all of that, I
5 don't think the back-end remedies matter. But I
6 think the fact that we do have the back end here
7 reinforces our conclusion on the front end.

8 JUSTICE KAVANAUGH: Do you agree with
9 Petitioner's counsel on the universe of terms
10 that you think are usually or always
11 rights-creating?

12 MR. HAWKINS: Well, Your Honor, I
13 don't know that I've got a specific
14 comprehensive list. I mean, I think I heard my
15 friend say the word "right." I think I heard
16 "entitlement."

17 JUSTICE KAVANAUGH: "Privilege."

18 MR. HAWKINS: I think I heard
19 "privilege."

20 JUSTICE KAVANAUGH: And "immunity."

21 MR. HAWKINS: Yeah, those all sound
22 right.

23 JUSTICE KAVANAUGH: Well, if you -- if
24 you don't, you -- you come up here and you say,
25 you know: We're concerned about line-drawing

1 problems. But you're not -- what -- what's the
2 line exactly? You want us to do a line. Well,
3 tell -- tell me what the line is.

4 MR. HAWKINS: Sure. I think -- I
5 think those three words would count.

6 I think, you know, looking at Title VI
7 and Title IX, you know, no person shall be
8 subject to discrimination, I think that gets the
9 job done as well.

10 Maybe a helpful way to think about it,
11 Justice Kavanaugh, is we're looking for words
12 that have a real rights-creating pedigree in our
13 nation's history and legal traditions. I think
14 the words that --

15 JUSTICE KAVANAUGH: Well, I think
16 Justice Kagan's raised good points about how,
17 once you, you know, open it up like that, it's
18 going -- there are going to be line-drawing
19 problems. You're not going to solve the issue
20 that you -- you came here to solve.

21 MR. HAWKINS: Well, Your Honor, I -- I
22 don't know that there's a way to avoid
23 line-drawing problems without saying that we
24 need the word "right" and exclusively "right"
25 and nothing else. And I -- I don't --

1 JUSTICE KAVANAUGH: Okay. Well,
2 you -- you -- right at the beginning, you said
3 you wanted to avoid line-drawing problems,
4 but --

5 MR. HAWKINS: Well, I -- I -- I think
6 that the Court could avoid a lot of the
7 difficult cases by making clear, as it said in
8 Talevski, that we're looking for atypical
9 language with this clear rights-creating
10 pedigree.

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

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett?

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

20 I mean, so both you and your friend
21 have talked about the possibility that many
22 other statutes and many other provisions then
23 might be understood to be enforceable through a
24 private cause of action.

25 But what about this one? I mean,

1 how -- I mean, so, here -- we're -- we're here
2 because of Planned Parenthood not being a
3 qualified provider in South Carolina. But would
4 people -- like, would this open the floodgates
5 of people bringing 1983 suits because they can't
6 see the provider of their choice, or is this
7 kind of a pretty unusual circumstance?

8 MR. HAWKINS: Well, Your Honor, it's
9 hard to say it's unusual. There have been a
10 number of lawsuits in a number of states about
11 (a)(23) in specific. I -- I think it's the most
12 litigated provision within 1396a.

13 JUSTICE BARRETT: Is it all about
14 abortion providers?

15 MR. HAWKINS: No, I don't believe so.
16 I believe there have been other instances. I
17 believe -- I'm worried about misspeaking. I
18 think one out of the Seventh Circuit didn't
19 involve abortion providers. It was in another
20 context.

21 We're -- we're not resting on any
22 particular floodgates argument.

23 JUSTICE BARRETT: Oh, I -- I -- I
24 didn't mean to suggest that you were. I was
25 just wondering.

1 MR. HAWKINS: Okay.

2 JUSTICE BARRETT: Okay. Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Jackson?

5 JUSTICE JACKSON: Yeah, three quick
6 points.

7 Just clarifying in your response to
8 Justice Sotomayor about what motivated the
9 government's change of position here, I heard
10 you say it's the change in administration that
11 caused the change in position, not necessarily
12 anything new or different in Talevski. Is that
13 right?

14 MR. HAWKINS: Well, Your Honor, we
15 think that the Talevski approach in -- in Your
16 Honor's opinion for the Court gives us more
17 confidence in the position that we're
18 advocating.

19 JUSTICE JACKSON: I understand. But
20 you don't see daylight between what Talevski was
21 saying and what Gonzaga said, which is what the
22 Bush administration and many, many other prior
23 administrations relied upon in reaching the
24 opposite conclusion here, right?

25 MR. HAWKINS: So I think Talevski does

1 a couple of things that maybe reinforce what
2 Gonzaga said in a way that helps think through
3 the issue more clearly.

4 I mean, number one, Talevski
5 emphasizes that these statutes are atypical, and
6 so we're looking for the atypical situation, not
7 the run-of-the-mill situation.

8 And -- and, second, in -- in Your
9 Honor's opinion for the Court -- I think it's in
10 part 3-2 -- it's noteworthy that it begins
11 looking at the overall placement of the text
12 within the structure, within the statutory
13 structure. And we think that that's an
14 indication that it really is important to marry
15 text, context, and structure all together.

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

19 JUSTICE JACKSON: All right. Can you
20 point me to the section in your brief that
21 endorses any particular words or bright-line
22 rule?

23 I -- I was kind of struck because I
24 thought that was the difference between you and
25 Petitioner when I read your brief. I didn't

1 take the United States to be adopting that kind
2 of test. So --

3 MR. HAWKINS: Well, I --

4 JUSTICE JACKSON: -- are you saying
5 something different here at the podium than you
6 were in your brief?

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

9 JUSTICE JACKSON: So the United States
10 is on fours with -- all fours with the idea that
11 we need to tell Congress exactly the words that
12 have to be used in order to create rights?

13 MR. HAWKINS: Well, I -- I think what
14 we've argued in our brief and what I'm -- I
15 certainly mean to argue today is that we're
16 looking for unmistakable rights-creating
17 language.

18 I think that's what we say in our
19 brief. And in our conversation this morning,
20 we've elucidated some ways that Congress could
21 do that, and I think that's consistent what what
22 we've been saying.

23 JUSTICE JACKSON: All right. Finally,
24 has, to your knowledge, HHS ever withheld
25 Medicaid funding for -- from a state for

1 violating this free-choice provider provision?

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

6 MR. HAWKINS: Your Honor, we don't
7 know of any instance in which funding has been
8 withheld in connection with (a)(23). We note in
9 our brief that we have denied plan modifications
10 for failure to comply with (a)(23). But, as to
11 funding, we don't have an example of that
12 happening.

13 I wouldn't read too much into that.
14 Again, this is a substantial compliance regime.
15 We've been concerned with compliance in the
16 aggregate. And the lack of funding denials, I
17 think, suggests that states are complying in the
18 aggregate.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 MR. HAWKINS: Thank you, Your Honor.

23 CHIEF JUSTICE ROBERTS: Ms. Saharsky.

24

25

1 ORAL ARGUMENT OF NICOLE A. SAHARSKY

2 ON BEHALF OF THE RESPONDENTS

3 MS. SAHARSKY: Mr. Chief Justice, and
4 may it please the Court:

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

11 She can for four reasons. First, look
12 at the text. It refers to individuals, any
13 individual eligible for medical assistance. It
14 gives them a right to choose their own doctor.
15 They "may obtain such assistance from any
16 qualified and willing provider." And it's
17 mandatory. The state must do it as part of the
18 federal state bargain. This language satisfies
19 the standard that the Court set out in Gonzaga
20 and Talevski. It uses mandatory,
21 individual-centric, rights-creating language.
22 The only thing it doesn't do is use the word
23 "right." And this Court has repeatedly said
24 that magic words aren't required.

25 Second, look at the context. Congress

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

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

19 And, fourth, there is no alternative
20 federal remedy. There is no way for individuals
21 to challenge the state's decision to deny them
22 their provider of choice. There's no federal
23 cause of action. There's no administrative
24 remedy.

25 Congress expected that an individual

1 would be able to sue in the rare instance when a
2 state is keeping a needy patient away from a
3 qualified and willing provider. If the
4 individual can't sue, this provision will be
5 meaningless.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Do you think that
8 rights-creating language under the -- under the
9 enumerated powers is different from the language
10 required under the Spending Clause?

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

22 And I think the -- the way that you
23 can tell that the word "right" is just a magic
24 words test here, I think, from my -- my friends
25 on the other side and why you don't need it is

1 because the statute here would do the exact same
2 thing if it said the word "right" as opposed to
3 what it says now.

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

10 MS. SAHARSKY: Well, I think it
11 creates a right either way. I think there's --
12 Congress can write statutes --

13 JUSTICE THOMAS: Well, I'm talking
14 about the language. If it's more demanding and
15 it's atypical, what language that we have --
16 what language that we have here you would not
17 need in the Commerce Clause case?

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

23 Second, it says that the -- there's --
24 any individual may -- may obtain care from
25 their -- from any qualified and willing

1 provider. So it's the combination of "any
2 individual" "may obtain care from any qualified
3 and willing provider."

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

13 I don't think anyone disagrees what --
14 what this provision is about. Maybe there's
15 some --

16 JUSTICE THOMAS: But do you think that
17 language is more exacting than would be required
18 under the Commerce Clause?

19 MS. SAHARSKY: I don't -- I -- I --
20 I'm -- I'm not certain. I think the Court has
21 said that the -- that in the -- in the Spending
22 Clause context, that -- that Congress needs to
23 speak clearly.

24 My point is just that Congress has
25 spoken clearly here because it has used what

1 this Court requires. The Court says we want to
2 look to see if there's individual-centric
3 rights-creating language that imposes a
4 mandatory obligation. The Court has never said
5 it has to say the word "right" or it has to be
6 magic words or anything like that.

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

16 And, here, it's not like Congress just
17 wrote this statute, you know, 50 years ago and
18 nothing has happened. Congress has come back
19 when this Court has interpreted this statute in
20 a way that the Court thought -- that Congress
21 thought was inappropriate with the Suter fix.
22 And that's a case where, as one of the factors
23 that was considered for whether language created
24 an individual right, not the sole factor, but as
25 one of the factors, this Court said in the Suter

1 decision we see that it's part of the state plan
2 requirements.

3 And Congress came back with language
4 that I think was quoted by one of the justices
5 that said, you know, no, that can't be a reason
6 why --

7 CHIEF JUSTICE ROBERTS: Counsel --

8 MS. SAHARSKY: -- because --

9 CHIEF JUSTICE ROBERTS: I'm sorry.
10 Finish your sentence, please.

11 MS. SAHARSKY: It -- it just can't be
12 a reason why.

13 CHIEF JUSTICE ROBERTS: Okay. Do you
14 think our opinions in Talevski and Gonzaga
15 narrowed Wilder in any way?

16 MS. SAHARSKY: Well, the Court didn't
17 mention Wilder.

18 CHIEF JUSTICE ROBERTS: Is that a way?

19 MS. SAHARSKY: The concurrence did.

20 CHIEF JUSTICE ROBERTS: Is that a way?

21 MS. SAHARSKY: Well, I -- I think the
22 Court made clear in Blessing -- in -- in -- in
23 Gonzaga that the -- that to the extent that
24 Wilder could be read in a certain way, which is
25 to readily imply individual rights and not to

1 require unambiguous rights-conferring language,
2 Gonzaga says don't read Wilder that way. And so
3 I thought that was clear in Gonzaga. And then,
4 in Talevski, the Court said we are using our
5 established test, which was settled in Gonzaga.

6 So I think that Gonzaga is the one
7 that explained that to the extent that
8 Talevski -- that Wilder had this -- didn't
9 require an unambiguous conferral of an
10 individual -- an individual right, that that was
11 wrong.

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

23 And so, you know, the Court has, I
24 think, used that -- that reasoning in Wilder.
25 That's the only reasoning that the Fourth

1 Circuit cited below. We think that's good
2 reasoning. But, even if you think -- even if
3 you act like Wilder doesn't exist, we think it
4 gets you to the same result in this case because
5 we're basing our argument on the requirements
6 set out in Gonzaga and in Talevski.

7 Just to go back to --

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

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

19 MS. SAHARSKY: Right. Rights-creating
20 language confers an individual entitlement.
21 It's for an individual and it is a protection,
22 an entitlement to something. Benefits --
23 language that addresses benefits or creates
24 benefits, which is often policy or practice
25 language, is aggregate language like -- that

1 refers to a policy or practice that has an
2 effect on, a beneficial effect on, individuals,
3 but it's not focused on protecting some
4 particular right or entitlement of the
5 individuals.

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

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

21 So it's the "may obtain from any
22 qualified and willing provider," "any," which
23 says that this is something that stops the state
24 and that this is something that has to be
25 followed.

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

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

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

21 JUSTICE GORSUCH: Well, just to follow
22 up on that, Ms. Saharsky, one can imagine a
23 statute written as an individual benefit that's
24 mandatory on the states but isn't a
25 right-creating -- I mean, we -- I think we can

1 agree on that.

2 MS. SAHARSKY: Sure. I think there
3 are a lot of provisions --

4 JUSTICE GORSUCH: So --

5 MS. SAHARSKY: -- in the state plan
6 requirements that are like that.

7 JUSTICE GORSUCH: Yeah.

8 MS. SAHARSKY: They all create rights.

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

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

18 JUSTICE GORSUCH: I'm --

19 MS. SAHARSKY: -- in the state plan
20 requirements that says any individual may
21 obtain, like the language here.

22 JUSTICE GORSUCH: So, once --

23 MS. SAHARSKY: There's nothing.

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

1 MS. SAHARSKY: Right.

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

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

12 JUSTICE GORSUCH: Well, yeah, yeah.

13 MS. SAHARSKY: And we focused on what
14 the --

15 JUSTICE GORSUCH: Yeah.

16 MS. SAHARSKY: I think our dialogue --
17 right.

18 JUSTICE GORSUCH: That third one's the
19 tricky one, right?

20 MS. SAHARSKY: One hundred percent.
21 And I think that's where we're talking about
22 an -- an individual entitlement that the state
23 has to provide something or that the state
24 cannot do something to someone like "no state
25 shall" -- we talked about the discrimination --

1 JUSTICE GORSUCH: Sure. But --

2 MS. SAHARSKY: -- language that's in,
3 like, Title VI.

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

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

12 MS. SAHARSKY: The Court -- Congress
13 could write statutes in a lot of different
14 ways --

15 JUSTICE GORSUCH: Yeah.

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

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

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

10 JUSTICE GORSUCH: So that would be
11 different.

12 MS. SAHARSKY: -- language is
13 stronger.

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

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

23 JUSTICE GORSUCH: Well, what if --
24 what if it did? What if it said states shall
25 create a policy to allow individuals to pick a

1 provider? Would that be rights-creating?

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

10 But the -- the point is, is that
11 Congress has flexibility in how it writes
12 statutes. It sometimes says in statutes, like,
13 this provision does not create any individually
14 enforceability rights given --

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

17 MS. SAHARSKY: It's not a magic --
18 I -- I -- I don't think it makes sense -- I -- I
19 respectfully suggest that this Court --

20 JUSTICE GORSUCH: I mean, is that
21 what --

22 MS. SAHARSKY: -- should not think of
23 it in terms of magic words. And, in all of the
24 Court's cases that have required clear
25 statements in other contexts, the Court has

1 said, look, it's not magic words; we don't tell
2 Congress how to write statutes.

3 JUSTICE GORSUCH: So it doesn't need
4 to do that either. So -- okay. All right.
5 Thank you.

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

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

15 MS. SAHARSKY: No.

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

20 When we take a step back -- and maybe
21 this is what's the broader separation-of-powers
22 concern. The broader separation-of-powers
23 concern is the Congress creates rights of action
24 and remedies, not the Court.

25 And in Gonzaga -- and that wasn't

1 really the view in the '70s and '80s. And in
2 Gonzaga, the Court specifically linked this
3 issue, this issue with the implied rights of
4 action case law. And since Gonzaga in that
5 other implied rights of action, we have really
6 tightened up, whether it's Bivens or otherwise,
7 and said essentially that far and no further.

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

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

23 What we're saying is that this
24 provision meets the bar. We don't think that
25 there are a lot of others, if any, in the state

1 plan requirements that would meet that high bar,
2 but this language here "may obtain from any
3 qualified and willing provider" does.

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

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

17 So we have what Congress said here,
18 you know, any -- any individual may obtain care
19 from any qualified and willing provider. If it
20 said any individual has a right to obtain care
21 from any qualified and willing provider, it does
22 the same thing. It's the exact same effect like
23 out in the world in terms of placing the
24 limitation on the state.

25 It could also say, I think the state

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

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

21 JUSTICE ALITO: Well, before you get
22 to that, would you agree with the proposition
23 that what we need to find in order to say that a
24 provision in Spending Clause legislation enables
25 enforcement by a private party under 1983,

1 something that's quite extraordinary, because
2 the norm for -- start out, if you back up,
3 Spending Clause legislation is an agreement
4 between the state and the federal government.
5 Yeah, it's an offer the state can't refuse, but,
6 nevertheless, that's the form of it.

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

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

25 MS. SAHARSKY: Yes. Let me say three

1 things about that.

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

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

14 JUSTICE ALITO: So just to --

15 MS. SAHARSKY: And then --

16 JUSTICE ALITO: This is helpful. So
17 individual is not enough. Mandatory is not
18 enough. You need something more. And what is
19 that more here that tips this -- makes this
20 really atypical, not typical?

21 MS. SAHARSKY: "May obtain from any
22 qualified and willing provider." That's the
23 rights-creating language, the third ingredient
24 that this Court has talked about.

25 The "may obtain" in this -- in this

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

5 And there's this --

6 JUSTICE ALITO: But what Congress made
7 -- I'm sorry, go ahead.

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

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

19 There's also "may" language used in
20 the Constitution, which I think is pretty
21 powerful, you know, "The judicial Power of the
22 United States shall be vested in one supreme
23 Court and in such inferior Courts as the
24 Congress may from time to time ordain and
25 establish."

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

7 JUSTICE ALITO: Well, the problem --
8 the problem is that Congress may well have had
9 in mind -- maybe it's likely that what they had
10 in mind, is simply that this is something that
11 the state has to do, but not that this is
12 something that allows an individual to sue in
13 court.

14 So don't we need something more than
15 that?

16 MS. SAHARSKY: Well, there's the
17 reference to the individual, and there's an
18 entitlement to the individual. And then we have
19 on top of it what is called the Suter fix, which
20 is Congress coming back to this Court after the
21 decision in Suter versus Artist M and saying
22 some of these plan requirements are -- we expect
23 will be individually enforceable. The fact that
24 it's a state plan requirement doesn't make it
25 not individually enforceable.

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

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

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

21 And, you know, this has been the
22 long-standing position of the federal
23 government. The first decision on this issue
24 with this statute was, you know, Judge Sutton's
25 opinion for the Sixth Circuit more than 20 years

1 ago. Like, if the flood of lawsuits was
2 supposed to happen, you know, we would expect to
3 see it.

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

10 They're not getting damages from the
11 state under Section 1983. This Court already
12 has precedents like saying that that generally
13 can't happen when a state official's acting in
14 their individual capacity. What they're seeking
15 is declaratory and injunctive relief. That's
16 what all these cases that led to the circuit
17 split are about.

18 Getting declaratory and injunctive
19 relief, when a state has for reasons unrelated
20 to medical competency just kicked out a provider
21 and the individual said you've denied me my
22 right to a provider of choice and I just want
23 some healthcare. These aren't people getting
24 rich. You know, they're just trying to get
25 healthcare here.

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

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

13 Do you agree that they've been
14 explicitly eclipsed by Gonzaga and Talevski?
15 And do you have a problem with our just saying
16 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 provision is not
6 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 I agree we're only talking about
18 an analytical framework, that we're not talking
19 about the results of particular cases. It just
20 seems like it already was pretty clear, but
21 maybe we should just say it.

22 And it sounds like you're okay with
23 that, saying Gonzaga and Talevski are -- are --
24 set 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 the -- many of the other
4 courts of appeals, Judge Wilkinson tried very
5 hard to, like, trace this Court's case law and
6 talk about how those decisions had been limited.
7 His analysis seemed right to us and was, you
8 know, 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: 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 know,
7 there's a -- a dispute about that, as you were
8 saying with Justice Kagan. But, if we take it
9 out of that, that you've disqualified a provider
10 because of non-Medicaid services that they
11 provide, be it gender transition, contraception,
12 abortion, whatever, that's a different issue,
13 right, than can you imagine if the state in an
14 area that we would all agree that the state gets
15 a healthy dose of deference, like, let's say,
16 you know, a doctor had malpractice -- a certain
17 number of malpractice suits or had violated, you
18 know, standards in some other way.

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

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

5 MS. SAHARSKY: Well, the Congress
6 wanted the patient to have the ability to see
7 their -- their provider of choice if it's a
8 qualified and willing provider.

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

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

23 CHIEF JUSTICE ROBERTS: Sure.

24 MS. SAHARSKY: -- is pretty simple,
25 which is states aren't for the most part keeping

1 needy patients away from qualified and willing
2 providers. It's just not happening.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas?

6 Justice Alito?

7 Justice Sotomayor?

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

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

22 MS. SAHARSKY: So let me start with
23 the substantial compliance question.

24 I think the state's argument is wrong
25 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 governors 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 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 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 the rights-creating pedigree.

9 Justice Kavanaugh noted that the clear
10 lines dissolve quickly, if you don't require
11 that explicit words, and this argument proves
12 that. 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 choice of
19 provider provision. The words "free" and
20 "choice" don't appear anywhere in the statute.

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

1 distinction that makes a difference.

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

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

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

19 A couple quick points. Our reply
20 brief, pages 22 to 23, explain why the
21 Respondents are wrong about their understanding
22 of Regulation 16-404. Page 22 gives the
23 statutory citation that contemplates the
24 provider administrative appeals. And Reply 23
25 explains that the administrative appeal remedy

1 is not futile and our counsel did not admit that
2 below.

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

7 And the fact that the 12 of us can
8 have such a robust conversation about whether
9 this statute is mandatory or not, whether it's
10 rights-creating or not, demonstrates that the
11 rights-creating language is ambiguous, not clear
12 and explicit.

13 And if there is any ambiguity in this
14 context, the state has to win because it's not
15 being put on notice of when it might be sued.

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

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel. The case is submitted.

24 (Whereupon, at 11:49 a.m., the case
25 was submitted.)

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