

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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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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Pages: 1 through 115  
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4   SOUTH CAROLINA DEPARTMENT OF            )  
5   HEALTH AND HUMAN SERVICES,                )  
6                                    Petitioner,            )  
7                                    v.                                ) No. 23-1275  
8   PLANNED PARENTHOOD SOUTH ATLANTIC, )  
9   ET AL.,                                        )  
10                                    Respondents.            )  
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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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6 United States, as amicus curiae, supporting the  
7 Petitioner.  
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9 behalf of the Respondents.  
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P R O C E E D I N G S

(10:15 a.m.)

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

Mr. Bursch.

ORAL ARGUMENT OF JOHN J. BURSCH

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

8 I welcome the Court's questions.

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

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

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

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

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

4 JUSTICE SOTOMAYOR: So --

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

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

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

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

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

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

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

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

22 But, in the IRS hypothetical, there's  
23 a number of problems with that. First, as we  
24 point out on page 9 of our reply, it could be  
25 clearer. But more important, the IRS provision

1 is not a Spending Clause provision. It's not  
2 this conversation between a state and the  
3 Secretary of Health and Human Services about  
4 what must be done.

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

13 It seems hard to understand that  
14 states didn't understand that they had to  
15 give -- provide individuals the right to choose  
16 a provider.

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

22 And I can make that same statement  
23 about what's important to people or what's  
24 significant about dozens of other provisions in  
25 1396a, if you're talking about equal protection

1 or the right to services. How about being  
2 reinstated on the Medicaid program after you've  
3 been in prison?

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

8 JUSTICE SOTOMAYOR: It doesn't seem --

9 MR. BURSCH: -- "any qualified  
10 provider" provision.

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

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

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

1 do and it doesn't.

2           The others, again, none of them have  
3 disputes. Some uniformly, courts have said,  
4 don't create private rights, and others they  
5 have said they do. Where they say they do, to  
6 me, it's a simple issue. You have to provide a  
7 fair hearing before the state agency of any  
8 individual who claims coverage. Most states  
9 have a hearing of some sort.

10           But -- so I don't understand why that  
11 makes -- is important here.

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

19           JUSTICE JACKSON: Can I --

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

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

3 JUSTICE KAGAN: The state has an  
4 obligation to provide this particular thing,  
5 right, which is the state has an obligation to  
6 ensure that a person -- I don't even know how to  
7 say this -- without saying "right" -- has a  
8 right to choose their doctor.

9 That's what this provision is. It's  
10 impossible to even say the thing without using  
11 the word "right."

12 Has a benefit to choose their doctor?  
13 The state has to ensure that individuals have a  
14 benefit to choose their doctor?

15 The state has to ensure that  
16 individuals have a right to choose their doctor.  
17 That's what this provision is.

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

22 JUSTICE KAGAN: I -- I don't want four  
23 reasons. I want you to answer my question. The  
24 obligation is to ensure that individuals can  
25 choose their doctor, and when we speak of that,

1 the obligation is to -- I mean, there's a  
2 correlative right. There's an obligation,  
3 there's a right, and the right is the right to  
4 choose your doctor.

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

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

23 So what doesn't the state know that's  
24 important here?

25 MR. BURSCHE: Whether it's going to be

1 sued in federal court. In other words --

2 JUSTICE KAGAN: Well, if -- if --  
3 if -- if you know that you have an obligation  
4 and you know that the individual has a right to  
5 choose their doctor, that suggests that there's  
6 some kind of enforcement.

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

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

17 In addition --

18 CHIEF JUSTICE ROBERTS: One of the --  
19 one of the -- one of the benefits provided by  
20 the Act is that you may choose your own doctor.

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

23 MR. BURSCH: They have a very specific  
24 remedy. If they are denied benefits, there's an  
25 administrative appeal process that they can go

1 through. But there is a separate remedy for  
2 providers who are disqualified. They also have  
3 an administrative appeal that could go through  
4 the state court system, and that could come to  
5 this Court if necessary.

6 And it makes sense that Congress would  
7 create the appeal right for the disqualification  
8 in the provider, not the beneficiary --

9 JUSTICE SOTOMAYOR: I'm sorry.

10 MR. BURSCH: -- because --

11 JUSTICE SOTOMAYOR: I'm sorry. The  
12 Medicaid recipient can only sue a denial for  
13 services that were actually rendered.

14 MR. BURSCH: Yes.

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

17 MR. BURSCH: That's correct.

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

23 Here, they can only challenge --  
24 providers can only challenge a certain subset of  
25 disqualifications via South Carolina's

1 administrative review process. They can only  
2 challenge a disqualification because of a -- of  
3 a criminal conviction or abuse.

4 So the providers here did go through  
5 the administrative process, and they were told  
6 they can't sue for this here.

7 MR. BURSCH: Justice Sotomayor, that  
8 is what they put in their brief. That is  
9 absolutely not what that regulation says.

10 126-404 says that those particular  
11 things that you mentioned, like a criminal  
12 conviction or recouping payments --

13 JUSTICE SOTOMAYOR: So why were they  
14 denied here?

15 MR. BURSCH: Well, can I finish?

16 JUSTICE SOTOMAYOR: They're not --  
17 but, go ahead.

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

25 And the reality is they haven't

1 pursued their administrative appeal yet. They  
2 went straight to court. They recruited a  
3 beneficiary. They filed their 1983 suit.

4 The state responded to that with a  
5 brief in opposition to a preliminary injunction  
6 motion and said: Hey, your -- your remedy,  
7 which you agreed in your contract was your  
8 exclusive remedy, is to go through the  
9 administrative appeal that we offer you, and --

10 JUSTICE JACKSON: So, Mr. Bursch, can  
11 I just ask you, to what extent is the  
12 administrative appeal scheme relevant to the  
13 first step of this inquiry?

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

25 So can you just help me to understand

1 whether you're now suggesting that we evaluate  
2 whether this is rights-creating, as we talked  
3 about, in the first step relative to an  
4 understanding of what Congress has done with  
5 respect to enforcement?

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

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

15 And so we're -- we're using the  
16 provider's remedy and the lack of any  
17 beneficiary remedy to be able to challenge --

18 JUSTICE JACKSON: But that does  
19 seem --

20 MR. BURSCH: -- that provider's  
21 disqualification.

22 JUSTICE JACKSON: -- awfully  
23 confusing. I mean, I -- you know, there isn't a  
24 whole lot of indication that lower courts are --  
25 are -- are confused about this.

1           I -- I -- I looked very carefully at  
2 Judge Wilkinson's opinion. He lays out very  
3 clearly how this works and what we've said  
4 repeatedly. And I guess my concern is that the  
5 kinds of things -- and I appreciate you had a  
6 long list of reasons why you think this isn't  
7 rights-creating -- but one of them had to do  
8 with the nature of this -- you know, the  
9 enforcement mechanism, and I just see that as a  
10 step 2 concern, and I'm worried about us getting  
11 people confused if we start putting those  
12 considerations into the first analysis.

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

18           In step 1, just like in Gonzaga, just  
19 like in Suter, the Court is entitled to consider  
20 remedies like the fact that the -- the  
21 disqualified provider has an administrative  
22 appeal to determine whether there is a right to  
23 go to court.

24           And I would note that one of the  
25 reasons it's significant Congress gave that

1 administrative appeal to the disqualified  
2 provider and not to the beneficiary is because  
3 the -- the provider is the one who has all the  
4 information.

5 Under Respondents' theory, if a  
6 provider commits malpractice and they're  
7 disqualified for that reason, there's still a  
8 beneficiary right to go to federal court and  
9 bring a 1983 action.

10 And that makes no sense because what  
11 does a beneficiary know about a provider's  
12 medical malpractice involving other patients?

13 JUSTICE JACKSON: All right. Well,  
14 can I get -- can I just turn your attention back  
15 to what I understand to be the classic kind of  
16 step 1 inquiry here --

17 MR. BURSCH: Yes.

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

1                   So, even if we were to have a magic  
2 words test, it seems to me to be too narrow to  
3 just say that Congress has to say "rights"  
4 because we have in the 1983 concept in -- in the  
5 actual text of the statute "rights, privileges,  
6 and immunities secured by the Constitution and  
7 laws."

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

14                   MR. BURSCH: Yeah. Two thoughts on  
15 that, Justice Jackson.

16                   JUSTICE JACKSON: Yes.

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

24                   But -- but it is a high bar. An  
25 obligation is not enough. Telling a state that

1 it has an obligation to do something or -- or  
2 that it -- it must provide something isn't the  
3 same as saying you have the ability to sue them  
4 in federal court and have 1983 fee-shifting  
5 opportunities, liability and fee shifting.

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

14 And, you know, if the word -- if the  
15 language in the statute said "right," as it did  
16 in Talevski, you would still say: Oh, well, the  
17 state doesn't know that it -- that right is  
18 enforceable.

19 What this language does is the same  
20 thing that the "rights" language does. It says:  
21 You have an entitlement. It's your option to  
22 choose a doctor.

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

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

2 CHIEF JUSTICE ROBERTS: Yes. Sure.

3 MR. BURSCH: Justice Kagan, what you  
4 said in Talevski is that you need  
5 rights-creating language with an unmistakable  
6 focus on the benefitted class. So the fact that  
7 you identify individuals and that there --  
8 there's a benefit there --

9 JUSTICE KAGAN: This is an  
10 unmistakable focus on the benefitted class.

11 MR. BURSCH: But there's --

12 JUSTICE KAGAN: The benefitted class  
13 is Medicaid beneficiaries who have the right to  
14 go see the doctor of their choice.

15 MR. BURSCH: But --

16 JUSTICE KAGAN: That's what this  
17 provision is.

18 MR. BURSCH: But, Justice Kagan, it's  
19 missing the connective tissue to the  
20 rights-creating language. You need clear  
21 rights-creating language that the beneficiaries  
22 are subject to and that is directed to the  
23 regulated entity, here, a state. And all of  
24 that connective tissue is missing because there  
25 are no clearly rights-creating words in this

1 statute.

2           If you would lower the bar, those  
3 provisions that we -- we mention in our brief  
4 are just the start. That's already 10 percent  
5 of Section 1396a. The atypical high bar that  
6 you articulated in Talevski would be abandoned  
7 and courts will continue discovering rights in  
8 all kinds of statutes.

9           CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11           Justice Thomas?

12           Justice Alito?

13           Anything? Anything further?

14           Justice Gorsuch?

15           JUSTICE GORSUCH: On the  
16 administrative review process --

17           MR. BURSCH: Yes.

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

21           MR. BURSCH: The state gives a full de  
22 novo review to a disqualification decision.  
23 That's clear on their website. It's clear in  
24 the administrative rules that govern that  
25 proceeding.

1 JUSTICE GORUSCH: Yeah, but they --

2 MR. BURSCH: They have counsel --

3 JUSTICE GORSUCH: -- they also report  
4 to the governor, right?

5 MR. BURSCH: They do, but let -- let's  
6 say you get a bad decision there. You've got an  
7 appeal right to the state courts and you've got  
8 an appeal right to this Court. So it's a -- a  
9 remedy that is fulsome and allows them to make  
10 any argument they want.

11 JUSTICE GORSUCH: You -- you  
12 emphasized Gonzaga and Talevski. But we have  
13 other cases too, Wilder, Wright, Blessing.  
14 Thoughts about our jurisprudence in this area?

15 MR. BURSCH: I -- I do. Obviously,  
16 Gonzaga and Armstrong have cast a lot of shade  
17 on decisions like Wilder, Wright, and Blessing.  
18 And I noted that, in the Talevski decision, this  
19 Court did not use any of those cases to reach  
20 its conclusion in that case.

21 But the problem is that the lower  
22 courts are still in a state of confusion about  
23 what the status of those cases are. So, for  
24 example, in Talevski, I believe Mr. Chief  
25 Justice asked a -- a question to counsel or

1 observed, haven't we put a stake in Wilder?

2 Well, outside the walls of this  
3 courtroom, lower courts have not gotten that  
4 message yet. Otherwise, Judge Wilder in his  
5 concurrence would not have said, well, we're  
6 still bound by Wilder and Wright and Blessing  
7 until this Court says that those are actually  
8 dead cases that we should no longer follow.

9 The problem with a case like Wilder is  
10 that the standard it applies is so low. Wilder  
11 says the inquiry turns on whether the provision  
12 was intended to benefit the putative plaintiff.  
13 Well, that kind of sounds like the test that  
14 Justice Kagan is propounding this morning, where  
15 you don't need rights-creating language.

16 But, if that's the case, there is no  
17 high bar, there is no atypical case, then the  
18 federal Spending Clause statutes are replete  
19 with private rights that can be enforced in  
20 federal court.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?

22 JUSTICE KAGAN: I think you gave me  
23 the option already.

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

25 (Laughter.)

1 CHIEF JUSTICE ROBERTS: Justice  
2 Kavanaugh?

3 JUSTICE KAVANAUGH: Thank you.

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

7 MR. BURSCH: Yes.

8 JUSTICE KAVANAUGH: And it's not the  
9 fault of any one judge, but, collectively, this  
10 Court has failed to give guidance, obviously,  
11 that lower courts can follow, that states,  
12 providers, and beneficiaries can follow. So one  
13 of my goals coming out of this will be to  
14 provide that clarity.

15 Your word "right" or its functional  
16 equivalent, that "or its functional equivalent"  
17 strikes me, as some of the questions have  
18 revealed --

19 MR. BURSCH: Mm-hmm.

20 JUSTICE KAVANAUGH: -- potentially  
21 lacking the clarity that I hope we can provide  
22 one way or the other going forward.

23 So don't you think it would be better  
24 to actually tell us the words that are  
25 rights-creating rather than having something

1 like "or its functional equivalent," which could  
2 be another decade of litigation?

3 MR. BURSCH: Yeah, that -- that's  
4 certainly possible because you'd have to keep  
5 that to a pretty small class. I -- I wouldn't  
6 be able to really do any better than Justice  
7 Alito's partial concurrence in Talevski, where  
8 he describes it as explicit rights-creating  
9 language.

10 And the list I would give you is  
11 "rights," "entitlement," "privilege," and  
12 "immunities." When you're -- you're using the  
13 word --

14 JUSTICE KAVANAUGH: And that's it?

15 MR. BURSCH: I -- you could define it  
16 as that universe. You know, I don't think  
17 that's a magic word, but if it is --

18 JUSTICE KAVANAUGH: Well --

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

21 JUSTICE KAVANAUGH: -- I'm not  
22 allergic to magic words because magic words, if  
23 they represent the principle, will provide the  
24 clarity that will avoid the litigation that is a  
25 huge waste of resources for states, courts,

1 providers, beneficiaries, and Congress. So --

2 MR. BURSCH: Right, right. Exactly.

3 And so, when Justice Kagan was bringing up the  
4 "may obtain" phrase -- if I could just, you  
5 know, quickly talk about that -- "may" obviously  
6 has its own ambiguity. It's not even clearly  
7 mandatory, much less having a -- a  
8 rights-creating pedigree.

9 When you pair it with the word  
10 "obtain," "may obtain," it's even less  
11 rights-creating because it's not giving anything  
12 directly to anyone in explicit terms. It's odd  
13 that that alleged rights scope is defined by the  
14 state, which is the gatekeeper to determine who  
15 is a qualified provider.

16 And then, of course, all of this is  
17 subject to the substantial compliance provision.  
18 And so, so long as this is in the plan, the  
19 state can administer it any way it wants, and if  
20 the Secretary doesn't complain if they don't  
21 honor any of the provisions, any -- any one of  
22 the provisions, then there -- there's no penalty  
23 for that.

24 So you can see how quickly, once you  
25 move away from those core words like "right,"

1 "entitlement," "privilege," "immunity," that  
2 it's easy to cascade and find rights in any  
3 provision that mentions individuals and a  
4 benefit. Like, that -- that's the problem I  
5 think you're trying to solve.

6 And if this Court doesn't toe the  
7 line, if it doesn't have the high bar, the  
8 atypical, not 10 percent of 1396a, you're going  
9 to be seeing these cases for the next decade  
10 easy. I mean, every term we could have a fight  
11 about this.

12 JUSTICE KAVANAUGH: And your  
13 response -- you've said this, but I just want to  
14 get it nailed down. Your response to the idea  
15 that those words, those terms you've given us,  
16 create an artificial divide between provisions?

17 MR. BURSCHE: Well, it's not artificial  
18 because, if we step back and think about this,  
19 this is a state entering into a contract and it  
20 knows that it has to provide benefits. We've  
21 talked about that.

22 The question is whether it's on notice  
23 that there is a private right that can be  
24 enforced in a Section 1983 action with attorney  
25 fee shifting, where all of a sudden money is

1 flowing into attorneys' pockets instead of into  
2 the beneficiaries', who are supposed to be  
3 getting the benefits of the congressional  
4 appropriation.

5           So, if you don't limit it to those few  
6 words, then all of a sudden you're -- you've  
7 got -- the floodgates are open. And I know  
8 their contention is, well, there is no real  
9 floodgates. Well, you know, we've cited circuit  
10 case after circuit case about all kinds of  
11 different provisions.

12           In the context of the "any qualified  
13 provider" provision alone, we're talking about  
14 9,000 providers who have been disqualified  
15 across the country, any one of whom, if you rule  
16 in favor of Respondents, can recruit a  
17 beneficiary and go to federal court and then  
18 line their pockets with the attorneys' fees.

19           So -- so I think your instinct to try  
20 to keep this as clearly defined and as narrowly  
21 defined as possible is consistent with putting  
22 the state on notice, which is the whole purpose  
23 of this Spending Clause exercise.

24           JUSTICE KAVANAUGH: And last point, on  
25 the clarity, you -- you think we need to say

1 something specific and explicit about Wilder and  
2 Blessing, I gather.

3 MR. BURSCH: I -- I -- I didn't think  
4 you did after Talevski, but when this case was  
5 GVR'ed and Judge Richardson says what are we  
6 supposed to do as lower courts, lower court  
7 judges, when the Court doesn't say explicitly  
8 don't file -- follow Wilder or Blessing or  
9 Wright anymore, I think you do need to be more  
10 clear. If you really want to put a stake in  
11 those cases, you're going to have to do it in  
12 writing, just like you did with Lemon.

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Barrett?

16 JUSTICE BARRETT: I'm going to ask you  
17 a little bit about Justice Jackson's question  
18 about how the availability of alternative  
19 remedies in a Sea Clammers sense might bear on  
20 step 1.

21 MR. BURSCH: Mm-hmm.

22 JUSTICE BARRETT: Is it totally  
23 irrelevant or would it affect the bar in some  
24 way? And this is -- this is how I'm thinking  
25 about it.

1           If you do have some alternative  
2     scheme, and it -- and it might -- under Sea  
3     Clammers, you might say, listen, that scheme  
4     isn't complete enough, that Congress was  
5     directing something only to that. But wouldn't  
6     the presence of a scheme cut against -- I mean,  
7     would it adjust the bar, the amount of clarity  
8     that has to be showed at step 1? Because, if  
9     there is some scheme, some method, mechanism by  
10    which the beneficiary can challenge the state's  
11    denial of her ability to seek the provider of  
12    her choice, I guess it doesn't seem like it's  
13    completely sealed off as a different question.

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

16           MR. BURSCH: Yeah, I agree. And I  
17    think that's exactly what the Court did in  
18    Gonzaga, where it said that the available  
19    remedy -- there, you could go to the -- the  
20    federal government and register a complaint --  
21    buttressed the analysis that there was no clear  
22    right created in that FERPA provision.

23           And I think it's the same thing here,  
24    where you've got a provider remedy and you've  
25    also got a beneficiary remedy that does not

1       involve reinstating the provider. That's  
2       exactly the kind of clarity that should make the  
3       bar even higher. So, when you --

4                   JUSTICE BARRETT: Well, but the  
5       beneficiary remedy, as Justice Sotomayor pointed  
6       out, that's if your claim is denied, right? So  
7       then that's the beneficiary taking the risk,  
8       going to the provider she wants to see, and then  
9       potentially having to pay out of pocket, right?

10                   MR. BURSCH: Well, it's a little bit  
11       different than that. If she's denied up front,  
12       say she applies to be a Medicaid recipient and  
13       she's turned down, she could appeal that  
14       decision. It's really about the status of her  
15       ability to get Medicaid benefits or whether a  
16       particular procedure is covered.

17                   But it -- it's significant, we think,  
18       that Congress gave the beneficiary the right to  
19       challenge what the beneficiary has personal  
20       knowledge of, her care, and it gave the provider  
21       the right what the provider is familiar with,  
22       the reasons why they were disqualified.

23                   JUSTICE BARRETT: Well, but, well,  
24       Mr. Bursch, I mean, like, don't you think -- you  
25       know, if I want to go see Dr. Jones, and

1 Dr. Jones, that's the provider of my choice, and  
2 the state has disqualified Dr. Jones, and, as  
3 Justice Kagan points out, you know, the statute  
4 says "may obtain the benefits," there's no  
5 mechanism, am I right, for the beneficiary to  
6 say, well, you're -- you're depriving me of my  
7 ability -- we won't -- won't call it right; we  
8 won't use the loaded word -- but my ability to  
9 see the provider of my choice, and nobody is  
10 disputing that Dr. Jones can provide the  
11 services in a competent way that I want to have.

12 MR. BURSCH: Well, in -- in a sense,  
13 what -- what all that means is that the  
14 beneficiary doesn't have the ability to whip out  
15 a magic wand and then just hit on the head the  
16 doctor that they want and then they must be  
17 qualified under Medicaid.

18 And this is getting a little bit more  
19 into the question of what's qualified. But  
20 that's not the right.

21 The -- the way that the statute  
22 conceptualizes this is it's like when I go to  
23 Blue Cross and Blue Shield and I don't get to  
24 pick any doctor that I want. If I want to go to  
25 Johns Hopkins, I can't request a doctor unless

1 they're on the list.

2           And -- and this "any qualified  
3 provider" provision works the same way. The  
4 state decides who the providers are who are  
5 qualified and you get to choose among them.  
6 And -- and they decided that Planned Parenthood  
7 was unqualified for many reasons, chiefly  
8 because they're the nation's largest abortion  
9 provider.

10           JUSTICE BARRETT: What about  
11 substantial compliance? So do you conceive of  
12 substantial client -- compliance as giving the  
13 state a little bit of wiggle room to maybe not  
14 be entirely in compliance? And, if so, how does  
15 that really affect the step 1, the -- the  
16 Gonzaga analysis?

17           MR. BURSCH: Yeah, absolutely. So  
18 substantial compliance says that everything has  
19 to be in the plan, but when the state  
20 administers the plan, it doesn't have to meet  
21 100 percent of every jot and tittle in the  
22 statute.

23           And if they start to deviate in any  
24 way, they -- they don't enforce this provision  
25 or they modify this provision, there -- there's

1 experimental flexibility in there. And the  
2 Secretary is the one who makes the call. He or  
3 she says: You've gotten so far out of whack,  
4 I'm going to withhold some or even all of your  
5 funding. But, as long as the Secretary's happy,  
6 they can continue on their path and --

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

9 MR. BURSCH: Thank you for that  
10 follow-up question, Justice Barrett.

11 It's because, if -- if you have a  
12 right, it's something that can't be taken away.  
13 And so, in a context where the state can not be  
14 following or administering that provision at all  
15 and the Secretary can say no harm, no foul,  
16 that's the exact opposite of a right.

17 And that's why this structure, in  
18 addition to the language, makes it so clear that  
19 this is not a right.

20 JUSTICE BARRETT: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Jackson?

23 JUSTICE JACKSON: So was there an  
24 administrative appeal process in the Talevski  
25 scenario?

1           MR. BURSCH: In the Talevski scenario,  
2 there was an ability for someone to register a  
3 complaint with the federal government.

4           JUSTICE JACKSON: So there was a  
5 process there and --

6           MR. BURSCH: Yes.

7           JUSTICE JACKSON: -- yet we still held  
8 that there was rights-creating language.

9           MR. BURSCH: Oh, sure.

10          JUSTICE JACKSON: Right.

11          MR. BURSCH: Because you had a  
12 separate bill of rights that mentioned the word  
13 "rights" two dozen times, and that  
14 rights-creating language --

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

19          MR. BURSCH: Well, I don't -- I don't  
20 want to offend any justice. We're -- we're  
21 fine with -- we're fine with a magic words test  
22 if you want to do that because then it would be  
23 clear.

24          JUSTICE JACKSON: Right. But I'm just  
25 trying --

1 MR. BURSCH: But there are -- there  
2 are some other words --

3 JUSTICE JACKSON: -- I'm trying to --  
4 I'm trying to evaluate the import of the  
5 separate appeal process. You're saying, in a  
6 situation in which Congress has used the word  
7 "right" --

8 MR. BURSCH: Right.

9 JUSTICE JACKSON: -- it doesn't  
10 matter.

11 MR. BURSCH: It -- it's just one of  
12 many factors.

13 And so, in Talevski, you had a  
14 separate provision. It was a bill of rights.  
15 You had the word "right."

16 JUSTICE JACKSON: Yeah.

17 MR. BURSCH: And, most importantly,  
18 there was the connective tissue where that  
19 rights-creating language, the -- the  
20 beneficiaries were the subject of that --

21 JUSTICE JACKSON: Yeah.

22 MR. BURSCH: -- and then the states  
23 were directed to follow that, the -- I'm sorry,  
24 the nursing facilities, you know, the regulated  
25 entities.

1 JUSTICE JACKSON: All right. Let me  
2 ask you about clarity and Justice Kavanaugh's  
3 argument.

4 So you -- you -- you indicate that you  
5 believe that lower courts need greater clarity.  
6 But we took this case on the basis of a  
7 pre-Talevski split. So, as we sit here today,  
8 we actually don't have any idea what the lower  
9 courts in the main are doing post-Talevski.

10 And I'm looking at Judge Wilkinson's  
11 opinion in this case, and he seems to have a  
12 pretty good sense of what our cases mean. I  
13 mean, he goes through all the cases, summarizes  
14 the evolution of our case law from Wilder to  
15 Blessing to Gonzaga to Talevski. He explains in  
16 a very nuanced way how each case refined the  
17 test for Section 1983 enforceability.

18 And I understand you disagree with how  
19 he's applied what the test is in this situation,  
20 but is there any part of his summary of the  
21 cases and where we are in terms of the evolution  
22 of the law that you disagree with?

23 MR. BURSCHE: A number of things, as  
24 you might expect.

25 JUSTICE JACKSON: Please.

1           MR. BURSCH: First, Judge Wilkinson  
2           cites Blessing, he cites Wilder, cases that this  
3           Court did not rely on in Talevski. But, as  
4           Judge Richardson points out in his  
5           concurrence --

6           JUSTICE JACKSON: No, he cites and  
7           explains how we've moved. So now he -- he had  
8           this case, this case that we are looking at  
9           today, both before and after Talevski.

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

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

20          JUSTICE JACKSON: -- I -- I -- I guess  
21          I don't understand what -- what the remaining  
22          confusion is.

23          And, certainly, we're only two years  
24          out from Talevski, so there is no confirmation  
25          that lower courts are still confused about what

1 they're supposed to be doing now.

2 MR. BURSCH: Two very specific  
3 responses to that, Justice Jackson.

4 First, he did not eschew the cases  
5 that this Court was no longer using. That's the  
6 confusion we were just talking about. But, more  
7 important, he didn't understand the clear or  
8 explicit or unambiguous rights-creating language  
9 component of the test. It's exactly what  
10 Justice Kavanaugh was describing. He looks --

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

16 But it just seems to me odd that we  
17 would, you know, wind back the clock many, many  
18 years and talk about what these old cases said  
19 when we've all agreed that we've evolved to this  
20 current point.

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

25 But what we're talking about --

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

3 MR. BURSCH: Could I just finish?

4 JUSTICE JACKSON: Yes, please.

5 MR. BURSCH: Yeah. But -- but the  
6 important thing is Judge Wilkinson doesn't get  
7 the explicit rights-creating language. It's not  
8 just a misapplication. It's a misunderstanding  
9 of the test.

10 When -- when he looks at 1396a and  
11 sees that a plan must include these things so  
12 the Secretary can approve it, he thinks that  
13 that's a directive to the state, and it's not.

14 He looks at words like "may obtain" or  
15 the fact that the statute references  
16 "individual" and thinks that's clear  
17 rights-creating language when it's not.

18 JUSTICE JACKSON: All right. So you  
19 disagree with him.

20 Let me ask you about the part of your  
21 list of things related to whether or not this is  
22 rights-created language that relates to the fact  
23 that this is part of state plan requirements.

24 MR. BURSCH: Yes.

25 JUSTICE JACKSON: I think you say, you

1 know, that's one indicia of it not being  
2 rights-created. But I -- I guess I'm looking at  
3 Section 1320a-2 in the statute which applies to  
4 the Medicare Act, where -- which Congress  
5 enacted in response to our decision in Suter,  
6 which had said a similar thing.

7 MR. BURSCH: Yes.

8 JUSTICE JACKSON: Suter had held that  
9 a Social Security Act provision was not  
10 privately enforceable because it appeared in a  
11 list of state plan requirements.

12 And, in response to that, Congress  
13 enacted a statute that specifically says: "A  
14 provision is not deemed unenforceable because of  
15 its inclusion in a section of this chapter  
16 requiring a state plan or specifying the  
17 contents of a state plan."

18 MR. BURSCH: Yes.

19 JUSTICE JACKSON: And that provision  
20 is applicable to the Medicare statute. So, if  
21 we take into account or give any weight to the  
22 fact that this is in the listing of a state  
23 plan, aren't we doing exactly what Congress has  
24 told us we're not supposed to do?

25 MR. BURSCH: No, because the -- the

1 key phrase in that statutory first sentence that  
2 you read is "because of." And we know that's  
3 a -- a but-for.

4 And so what that means is, when a  
5 provision is simply on a -- a list, that can't  
6 be the standalone reason why it doesn't create  
7 rights. But, as the plurality then --

8 JUSTICE JACKSON: But that's a reason  
9 we can take into account as to why it can't?

10 MR. BURSCH: Just like the plurality  
11 in Armstrong, absolutely, 20 years after that  
12 statute was adopted.

13 And -- and we're not just relying on  
14 the list --

15 JUSTICE JACKSON: So how would  
16 Congress have made it clear that we're not  
17 supposed to do that?

18 MR. BURSCH: That it would --

19 JUSTICE JACKSON: It would have to --  
20 the statute would have to say: You can never  
21 look at this as a factor in determining whether  
22 or not --

23 MR. BURSCH: Yes.

24 JUSTICE JACKSON: Yes.

25 MR. BURSCH: I mean, that -- that's

1 very different than "because of."

2 JUSTICE JACKSON: All right.

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

6 JUSTICE JACKSON: Sure. You have a  
7 whole list.

8 MR. BURSCH: Yes.

9 JUSTICE JACKSON: I'm just trying to  
10 understand the extent to which this factor is  
11 consistent with the will of Congress.

12 MR. BURSCH: Right.

13 JUSTICE JACKSON: Thank you.

14 MR. BURSCH: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 MR. BURSCH: Thank you, Mr. Chief  
18 Justice.

19 CHIEF JUSTICE ROBERTS: Mr. Hawkins.

20 ORAL ARGUMENT OF KYLE D. HAWKINS

21 FOR THE UNITED STATES, AS AMICUS CURIAE,  
22 SUPPORTING THE PETITIONER

23 MR. HAWKINS: Mr. Chief Justice, and  
24 may it please the Court:

25 The text, context, and structure of

1 (a)(23) confirm that it does not create a  
2 private right. Starting with the text, (a)(23)  
3 lacks the unambiguously rights-creating language  
4 we saw in the FNHRA statute in Talevski, which  
5 used the word "right" nearly two dozen times in  
6 its own bill of rights.

7 And read in context, (a)(23) is part  
8 of a conversation between the federal government  
9 and the states. It's buried deep among 86  
10 administrative provisions, arranged in no  
11 discernible order, and directed to a plan  
12 administrator and the HHS Secretary.

13 Structurally, it's part of a  
14 substantial compliance regime, which, as Gonzaga  
15 recognized, shows a concern with compliance only  
16 in the aggregate. That's not usually how we  
17 think of rights.

18 On top of that, (a)(23) compliance can  
19 be waived by the federal government, which makes  
20 the creation of a right all the more  
21 implausible.

22 Finally, (a)(23) includes multiple  
23 enforcement mechanisms of its own, including  
24 state administrative remedies subject to  
25 judicial review and the denial of funding.

1           Talevski emphasized that  
2           rights-creating statutes are atypical. But this  
3           is a run-of-the-mill Spending Clause statute,  
4           and holding otherwise would invite line-drawing  
5           problems.

6           I welcome the Court's questions.

7           JUSTICE THOMAS: What do you think is  
8           left of Wilder and Blessing after Talevski and  
9           Gonzaga?

10          MR. HAWKINS: Well, Justice Thomas, we  
11          think that the star footnote in the Armstrong  
12          decision effectively overruled Wilder. It  
13          specifically said that Wilder was repudiated.  
14          We think that's functionally the equivalent of  
15          saying overruled. And it didn't mention Wright  
16          by name, but we think Wright and Blessing are no  
17          longer good law either.

18          I heard my friend, counsel for  
19          Petitioner, note the confusion in the concurring  
20          opinion below about those cases, but I thought  
21          it would have been clearer after Armstrong.

22          JUSTICE KAGAN: Mr. Hawkins, you  
23          talked a lot about the structure of this statute  
24          and the fact that this is one of 87 and so  
25          forth. And we heard that argument some years

1 back in the Suter case from the government, and  
2 the Court accepted it and Congress did not.

3 Congress came right back and passed an  
4 amendment and said: The fact that this is  
5 listed in this big 87-item list should not be  
6 thought to have anything to say with whether  
7 something in that list is a right. Not  
8 everything in that list is a right, but the fact  
9 that it's in that list is -- is pretty  
10 irrelevant to the question of whether something  
11 is a right.

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

22 JUSTICE KAGAN: Yeah, I would have  
23 thought that if Congress goes to the trouble of  
24 passing this statute, what Congress was looking  
25 at was, like, oh, you know, we agree with their

1 result in Suter, but, if we look at their  
2 reasoning -- I mean, it was a very kind of  
3 nuanced way to react to our decision.

4 We look at their reasoning, and if  
5 their reasoning is that it was on this list, we  
6 want to say that that should be no part of  
7 anybody's reasoning because we think that there  
8 are things on this list that are rights, and we  
9 want to make sure that in the future, when those  
10 other things come up, that the Court doesn't do  
11 the exact same thing.

12 That was the whole point of the Suter  
13 fix.

14 MR. HAWKINS: Well, Your Honor, we  
15 think that the best reading of it is that  
16 Congress said we don't want that to be the only  
17 reason that courts say --

18 JUSTICE SOTOMAYOR: But that wasn't  
19 the only reason in Suter. There was a central  
20 argument in Suter that the standards set forth  
21 were not intelligible, which is part of our  
22 review. So I'm not sure how we can read the  
23 Suter fix as -- as a "don't use this only" fix  
24 approach.

25 MR. HAWKINS: Well, Your Honor,

1 1320a-2 also notes that it's not disagreeing  
2 with the outcome in Suter. And I -- and I think  
3 the best way to interpret that is saying this  
4 can't be the sole reason.

5 And I -- I think I heard my friend  
6 mention the Armstrong plurality. I mean, I  
7 think it's worth noting that 1320a-2 was briefed  
8 in that case, and the Armstrong plurality  
9 nevertheless reached the conclusion that it did  
10 that the inclusion in this plan list was a  
11 relevant consideration. And, as I said earlier,  
12 I think that does flow fairly from Gonzaga.

13 JUSTICE SOTOMAYOR: Now, for 20 years,  
14 the government took the position that the "free  
15 choice of provider" provision was enforceable  
16 via Section 1983. You now say that Talevski  
17 made you change your mind.

18 But I'm confused by that. I thought  
19 Talevski just reiterate that Gonzaga analysis  
20 governs step 1. So you took the position -- the  
21 same position after Gonzaga. Did you need a hit  
22 over the head or --

23 MR. HAWKINS: Well, respectfully, Your  
24 Honor, I think we note in our brief that with  
25 the change --

1 JUSTICE SOTOMAYOR: Meaning did you  
2 need for us to say it a second time before you  
3 understood it or --

4 MR. HAWKINS: Your Honor, as we note  
5 in our brief, with the change in administration,  
6 the federal government re-evaluated its position  
7 in this case, and we believe that the view we're  
8 advancing today is the best reading of the  
9 statute.

10 JUSTICE SOTOMAYOR: Now the government  
11 takes the position, as have many, that for  
12 Spending Clause legislation, that the remedy is  
13 only that of Congress -- of the agency  
14 withholding money from someone who violates its  
15 provisions.

16 It does seem awfully odd to think that  
17 that is a remedy at all because what you would  
18 be doing would be depriving thousands of other  
19 Medicaid recipients of coverage in a particular  
20 state over the fact that an individual has been  
21 denied something that the provision says they're  
22 entitled to.

23 Is -- is there much sense in that?

24 MR. HAWKINS: Well --

25 JUSTICE SOTOMAYOR: If you have

1 something, as Justice Kagan said, is an  
2 individual obtaining a privilege of choosing its  
3 provider, why would we say that because it's  
4 Spending Clause, somehow the only remedy is  
5 suspension of benefits?

6 MR. HAWKINS: Well, Your Honor, I -- I  
7 guess a couple things. I mean, first, that's  
8 been the basic Spending Clause framework since  
9 at least Pennhurst and maybe going even farther  
10 back. That's -- that's typically how any  
11 Spending Clause statute works.

12 JUSTICE SOTOMAYOR: Yes, but --

13 MR. HAWKINS: The -- the --

14 JUSTICE SOTOMAYOR: -- the question is  
15 you don't disagree that there's no magic word  
16 formulation for a right. And I assume in your  
17 brief that you accepted that "may obtain"  
18 formulation could confer rights depending on the  
19 circumstances. And, here, you say the  
20 circumstances don't.

21 But why can't or why shouldn't we take  
22 into account that the Act itself doesn't provide  
23 a mechanism for redress by the recipient or by  
24 the provider that the states are free to put in  
25 state administrative remedies, but they don't

1 have to by the Act?

2 So wouldn't a circumstance like that  
3 inform someone that it's a right that the  
4 individual should be able to enforce in court?

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

8 First, you mentioned the -- the "may  
9 obtain" language. What we're trying to indicate  
10 in our brief is that we don't want to foreclose  
11 the possibility that somewhere someday Congress  
12 could enact a statute that used a phrasing like  
13 that to create a right. I mean, it's difficult  
14 to predict the future.

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

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

18 JUSTICE SOTOMAYOR: The bill of rights  
19 itself does it?

20 MR. HAWKINS: So I -- I --

21 JUSTICE SOTOMAYOR: "No person shall"  
22 and then it says --

23 MR. HAWKINS: Oh --

24 JUSTICE SOTOMAYOR: -- "no state may,"  
25 a person -- you know.

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

3 JUSTICE SOTOMAYOR: No, but it --

4 MR. HAWKINS: I think that --

5 JUSTICE KAGAN: Well, Mr. Hawkins,  
6 "may obtain" in this language is just to say --  
7 I mean, a person doesn't have to go see a  
8 doctor. It's the person may go see a doctor,  
9 but it's of their choice.

10 The "may" has nothing to do with the  
11 question that we're talking about now. The  
12 "may" is just like you don't have to see anybody  
13 if you don't want to.

14 MR. HAWKINS: I -- I -- I respectfully  
15 don't think that's the best reading of the  
16 statute. I mean, we're looking for unambiguous  
17 rights-creating language, and I think that our  
18 problem with "may" is that it's inherently  
19 ambiguous. It's usually used to create  
20 permission. And I think --

21 JUSTICE KAGAN: It depends on the  
22 context.

23 MR. HAWKINS: -- there's a difference  
24 between permission and a right.

25 JUSTICE KAGAN: I mean, the "may" is

1 just you may see a doctor. You -- you know, we  
2 don't expect that -- you know, we're not forcing  
3 people to see doctors. So that's the way the  
4 "may" functions in the sentence.

5 MR. HAWKINS: Well, if -- if that's  
6 right, Your Honor, I think that would be unique.  
7 I mean, I -- in Respondents' brief, I don't  
8 think I saw one example of any federal statute  
9 anywhere that creates a right using the phrase  
10 "may obtain." It's just not something that has  
11 that sort of -- I think I heard my friend say,  
12 like, a rights-creating pedigree.

13 JUSTICE KAGAN: Can I ask about this  
14 idea that you have to say "right" or  
15 "entitlement" or -- what was the other words  
16 that -- "privilege." "Privilege" is sort of not  
17 a right, but, okay, "right," "entitlement," or  
18 "privilege?"

19 I mean, this is kind of changing the  
20 rules midstream, isn't it? Congress wrote this  
21 statute a while ago. And if we come in now and  
22 say you have to use one of these three words, I  
23 mean, that's good going forward for the -- for  
24 the statutes Congress wants to write in the  
25 future, but it's not a fair way to interpret

1 statutes that Congress passed many moons ago and  
2 that then Congress amended by way of the Suter  
3 fix to say: You know, by the way, that list of  
4 requirements for the state plan, we think that  
5 there are some rights in there.

6 MR. HAWKINS: May I answer the  
7 question, Mr. Chief Justice?

8 CHIEF JUSTICE ROBERTS: Yes.

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

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Justice Thomas?

24 Justice Alito, anything?

25 Justice Kagan?

1 Justice Kavanaugh?

2 JUSTICE KAVANAUGH: I just want to  
3 isolate the role of the alternative enforcement  
4 mechanism in your analysis. Could a -- could a  
5 term be rights-enforcing if there's no  
6 alternative enforcement mechanism but the same  
7 term be not rights-enforcing if there is an  
8 alternative enforcement mechanism?

9 MR. HAWKINS: Justice Kavanaugh, I  
10 guess I'm trying to think of a -- a -- an  
11 example where -- where that would be true. I --  
12 I guess I have to answer the question yes  
13 because it's hard to know how that would play  
14 out in any given statute.

15 I mean, we know from Talevski that we  
16 look at terms as they're situated in structure  
17 and context. So we're always taking structure  
18 and context into account. And so it's --

19 JUSTICE KAVANAUGH: So are you saying  
20 that a statute without an alternative  
21 enforcement mechanism is problem -- more  
22 problematic in your analysis? I think that is  
23 what you're saying.

24 MR. HAWKINS: Well, we do -- the -- we  
25 do think that the alternative enforcement

1 mechanisms here -- I think "buttress" is the  
2 word that's used in Gonzaga -- buttress --

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

6 MR. HAWKINS: Yeah.

7 JUSTICE KAVANAUGH: -- maybe you're  
8 saying you can't -- you can't do that.

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

21 JUSTICE KAVANAUGH: Do you agree with  
22 Petitioner's counsel on the universe of terms  
23 that you think are usually or always  
24 rights-creating?

25 MR. HAWKINS: Well, Your Honor, I

1 don't know that I've got a specific  
2 comprehensive list. I mean, I think I heard my  
3 friend say the word "right." I think I heard  
4 "entitlement."

5 JUSTICE KAVANAUGH: "Privilege."

6 MR. HAWKINS: I think I heard  
7 "privilege."

8 JUSTICE KAVANAUGH: And "immunity."

9 MR. HAWKINS: Yeah, those all sound  
10 right.

11 JUSTICE KAVANAUGH: Well, if you -- if  
12 you don't, you -- you come up here and you say,  
13 you know: We're concerned about line-drawing  
14 problems. But you're not -- what -- what's the  
15 line exactly? You want us to do a line. Well,  
16 tell -- tell me what the line is.

17 MR. HAWKINS: Sure. I think -- I  
18 think those three words would count.

19 I think, you know, looking at Title VI  
20 and Title IX, you know, no person shall be  
21 subject to discrimination, I think that gets the  
22 job done as well.

23 I mean, maybe a helpful way to think  
24 about it, Justice Kavanaugh, is we're looking  
25 for words that have a real rights-creating

1 pedigree in our nation's history and legal  
2 traditions. I think the words that --

3 JUSTICE KAVANAUGH: Well, I think  
4 Justice Kagan's raised good points about how,  
5 once you, you know, open it up like that,  
6 it's -- there are going to be line-drawing  
7 problems. You're not going to solve the issue  
8 that you -- you came here to solve.

9 MR. HAWKINS: Well, Your Honor, I -- I  
10 don't know that there's a way to avoid  
11 line-drawing problems without saying that we  
12 need the word "right" and exclusively "right"  
13 and nothing else. And I -- I don't think --

14 JUSTICE KAVANAUGH: Okay. Well,  
15 you -- you -- right at the beginning, you said  
16 you wanted to avoid line-drawing problems,  
17 but --

18 MR. HAWKINS: Well, I -- I -- I think  
19 that the Court could avoid a lot of the  
20 difficult cases by making clear, as it said in  
21 Talevski, that we're looking for atypical  
22 language with this clear rights-creating  
23 pedigree.

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

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Barrett?

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

8 I mean, so both you and your friend  
9 have talked about the possibility that many  
10 other statutes and many other provisions then  
11 might be understood to be enforceable through a  
12 private cause of action.

13 But what about this one? I mean,  
14 how -- I mean, so, here -- we're -- we're here  
15 because of Planned Parenthood not being a  
16 qualified provider in South Carolina. But would  
17 people -- like, would this open the floodgates  
18 of people bringing 1983 suits because they can't  
19 see the provider of their choice, or is this  
20 kind of a pretty unusual circumstance?

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

1 JUSTICE BARRETT: Is it all about  
2 abortion providers?

3 MR. HAWKINS: No, I don't believe so.  
4 I believe there have been other instances. I  
5 believe -- I'm worried about misspeaking. I  
6 think one out of the Seventh Circuit didn't  
7 involve abortion providers. It was in another  
8 context.

9 We're -- we're not resting on any  
10 particular floodgates argument.

11 JUSTICE BARRETT: Oh, I -- I -- I  
12 didn't mean to suggest that you were. I was  
13 just wondering.

14 MR. HAWKINS: Okay.

15 JUSTICE BARRETT: Okay. Thank you.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Jackson?

18 JUSTICE JACKSON: Yeah, three quick  
19 points.

20 Just clarifying in your response to  
21 Justice Sotomayor about what motivated the  
22 government's change of position here, I -- I  
23 heard you say it's the change in administration  
24 that caused the change in position, not  
25 necessarily anything new or different in

1 Talevski.

2 Is that right?

3 MR. HAWKINS: Well, Your Honor, we  
4 think that the Talevski approach in -- in Your  
5 Honor's opinion for the Court gives us more  
6 confidence in the position that we're  
7 advocating.

8 JUSTICE JACKSON: I understand. But  
9 you don't see daylight between what Talevski was  
10 saying and what Gonzaga said, which is what the  
11 Bush administration and many, many other prior  
12 administrations relied upon in reaching the  
13 opposite conclusion here, right?

14 MR. HAWKINS: So I -- I think Talevski  
15 does a couple of things that maybe reinforce  
16 what Gonzaga said in a way that helps think  
17 through the issue more clearly.

18 I mean, number one, Talevski  
19 emphasizes that these statutes are atypical, and  
20 so we're looking for the atypical situation, not  
21 the run-of-the-mill situation.

22 And -- and, second, in -- in Your  
23 Honor's opinion for the Court -- I think it's in  
24 Part 3-2 -- it's noteworthy that it begins  
25 looking at the overall placement of the text

1 within the structure, within the statutory  
2 structure. And we think that that's an  
3 indication that it really is important to marry  
4 text, context, and structure all together.

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

8 JUSTICE JACKSON: All right. Can you  
9 point me to the section in your brief that  
10 endorses any particular words or bright-line  
11 rule?

12 I -- I was kind of struck because I  
13 thought that was the difference between you and  
14 Petitioner when I read your brief. I didn't  
15 take the United States to be adopting that kind  
16 of test. So --

17 MR. HAWKINS: Well, I --

18 JUSTICE JACKSON: -- are you saying  
19 something different here at the podium than you  
20 were in your brief?

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

23 JUSTICE JACKSON: So United States is  
24 on fours with -- all fours with the idea that we  
25 need to tell Congress exactly the words that

1 have to be used in order to create rights?

2 MR. HAWKINS: Well, I -- I think what  
3 we've argued in our brief and what I'm -- I'm  
4 certainly mean to argue today is that we're  
5 looking for unmistakable rights-creating  
6 language.

7 I think that's what we say in our  
8 brief. And, in our conversation this morning,  
9 we've elucidated some ways that Congress could  
10 do that, and I think that's consistent with what  
11 we've been saying.

12 JUSTICE JACKSON: All right. Finally,  
13 has, to your knowledge, HHS ever withheld  
14 Medicaid funding for a -- from a state for  
15 violating this free-choice provider provision?

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

20 MR. HAWKINS: Your Honor, we don't  
21 know of any instance in which funding has been  
22 withheld in connection with (a)(23). We note in  
23 our brief that we have denied plan modifications  
24 for failure to comply with (a)(23). But, as to  
25 funding, we don't have an example of that

1 happening.

2 I wouldn't read too much into that.  
3 Again, this is a substantial compliance regime.  
4 We've been concerned with compliance in the  
5 aggregate. And the lack of funding denials, I  
6 think, suggests that states are complying in the  
7 aggregate.

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 MR. HAWKINS: Thank you, Your Honor.

12 CHIEF JUSTICE ROBERTS: Ms. Saharsky.

13 ORAL ARGUMENT OF NICOLE A. SAHARSKY

14 ON BEHALF OF THE RESPONDENTS

15 MS. SAHARSKY: Mr. Chief Justice, and  
16 may it please the Court:

17 As this case comes to the Court, it is  
18 established that South Carolina violated the  
19 statute by denying Julie Edwards her choice of a  
20 qualified and willing provider. The only  
21 question is whether she can do something about  
22 it, to sue under Section 1983.

23 She can for four reasons. First, look  
24 at the text. It refers to individuals, any  
25 individual eligible for medical assistance. It

1 gives them a right to choose their own doctor.  
2 They "may obtain such assistance from any  
3 qualified and willing provider." And it's  
4 mandatory. The state must do it as part of the  
5 federal state bargain. This language satisfies  
6 the standard that the Court set out in Gonzaga  
7 and Talevski. It uses mandatory,  
8 individual-centric, rights-creating language.  
9 The only thing it doesn't do is use the word  
10 "right." And this Court has repeatedly said  
11 that magic words aren't required.

12           Second, look at the context. Congress  
13 took this language from Medicare, which uses the  
14 same operative text. That text makes clear that  
15 it gives an individual the right to choose a  
16 provider. It's titled Free Choice by Patient  
17 Guaranteed. The family planning provision,  
18 which comes right after the language at issue,  
19 confirms that this is a protected choice. The  
20 state "shall not restrict the choice."

21           Three, there's no doubt about what  
22 Congress was trying to do here. It enacted this  
23 statute because states were artificially  
24 limiting the providers in Medicaid. And that's  
25 the same thing that the state is doing now. And

1 Congress made this an individual right because  
2 it recognized that when the state does that, it  
3 hurts individual patients. It is the  
4 individual's right. It is not the provider's  
5 right.

6 And, fourth, there is no alternative  
7 federal remedy. There is no way for individuals  
8 to challenge the state's decision to deny them  
9 their provider of choice. There's no federal  
10 cause of action. There's no administrative  
11 remedy.

12 Congress expected that an individual  
13 would be able to sue in the rare instance when a  
14 state is keeping a needy patient away from a  
15 qualified and willing provider. If the  
16 individual can't sue, this provision will be  
17 meaningless.

18 I welcome the Court's questions.

19 JUSTICE THOMAS: Do you think that  
20 rights-creating language under the -- under the  
21 enumerated powers is different from the language  
22 required under the Spending Clause?

23 MS. SAHARSKY: Well, so the Court has  
24 spend said in -- in Spending Clause cases that  
25 the Court -- that Congress has to speak

1 unambiguously. But, at the same time, there's  
2 many cases in which the Court has -- has  
3 required clear statements from Congress, and it  
4 has said: We don't require magic words from  
5 that. Our job is to figure out what did  
6 Congress intend. So we look at the words in  
7 what -- that Congress enacted and figure out  
8 what Congress intended.

9           And I think the -- the way that you  
10 can tell that the word "right" is just a magic  
11 words test here, I think, from my -- my friends  
12 on the other side and why you don't need it is  
13 because the statute here would do the exact same  
14 thing if it said the word "right" as opposed to  
15 what it says now.

16           JUSTICE THOMAS: So how would this --  
17 if -- if it's more demanding under the Spending  
18 Clause, how would this statute differ under the  
19 Commerce Clause? What language would you use if  
20 it were -- if this right were created under --  
21 under the Commerce Clause?

22           MS. SAHARSKY: Well, I think it  
23 creates a right either way. I think there's --  
24 Congress can write statutes --

25           JUSTICE THOMAS: Well, I'm talking

1 about the language. If it's more demanding and  
2 it's atypical, what language that we have --  
3 what language that we have here you would not  
4 need in the Commerce Clause?

5 MS. SAHARSKY: Well, this -- first,  
6 it's talking about a state obligation, and it's  
7 something the state must do to participate. So  
8 it starts by saying that it's a mandatory  
9 obligation.

10 Second, it says that the -- there's --  
11 any individual may -- may obtain care from  
12 their -- from any qualified and willing  
13 provider. So it's the combination of "any  
14 individual" "may obtain care from any qualified  
15 and willing provider."

16 It's -- it's a -- it disables the  
17 state from doing something the state might  
18 otherwise want to do, like we -- you know, we  
19 want to take this provider out of Medicaid for a  
20 reason that's unrelated to medical  
21 qualifications, which is what the state is doing  
22 here. And so it's just -- the combination of  
23 this language makes clear what this provision is  
24 doing.

25 I don't think anyone disagrees what --

1 what this provision is about. Maybe there's  
2 some --

3 JUSTICE THOMAS: But do you think that  
4 language is more exacting than would be required  
5 under the Commerce Clause?

6 MS. SAHARSKY: I don't -- I -- I --  
7 I'm -- I'm not certain. I think the Court has  
8 said that -- that -- that in the -- in the  
9 Spending Clause context, that -- that Congress  
10 needs to speak clearly.

11 My point is just that Congress has  
12 spoken clearly here because it has used what  
13 this Court requires. The Court says we want to  
14 look to see if there's individual-centric  
15 rights-creating language that imposes a  
16 mandatory obligation. The Court has never said  
17 it has to say the word "right" or it has to be  
18 magic words or anything like that.

19 And just to pick up on this -- this  
20 idea that I -- you know, we heard maybe for the  
21 first time today that there are only certain  
22 magic words that count. You know, there are  
23 some real problems with that from a  
24 separation-of-powers perspective. Congress  
25 writes statutes. It's this Court's job to -- to

1 interpret them and figure out what Congress  
2 intended.

3           And, here, it's not like Congress just  
4 wrote this statute, you know, 50 years ago and  
5 nothing has happened. Congress has come back  
6 when this Court has interpreted this statute in  
7 a way that the Court thought -- that Congress  
8 thought was inappropriate with the Suter fix.  
9 And that's a case where, as one of the factors  
10 that was considered for whether language created  
11 an individual right, not the sole factor, but as  
12 one of the factors, this Court said in the Suter  
13 decision we see that it's part of the state plan  
14 requirements.

15           And Congress came back with language  
16 that I think was quoted by one of the justices  
17 that said, you know, no, that can't be a reason  
18 why --

19           CHIEF JUSTICE ROBERTS: Counsel --

20           MS. SAHARSKY: -- because --

21           CHIEF JUSTICE ROBERTS: I'm sorry.

22 Finish your sentence, please.

23           MS. SAHARSKY: It -- it just can't be  
24 a reason why.

25           CHIEF JUSTICE ROBERTS: Okay. Do you

1 think our opinions in Talevski and Gonzaga  
2 narrowed Wilder in any way?

3 MS. SAHARSKY: Well, the Court didn't  
4 mention Wilder.

5 CHIEF JUSTICE ROBERTS: Is that a way?

6 MS. SAHARSKY: The concurrence did.

7 CHIEF JUSTICE ROBERTS: Is that a way?

8 MS. SAHARSKY: Well, I -- I think the  
9 Court made clear in Blessing -- in -- in -- in  
10 Gonzaga that the -- that to the extent that  
11 Wilder could be read in a certain way, which is  
12 to readily imply individual rights and not to  
13 require unambiguous rights-conferring language,  
14 Gonzaga says don't read Wilder that way. And so  
15 I thought that was clear in Gonzaga. And then,  
16 in Talevski, the Court said we are using our  
17 established test, which was settled in Gonzaga.

18 So I think that Gonzaga is the one  
19 that explained that to the extent that -- that  
20 Wilder had this -- didn't require an unambiguous  
21 conferral of an -- an individual -- an  
22 individual right, that that was wrong.

23 At the same time, the Court has  
24 re-upped certain reasoning in the Wilder  
25 decision, including in the Rancho Palos Verdes

1 decision, about HHS enforcement because one of  
2 the things -- not just looking at the text of  
3 the statute, but in what is now known as -- as  
4 Talevski step 2, one of the things that the  
5 Court said in Wilder, it said the possibility of  
6 HHS enforcement is not the kind of comprehensive  
7 enforcement scheme, and then the Court cited  
8 that again in the Rancho Palos Verdes decision.

9           And so, you know, the Court has, I  
10 think, used that -- that reasoning in Wilder.  
11 That's the only reasoning that the Fourth  
12 Circuit cited below. We think that's good  
13 reasoning. But, even if you think -- even if  
14 you act like Wilder doesn't exist, we think it  
15 gets you to the same result in this case because  
16 we're basing our argument on the requirements  
17 set out in Gonzaga and in Talevski.

18           Just to go back to --

19           JUSTICE KAVANAUGH: How -- how do you  
20 -- I -- I think the difficulty arises because of  
21 trying to draw the distinction between benefits  
22 and rights, and Gonzaga draws this line and  
23 that's trying to make sense of prior precedent,  
24 and it's very elusive, and I think that's why  
25 there's a search for how can we draw the line.

1                   What guidance would you give us on how  
2 to do that going -- going forward or how to set  
3 out a principle that's not going to be just eye  
4 of the beholder?

5                   MS. SAHARSKY: Right. Rights-creating  
6 language confers an individual entitlement.  
7 It's for an individual and it is an protection,  
8 an entitlement, to something. Benefits --  
9 language that addresses benefits or creates  
10 benefits, which is often policy or practice  
11 language, is aggregate language like -- that  
12 refers to a policy or practice that has an  
13 effect on, a beneficial effect on, individuals,  
14 but it's not focused on protecting some  
15 particular right or entitlement of the  
16 individuals.

17                   And, if we look at the language here,  
18 here's how we know that it's not a benefit but  
19 protecting a right. It says that the -- the  
20 individual may obtain care from any qualified  
21 and willing provider. So that stops the state  
22 from doing something.

23                   It's not just, oh, you know, you  
24 should have a list of a lot of providers and try  
25 to get as many providers as possible on the

1 list. It's that Congress saw that there was a  
2 particular problem, you know, happening out in  
3 the world in terms of providers being excluded  
4 from Medicaid for -- arbitrarily, same thing  
5 that's happening here, in the -- the Congress  
6 said no to that.

7 So it's the "may obtain from any  
8 qualified and willing provider," "any," which  
9 says that this is something that stops the state  
10 and that this is something that has to be  
11 followed.

12 JUSTICE KAVANAUGH: To go back to the  
13 first part of your answer, something that's  
14 mandatory and is a benefit seems like a right,  
15 or how would you distinguish a mandatory benefit  
16 from a right?

17 MS. SAHARSKY: So I would look to  
18 Gonzaga, for example. So you could have  
19 something that is mandatory that -- that was  
20 about educational privacy, like that you must  
21 have a policy or practice about individual  
22 consent for educational records. But that just  
23 isn't written in the circumstances of an  
24 individual being able to enforce a particular  
25 right.

1                   And so that was where there were  
2 individuals who were benefitted by these  
3 policies that were required, but it wasn't  
4 saying an individual gets to do a particular  
5 thing and the state has to protect that and the  
6 state can't stop them from doing that.

7                   JUSTICE GORSUCH: Well, just to follow  
8 up on that, Ms. Saharsky, one can imagine a  
9 statute written as an individual benefit that's  
10 mandatory on the states but isn't a  
11 right-creating -- I mean, we -- I think we can  
12 agree on that.

13                   MS. SAHARSKY: Sure. I think there  
14 are a lot of provisions --

15                   JUSTICE GORSUCH: So --

16                   MS. SAHARSKY: -- in the state plan  
17 requirements that are like that.

18                   JUSTICE GORSUCH: Yeah.

19                   MS. SAHARSKY: They all create rights.

20                   JUSTICE GORSUCH: Right. So -- so  
21 they focus on the individual and says that  
22 person's entitled or shall receive a benefit.  
23 But it could be limited to state compliance  
24 substantially with the overall scheme. I mean,  
25 that's -- that's an imaginable scenario.

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

4 JUSTICE GORSUCH: I'm --

5 MS. SAHARSKY: -- in the state plan  
6 requirements that says "any individual may  
7 obtain" like the language here.

8 JUSTICE GORSUCH: So, once --

9 MS. SAHARSKY: There's nothing.

10 JUSTICE GORSUCH: -- once its focus is  
11 on the individual -- I'm -- I'm just trying to  
12 --

13 MS. SAHARSKY: Right.

14 JUSTICE GORSUCH: -- drill down on  
15 Justice Kavanaugh's, you know, bright line.  
16 Once it focuses on the individual and says  
17 you're entitled to some benefit, that's --  
18 that's the line you'd have us draw?

19 MS. SAHARSKY: I think the Court in  
20 Gonzaga and Talevski set out three requirements.  
21 First, it has to be mandatory. Second, it has  
22 to be individual-focused. And, third, it has to  
23 use rights-creating language.

24 JUSTICE GORSUCH: Well, yeah, yeah.

25 MS. SAHARSKY: And we focused on what

1 the --

2 JUSTICE GORSUCH: Yeah.

3 MS. SAHARSKY: I think our dialogue --  
4 right.

5 JUSTICE GORSUCH: That third one's the  
6 tricky one, right?

7 MS. SAHARSKY: One hundred percent.

8 And I think that's where we're talking about  
9 an -- an individual entitlement that the state  
10 has to provide something or that the state --

11 JUSTICE GORSUCH: But --

12 MS. SAHARSKY: -- cannot do something  
13 to someone like "no state shall" -- we talked  
14 about the discrimination --

15 JUSTICE GORSUCH: Sure. But --

16 MS. SAHARSKY: -- language that's in,  
17 like, Title VI.

18 JUSTICE GORSUCH: -- what I'm trying  
19 to drill down on is it seems to me Congress  
20 could hypothetically say an individual should be  
21 entitled to these benefits but not want to  
22 create a right of enforcement but allow it to be  
23 subject to the state's overall substantial  
24 compliance with a larger rubric.

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

1 MS. SAHARSKY: The Court -- Congress  
2 could write statutes in a lot of different  
3 ways --

4 JUSTICE GORSUCH: Yeah.

5 MS. SAHARSKY: -- that would provide a  
6 benefit that would be not like the statute here.  
7 So let me just hone in on the particular thing  
8 at issue in this case. Let's say that it said a  
9 state plan shall include a policy to allow  
10 participants to choose their provider to the  
11 extent practicable. Or --

12 JUSTICE GORSUCH: Well, I see to the  
13 extent -- but take that out. Then what? What  
14 would be the answer there?

15 MS. SAHARSKY: So I think, in that  
16 case, if it's a -- you know, it talks about a  
17 policy. So Gonzaga suggested that that's more  
18 of an aggregate focus. And so I think the  
19 question would be, you know, to allow  
20 participants, that doesn't use the same, what we  
21 call rights-creating language, like "may obtain  
22 from any." So we think the "may obtain from  
23 any" --

24 JUSTICE GORSUCH: So that would be  
25 different.

1 MS. SAHARSKY: -- language is  
2 stronger.

3 JUSTICE GORSUCH: So -- so a -- a -- a  
4 statute that says states shall create a policy  
5 that allows individuals to choose their doctors  
6 would not be a rights-creating statute?

7 MS. SAHARSKY: I think it would be a  
8 more difficult case because it doesn't say the  
9 "any qualified and willing provider." I just  
10 think that would be a potentially more difficult  
11 case. Or --

12 JUSTICE GORSUCH: Well, what if --  
13 what if it did? What if it said states shall  
14 create a policy to allow individuals to pick a  
15 provider? Would that be rights-creating?

16 MS. SAHARSKY: Well, it still doesn't  
17 say "from any qualified and willing provider."  
18 And I think it's the "any qualified and willing"  
19 that makes clear that if a provider is medically  
20 qualified, that the state can't take the  
21 provider out of Medicaid for a different reason  
22 because that was the problem that Congress was  
23 addressing in the first place.

24 But the -- the point is, is that  
25 Congress has flexibility in how it writes

1 statutes. It sometimes says in statutes, like,  
2 this provision does not create any individually  
3 enforceable rights if --

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

6 MS. SAHARSKY: It's not a magic --  
7 I -- I -- I don't think it makes sense -- I -- I  
8 respectfully suggest that this Court --

9 JUSTICE GORSUCH: I mean, is that  
10 what --

11 MS. SAHARSKY: -- should not think of  
12 it in terms of magic words. And, in all of the  
13 Court's cases that have required clear  
14 statements in other contexts, the Court has  
15 said, look, it's not magic words; we don't tell  
16 Congress how to write statutes.

17 JUSTICE GORSUCH: So it doesn't need  
18 to do that either. So -- okay. All right.  
19 Thank you.

20 MS. SAHARSKY: I mean, that's the same  
21 thing that Judge Wilkinson said. He said:  
22 We're just trying to interpret what Congress did  
23 here. Like, what -- what were they -- what were  
24 they focused on? What were they trying to do?  
25 Would they think that an individual could

1 enforce this in the way --

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

4 MS. SAHARSKY: No.

5 JUSTICE KAVANAUGH: I don't think  
6 "magic words" is the proper term. Just what  
7 words convey rights, unambiguously convey  
8 rights-creating language?

9 When we take a step back -- and maybe  
10 this is what's the broader separation-of-powers  
11 concern. The broader separation-of-powers  
12 concern is the -- Congress creates rights of  
13 action and remedies, not the Court.

14 And in Gonzaga -- and that wasn't  
15 really the view in the '70s and '80s. And, in  
16 Gonzaga, the Court specifically linked this  
17 issue -- this issue with the implied rights of  
18 action case law. And since Gonzaga, in that  
19 other implied rights of action, we have really  
20 tightened up, whether it's Bivens or otherwise,  
21 and said essentially that far and no further.

22 And I'm wondering how we should square  
23 Gonzaga's linkage of those two lines of cases if  
24 we said something like that here or how you  
25 think we should just deal with the fact that we

1 no longer really engage in the process of  
2 creating implied rights of action or implying --  
3 inferring rights of action because we leave it  
4 to Congress.

5 MS. SAHARSKY: Okay. So this is not  
6 an implied right of action case, as you pointed  
7 out, because there is an express cause of action  
8 under Section 1983. And we accept from Gonzaga  
9 and Talevski that where this Court is is that it  
10 is a high bar to find that Congress put in place  
11 an individually enforceable right.

12 What we're saying is that this  
13 provision meets the bar. We don't think that  
14 there are a lot of others, if any, in the state  
15 plan requirements that would meet that high bar,  
16 but this language here, "may obtain from any  
17 qualified and willing provider," does.

18 I mean, this is a very individual  
19 choice that Congress was trying to protect.  
20 It's individuals who are hurt. I don't think  
21 anyone disputes what this provision does, that  
22 it allows them to choose -- an individual  
23 Medicaid provider to choose from any qualified  
24 and willing provider.

25 And I guess that -- just the thing I

1 would say about how to write this, and I, of  
2 course, understand that the Court wants to  
3 provide guidance, there's just different ways  
4 Congress could have said this and they're all --  
5 they all get to the same place.

6           So we have what Congress said here,  
7 you know, any -- any individual may obtain care  
8 from any qualified and willing provider. If it  
9 said any individual has a right to obtain care  
10 from any qualified and willing provider, it does  
11 the same thing. It's the exact same effect,  
12 like, out in the world in terms of placing the  
13 limitation on the state.

14           It could also say, I think the state  
15 would agree or maybe it used to agree, any  
16 individual has the freedom to choose from any  
17 qualified and willing provider or no person  
18 shall be denied the free choice of any qualified  
19 and willing provider. It's just, you know,  
20 Congress can write these in different ways, and,  
21 you know, Judge Wilkinson said, I think very  
22 reasonably, we as the federal courts can't limit  
23 Congress to a thin thesaurus of our own design.

24           And this Court, of course, wants to  
25 provide guidance in terms of what the standard

1 is in Talevski and in Gonzaga, but what we're  
2 telling you here is that this statute meets that  
3 requirement. And I might just speak briefly  
4 about the other state plan requirements because  
5 I understand that the state has, like, raised  
6 this specter of how there are 86 other state  
7 plan requirements and what if they're all  
8 individually enforceable and there could be so  
9 much litigation.

10 JUSTICE ALITO: Well, before you get  
11 to that, would you agree with the proposition  
12 that what we need to find in order to say that a  
13 provision in Spending Clause legislation enables  
14 enforcement by a private party under 1983,  
15 something that's quite extraordinary, because  
16 the norm for -- let's start out, if you back up,  
17 Spending Clause legislation is an agreement  
18 between the state and the federal government.  
19 Yeah, it's an offer the state can't refuse, but,  
20 nevertheless, that's the form of it.

21 And the -- the standard mechanism for  
22 the enforcement of that is for the counterparty,  
23 the federal government, to take some action if  
24 the state doesn't meet up to its obligation.  
25 And the state -- part of the obligation that may

1 be imposed under Spending Clause legislation is  
2 something that is helpful in some way to an  
3 individual.

4 Now, if we say, whenever Congress uses  
5 the word "individual," the suit can be brought  
6 under 1983, then all sorts of provisions could  
7 give rise to 1983 liability. So would you agree  
8 we need something that's out of the ordinary,  
9 that signals to the federal court this is not  
10 just something that -- that the state must do.  
11 This is something that allows the individual to  
12 go into court and get enforcement.

13 MS. SAHARSKY: Yes. Let me say three  
14 things about that.

15 First, we don't think that just a mere  
16 reference to an individual gives an individually  
17 enforceable right. It's -- here, it's any  
18 individual may obtain from any qualified and  
19 willing provider.

20 Two, we also don't think that the fact  
21 that it's a mandatory obligation on the states  
22 creates an individually enforceable right  
23 because, as you pointed out, once the state  
24 agrees to the bargain, these are all things it  
25 has to do, even if it's just a policy or

1 practice that benefits an individual.

2 JUSTICE ALITO: So just to make --

3 MS. SAHARSKY: And then --

4 JUSTICE ALITO: This is helpful. So  
5 individual's not enough. Mandatory is not  
6 enough. You need something more. And what is  
7 that more here that tips this or makes this  
8 really atypical, not typical?

9 MS. SAHARSKY: "May obtain from any  
10 qualified and willing provider." That's the  
11 rights-creating language, the third ingredient  
12 that this Court has talked about.

13 The "may obtain" in this -- in this  
14 context, I think, is a natural way for Congress  
15 to talk about obtaining healthcare because you  
16 don't have to get it. It's just, if you need  
17 healthcare, you may obtain it.

18 JUSTICE ALITO: But what Congress  
19 made --

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

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

22 MS. SAHARSKY: Well, I was just going  
23 to say, you know, there's a suggestion, I think,  
24 from the state that, like, "may" is not strong  
25 enough language, but "may" is used in a lot of

1 contexts to reflect, like, a protected choice or  
2 a right.

3 There are a lot of judicial review  
4 provisions, for example, like of the Federal  
5 Trade Commission orders or the SEC orders, that  
6 say any person may obtain judicial review of  
7 such order by filing in a court of appeals.

8 There's also "may" language used in  
9 the Constitution which I think is pretty  
10 powerful, you know, "The judicial Power of the  
11 United States, shall be vested in one supreme  
12 Court, and in such inferior Courts as the  
13 Congress may from time to time ordain and  
14 establish."

15 Now that's a little bit different in  
16 that it's a power of Congress as opposed to  
17 rights-creating language from an individual, but  
18 my point is just this idea that "may" is, like,  
19 too wimpy of language, I -- I just don't think  
20 is a -- a good line to draw.

21 JUSTICE ALITO: Well, the problem --  
22 the problem is that Congress may well have had  
23 in mind -- maybe it's likely that what they had  
24 in mind is simply that this is something that  
25 the state has to do but not that this is

1 something that allows an individual to sue in  
2 court. So don't we need something more than  
3 that?

4 MS. SAHARSKY: Well, there's the  
5 reference to the individual, and there's an  
6 entitlement to the individual. And then we have  
7 on top of it what is called the Suter fix, which  
8 is Congress coming back to this Court after the  
9 decision in Suter versus Artist M and saying  
10 some of these plan requirements are -- we -- we  
11 expect will be individually enforceable. The  
12 fact that it's a state plan requirement doesn't  
13 make it not individually enforceable.

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

18 Now there have not been lawsuits to  
19 try to figure out whether all of these other  
20 requirements are individually enforceable  
21 because the vast majority of them obviously  
22 aren't. I think that the most that the state  
23 and the federal government suggest is that there  
24 are nine -- eight or nine other provisions that,  
25 you know, one might look at to see are they

1 sufficiently clear language that they could be  
2 individually enforceable.

3 Most of them, like most of the other  
4 provisions, have been never litigated in the  
5 courts of appeals. There -- there are a few  
6 that have. But, you know, there has not been a  
7 flood of litigation here, really, under this  
8 provision or any of these other provisions.

9 And, you know, this has been the  
10 longstanding position of the federal government.  
11 The first decision on this issue with this  
12 statute was, you know, Judge Sutton's opinion  
13 for the Sixth Circuit more than 20 years ago.  
14 Like, if the flood of lawsuits was supposed to  
15 happen, you know, we would expect to see it.

16 And, you know, the only other thing  
17 I -- I might say there is that I -- I think it's  
18 wrong to suggest that, like, Medicaid --  
19 individuals on Medicaid are, like, you know,  
20 seeking to -- to file lawsuits to try to get  
21 attorneys' fees or some kind of financial  
22 benefit.

23 They're not getting damages from the  
24 state under Section 1983. This Court already  
25 has precedents, like, saying that that generally

1 can't happen when a state official's acting in  
2 their individual capacity. What they're seeking  
3 is declaratory and injunctive relief.

4           That's what all these cases that led  
5 to the circuit split are about: getting  
6 declaratory and injunctive relief when a state  
7 has for reasons unrelated to medical competency  
8 just kicked out a provider and the individual  
9 said you've denied me my right to a provider of  
10 choice and I just want some healthcare. These  
11 aren't people getting rich. You know, they're  
12 just trying to get healthcare here.

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

17           You have framed your argument in terms  
18 of Gonzaga and Talevski, and I agree that those  
19 are the relevant cases. But, you know, Judge  
20 Richardson asked for help. I mean, I -- I guess  
21 I feel like it's been clear that we've -- that  
22 Blessing and Wilder have been eclipsed. Judge  
23 Richardson says, you know, can you please just  
24 explicitly say so?

25           Do you agree that they've been

1 explicitly eclipsed by Gonzaga and Talevski and  
2 do you have a problem with our just saying that?

3 MS. SAHARSKY: The Court --

4 JUSTICE BARRETT: I mean, you framed  
5 your argument in terms of Gonzaga and Talevski,  
6 so just, you know --

7 MS. SAHARSKY: Right. To the extent  
8 the Court thinks there should be additional  
9 clarity on that, the Court absolutely should  
10 provide it. And we don't see an issue with the  
11 discussion that we've had here today about the  
12 way in which the Court in Gonzaga said: Look,  
13 if those decisions had been read a certain way,  
14 that is a wrong reading, like, don't do that.

15 So, you know, whether you would need  
16 to overrule Wilder or not, that -- that -- that  
17 provision's not even on the books anymore.

18 JUSTICE BARRETT: Right.

19 MS. SAHARSKY: So that seems like a  
20 bit much, particularly when there's pretty  
21 strong statutory stare decisis considerations.  
22 But, certainly, the analysis set out in Gonzaga  
23 focuses on whether there's unambiguous conferral  
24 of an individual right and to me makes pretty  
25 clear you can't just look at three factors in,

1 you know, Blessing and --

2 JUSTICE BARRETT: I entirely agree. I  
3 mean, so -- and -- and I agree that we're only  
4 talking about the analytical framework, that  
5 we're not talking about the results of  
6 particular cases. It just seems like it already  
7 was pretty clear, but maybe we should just say  
8 it. And it sounds like you're okay with that,  
9 saying Gonzaga and Talevski are -- are -- set  
10 out the framework that we need to follow.

11 MS. SAHARSKY: Yes. I thought that  
12 was clear. If the Court wants to make it more  
13 clear, that seems right. I think the Fourth  
14 Circuit here, like the -- many of the other  
15 courts of appeals, Judge Wilkinson tried very  
16 hard to, like, trace this Court's case law and  
17 talk about how those decisions had been limited.  
18 His analysis seemed right to us and was, you  
19 know, very careful in doing that.

20 But, to the extent that the Court  
21 thinks that there needs to be more clarity here,  
22 please, you know, go ahead and provide it.

23 JUSTICE BARRETT: Well, we can save  
24 him --

25 MS. SAHARSKY: But just --

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

4 MS. SAHARSKY: Sure. I think the one  
5 thing that we don't think the Court should do is  
6 adopt some kind of magic words test. We just  
7 don't think that that's appropriate from a  
8 separation-of-powers perspective to Congress.  
9 It's not really fair to the -- the Congress  
10 that -- that, you know, wrote these statutes.  
11 And it -- you know, it -- it takes away from  
12 what the central inquiry, I think, is supposed  
13 to be here, which is so Congress enacted a  
14 statute, and we're supposed to figure out, like,  
15 does it want individuals to be able to enforce  
16 that.

17 And, you know, here, starting with  
18 what we call Talevski step 1, you know, we think  
19 it's pretty clear from this language that it  
20 confers rights on individuals. I mean, if it's  
21 not doing that, like -- like, what is it doing?

22 CHIEF JUSTICE ROBERTS: Well, you  
23 know --

24 MS. SAHARSKY: It clearly is giving --

25 CHIEF JUSTICE ROBERTS: -- we -- we

1 could say -- say it again, what we said in  
2 Gonzaga and Talevski, or we say -- or we could  
3 say we meant it when we said it.

4 (Laughter.)

5 MS. SAHARSKY: Yes, although I -- I  
6 don't think it's right to think that the courts  
7 of appeals aren't getting the message. I think  
8 they're getting the message, and let me just  
9 give you a few examples.

10 First of all, you have Judge  
11 Wilkinson's opinion for the Fourth Circuit here,  
12 and he says many times I understand that Gonzaga  
13 provides the test. I understand that it has to  
14 be unambiguous language. I understand that we  
15 cannot find individual rights in these statutes  
16 willy-nilly. We need to be absolutely sure  
17 about it.

18 But all three of the judges on this  
19 panel, including the concurring Judge  
20 Richardson, found that this statute  
21 unambiguously confers individual rights, that it  
22 is guaranteeing an individual the right to their  
23 provider of choice.

24 And then, if you look at, you know,  
25 other cases, there -- as I said, there haven't

1     been a lot of cases where people have litigated  
2     provisions, other -- other state plan  
3     requirements, but, you know, the -- the courts  
4     of appeals have, like, routinely said no, these  
5     things are not individually enforceable. We  
6     give -- you know, we gave one of the -- one of  
7     them in our brief, an example, you know, in  
8     Section (a)(32), which is about paying only the  
9     provider and not third parties. You know, there  
10    are -- there are many other provisions.

11             But, if you're looking for some kind  
12    of, you know, issue here in the courts of  
13    appeals, like, the courts of appeals aren't  
14    getting the message, you know, frankly, that's  
15    just not true. It's just that this is a  
16    situation where we're talking about an intensely  
17    personal right that Congress wanted to protect.

18             I mean, there aren't that many things  
19    that are -- are more important than, you know,  
20    being able to choose your doctor, the person  
21    that you see when you're at your most  
22    vulnerable, facing, you know, some of the most  
23    significant, you know, challenges to your life  
24    and your health.

25             And Congress said a long time ago, you

1 know, this is something we want to protect. We  
2 want people on Medicaid, who are insured through  
3 Medicaid, to have the same right that people who  
4 have private insurance enjoy because it's so  
5 foundational to -- to individual -- individual  
6 dignity and individual autonomy, and it makes  
7 sense to -- to -- for Congress to have said  
8 that.

9 I guess the -- a couple other things  
10 that have been discussed that I -- I just wanted  
11 to make sure that we address. You know, we  
12 understand that there needs to be clear notice  
13 provided to the states here about their end of  
14 the bargain. But, you know, as I said, I don't  
15 think that there's a disagreement about what  
16 this provision does. I -- I think everyone  
17 agrees that it's -- you know, you have the right  
18 to -- to any qualified and willing provider.

19 Now the state has an argument that  
20 they think they have an unfettered right to  
21 define "qualified" as being something other than  
22 professional qualifications and medical  
23 qualifications. That is some -- an argument  
24 that was made and rejected below in a long  
25 discussion by the Fourth Circuit. The Court

1 denied cert on that.

2           But just to maybe give the Court some  
3 confidence in -- in the Fourth Circuit's  
4 decision, you know, if this were a case in which  
5 there were real question about medical  
6 competence, like is this provider qualified to  
7 be a medical provider in the state, the Fourth  
8 Circuit said, of course, the state would get a  
9 healthy dose of deference in those  
10 circumstances. The Fourth Circuit said that  
11 multiple times in its opinion.

12           But the Fourth Circuit also said, you  
13 know, this is an easy case. There has never  
14 been an argument through the long history of  
15 this litigation that Planned Parenthood is  
16 unqualified medically, professionally  
17 unqualified. It is only that there is something  
18 that Planned Parenthood is doing outside of  
19 Medicaid that the state wants to disqualify it  
20 from the program.

21           And so, if it -- if it were a real  
22 case about qualifications, you know, it's  
23 something where the state would get deference.  
24 But it's absolutely wrong under the scheme here  
25 to say that the state can just deem any

1 requirement it wants, you know, that a  
2 provider's unqualified -- too many people work  
3 at the provider have blue eyes or they support  
4 green energy or -- or whatever else.

5 JUSTICE KAGAN: Ms. Saharsky, if every  
6 state thought that, right, we would have every  
7 state deciding what their various, you know,  
8 policy justifications -- you -- you know, it  
9 could be people who do provide abortions, people  
10 who don't provide abortions, people who do  
11 provide contraception, people who don't provide  
12 contraception, people who do do gender  
13 transition treatment, people who don't, and, you  
14 know, every state could split up the world by  
15 providers like that, right?

16 Is -- I -- I -- that does not seem --

17 MS. SAHARSKY: Right. That --

18 JUSTICE KAGAN: -- what this statute  
19 is all about, is allowing states to do that and  
20 then giving individuals no ability to come back  
21 and say that's wrong, I'm entitled to see my  
22 provider of choice regardless of what they think  
23 about contraception or abortion or gender  
24 transition treatment.

25 MS. SAHARSKY: That is absolutely

1 right. I think, if one accepted the full  
2 argument that the state makes, including on the  
3 question for which the Court denied cert, it  
4 would be that a state can just say a provider is  
5 disqualified for any reason unrelated to medical  
6 competency, and that could cause a whole host of  
7 problems, but the main problem, as you  
8 identified, is that it would make the free  
9 choice of provider provision not mean anything  
10 because Congress --

11 JUSTICE BARRETT: But isn't that the  
12 real problem here? Like, isn't that -- I mean,  
13 if you really kind of boil down the dispute, the  
14 real problem is that Planned Parenthood was  
15 considered a not a qualified provider. If -- if  
16 you take it out of that -- and -- and -- you  
17 know, there's a -- a dispute about that, as you  
18 were saying with Justice Kagan. But, if we take  
19 it out of that, that you've disqualified a  
20 provider because of non-Medicaid services that  
21 they provide, be it gender transition,  
22 contraception, abortion, whatever, that's a  
23 different issue, right, than can you imagine if  
24 the state in an area that we would all agree  
25 that the state gets a healthy dose of deference,

1 like, let's say, you know, a doctor had  
2 malpractice -- a certain number of malpractice  
3 suits or had violated, you know, standards in  
4 some other way.

5 Does it make sense in that  
6 circumstance for plaintiffs to have a -- for  
7 Congress to have wanted plaintiffs to have a  
8 right to come in and sue to say, well, you  
9 shouldn't -- that -- that's my provider of  
10 choice; he may have violated these standards --  
11 and then litigate the qualifications of that  
12 provider who might have been disqualified for  
13 reasons that are within the state's authority?  
14 Does it make sense that Congress would have  
15 wanted the patient to litigate that issue?

16 MS. SAHARSKY: Well, the Congress  
17 wanted the patient to have the ability to see  
18 their -- their provider of choice if it's a  
19 qualified and willing provider. And so that's a  
20 limitation that Congress put on the statute.

21 And, you know, as I said, if it were a  
22 case in which the state asserted that it was  
23 about a medical qualification, then that -- the  
24 statute does say, you know, qualified to provide  
25 the services at issue. And so, as the Fourth

1 Circuit said, a court would interpret it --  
2 interpret, you know, what does that mean? It  
3 means professionally qualified, medically  
4 qualified. And, in those circumstances, the  
5 state would get deference.

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

9 CHIEF JUSTICE ROBERTS: Sure.

10 MS. SAHARSKY: -- is pretty simple,  
11 which is states aren't for the most part keeping  
12 needy patients away from qualified and willing  
13 providers. It's just not happening.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 Justice Thomas?

17 Justice Alito?

18 Justice Sotomayor?

19 JUSTICE SOTOMAYOR: I don't want to  
20 get -- I -- I do want to have you address the  
21 substantial compliance issue. The other side  
22 says, when it's a substantial compliance issue,  
23 that brings into -- always brings everything  
24 into question as to whether a right was granted.  
25 That's the only way you could read that

1 argument. But do you have another way to  
2 address it?

3 And, number two, Mr. Bursch said that  
4 you were wrong that providers could challenge  
5 this in their review mechanism. Could you  
6 explain why they can't? He says you were  
7 reading 126-400(E) wrong.

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

11 One, that is flatly inconsistent with  
12 Talevski if you said that because Talevski was  
13 also a substantial compliance regime.

14 Two, it is inconsistent with  
15 Congress's judgment in the Suter fix because  
16 those state plan provisions that Congress was  
17 saying could confer individual rights also all  
18 are substantial compliance provisions.

19 And, three, just to provide the  
20 reasoning for it, the question of substantial  
21 compliance is a different question from whether  
22 the statute creates a right. There is a right  
23 and then there are mechanisms for enforcement of  
24 that right. Substantial compliance limits HHS's  
25 mechanism for enforcement.

1           I think, understandably, Congress said  
2           this is a blunt instrument where it's going to  
3           be cutting off healthcare to people that are  
4           saying that they were denied healthcare, so  
5           we're only going to have Congress be able -- or  
6           have HHS be able to do that in situations where  
7           they're not even in substantial compliance.

8           But I think that shows that the 1983  
9           remedy was expected here because it would be a  
10          scalpel to that blunt -- blunt instrument, a  
11          more tailored remedy, to be able to say these  
12          people have been denied healthcare, and they can  
13          get that healthcare to get that declaratory and  
14          injunctive relief. So that's substantial  
15          compliance.

16          The second is about enforcement  
17          proceedings. So I'll just say off the bat there  
18          I think there is agreement that there is no  
19          individual enforcement proceeding that can  
20          challenge the denial of a provider of choice.  
21          There's only a claimed denial proceeding that is  
22          available in a state administrative proceeding.

23          But you asked about provider  
24          proceedings. So the statute itself, Medicaid,  
25          does not require the state to have a provider

1 proceeding, but a federal regulation, so not a  
2 judgment by Congress but federal law, a federal  
3 regulation does require that a type of  
4 challenge -- the state to have a -- a procedure  
5 for the provider to challenge. The grounds of  
6 that are -- are pretty limited to provider  
7 competency, as we discussed. You know, you can  
8 look at the grounds in -- in the provision  
9 that -- that you mentioned.

10           And, here, the state admitted that  
11 that process was futile. And you don't just  
12 need to take my word for it. Both the district  
13 court and the court of appeals found that. On  
14 pages 101A, Note 4 of the Petition Appendix, is  
15 the court of appeals, and then the district  
16 court, Petition Appendix 137A to 138A.

17           And this came after a colloquy that  
18 the state's lawyer had with the district court,  
19 who said: What is the -- what is the hearing  
20 officer in the state procedure for the provider  
21 supposed to do here because the governor's made  
22 this determination? Can they offer any relief?  
23 And the state attorney said no.

24           And the only other thing I would say  
25 is, you know, I don't think it really matters

1       whether the provider has a remedy here because  
2       it's the individual's right that Congress was  
3       protecting. Congress wrote this in individual  
4       terms because those are the folks that were  
5       denied, you know, healthcare when providers were  
6       cut out of Medicaid before the statute was  
7       enacted. And Congress said, you know, we --  
8       they're the ones being hurt, so we need to do  
9       something that, you know, allows them to be able  
10      to see their provider of choice.

11                 JUSTICE SOTOMAYOR: Thank you.

12                 CHIEF JUSTICE ROBERTS: Justice Kagan?  
13                 Justice Gorsuch?

14                 Justice Kavanaugh?

15                 JUSTICE KAVANAUGH: On the alternative  
16       enforcement mechanism, though, we did say in  
17       Gonzaga that that is -- is relevant. The fact  
18       that there is one buttresses the conclusion that  
19       those provisions fail to confer enforceable  
20       rights was the language in Gonzaga.

21                 So do you agree with that language?

22                 MS. SAHARSKY: Well, I think there's a  
23       question about what "buttress" means. You know,  
24       this Court explained it later in Talevski as  
25       there being step 1 and step 2. And that

1 explanation makes a lot of sense to me because  
2 the first question is look at the text at issue  
3 and does it confer a right.

4           And then the way the Court explains  
5 step 2 is, well, okay, so we have this right,  
6 but there's all these other ways of enforcing  
7 it. So we would have thought that that -- those  
8 other ways of enforcing it make us think that  
9 there's not a Section 1983 remedy.

10           So, you know, I think the Court  
11 explained those as separate in Talevski, and  
12 that -- that seemed to me to be a -- a correct  
13 clarification. I -- I -- I read, if you read  
14 all of the Gonzaga, you know, opinion together  
15 with the "buttress" language, you know, the  
16 Court also does it in two steps. It says, you  
17 know, this language doesn't say anything about  
18 individuals. It's all about policy and  
19 practice. That's not going to create any -- any  
20 rights.

21           And then it says this buttress  
22 language, like, by the way, you've got this  
23 other problem too, which is this, like,  
24 enforcement mechanism where there's a federal  
25 hearing board where an individual can go and get

1 a hearing on their own particular complaint.

2 So, to me, that's kind of still the  
3 two-step thing. I don't exactly know what  
4 buttress means, but I -- I also don't really  
5 think it matters here because this is nothing  
6 like the Gonzaga ability to get, you know, a --  
7 a hearing before a federal hearing board where  
8 an individual can bring a suit.

9 There's no individual cause of action.  
10 There's no individual administrative remedy. I  
11 mean, it's just so far away from, you know, Sea  
12 Clammers and those cases that said, you know,  
13 there is enough of an enforcement scheme that  
14 means that there shouldn't be individual  
15 enforcement.

16 Like, if -- if this provision is not  
17 enforceable under Section 1983, individuals --  
18 it's -- it's not going to be enforced. I mean,  
19 this provision will become meaningless. HHS has  
20 never cut off funding.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Barrett?

24 Justice Jackson?

25 JUSTICE JACKSON: So let me just

1 clarify that Congress adopted this provision in  
2 response to a specific problem. That's my  
3 understanding, which is that in the first two  
4 years of the Medicaid program, some states were  
5 trying to steer their Medicaid beneficiaries to  
6 certain providers and away from others.

7 Is that your understanding of what  
8 they -- Congress was responding to when it  
9 enacted this provision?

10 MS. SAHARSKY: Yes.

11 JUSTICE JACKSON: So, to the extent  
12 that the state is arguing here that this  
13 provision is merely meant to serve as a  
14 directive to the Secretary, I -- I feel like  
15 that might be inconsistent with the  
16 understanding that the primary target of the  
17 statute was not the Secretary, it was the states  
18 who were restricting people's rights or  
19 restricting people's choices of healthcare  
20 provider.

21 MS. SAHARSKY: Correct. It is like  
22 the statute at issue in Talevski that it speaks  
23 both of the individuals who have the rights, the  
24 rights-bearers, and the people that might  
25 infringe those rights, which in Talevski was,

1 you know, the nursing homes and here is the  
2 state. So it has both components: the  
3 individuals who have the rights and the people  
4 that might not, you know, protect those rights,  
5 but it tells the state, you know, you -- you  
6 have to protect this right to any qualified and  
7 willing provider.

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Rebuttal, Mr. Bursch.

12 REBUTTAL ARGUMENT OF JOHN J. BURSCH

13 ON BEHALF OF THE PETITIONER

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

15 In the Spending Clause context, private  
16 rights are the exception, not the rule. That's why  
17 Congress must use explicit rights-creating language,  
18 words with a rights-creating pedigree.

19 Justice Kavanaugh noted that the clear  
20 lines dissolve quickly if you don't require that  
21 explicit words, and this argument proves that.

22 Justice Kagan started describing our  
23 provision as a right to choose a doctor. The  
24 word "right" doesn't appear in the statute.

25 Justice Sotomayor at one point called

1 it a privilege of choosing your doctor. The  
2 word "privilege" doesn't appear in the statute.

3 Justice Jackson called it a free  
4 choice of provider provision. The words "free"  
5 and "choice" don't appear anywhere in the  
6 statute.

7 My friend, Ms. Saharsky, said the  
8 provision is mandatory because the state must do  
9 these things. That's not what it says. It says  
10 that the plan must provide these things. In a  
11 substantial compliance context, that's a  
12 distinction that makes a difference.

13 My friend also said twice that the  
14 statute would do the exact same thing if it used  
15 the word "right." But that's absolutely wrong.  
16 If the statute said "right," it would put the  
17 state on notice that it could be subjected to  
18 1983 lawsuits.

19 My friend also says that requiring  
20 explicit rights-creating language is a  
21 separation-of-powers problem. That's not  
22 correct. The absence of that language is a  
23 federalism problem because it doesn't give clear  
24 notice to the states.

25 To the extent there's a

1 separation-of-powers implication, it's because  
2 not requiring clear rights-creating language  
3 disperses the Secretary's discretionary  
4 authority to federal district courts all across  
5 the country.

6           A couple quick points. Our reply  
7 brief, pages 22 to 23, explain why the  
8 Respondents are wrong about their understanding  
9 of Regulation 16-404. Page 22 gives the  
10 statutory citation that contemplates the  
11 provider administrative appeals. And Reply 23  
12 explains that the administrative appeal remedy  
13 is not futile and our counsel did not admit that  
14 below.

15           My friend admitted to Justice Gorsuch  
16 that a statute can require the provision of a  
17 benefit yet not have rights-creating language.  
18 That's this case.

19           And the fact that the 12 of us can  
20 have such a robust conversation about whether  
21 this statute is mandatory or not, whether it's  
22 rights-creating or not, demonstrates that the  
23 rights-creating language is ambiguous, not clear  
24 and explicit. And if there is any ambiguity in  
25 this context, the state has to win because it's

1 not being put on notice of when it might be  
2 sued.

3 At the end of the day, putting states  
4 on clear notice requires explicit  
5 rights-creating language, as this Court has  
6 said. Because the "any qualified provider"  
7 provision lacks that language, we ask that you  
8 reverse. Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 The case is submitted.

12 (Whereupon, at 11:49 a.m., the case  
13 was submitted.)

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## Official

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