

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TOBY DOUGLAS, DIRECTOR, CALIFORNIA :

4 DEPARTMENT OF HEALTH CARE SERVICES, :

5 Petitioner : No. 09-958

6 v. :

7 INDEPENDENT LIVING CENTER OF :

8 SOUTHERN CALIFORNIA, INC., ET AL. :

9 - - - - -x

10 and

11 - - - - -x

12 TOBY DOUGLAS, DIRECTOR, CALIFORNIA :

13 DEPARTMENT OF HEALTH CARE SERVICES, :

14 Petitioner : No. 09-1158

15 v. :

16 CALIFORNIA PHARMACISTS ASSOCIATION, :

17 ET AL. :

18 - - - - -x

19 and

20 - - - - -x

21 TOBY DOUGLAS, DIRECTOR, CALIFORNIA :

22 DEPARTMENT OF HEALTH CARE SERVICES, :

23 Petitioner : No. 10-283

24 v. :

25 SANTA ROSA MEMORIAL HOSPITAL, :

1 ET AL. :

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3 Washington, D.C.

4 Monday, October 3, 2011

5

6 The above-entitled matter came on for oral
7 argument before the Supreme Court of the United States
8 at 10:05 a.m.

9 APPEARANCES:

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12 Petitioner.

13 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
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15 States, as amicus curiae, supporting Petitioner.

16 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf
17 of Respondents.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 09-958, Douglas v. Independent Living Center of Southern California and the consolidated cases.

Ms. Schwartz.

ORAL ARGUMENT OF KARIN S. SCHWARTZ
ON BEHALF OF THE PETITIONER

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

There are many reasons why this Court should not recognize a private cause of action to enforce 30(A) and I would like to focus on three. First, the separation of powers. Congress controls who can enforce Federal law, and it has not provided for -- for private enforcement of 30(A). Instead it has provided for administrative enforcement.

Second is the Spending Clause context in which the case arises. The very legitimacy of Spending Clause legislation depends on the State's voluntary and knowing acceptance of its obligations. For this reason, if Congress wants to provide for private party litigation, it must do so clear and unambiguously, and it has not done so in this case.

1 And third is the language of 30(A) itself,
2 which is broad and undefined and which includes
3 competing policy interests. These are suited to
4 administrative enforcement, with all the expertise and
5 judgment and discretion and administrative know-how that
6 can be brought to bear. These three principles all
7 focus -- all point to one conclusion -- that section
8 30(A) is not enforceable.

9 JUSTICE GINSBURG: Ms. Schwartz, the
10 government doesn't have the injunctive power. As far as
11 California's rates are concerned, California puts them
12 into effect. The government can't stop that from
13 happening, even if the government thinks that they are
14 in violation of the Medicaid Act; is that right?

15 MS. SCHWARTZ: No, Your Honor, it -- it is
16 not. I mean, in the sense that it can't go out
17 immediately and get an injunction, Your Honor is
18 correct. However, the government has the power to deny
19 a State --

20 JUSTICE GINSBURG: Yes, but that's a very
21 drastic remedy that's going to hurt the people that
22 Medicaid was meant to benefit. Does the Government have
23 any injunctive power, or is its only -- only remedy a
24 fund cutoff?

25 MS. SCHWARTZ: Well, its only remedy

1 provided by statute is to terminate funds. However, it
2 is not a drastic remedy, it -- and it is the remedy
3 that's provided by statute.

4 JUSTICE GINSBURG: How often has it
5 happened?

6 MS. SCHWARTZ: How often does it happen?

7 JUSTICE GINSBURG: How -- how often has in
8 the Medicaid context --

9 MS. SCHWARTZ: Very rarely, and the reason
10 for that is because the way that most State plan
11 amendments operate is that these issues are resolved on
12 a consensual basis, generally within the 90 days
13 provided by regulation. This case is the exception that
14 proves the rule.

15 JUSTICE KAGAN: Well, Ms. Schwartz, isn't it
16 the exception because in fact you end-run -- end-ran the
17 administrative process, that you put your regulations,
18 your new rate schedules, into effect even before you
19 submitted them to HHS, and continued them in effect
20 while HHS was considering them, and continued them in
21 effect to the extent that you were allowed to do so by
22 injunction, even after HSS disapproved them?

23 MS. SCHWARTZ: There is no end run here
24 because HHS's own regulations provide that our time for
25 submitting the State -- State plan amendment is within

1 the 90 days that the amendment will take effect, and HHS
2 will confirm that -- it's the position of the Federal
3 Government that the State may implement its rate
4 reductions while the State plan amendment is pending.
5 It does so at the risk that, if a State plan amendment
6 is disapproved, that it may have to pay additional
7 funds. But we did not do an end run around anything.
8 We are entirely consistent with the administrative
9 process.

10 JUSTICE KENNEDY: Could a State in its own
11 courts provide for procedures whereby adversely affected
12 parties could test the regulation?

13 MS. SCHWARTZ: I don't believe so. And
14 that's because in --

15 JUSTICE KENNEDY: It seems to me you have to
16 say that. Otherwise the next question would be under
17 Gonzaga, you wouldn't say that a State can entertain a
18 monetary cause of action, so I think that's consistent
19 with your position.

20 MS. SCHWARTZ: Well, and I think what's very
21 important to focus on here is that this is not just any
22 Federal statute that is being enforced, but it is a
23 Spending Clause provision that is vague and ambiguous in
24 its terms. It cries -- it has all these policy elements
25 to it and it cries out for administrative review.

1 JUSTICE KENNEDY: Well, when you say -- that
2 brings me to a slightly different point. You -- you
3 introduce the fact or the consideration of what's
4 administratively workable. The brief by the former HHS
5 officials says quite to the contrary. It -- it says
6 that there are almost \$400 billion of HHS expenditures
7 that are supervised by 50 people. That works out to 800
8 million each; and they say, we don't have time for this,
9 and it's much more efficient and it's much more
10 consistent with the application of -- proper application
11 of Federal law, to allow this action be brought in the
12 -- in the courts.

13 MS. SCHWARTZ: I have two answers, Your
14 Honor. One is that I don't think it is more efficient
15 to have 700 district court judges interpreting a statute
16 that does not have any objective standard, but that is
17 susceptible to many different interpretations.

18 JUSTICE KAGAN: Well, Ms. Schwartz, the
19 agency --

20 JUSTICE KENNEDY: Well, I mean, that's "the
21 sky is falling," 7 -- 700 judges. It would be just each
22 district if it were in every district. And it -- it --
23 and certainly to the extent we are involving a State,
24 there would be only one State involved. So - so there
25 is just the State of California and only four districts

1 there and the suit could only be brought in one. So --
2 I think that's an -- you know, I don't think that the
3 "sky is falling" argument really works.

4 MS. SCHWARTZ: But California is now subject
5 to standards that don't apply anywhere else in the
6 country, and I believe the Court acknowledged exactly
7 this problem just last term in *Astra v. Santa Clara* when
8 it declined to allow private parties to use a contract
9 provision to do an end run around *Gonzaga*,
10 *Sandoval* versus -- *Sandoval v. Alexander*; I think I have
11 that reversed -- and the other cases that, based on
12 separation of powers of principles, based on Spending
13 Clause principles, limit the -- the circumstances in
14 which private parties can sue.

15 JUSTICE ALITO: Are you asking us to adopt a
16 rule that is good for this one case only?

17 MS. SCHWARTZ: Yes.

18 JUSTICE ALITO: You gave -- or is there --
19 could you state the rule in broader terms or more
20 neutral terms?

21 And you gave three reasons why we should
22 reverse. One, Congress hasn't created a cause of action
23 here. Well, Congress has never created causes of
24 action, never creates a cause of action in any case in
25 the *Ex parte Young* line or cases like that.

1 The Supremacy Clause, because this is a
2 Spending Clause, this was an act under the Spending
3 Clause. But you are not asking us to hold that a
4 Spending Clause legislation can never preempt State
5 legislation, I take it.

6 And then the language of 30(A), where you --
7 are you arguing that 30 -- that the Medicaid Act
8 affirmatively precludes any action like this. I don't
9 understand that. Is -- is any of those arguments
10 sufficient by itself, or do you have to take them all
11 together, and you are asking for a rule that only
12 applies here?

13 MS. SCHWARTZ: All of those arguments are
14 sufficient, as is the fact that, as we briefed, the
15 Supremacy Clause itself is an implied cause of action.
16 But let me focus on those three points. These are
17 points -- the rule that we are seeking is that a Federal
18 statute is not enforceable unless Congress intended for
19 it to be enforceable, and that that principle has
20 special force with respect to Spending Clause provisions
21 where Congress has to clearly and unambiguously provide
22 for that enforcement, because the State has to be on
23 fair notice due to the nature of the Spending Clause of
24 the obligations to which it is agreeing. That is
25 Pennhurst; and that is applied with even greater force

1 with respect to 30(A) because of the type of standards
2 that it incorporates.

3 If it's not suitable for -- if a
4 determination applying Gonzaga if that if you are
5 finding under 1983 the administrative nature and
6 flexible nature of those standards is not appropriate
7 for private enforcement, that shouldn't matter what
8 vehicle you are using to bring the case.

9 And I want to just -- to put this into real
10 clear context, in the 3 years that this case has been
11 pending, California has submitted 68 State plan
12 amendments outside of the rate context. 36 of them were
13 approved. The rest were withdrawn voluntarily. These
14 cases -- and they were all approved, almost all of them
15 within the 90-day period. So the administrative process
16 works.

17 JUSTICE SOTOMAYOR: Excuse me. Were
18 those -- were those amendments submitted before they
19 took effect or after they had taken affect, like here?

20 MS. SCHWARTZ: I don't know the answer to
21 that question. These are non-rate --
22 rate-related amendments, State plan amendments. But the
23 point is the administrative process is working. We
24 obtained -- and it resolves in the usual case in a
25 consensual resolution that is consistent with the

1 cooperative nature of the joint venture between the
2 States and the Federal Government --

3 JUSTICE SOTOMAYOR: That's where I'm a
4 little bit confused. The injunction here only stopped
5 you from implementing the rate changes until you got
6 approval from HHS in its administrative process that it
7 was going to approve the amendment, correct?

8 MS. SCHWARTZ: No, I don't believe the
9 injunctions were that limited. So if we obtained State
10 plan approval we then would have to go back to the court
11 and argue over what the impact is of the State plan.

12 JUSTICE SOTOMAYOR: That's a separate
13 question about whether the courts are required to give
14 deference to an HHS finding. But the injunction here
15 wasn't one that said you could never do this. It just
16 said go finish the process, right?

17 MS. SCHWARTZ: No, the injunctions were not
18 so conditional. And the point I want to make is, the
19 injunctions have disrupted the administrative process as
20 it is intended to work by drawing out the process, by
21 politicizing the process, by prejudicing our ability to
22 get State plan approval because now there is the concern
23 about what about retroactive relief when they approve
24 your State plan?

25 JUSTICE KENNEDY: Well, the courts I take it

1 have the prerogative, perhaps even the obligation, under
2 the primary jurisdiction rational to simply withhold
3 adjudication until the agency acts.

4 MS. SCHWARTZ: We requested that in some of
5 these cases and the courts ignored that argument. And
6 so the upshot is that we are now --

7 JUSTICE KENNEDY: But that's an abuse of
8 discretion, not an absence of power. You're arguing an
9 absence of power.

10 MS. SCHWARTZ: There is no cause of action,
11 that's correct, Your Honor. Our position is that there
12 is no cause of action here.

13 JUSTICE KAGAN: Can I go back to the
14 question that Justice Alito asked you about why there's
15 no cause of action. You are asking us to treat the
16 Supremacy Clause differently than every other
17 constitutional provision. Why should we?

18 MS. SCHWARTZ: For several reasons, Your
19 Honor. First, what you're doing here, what the Court is
20 doing here, is enforcing a Federal statute. You look
21 through the Supremacy Clause to the obligation --

22 JUSTICE KAGAN: The Supremacy Clause is part
23 of the Constitution -- -

24 MS. SCHWARTZ: It is.

25 JUSTICE KAGAN: And the Petitioners here --

1 excuse me. The plaintiffs here essentially said that
2 the Supremacy Clause as part of the Constitution had
3 been violated and sought, not damages, but only a
4 prospective injunction. And the question is why should
5 the Court do what the Court has done many, many, many
6 times before, tens and tens and tens of times before,
7 and say, yes, that's our prerogative and we'll proceed
8 to the merits.

9 MS. SCHWARTZ: Two points, Your Honor.
10 First, they did seek damages and they obtained damages
11 in Independent Living. The second is the obligations
12 that are imposed, the study requirement, the data
13 requirement, all these obligations are imposed by 30(A).
14 We look through the Supreme Clause to the statute to see
15 the obligations. So the question is, does Congress get
16 to control who enforces those obligations or not.

17 JUSTICE KAGAN: In a -- in a cause of -- in
18 a suit that's brought under a statute directly, a person
19 could be claiming damages. Here that is not the case.
20 A person is only claiming injunctive relief. And that
21 should -- there should be a difference between those two
22 in terms of when the cause of action is available.

23 MS. SCHWARTZ: First just one point: In
24 Independent Living they did claim damages and they
25 obtained damages. But setting that issue aside, no,

1 Your Honor, this Court has the obligation and the right
2 with respect to constitutional provisions to determine
3 how they will be enforced subject potentially to
4 congressional action, but there is far more latitude for
5 the court. With respect to statutes, of course, as this
6 Court is explained in *Davis v. Passman*, deference to
7 congressional intent is appropriate. And here --

8 JUSTICE ALITO: Well, suppose the plaintiffs
9 here were facing an imminent State enforcement action.
10 Would your argument be different?

11 MS. SCHWARTZ: Well, if -- if the plaintiffs
12 fell within -- yes. If the plaintiffs fell within of
13 the bill in equity to restrain enforce proceedings that
14 was in issue in *Ex parte Young* and that Justice Kennedy
15 has discussed in terms of the immunity to invalid
16 regulation, then the result would be different. But
17 there are several reasons why --

18 JUSTICE ALITO: But how does that square
19 with the argument that you made relying on separation of
20 powers, Spending Clause and the language of 30(A)? All
21 of those are still in play --

22 MS. SCHWARTZ: For a couple --

23 JUSTICE ALITO: -- in that situation.

24 MS. SCHWARTZ: Well, for a couple of
25 different reasons. First of all, a defense, which is

1 what you're asserting in such a case, is not a cause of
2 action, and so it doesn't implicate the separation of
3 powers concerns to the same degree as a stand-alone
4 cause of action to compel the State to comply with an
5 obligation owed to another entity.

6 Also, in those cases there, in the equity
7 cases -- equity doesn't provide a remedy just for an
8 injury. You have to have an invasion of what in old
9 times was called a primary right. But what that means
10 is a right to property or a right in the person. And
11 there are other kinds of primary rights.

12 JUSTICE GINSBURG: But what about the
13 providers who say, but under -- under the State law, if
14 we charge more than the hospitals -- if we charge more
15 than the State ceiling, we are subject to sanctions, so
16 this does fit into the category of anticipatory
17 defenses?

18 MS. SCHWARTZ: No it does not, because we
19 have not threatened to enforce that statute. They are
20 not arguing that statute is preempted. The statute
21 that they --

22 JUSTICE GINSBURG: But wouldn't they be --
23 the rates go into effect. Someone charges more on the
24 theory that the rates are impermissible under the
25 Supremacy Clause. That person would be subject to

1 sanction under State law.

2 MS. SCHWARTZ: And that would be a different
3 case and it would be a closer case, although even in
4 that context, because in the Spending Clause context in
5 which the case arises I don't believe that they would be
6 able to challenge that under the Supremacy Clause.

7 But that is not this case. That case at
8 least presents the fact -- and the reason why it's a
9 closer case is because in that case there is regulation
10 and we are potentially infringing on their property.
11 However, what's the law that they are trying to assert
12 defensively there is, as a Spending Clause provision
13 that has administrative standards that have been
14 entrusted to Congress. So shouldn't Congress be able to
15 enforce it? Fundamentally, this Court --

16 JUSTICE SCALIA: Excuse me. You spoke of
17 that, Justice Ginsburg's question, as though it were a
18 hypothetical. But that could happen, couldn't it? What
19 if one of these Respondents charged more than the State
20 law permits? Wouldn't -- wouldn't the State move
21 against them?

22 MS. SCHWARTZ: Of course we would, and they
23 would have a decision about whether to stay in the
24 Medicaid program or not. But the question is does this
25 Court exercise its equitable powers to create a cause of

1 action directly that Congress itself has not? That's
2 really the question for this Court.

3 In the Spending Clause context with respect
4 to this kind of standard that is suited for
5 administrative standards, we submit you should not.

6 Unless there are any further questions, Your
7 Honor, I would like to reserve our remaining time for
8 rebuttal.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Kneedler?

11 ORAL ARGUMENT OF EDWIN S. KNEEDLER

12 ON BEHALF OF THE UNITED STATES,

13 AS AMICUS CURIAE, SUPPORTING PETITIONER

14 MR. KNEEDLER: Mr. Chief Justice and may it
15 please the Court:

16 Medicaid is a cooperative program between
17 the Federal Government and the States. Congress has not
18 created a cause of action under that act for private
19 parties to enforce particular provisions of it.

20 Nor does paragraph 30(A) confer private
21 rights that are enforceable under 1983. Rather
22 paragraph 30(A) is written in general terms that
23 describe the general undertaking by the State in its
24 bilateral relationship with the Federal Government.

25 CHIEF JUSTICE ROBERTS: Mr. Kneedler, is

1 your argument in this case limited to Spending Clause
2 legislation?

3 MR. KNEEDLER: Yes. And what --

4 JUSTICE SOTOMAYOR: And if it's not, could
5 you please -- you said yes, it is.

6 MR. KNEEDLER: Yes.

7 JUSTICE SOTOMAYOR: But give me the
8 theoretical foundation? The Supremacy Clause doesn't, I
9 am assuming you agree with your -- with Petitioner that
10 it doesn't provide for a cause of action?

11 MR. KNEEDLER: Yes.

12 JUSTICE SOTOMAYOR: Is that your position?

13 MR. KNEEDLER: Yes.

14 JUSTICE SOTOMAYOR: Then what gets all of
15 the cases that we've had since 1824 into this Court that
16 have granted injunctive relief on supremacy arguments?

17 MR. KNEEDLER: I think that the great
18 majority of those cases are ones in which the plaintiff
19 in the suit in equity is bringing an action anticipating
20 an action at law.

21 JUSTICE SOTOMAYOR: Well, but we have plenty
22 that don't -- King, Townsend, Carlson. We have had many
23 others that are not dissimilar to this case.

24 MR. KNEEDLER: I think though that they do
25 not reflect a general assumption that there is a cause

1 of action directly under the Supremacy Clause, because
2 as this Court said, the Supremacy Clause is not itself a
3 source of rights --

4 JUSTICE SOTOMAYOR: So go back and explain
5 to me how all of those cases, what's the theoretical.

6 MR. KNEEDLER: I think there is -- I think
7 one has to look to an equitable cause of action, which I
8 think is the way ex parte Young describes what is going
9 on in that way is anticipating a defense, and to --

10 JUSTICE SOTOMAYOR: So go to your
11 Petitioner's response to one of my colleague's -- to
12 Justice Scalia, when she said yes, if these providers
13 decide to charge the old rate to their patients, the
14 State will go after them. How is that any different
15 than the cases where we are talking about railroads
16 charging -- not charging customers more than a State
17 commands because the penalty's too high, or those types
18 of cases that fall into this preemptive category that
19 you're talking about?

20 MR. KNEEDLER: That has not been plaintiff's
21 theory of this case. They have not said we are going to
22 resort to self-help and charge more than the State
23 allows. What they want to do is they brought this suit
24 to challenge the rates in the first instance. They are
25 not claiming that they are going to violate State law

1 and charge more; they are simply wanting to challenge
2 the rates that the State is charging, but --

3 JUSTICE SOTOMAYOR: But you haven't
4 explained how that's theoretically different than the
5 example I just gave you.

6 MR. KNEEDLER: Yes, I think it is, and if I
7 could explain --

8 JUSTICE SCALIA: So all they have to do as
9 far as the government is concerned is amend their
10 complaint to say, "we intend to charge higher rates than
11 the State law allows." And then you would agree that
12 the suit would lie.

13 MR. KNEEDLER: I'm not sure. There would be
14 further questions that would arise in that context. For
15 example, I don't know whether -- whether -- whether in a
16 prosecution under the statute for charging -- that
17 prohibits charging more than State regs allow, whether
18 you can raise as a defense in that prosecution a
19 challenge to the validity of the rates.

20 JUSTICE SCALIA: Well, gee, we're not
21 deciding a whole lot here, then. It's just a matter of
22 pleading that we're deciding.

23 MR. KNEEDLER: That's why I'm saying there
24 might be a further question in -- in what you're
25 describing as to whether that would be a valid defense

1 in the State prosecution, because I could certainly
2 imagine the State saying, we don't want our rates tested
3 in individual criminal prosecutions any more than we
4 would want them tested in an affirmative --

5 JUSTICE KAGAN: Mr. Kneedler, why should
6 this even matter so much whether there is a defense
7 available in a regulation that's brought against a
8 person or not. In your brief, you admit that there are
9 numerous cases that don't fit within that category,
10 where the -- but where the State has acted in some sense
11 to change the behavior of the person, to regulate the
12 person, even if that person doesn't have a proceeding in
13 which to mount a defense. And this Court has treated
14 those cases in exactly the same way, haven't they?

15 MR. KNEEDLER: Yes, unexamined. And let me
16 say, we are not challenging those cases. And the Court,
17 we think, doesn't need to look more broadly to a
18 theory -- to an all-encompassing theory. We are
19 focusing on Spending Clause legislation in a particular
20 cooperative federal/state --

21 CHIEF JUSTICE ROBERTS: So you think --

22 MR. KNEEDLER: Under the Spending Clause.

23 CHIEF JUSTICE ROBERTS: So you think there
24 may well be implied rights of action outside the
25 Spending Clause context.

1 MR. KNEEDLER: I think probably the best way
2 to explain it is equitable cause of action drawing on
3 the Court's traditional equitable jurisdiction; you can
4 call that an implied cause of action under the Supremacy
5 Clause, but I think historically, it's been described as
6 an --

7 CHIEF JUSTICE ROBERTS: So --

8 MR. KNEEDLER: Exercise of the Court's
9 equitable authority. The Court has equitable
10 discretion, and we think because of the Spending Clause
11 nature of this legislation, it should not create the
12 cause of action --

13 CHIEF JUSTICE ROBERTS: So your answer to my
14 earlier question was that you were not arguing about
15 that in this case?

16 MR. KNEEDLER: Right -- we are focusing
17 on --

18 CHIEF JUSTICE ROBERTS: So the government --
19 the government, we don't have a position from the
20 government on whether or not there is an implied right
21 of action under other constitutional provisions --

22 MR. KNEEDLER: Under --

23 CHIEF JUSTICE ROBERTS: I mean outside the
24 Spending Clause context.

25 MR. KNEEDLER: We are certainly not

1 challenging the existence of a cause of action in
2 equity. I'm -- I'm -- I'm just -- I think we would view
3 it as a cause of action in equity rather than implied
4 under the Supremacy Clause, but I think you may -- you
5 might get to the same place, but I think it's judicial
6 creation of a cause of action. But if I could before my
7 time is --

8 JUSTICE SCALIA: You do not even exclude all
9 Spending Clause cases. You only exclude those Spending
10 Clause cases where -- where the plaintiff does not say
11 we are -- you know, we are going to violate the State
12 law, and they are going to come after us. So you
13 haven't made an exception for the Spending Clause --

14 MR. KNEEDLER: Well -- I don't think there
15 is any categorical rule because, for example, under
16 Spending Clause cases, you can have rights enforceable
17 under 1983. Our basic point is, a Spending Clause is a
18 contractual relationship between the Federal Government
19 and the State, and the Respondents here are in the
20 position of the people asserting rights as third-party
21 beneficiaries to the bilateral relationship between the
22 United States and the States. Under standard contract
23 law principles --

24 JUSTICE KAGAN: But Mr. Kneedler --

25 MR. KNEEDLER: The third-party can sue only

1 if the parties intending them to be.

2 JUSTICE KAGAN: Mr. Kneedler, this is what
3 you said in your cert stance brief: You said "those
4 programs in which the drastic measure of withholding all
5 or a major portion of the Federal funding is the only
6 available remedy," and you are talking here about
7 Spending Clause programs, obviously -- "would be
8 generally less effective than a system that also permits
9 awards of injunctive relief in private actions."

10 MR. KNEEDLER: Yes, and the circumstances in
11 which the Court has made that point and we agree with
12 are often in situations where you have Title 6, Title 9
13 instances of individual discrimination that are arising
14 under federal programs, or where you have a right under
15 1983 where -- whether as an enforceable right that a
16 party has and is going into court and is supplementing
17 the agency's oversight.

18 Here, under paragraph 30(A), you have only
19 general standards that are really suitable for
20 administrative review, balancing general --

21 JUSTICE KAGAN: Can that really be the
22 difference? I mean, do you think if 30(A) were
23 written -- were drafted as a formula, a rate schedule
24 formula, that there would be a cause of action, but
25 because 30(A) is more general in nature, that there is

1 no cause of action? I mean, surely that's a question
2 for the merits of whether there is preemption or not.

3 MR. KNEEDLER: Well, I don't think it's just
4 a merits question, I think it also goes to the question
5 whether the parties to the contract intended third-party
6 beneficiary-type rights to be able to sue under what is
7 really analogous to a contract. I would also point out
8 that this Court's decision in *Maine v. Thibotout* first
9 recognized a 1983 cause of action, pointed to prior
10 cases enforcing Social Security programs, on the
11 assumption that 1983 could have been the only source of
12 the cause of action. If there was an implied judge-made
13 cause of action in those circumstances, that assumption
14 would have been unwarranted.

15 JUSTICE GINSBURG: Then Mr. Kneedler, before
16 you sit down, could you please enlighten us on two fact
17 points. One is, what is the status of the 30(A)
18 rulemaking? I take it once the rule is made, it would
19 get Chevron deference. You said that there would be a
20 final rule in December. Is that still --

21 MR. KNEEDLER: I am informed that it may
22 slip past December, that there's been a lot of
23 interaction with comments on it. I don't know a precise
24 date, but I'm informed that that may be possible.

25 JUSTICE GINSBURG: How about the status of

1 the hearing on California's compliance?

2 MR. KNEEDLER: That is still pending. There
3 have been extensions that have also been planned
4 amendments that have been submitted covering some of
5 these same regs, Justice Ginsburg I also wanted to
6 respond to one of your questions I do believe that the
7 United States would have injunctive actions under
8 certain cases, for example, if the State itself accepted
9 a plan and the State continued to follow the terms of
10 the disapproved final amendment, I think the United
11 States would have a cause of action to enforce as the
12 party to the contract.

13 JUSTICE KENNEDY: Under a preemption, would
14 it be a preemption argument.

15 MR. KNEEDLER: No it would be enforcing the
16 terms of its agreement with the United States. It can't
17 rely on preemption in those -- those circumstances.

18 JUSTICE KENNEDY: Do you agree with the
19 Petitioner that if the state shows to allow its courts
20 to issue an injunction on Supremacy Clause grounds in
21 the state courts that that would be impermissible?

22 MR. KNEEDLER: We think it's a harder
23 question, but probably so, because we believe paragraph
24 38 does not confer private rights and that would be true
25 in the state court as well as the federal court.

1 CHIEF JUSTICE ROBERTS: Thank you, Mr.
2 Kneedler.

3 Mr. Phillips?

4 ORAL ARGUMENT OF CARTER G. PHILLIPS

5 ON BEHALF OF THE RESPONDENTS

6 MR. PHILLIPS: Thank you Mr. Chief Justice
7 and may it please the Court: I've would like to focus
8 on two points that came out of the questioning in the
9 first part of the oral argument today.

10 First of all I would like to focus on the
11 question -- the comment at least and the question that
12 flows from it from justice Alito which is that there has
13 never been a recognition of a third-party action in the
14 ex parte Young case. That is true and I didn't hear
15 anything from the other side that suggests anything to
16 the contrary. And that what this court said in the
17 Verizon case and in Shaw when you look to the Supremacy
18 Clause arising-under jurisdiction and if you look to
19 jurisdiction you look to the traditional equitable
20 standards to determine whether they have been satisfied
21 in a particular case. And under this Court's decision
22 in Ex parte Young, what the Court said was an injunction
23 which restrains the State from taking any steps to the
24 enforcement of an unconstitutional enactment to the
25 injury of the complainant is the basis for relief. And

1 that's exactly the circumstance we have in this case.

2 CHIEF JUSTICE ROBERTS: Why isn't-- Why
3 doesn't your position constitute a complete end run
4 around all of our implied right of action jurisprudence?
5 We have wasted a lot of time trying to figure out
6 whether there's an implied right of action under a
7 particular statute if there has always been one under
8 the Supremacy Clause.

9 MR. PHILLIPS: Mr. Chief Justice, there is a
10 very fundamental difference between an implied right of
11 action or an action under section 1983 and a very simple
12 and straightforward Ex parte Young remedy that is
13 otherwise available. Under 1983, in private rights of
14 action, the district courts, the Federal courts, State
15 courts for that matter in enforcing them, have authority
16 to grant damages, they have much broader injunctive
17 relief, and under section 1983 --

18 CHIEF JUSTICE ROBERTS: How can they have
19 much broader -- broader -- First of all, all of those
20 cases -- I don't know if all of them did, but certainly
21 a lot of them did -- included claims for injunctive
22 relief. And I would have thought the court's authority
23 under your equitable action under the Constitution would
24 be at least as broad as it would be under the Statute.

25 MR. PHILLIPS: Well, Ex parte Young has been

1 pretty consistently evaluated as saying simply you
2 cannot do what the Constitution immediately prohibits
3 you from doing. So frankly, the Ex parte Young remedy
4 has been a negative --

5 CHIEF JUSTICE ROBERTS: But your position --

6 MR. PHILLIPS: -- not to violate -- not to
7 violate the Supremacy Clause.

8 CHIEF JUSTICE ROBERTS: Your position is
9 that the Constitution prohibits you from doing anything
10 where the State law is preempted by the Federal law.
11 That doesn't sound very narrow to me.

12 MR. PHILLIPS: Well, but if you go back and
13 look at the cases in which 1983 relief has been
14 involved, a case like Blessing -- in Blessing, the
15 complaint there sought essentially to take over the
16 entire State law function of providing support for
17 children. And that was the injunctive relief that was
18 requested. And if the Court had adopted the motion that
19 1983 carried with it a private right of action, that
20 would have been available relief; there would have been
21 a claim for damages in that circumstance; and there
22 would have been access to attorneys' fees. None of
23 those things is available here.

24 CHIEF JUSTICE ROBERTS: What if -- what if
25 the law that Congress passes sets forth certain Federal

1 standards, it's a cooperative Federal-State law like
2 this one, and it says: And there is no private right of
3 action for any individual to enforce this. That's
4 limited to the Federal Government.

5 MR. PHILLIPS: In that -- in that situation,
6 there is obviously no authority to bring a private right
7 of action under the statute. That still doesn't answer
8 the question whether or not there is a right to invoke
9 the Supremacy Clause --

10 CHIEF JUSTICE ROBERTS: So Congress can
11 say --

12 MR. PHILLIPS: -- when there is a conflict
13 between Federal and State law.

14 CHIEF JUSTICE ROBERTS: -- Congress can say
15 in the same statute that confers the allegedly
16 preemptive Federal standards that we do not want
17 individuals bringing actions in Court to enforce this.
18 We want to leave that up to HHS. And you are saying,
19 even though Congress said that, individuals can
20 nonetheless bring a suit under the Supremacy Clause, the
21 theory of which is we are making sure that Federal law
22 controls.

23 MR. PHILLIPS: Right.

24 CHIEF JUSTICE ROBERTS: The same Federal law
25 that says you can't bring a claim of action.

1 MR. PHILLIPS: No, I understand that,
2 Mr. Chief Justice, but you still have the problem that
3 even under those circumstances a regime can arise in
4 which there is a square and, in this case I think
5 undeniable, conflict between Federal and State law, and
6 the question is -- and that that conflict imposes not
7 only injury in fact to an individual, but also imposes
8 irreparable harm.

9 JUSTICE GINSBURG: But you are saying then,
10 if Congress loud and clear says, we want HHS to be the
11 sole enforcer of this law, You're saying--

12 MR. PHILLIPS: Of the Federal statute.

13 JUSTICE GINSBURG: You are saying that that
14 would be ineffective because there could still be a
15 Supremacy Clause claim.

16 MR. PHILLIPS: Yes. Whether or not you
17 would in fact get relief under the Supremacy Clause
18 seems to me a very --

19 JUSTICE GINSBURG: That's on the merits, but
20 Congress says we don't want anybody coming into the
21 court. We want --

22 MR. PHILLIPS: I don't think Congress has
23 the authority to essentially say there are some
24 conflicts between Federal and State law that we will
25 simply ignore even though it causes irreparable harm --

1 JUSTICE KAGAN: Is that necessary to your
2 position, Mr. Phillips?

3 MR. PHILLIPS: Absolutely not. It doesn't
4 say anything about --

5 JUSTICE KAGAN: Because you could take the
6 view, right, that if Congress speaks to cut off a claim,
7 that's one thing, and a very different thing, than if
8 Congress has not spoken at all.

9 MR. PHILLIPS: Right. And it seems to me
10 here is a situation where you would expect Congress to
11 have spoken explicitly --

12 JUSTICE GINSBURG: Then it's a question of
13 what would be the default rule. Congress is silent.

14 MR. PHILLIPS: Of course.

15 JUSTICE GINSBURG: Is the default rule that
16 there is a Supremacy Clause action or that Congress must
17 expressly allow it?

18 MR. PHILLIPS: And the reason why the
19 default rule would almost certainly be that in fact you
20 can bring the Ex parte Young cause of action is because
21 the effect -- the spending clause has been subject to
22 the -- to preemption claims since 1968. This whole
23 notion that they contracted against this background of
24 what obligations did they assume, the obligation that
25 they clearly would have assumed is that if in fact there

1 is a violation of Federal law based on a failure to
2 satisfy one of the conditions of spending under these
3 circumstances, you would -- they would be susceptible to
4 an Ex parte Young injunctive action.

5 JUSTICE BREYER: Why? I am not certain, as
6 I find this a difficult case. It seems to me the
7 government is prepared to concede that if an individual
8 has a Federal right that he would like to enforce and
9 someone is trying to block it by asserting a State law
10 that he thinks is preempted, he can go ahead. If it
11 looks as if the State is going to take something from
12 him that a Federal law guarantees and he has a defense
13 that he would like to make to that under Federal law,
14 the State law seems to allow, it is preempted, he can
15 make it.

16 Our problem arising where neither of those
17 things is true. So we say, what is true here? What
18 kind of Federal claim does he have? And the word is
19 that rates have to be -- that the rate that the State
20 has to pay back to the doctor has to be "sufficient."
21 Okay, "sufficient." That's basically the word.

22 MR. PHILLIPS: Right.

23 JUSTICE BREYER: So I see three
24 possibilities. One is you say, sure, let all the
25 doctors go and sue. There are only 50,000 kinds of

1 reimbursement. Maybe there are a million. I don't know
2 how many. And they only take place in like, say,
3 400,000 counties. And we will have Federal judges
4 reaching different views about what is sufficient in
5 each of those different places. And sometimes they will
6 agree. Did Congress want that? Well, hm, a problem.

7 The second way of going about it is cure
8 that and say you win, but you have to use primary
9 jurisdiction and you have to get the government's view
10 on it, Judge; and before you decide, you have to pay
11 attention.

12 MR. PHILLIPS: Can I just --

13 JUSTICE BREYER: There is a long line of
14 cases -- I have one more thing and then you'll get all
15 three.

16 MR. PHILLIPS: Can I deal with that one
17 immediately?

18 JUSTICE BREYER: Yes.

19 MR. PHILLIPS: Because I think it's
20 important in the context of this case to recognize it.
21 We are talking about the issuance of a preliminary
22 injunction that was designed to hold everything until
23 matters could be avoided. We realize that we're talking
24 about a situation where the State, solely for budgetary
25 reasons, without regard to Federal law whatsoever,

1 simply made a slash in the reimbursements.

2 JUSTICE BREYER: If I want your view, I want
3 your view on whether the right approach -- you are
4 saying what is the status quo pending. And I want your
5 view on these three possibilities:

6 One is the possibility the judges just do it
7 in all the different places, try to figure out what is
8 sufficient. The second is the possibility that we try
9 primary jurisdiction, and that's the -- then the
10 curlicue on that is what do you do pending. And that's
11 your injunction.

12 MR. PHILLIPS: That's what I just wanted to
13 be clear on.

14 JUSTICE BREYER: Yes. And the third
15 possibility is, you say I'm just sorry, that this is
16 just too vague, the sufficient, et cetera. It has to be
17 centralized. There is no way to work this out with all
18 these different judges and different rates and different
19 kinds of provisions, and so this is an instance where
20 you cannot bring your claim that something violates the
21 Supremacy Clause because you don't have a Federal right
22 to a thing, and you are not trying to take away a thing
23 that the Federal right gives you, et cetera. Do you see
24 those three possibilities?

25 MR. PHILLIPS: Right.

1 JUSTICE BREYER: And what I wanted you to do
2 is address them.

3 MR. PHILLIPS: The third possibility it
4 seems to me, Justice Breyer, is not different from a lot
5 of the other cases that this Court has already decided,
6 Crosby and like Engine Manufacturers, where there's this
7 vague standard out here and they're not asserting a
8 right not to have an enforcement action brought against
9 them, and this Court has routinely held in that
10 circumstance that there is in fact a Supremacy Clause
11 action available.

12 So I don't think the third option is really
13 an option. And it also ultimately goes to the merits of
14 the preemption claim. If it turns out that all of this
15 is just too squishy to evaluate, then it would seem to
16 me that on the merits you would say it is not a clear
17 enough statement on the Federal law to justify saying
18 there is a conflict, and therefore you would lose on the
19 merits. But that wouldn't prevent you from going into
20 Court and trying to make the showing that we made here.

21 JUSTICE BREYER: You think primary
22 jurisdiction is the way to do it.

23 MR. PHILLIPS: Yes.

24 JUSTICE BREYER: I see a practical problem
25 and the practical problem is millions of rates all

1 judged by the term "sufficient" and instead of the
2 agency in charge deciding what's sufficient, we do have
3 a lot of judges.

4 MR. PHILLIPS: But Justice Breyer, the
5 agency always has the ultimate authority to step in and
6 take action and the real question is to think that
7 Congress meant to place this in an agency to
8 circumstances where the agency isn't going to receive
9 notice of the implementation of the change before it
10 gets implemented, where the state is permitted to take
11 no -- to make no response to a request for information
12 and allow the unlawful rates to go into effect for years
13 on end.

14 JUSTICE SOTOMAYOR: Can I ask -- why are you
15 fighting Justice Breyer so much?

16 MR. PHILLIPS: I didn't think I was.

17 JUSTICE SOTOMAYOR: It sounds like you are
18 and that's why I am having some difficulty.

19 There are two points. Following up on his
20 and then my second question. Engage the Solicitor
21 General's question that this isn't a cause of action
22 under the Supremacy Clause, but that it is a cause of
23 action under some implied equitable --

24 MR. PHILLIPS: Doctrine.

25 JUSTICE SOTOMAYOR: -- doctrine, okay?

1 Which may square enough now.

2 Coming back to Justice Breyer's question. I
3 agree with all you were trying to say about what the
4 State did or didn't do here, but if it's a primary
5 jurisdiction question, what's wrong with just saying
6 that the court's power is limited under equity to
7 issuing an injunction that gives the matter over to the
8 administrative agency that puts in the status quo --
9 assuming there is some sort of violation of Federal law
10 or seeming violation of Federal law -- a preventive
11 injunction that just stops the State from acting until
12 the administrative process concludes?

13 MR. PHILLIPS: Justice Sotomayor --

14 JUSTICE SOTOMAYOR: What's wrong with that?

15 MR. PHILLIPS: There is nothing wrong with
16 that. Candidly, we -- we would be perfectly comfortable
17 about that; but I don't understand the other side to be
18 complaining about the scope of the injunctive relief.
19 It is not that they are saying --

20 JUSTICE SOTOMAYOR: No, no; they are saying
21 you can't have any.

22 MR. PHILLIPS: Right. And so --

23 JUSTICE SOTOMAYOR: But -- but Justice
24 Breyer's question I think was slightly different, which
25 is, what's the limit on the court's power? And how do

1 you --

2 MR. PHILLIPS: We did have an alternative
3 argument that the injunction should stay into effect at
4 least until HHS acts, and the -- the district court
5 granted a broader preliminary injunction and didn't
6 consider the alternative argument that was -- that was
7 there.

8 But again, it seems to me, you know, the
9 court ought to recognize that you are in the context of
10 preliminary injunctive relief in this situation, and --
11 and there will be plenty of time to kind of work through
12 the nature of the injunctive relief if in fact the
13 court's allowed to go forward and take up the Ex parte
14 Young issue -- in the circumstance.

15 JUSTICE SOTOMAYOR: But you engaged the
16 question that -- the approach that the Solicitor General
17 has been making, which is don't find a cause of action
18 under the Supremacy Clause; find it in the court's -- an
19 implied cause of action.

20 MR. PHILLIPS: I am not perfectly
21 comfortable with that rationale. I think the answer is
22 it's sort of a combination of the Supremacy Clause and
23 the -- and broad equitable relief, rather than -- I
24 mean, clearly one or the other. They seem to go pretty
25 much hand-in-glove in the ex parte line of cases. And

1 so I don't have any particular problem with that.

2 JUSTICE SOTOMAYOR: Well, I might, if you
3 continue in your earlier position that a Supremacy
4 Clause cause of action would stop Congress from having a
5 -- a voice in enforcement and cutting it off clearly.
6 If Congress were to write a law that says no one can
7 enforce this, either in damages or in injunctive relief,
8 your earlier answer seemed to suggest that Congress
9 didn't have the power under the Supremacy Clause to do
10 that.

11 MR. PHILLIPS: Well, I --

12 JUSTICE SOTOMAYOR: If this were an
13 equitable --

14 MR. PHILLIPS: It will depend on the -- on
15 the circumstances of the case, but I do think there is
16 some gap between the full extent of Congress's power in
17 this area and -- and the protections of the Supremacy
18 Clause, if for no other reason -- and because the
19 Executive Branch certainly has the authority, and
20 certainly acting within its own exclusive authority
21 could -- could preempt State law or could create a
22 situation where State law would be preempted, and I
23 don't think Congress would have the authority to -- to
24 take away the Ex parte Young remedy under -- under those
25 particular circumstances.

1 JUSTICE ALITO: What is your response to the
2 argument that the equitable power exercised in Ex parte
3 Young and similar cases is limited to certain specific
4 situations such as where there is an imminent threat of
5 the State enforcement action, and a few others where
6 there is a trespass, where there's a clearly defined
7 Federal right. I mean, it doesn't encompass every
8 situation in which the plaintiff simply has Article III
9 standing and wants to obtain an injunction that a
10 particular State law is preempted by a Federal law.

11 MR. PHILLIPS: The -- I mean, to be sure,
12 the Court in Ex parte Young was dealing with a specific
13 situation in trying to prevent enforcement. But the --
14 the Supreme Court -- this Court in all of its decisions
15 post Ex parte Young has never said that that's the only
16 circumstance and has certainly never said that in
17 exercising the judicial power under Article III that
18 extends to all cases in equity, that it means only the
19 equity that existed in -- in the 18th Century at that
20 point in time.

21 So it seems to me the right answer at this
22 stage is for this Court to look at the situation and
23 safe is this a context in which equitable relief would
24 be appropriate? And if you just use the preliminary
25 injunction standards, it clearly would be appropriate

1 under -- under these particular circumstances, where we
2 have a likelihood of success on the merits, irreparable
3 harm and the balance of harms favor the -- favor the --

4 JUSTICE BREYER: Right.

5 JUSTICE KENNEDY: What is the best authority
6 in our cases other than Ex parte Young or in a treatise
7 or in recognized statements of the difference in law and
8 equity, for the proposition that in this area we can
9 make a distinction between law and equity after
10 centuries in which we have tried to say that that
11 distinction ought to be blurred?

12 MR. PHILLIPS: Well --

13 JUSTICE KENNEDY: I mean, do you want us --
14 do you want us to write an opinion and say oh, there is
15 a difference in damages and equity?

16 MR. PHILLIPS: Well, all --

17 JUSTICE KENNEDY: What do I -- other than Ex
18 parte Young, what do I site for that?

19 MR. PHILLIPS: Well, any of the cases in
20 which the Court has recognized that obviously in order
21 to get -- in order to get injunctive relief you have to
22 demonstrate that there -- that there is no adequate
23 remedy at law. So, I mean, the distinction has always
24 been there, even after of the merging of law and
25 equity --

1 JUSTICE SCALIA: That -- that's not --

2 MR. PHILLIPS: -- in the earlier part of the
3 -- century.

4 JUSTICE SCALIA: That's not the theory on
5 which we've said you can't get damages under Ex parte
6 Young. The theory that prevents damages is the theory
7 of sovereign immunity. The -- the fiction that
8 you're -- the fiction that you're moving against the
9 individual and not against the State simply cannot be
10 maintained when you are taking money out of the State
11 treasury. That's the basis for it, not -- not just what
12 you just described.

13 MR. PHILLIPS: No, but I'm -- I'm not
14 asking for -- for -- I mean, we are not asking for
15 damages here, Justice Scalia. All we're asking for
16 is injunctive relief.

17 JUSTICE KENNEDY: I know, but see -- but
18 that -- but that wouldn't explain the case like Gonzaga
19 where there was no State entity. Gonzaga was a private
20 institution.

21 MR. PHILLIPS: Right. But --

22 JUSTICE KENNEDY: So I'm -- I'm wondering.
23 I understand the Eleventh Amendment dynamic which --

24 MR. PHILLIPS: Right.

25 JUSTICE KENNEDY: -- as Justice Scalia

1 pointed out was the whole driving force of -- of Ex
2 parte Young. Is there -- is there any other basis for
3 us to say there has to be a law/equity distinction? You
4 say well, that's because there is no adequate remedy at
5 law; but that's circular; that assumes because there is
6 no cause of action. So that doesn't work.

7 MR. PHILLIPS: No, but I -- I mean all of
8 the cases that come out of the Ex parte Young line of
9 authority seem to base -- you know, they all tee up,
10 obviously, the problem that exists in this context which
11 is -- which is the one Justice Scalia identified.

12 JUSTICE BREYER: There must be a limit.
13 There must be a limit because if there is not a limit
14 under what you can do under Ex parte Young, I can go in
15 my office and I look at the statute books and they are
16 just filled with statutes, and I -- Federal; and if I
17 have all the State statute books there would be 15
18 offices or 20 or 100; and I know perfectly well that a
19 lot of those statutes in the Federal books have to do
20 with Federal agencies, and they give jobs to agencies,
21 and it's perfectly apparent that the ones who run those
22 statutes in many instances are the agencies, and really
23 judges are out of it.

24 Now if I adopt your line, it seems to me I
25 am saying that any time that a person has an individual

1 of saying that a State law is contrary to one of those
2 statutes, he can run right into court. And I can see
3 we've done that where he has some kind of right that he
4 is protecting that is threatened in some way or that he
5 wants to assert. I can see that we could do that in the
6 foreign policy case like Burma; I see that we could do
7 that where Federal voting rights are at stake, which are
8 very important.

9 But a principle that says you can do that
10 any time you want, seems to me a little -- it seems to
11 me the real fear of far reaching, in the extent that it
12 just stops the agency of doing their business at the
13 behest of anyone who would like to assert a State law,
14 or States -- it's a mess, in other words.

15 MR. PHILLIPS: Justice Breyer, can I -- two
16 points here. First of all, we are not talking about a
17 situation of somebody seeking a roving commission to go
18 find all Federal -- all situations where State law
19 violates Federal law. We're -- the beneficiaries in
20 this case --

21 JUSTICE BREYER: No, no. Your people have
22 your problem. But some other people have another
23 problem.

24 MR. PHILLIPS: But my people have a life and
25 death problem, Justice Breyer. So if there were ever a

1 situation where you would say, let's look to see whether
2 or not there is relief available, this would be the
3 situation where -- where I would hope --

4 JUSTICE BREYER: The doctors want to be paid
5 more money or at least not paid as much as they were, I
6 understand that.

7 MR. PHILLIPS: But the beneficiaries --

8 JUSTICE BREYER: Yes.

9 MR. PHILLIPS: The patients are the one
10 whose lose access to --

11 JUSTICE BREYER: So is there a medical
12 exception?

13 MR. PHILLIPS: I'm sorry.

14 JUSTICE BREYER: Is there a medical
15 exception? Is it that you can have this generalized
16 claim if you are a doctor, but not others?

17 MR. PHILLIPS: No, to be sure, Justice
18 Breyer. The exception is that we have to satisfy the
19 requirements of Article III, we have to have injury and
20 redressability, and in order to get equitable relief, we
21 ultimately are going to have to demonstrate that the
22 injury is irreparable, that there is no adequate remedy
23 at law. Those are high burdens --

24 JUSTICE KAGAN: Mr. Phillips --

25 MR. PHILLIPS: -- and in a circumstance

1 where you cannot get damages and you cannot get
2 attorneys' fees.

3 JUSTICE KAGAN: Mr. Phillips, can I ask you
4 a little bit more about how this interacts with the
5 agency process? Now suppose that California had done
6 what, the way I read the statute, it was supposed to do,
7 which is to go to the agency and say we want to change
8 our rates? We can't afford these rates any more and we
9 think these lower rates would do just as well. All
10 right.

11 And then the agency and California sit down
12 and discuss the matter. Would this suit have ever come
13 into being?

14 MR. PHILLIPS: If they had just discussed
15 the matter?

16 JUSTICE KAGAN: You know, they did not
17 impose them unilaterally. They go to the -- to HHS and
18 they wait for HHS to approve what they want to do. If
19 HHS approves --

20 MR. PHILLIPS: We wouldn't be here. I
21 guarantee you we wouldn't be here.

22 JUSTICE KAGAN: Well, if HHS approved, maybe
23 somebody does sue. And then there is great deference to
24 the agency, isn't that right?

25 MR. PHILLIPS: That's -- that's exactly

1 right.

2 JUSTICE KAGAN: And if HHS doesn't approve,
3 then what's there to talk about? There is no suit.

4 MR. PHILLIPS: Right. So there's no
5 question.

6 JUSTICE KAGAN: So either way, the agency
7 wins; right?

8 MR. PHILLIPS: Right. The agency always
9 wins. That's the rule that they --

10 (Laughter.)

11 CHIEF JUSTICE ROBERTS: Why is there no suit
12 -- why is there no suit if the agency doesn't approve,

13 MR. PHILLIPS: Well, if -- I mean -- I mean,
14 if the agency --

15 CHIEF JUSTICE ROBERTS: You're saying
16 Congress can't say there's no implied right of action --

17 MR. PHILLIPS: Right.

18 CHIEF JUSTICE ROBERTS: But the agency can?

19 JUSTICE KAGAN: Well, it's the -- I was just
20 saying if the agency didn't approve, your clients don't
21 have anything to complain about.

22 MR. PHILLIPS: Right, because --

23 CHIEF JUSTICE ROBERTS: Do you have the same
24 answer or --

25 MR. PHILLIPS: Well, it also depends on

1 whether they go ahead and -- if California, in the face
2 of disapproval, continues to violate the law -- and I
3 would -- I assume you meant that California complied.

4 JUSTICE KAGAN: Correct.

5 JUSTICE ALITO: What happens when the agency
6 approves rates and someone is dissatisfied with the rate
7 sues and says these rates are ridiculously low?

8 MR. PHILLIPS: You can bring a lawsuit,
9 Justice Alito --

10 JUSTICE ALITO: They can still bring a suit
11 --

12 MR. PHILLIPS: But the bottom line is you're
13 going to lose that -- that litigation, and in a
14 circumstance where you have no realistic --

15 JUSTICE ALITO: Well, how do you know
16 they're going to lose the litigation? Why should they
17 lose the litigation if it's really -- if there really is
18 a cause of action there? Some of the Medicaid rates are
19 very low, aren't they?

20 MR. PHILLIPS: Well, ultimately, they have
21 to demonstrate that there's -- that there is a -- by
22 clear and convincing evidence a conflict between Federal
23 and State law, and the agency that has made -- that
24 evaluates the standards of Federal law will have said in
25 a very authoritative way that there is not a violation

1 under those --

2 CHIEF JUSTICE ROBERTS: But you still have a
3 cause of action under the Supremacy Clause.

4 MR. PHILLIPS: One has to be sure of a cause
5 of action.

6 CHIEF JUSTICE ROBERTS: I thought you were
7 saying you didn't, if the --

8 MR. PHILLIPS: No, no.

9 CHIEF JUSTICE ROBERTS: Agency that --

10 MR. PHILLIPS: I'm not saying you don't, I'm
11 just -- all I'm saying is that if the process works
12 appropriately, there would be not the litigation that
13 Justice Breyer was worried about, where you would have
14 hundreds of thousands of cases going forward.

15 If the process -- which again, it goes back
16 to the default rule --

17 JUSTICE SCALIA: You've lost me here. You
18 say there would be a cause of action under the Supremacy
19 Clause if the agency approves the rates, but your
20 clients don't think the rates are high enough?

21 MR. PHILLIPS: Sure, we would still say
22 there's a --

23 JUSTICE SCALIA: Under the --

24 MR. PHILLIPS: We would still have an
25 argument that there is a conflict between Federal and

1 State law.

2 JUSTICE SCALIA: Well, Federal law is
3 determined by the agency, surely. So long as the agency
4 is complying with the Administrative Procedure Act, I
5 don't see how you have any cause of action under the
6 Supremacy Clause; you may have an APA cause of action.

7 MR. PHILLIPS: Well, the problem with the
8 APA -- we might have an APA cause of action, but I also
9 think that there is a -- again, look, that hypothetical
10 is so far afield --

11 JUSTICE SCALIA: Federal law is not
12 determined by the agency?

13 MR. PHILLIPS: I'm sorry, Justice Scalia?

14 JUSTICE SCALIA: Federal law is not
15 determined by of the agency?

16 MR. PHILLIPS: No, of course Federal law is
17 determined by the --

18 JUSTICE SCALIA: Well, then you don't have a
19 Supremacy Clause cause of action.

20 MR. PHILLIPS: I think you -- I still think
21 you can bring an action under the Supremacy Clause. I
22 think ultimately you have very -- you have zero
23 ultimately prevailing --

24 CHIEF JUSTICE ROBERTS: Why does the agency
25 get to determine Federal law when Congress doesn't? You

1 told me earlier if Congress --

2 MR. PHILLIPS: Because Congress --

3 CHIEF JUSTICE ROBERTS: Congress says it its
4 statute no implied right of action, that that doesn't
5 control.

6 MR. PHILLIPS: That doesn't -- that
7 controls, to the extent of trying to enforce directly
8 the Federal statute; it doesn't control with respect to
9 trying to enforce the Supremacy Clause.

10 JUSTICE KENNEDY: The Supremacy Clause says
11 that judges in every State shall be bound thereby, but
12 you want to amend it so that judges in every State and
13 all administrators should be bound thereby, then you
14 have a Supremacy Clause action against every Federal
15 agency. That doesn't make sense.

16 MR. PHILLIPS: But there, what the Supremacy
17 Clause says is that Federal law will be supreme in all
18 circumstances, notwithstanding State law --

19 JUSTICE KENNEDY: Number one, it doesn't say
20 that. There's no -- it doesn't say "all circumstances."
21 It doesn't say that.

22 MR. PHILLIPS: The Supremacy Clause -- well,
23 I don't know of any exceptions in the Supremacy Clause
24 where State law gets to remain supreme --

25 JUSTICE KENNEDY: Well, Justice Scalia's

1 question was related to a Federal agency. The Federal
2 agency does something that's inconsistent with the
3 statute, arguably, and you say there is a Supremacy
4 Clause violation? That's -- I don't --

5 MR. PHILLIPS: Not -- not -- not that -- not
6 that -- not what the agency has done violates the
7 Supremacy Clause, it's the State acting pursuant to what
8 the agency has approved, that if you still thought it
9 violated Federal law would be a basis for seeking a
10 Supremacy Clause action. But no, Justice Scalia's
11 right, the obvious solution to the immediate problem is
12 to seek review of the decision by HHS, and to follow it
13 under those circumstances.

14 The second point that I wanted to focus a
15 little bit about, because it does seem to me -- again,
16 it goes to what are -- what should be the background
17 principles that operate here. And a couple of justices
18 specifically raised the question of, you know, would
19 this case be different if we were seeking to balance the
20 bill -- that is to bill the extent to which we were
21 allowed to bill prior to the time the State of
22 California reduced by 10 percent. If we brought that
23 lawsuit, would that be perfectly permissible?

24 And I understand California I think
25 suggested that it would be, and I heard Mr. Kneedler

1 suggest that well, there might be some additional issues
2 there. But the reality is, is it seems to me that shows
3 you just how unrealistic the distinction is in this
4 particular case, because we are talking about
5 individuals -- the question is not, you know, how are
6 you going to implement this down the road. The question
7 is, what do you do with someone who is suffering a lack
8 of access to vital medical care in a way that is
9 irreparable, and is it realistic to think that Congress
10 meant under those circumstances to deprive the
11 individual plaintiff of any kind of rights. And the
12 answer is no. And that's -- that's as far as the Court
13 needs to go. It doesn't need to figure out exactly how
14 far Congress could deal with the Supremacy Clause. I
15 realize that there is some skepticism on that score.
16 But on the core question here, did Congress intend to
17 deprive these plaintiffs of their rights under *Ex parte*
18 *Young*? The answer is no.

19 CHIEF JUSTICE ROBERTS: The answer is yes,
20 they intended to deprive them of the right to sue under
21 the statute. I understand that you're not challenging
22 the proposition that this statute, when Congress was
23 specifically focused on the question of how to enforce
24 this provision, they did not provide a right of action.
25 And under our implied right of action jurisprudence,

1 that means there isn't one. So why when they are
2 confronted with the precise question did they say no, we
3 don't want these people to sue, but you say well, they
4 knew under the Constitution they were going to be able
5 to anyway?

6 MR. PHILLIPS: Because there is a difference
7 between providing a private right of action and all the
8 bells and whistles that go with that, as opposed to
9 recognizing that Ex parte Young is the background
10 principle that has been in place for well over a
11 century, and that it says that when the standards for
12 equitable relief are satisfied, the Courts have the
13 power, and they can prevent the violation of the
14 Supremacy Clause.

15 JUSTICE GINSBURG: You said you would be
16 satisfied with a limitation that the Court can issue an
17 injunction pending the administrative procedure without
18 going on to then the substance of the question, was
19 there compliance with 30(A) by California?

20 MR. PHILLIPS: Yes, Justice Ginsburg, I
21 would have been perfectly comfortable with that. I
22 mean, that was one of the alternative grounds for relief
23 that we sought. The district judge didn't happen to go
24 down that particular path. But clearly from our
25 perspective, the important element is to maintain the

1 status quo ante until a resolution of the legality of
2 California statute can be made, either by the agency or
3 the courts. But the one thing you shouldn't be allowed
4 to do is simply to -- to permit this to drift without
5 any remedy and without any ability to get access to
6 medical care that's clearly consistent with what
7 Congress intended, and where a remedy is available under
8 the Ex parte Young formulation.

9 If there are no further questions, Your
10 Honor.

11 CHIEF JUSTICE ROBERTS: Thank you, Mr.
12 Phillips.

13 Ms. Schwartz, you have 4 minutes remaining.

14 REBUTTAL ARGUMENT OF KARIN SCHWARTZ,
15 ON BEHALF OF THE PETITIONER

16 MS. SCHWARTZ: Thank you, Your Honor, so
17 there are other provisions of the Medicaid Act that are
18 privately enforceable. This one is not. I've would
19 like to address the court's questions about Ex parte
20 Young. Ex parte Young of course involved a
21 Constitution -- the Due Process Clause and not the
22 Supremacy Clause of the substance of the Constitution
23 that was being enforced and the plaintiff had an
24 independent pre-standing personal right in ex parte
25 Young in all of the cases that are its progeny.

1 Now there is another -- I want to address Justice
2 Alito's point about do we apply the right's required in
3 Ex parte Young causes of action. Yes you do, Alexander
4 v. Sandoval, California v. Sierra Club, Blessing versus
5 Freestone. Look at Alexander v. Sandoval. The State
6 passes a constitutional amendment that says English
7 only. The State adopts a policy, English-only drivers
8 tests. This is challenged as conflicting with Federal
9 law and specifically a Federal regulation. The Court
10 said no court is satisfied. Congress drafted that
11 statute, it controls who gets to enforce them.

12 JUSTICE KAGAN: I'm sorry Ms. Schwartz. Are
13 you saying -- this is the way I understood you and tell
14 me if I am right: Are you saying that the test for
15 determining whether there is a 1983 suit is the same as
16 the test for determining whether there is an Ex parte
17 Young action? Because you talked about whether somebody
18 has a right, which is usually the language we use in the
19 1983 context.

20 MS. SCHWARTZ: No, I'm not. The test for
21 whether there is an Ex parte -- there is different means
22 of Ex parte Young, but none of them apply here. You can
23 see Ex parte Young as construing a cause of action under
24 the Due Process clause. This not a cause of action
25 under the Due Process Clause.

1 You can see Ex parte Young as involving a
2 specific kind of bill in equity which is a defense of
3 regulation of your conduct where that regulation
4 infringes a personal or property right. That is not
5 this case. There is no regulation of Respondent's
6 conduct and there is no infringement of a personal or
7 property right in this case. The only entity that's
8 being regulated by the State -- by the State statute
9 that purportedly is being -- well, that is being
10 challenged as preempted, is the state of California
11 itself because we are the entity that sets rates and so
12 the statute tells the agency, this is how you will set
13 rates.

14 So however you look at ex parte Young,
15 plaintiffs cannot satisfy the elements of an ex parte
16 Young cause of action.

17 What I'm saying with respect to
18 Alexander v. Sandoval and these other cases is injury is
19 not enough. You have to have a--a right. Under equity
20 injury, it's never been enough, and it's not enough
21 under this Court's separation of powers decisions and
22 its Spending Clause cases.

23 And I wanted to segue very quickly to this
24 idea that there is a default rule that a Supremacy
25 Clause cause of action exists by default the. That is

1 absolutely not true, and it's not true in this context,
2 and I'd like to identify two reasons. First, the Suter
3 fix. The -- Congress acted in this Court in Suter, said
4 that there was no cause of action. And it said just
5 because something is in a-- in an estate plan, doesn't
6 render it unenforceable. But we want to preserve the
7 holding in Suter.

8 Look, it-- That suggests that other things
9 are unenforceable; that Congress is not act--legislating
10 against a backdrop of an assumption that there is an
11 injunctive relief to the claim, or it wouldn't have
12 required it. In *Maine v. Thibotout*, another case that
13 assumes, that recognizes that with respect to spending
14 clause actions, the sole means -- the Spending Clause
15 statute, the means, the vehicle for enforcing is 1983.

16

17 And finally, in the Spending Clause context,
18 we have the clear state role which is incompatible with
19 the assumption that a cause of action always exists.
20 Because the State has to have knowing and acceptance--
21 knowing and accepting its obligations, we require that
22 they reassert statement.

23 Thank you, Your Honor.

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

1 (Whereupon, at 11:04 a.m., the case in the
2 above-entitled matter was submitted.)

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