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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Washington, D.C.

Wednesday, April 2, 2025

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

APPEARANCES:

JOHN J. BURSCH, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

KYLE D. HAWKINS, Counselor to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Petitioner.

NICOLE A. SAHARSKY, ESQUIRE, Washington, D.C.; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:15 a.m.)

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

Mr. Bursch.

ORAL ARGUMENT OF JOHN J. BURSCH

ON BEHALF OF THE PETITIONER

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

In our federalist system, the legitimacy of Congress's exercise of its spending power depends on a state's knowing acceptance of funding conditions. As even Respondents concede, an individual focus and mandatory language are not enough. Gonzaga held that clear rights-creating language is critical to creating private rights. Congress did not use clear rights-creating language in the "any qualified provider" provision.

Consider its text and structure. First, it does not use the word "right" or its functional equivalent, nor does it use words with a deeply rooted rights-creating pedigree like the Fifth Amendment's "no person shall."

That lack should be dispositive.

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

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

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

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

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

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

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

I welcome the Court's questions.

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

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

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

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

agreeing to, it needs to be really clear.

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

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

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

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: It seems a little

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

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

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

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

JUSTICE SOTOMAYOR: It doesn't seem --
MR. BURSCH: -- "any qualified provider" provision.
JUSTICE SOTOMAYOR: It -- in your -- in your brief, you had eight provisions of the Act that were part of this same list of rights, and you said, if we recognize a private cause of action here, these eight are open to dispute.
I looked at the eight very carefully, and there hasn't been much of a dispute among the circuits. There hasn't even been a challenge.
You mentioned one of them because it's hard to see how a state can't understand it -- there hasn't even been a challenge to it -- about providing Medicaid to juveniles in prison. And there's been no dispute over that because no one doubts that the state knows what it has to do and it does it.
The others, again, none of them have disputes. Some uniformly, courts have said, don't create private rights, and others they have said they do. Where they say they do, to me, it's a simple issue. You have to provide a fair hearing before the state agency of any

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

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

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

JUSTICE JACKSON: Can I --

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

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

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

right to choose their doctor.

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

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

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

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

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

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

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

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

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

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

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

MR. BURSCH: Gonzaga makes clear that

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

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

In addition --

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

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

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

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

in the provider, not the beneficiary --

JUSTICE SOTOMAYOR: I'm sorry.

MR. BURSCH: -- because --

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

MR. BURSCH: Yes.

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

MR. BURSCH: That's correct.

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

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

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

MR. BURSCH: Justice Sotomayor, that

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

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

JUSTICE SOTOMAYOR: So why were they denied here?

MR. BURSCH: Well, can I finish?

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

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

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

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

administrative appeal that we offer you, and --

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

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

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

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

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

argument. Never have, are not making it here.

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

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

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

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

And I just see that as a step 2

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

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

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

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

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

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

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

MR. BURSCH: Yes.

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

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

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

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

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

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

JUSTICE JACKSON: Yes.

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Yes. Sure.

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

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

MR. BURSCH: But there's --

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Alito?

Anything? Anything further?

Justice Gorsuch?

JUSTICE GORSUCH: On the administrative review process --

MR. BURSCH: Yes.

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

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

JUSTICE GORUSCH: Yeah, but they --

MR. BURSCH: They have counsel --

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice Kagan?

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

CHIEF JUSTICE ROBERTS: Oh, I'm sorry.

(Laughter.)

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

JUSTICE KAVANAUGH: Thank you.

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

MR. BURSCH: Yes.

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

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

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

MR. BURSCH: Mm-hmm.

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

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

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

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

word --

JUSTICE KAVANAUGH: And that's it?

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

JUSTICE KAVANAUGH: Well --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

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

MR. BURSCH: Mm-hmm.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Gonzaga analysis?

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

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

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

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

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

that's the exact opposite of a right.

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

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Justice Jackson?

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

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

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

MR. BURSCH: Yes.

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

MR. BURSCH: Oh, sure.

JUSTICE JACKSON: Right.

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

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

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

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

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

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

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

MR. BURSCH: Right.

JUSTICE JACKSON: -- it doesn't matter.

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

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

JUSTICE JACKSON: Yeah.

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

JUSTICE JACKSON: Yeah.

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

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

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

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

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

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

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

JUSTICE JACKSON: Please.

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

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

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

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

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

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

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

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

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

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

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

it wrong. I totally understand that.

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

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

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

MR. BURSCH: Could I just finish?

JUSTICE JACKSON: Yes, please.

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

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

He looks at words like "may obtain" or

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

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

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

MR. BURSCH: Yes.

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

MR. BURSCH: Yes.

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

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

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

MR. BURSCH: Yes.

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

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

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

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

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

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

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

MR. BURSCH: That it would --

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

MR. BURSCH: Yes.

JUSTICE JACKSON: Yes.

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

JUSTICE JACKSON: All right.

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

JUSTICE JACKSON: Sure. You have a whole list.

MR. BURSCH: Yes.

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

MR. BURSCH: Right.

JUSTICE JACKSON: Thank you.

MR. BURSCH: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. BURSCH: Thank you, Chief Justice.

CHIEF JUSTICE ROBERTS: Mr. Hawkins.

ORAL ARGUMENT OF KYLE D. HAWKINS

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

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

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

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

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

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

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

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

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

I welcome the Court's questions.

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

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

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

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

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

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

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

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

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

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

That was the whole point of the Suter fix.

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

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

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

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

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

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

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

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

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

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

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

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

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

Is there much sense in that?

MR. HAWKINS: Well --

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

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

JUSTICE SOTOMAYOR: Yes, but --

MR. HAWKINS: The -- the --

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

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

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

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

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

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

JUSTICE SOTOMAYOR: The Bill of Rights

does it all the -- doesn't it?

MR. HAWKINS: Sorry, Your Honor. The?

JUSTICE SOTOMAYOR: The Bill of Rights itself does it?

MR. HAWKINS: So I --

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

MR. HAWKINS: Oh --

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

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

JUSTICE SOTOMAYOR: No, but it --

MR. HAWKINS: I think that --

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

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

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

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

JUSTICE KAGAN: It depends on the context.

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Yes.

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Alito, anything?

Justice Kagan?

Justice Kavanaugh?

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

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

I mean, we know from Talevski that we

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

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

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

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

MR. HAWKINS: Yeah.

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

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

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

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

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

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

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

JUSTICE KAVANAUGH: "Privilege."

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

JUSTICE KAVANAUGH: And "immunity."

MR. HAWKINS: Yeah, those all sound right.

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

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

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

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

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

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

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

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

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

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

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

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

But what about this one? I mean,

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

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

JUSTICE BARRETT: Is it all about abortion providers?

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

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

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

MR. HAWKINS: Okay.

JUSTICE BARRETT: Okay. Thank you.

CHIEF JUSTICE ROBERTS: Justice Jackson?

JUSTICE JACKSON: Yeah, three quick points.

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

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

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

MR. HAWKINS: So I think Talevski does

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

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

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

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

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

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

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

MR. HAWKINS: Well, I --

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

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

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

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

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

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

violating this free-choice provider provision?

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

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

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

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. HAWKINS: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Ms. Saharsky.

ORAL ARGUMENT OF NICOLE A. SAHARSKY

ON BEHALF OF THE RESPONDENTS

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

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

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

Second, look at the context. Congress

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

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

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

Congress expected that an individual

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

I welcome the Court's questions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Counsel --

MS. SAHARSKY: -- because --

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

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

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

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

CHIEF JUSTICE ROBERTS: Is that a way?

MS. SAHARSKY: The concurrence did.

CHIEF JUSTICE ROBERTS: Is that a way?

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

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

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

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

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

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

Just to go back to --

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

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

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

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

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

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

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

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

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

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

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

agree on that.

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

JUSTICE GORSUCH: So --

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

JUSTICE GORSUCH: Yeah.

MS. SAHARSKY: They all create rights.

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

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

JUSTICE GORSUCH: I'm --

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

JUSTICE GORSUCH: So, once --

MS. SAHARSKY: There's nothing.

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

MS. SAHARSKY: Right.

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

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

JUSTICE GORSUCH: Well, yeah, yeah.

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

JUSTICE GORSUCH: Yeah.

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

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

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

JUSTICE GORSUCH: Sure. But --

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

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

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

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

JUSTICE GORSUCH: Yeah.

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

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

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

JUSTICE GORSUCH: So that would be different.

MS. SAHARSKY: -- language is stronger.

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

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

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

provider? Would that be rights-creating?

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

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

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

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

JUSTICE GORSUCH: I mean, is that what --

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

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

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

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

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

MS. SAHARSKY: No.

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

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

And in Gonzaga -- and that wasn't

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

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

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

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

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

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

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

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

It could also say, I think the state

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

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

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

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

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

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

MS. SAHARSKY: Yes. Let me say three

things about that.

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

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

JUSTICE ALITO: So just to --

MS. SAHARSKY: And then --

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

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

The "may obtain" in this -- in this

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

And there's this --

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

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

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

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

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

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

So don't we need something more than that?

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

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

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

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

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

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

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

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

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

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

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

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

MS. SAHARSKY: The Court --

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

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

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

So, you know, whether you would need to overrule Wilder or not, that provision is not even on the books anymore --

JUSTICE BARRETT: Right.

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

JUSTICE BARRETT: I entirely agree. I mean, so -- and I agree we're only talking about an analytical framework, that we're not talking about the results of particular cases. It just seems like it already was pretty clear, but maybe we should just say it.

And it sounds like you're okay with that, saying Gonzaga and Talevski are -- are -- set out the framework that we need to follow.

MS. SAHARSKY: Yes. I thought that

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

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

JUSTICE BARRETT: Well, we can save him --

MS. SAHARSKY: Just --

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

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

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

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

CHIEF JUSTICE ROBERTS: Well, you know --

MS. SAHARSKY: It clearly is giving --

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

multiple times in its opinion.

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

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

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

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

Is -- that does not seem --

MS. SAHARSKY: Right. That --

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Sure.

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Alito?

Justice Sotomayor?

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

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

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

I think the state's argument is wrong for three reasons.

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

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

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

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

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

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

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

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

And, here, the state admitted that

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

And this came after a colloquy that the state's lawyer had with the district court who said what is the -- what is the hearing officer in the state procedure for the provider supposed to do here because the governors made this determination. Can they offer any relief? And the state attorney said no.

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

JUSTICE SOTOMAYOR: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch?

Justice Kavanaugh?

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

So you agree with that language?

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

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

So, you know, I think the Court

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

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

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

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

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

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

Justice Jackson?

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

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

MS. SAHARSKY: Yes.

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

MS. SAHARSKY: Correct. It is like the statute at issue in Talevski that it speaks both of the individuals who have the rights, the rights' bearers, and the people that might infringe those rights, which in Talevski was, you know, the nursing homes; and here is the state. So it has both components; the individuals who have the rights and the people that might not, you know, protect those rights, but it tells the state, you know, you -- you have to protect this right to any qualified and willing provider.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Rebuttal, Mr. Bursch.

REBUTTAL ARGUMENT OF JOHN J. BURSCH

ON BEHALF OF THE PETITIONER

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

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

Justice Kavanaugh noted that the clear lines dissolve quickly, if you don't require that explicit words, and this argument proves that. Justice Kagan started describing our provision as a right to choose a doctor. The word "right" doesn't appear in the statute.

Justice Sotomayor at one point called it a privilege of choosing your doctor. The word "privilege" doesn't appear in the statute. Justice Jackson called it a free choice of provider provision. The words "free" and "choice" don't appear anywhere in the statute.

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

distinction that makes a difference.

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

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

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

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

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

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

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

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

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

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

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

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