IN THE SUPREME COURT OF THE UNITED STATES

TOBY DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES,
Petitioner : No. 09-958
v.
INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., ET AL.

and

TOBY DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES,
Petitioner : No. 09-1158
v.
CALIFORNIA PHARMACISTS ASSOCIATION, ET AL.

and

TOBY DOUGLAS, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES,
Petitioner : No. 10-283
v.
SANTA ROSA MEMORIAL HOSPITAL,

ET AL. :

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Washington, D.C.

Monday, October 3, 2011

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

APPEARANCES:

KARIN S. SCHWARTZ, ESQ., Supervising Deputy Attorney General, San Francisco, California; on behalf of Petitioner.

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

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

C O N T E N T S

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.

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

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

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

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

MS. SCHWARTZ: Well, its only remedy

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

JUSTICE GINSBURG: How often has it happened?

MS. SCHWARTZ: How often does it happen?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. SCHWARTZ: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE KENNEDY: Well, the courts I take it

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

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

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

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

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

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

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

MS. SCHWARTZ: It is.

JUSTICE KAGAN: And the Petitioners here --

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

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

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

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

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

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

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

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

MS. SCHWARTZ: For a couple --

JUSTICE ALITO: -- in that situation.

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

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

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

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

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

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

sanction under State law.

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Kneedler?

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING PETITIONER

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

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

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

CHIEF JUSTICE ROBERTS: Mr. Kneedler, is

your argument in this case limited to Spending Clause legislation?

MR. KNEEDLER: Yes. And what --

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

MR. KNEEDLER: Yes.

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

MR. KNEEDLER: Yes.

JUSTICE SOTOMAYOR: Is that your position?

MR. KNEEDLER: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: So you think --

MR. KNEEDLER: Under the Spending Clause.

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

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

CHIEF JUSTICE ROBERTS: So --

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

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

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

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

MR. KNEEDLER: Under --

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

MR. KNEEDLER: We are certainly not

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

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

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

JUSTICE KAGAN: But Mr. Kneedler --

MR. KNEEDLER: The third-party can sue only

if the parties intending them to be.

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: How about the status of

the hearing on California's compliance?

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Kneedler.

Mr. Phillips?

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

MR. PHILLIPS: Well, Ex parte Young has been

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

CHIEF JUSTICE ROBERTS: But your position --

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: So Congress can say --

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

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

MR. PHILLIPS: Right.

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

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

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

MR. PHILLIPS: Of the Federal statute.

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

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

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

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

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

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

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

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

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

MR. PHILLIPS: Of course.

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

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

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

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

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

MR. PHILLIPS: Right.

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

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

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

MR. PHILLIPS: Can I just --

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

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

JUSTICE BREYER: Yes.

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

simply made a slash in the reimbursements.

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

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

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

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

MR. PHILLIPS: Right.

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

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

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

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

MR. PHILLIPS: Yes.

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

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

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

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

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

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

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

MR. PHILLIPS: Doctrine.

JUSTICE SOTOMAYOR: -- doctrine, okay?

Which may square enough now.

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

MR. PHILLIPS: Justice Sotomayor --

JUSTICE SOTOMAYOR: What's wrong with that?

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

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

MR. PHILLIPS: Right. And so --

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

you --

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

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

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

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

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

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

MR. PHILLIPS: Well, I --

JUSTICE SOTOMAYOR: If this were an equitable --

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

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

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

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

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

JUSTICE BREYER: Right.

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

MR. PHILLIPS: Well --

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

MR. PHILLIPS: Well, all --

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

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

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

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

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

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

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

MR. PHILLIPS: Right. But --

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

MR. PHILLIPS: Right.

JUSTICE KENNEDY: -- as Justice Scalia

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

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

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

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

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

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

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

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

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

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

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

MR. PHILLIPS: But the beneficiaries --

JUSTICE BREYER: Yes.

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

JUSTICE BREYER: So is there a medical exception?

MR. PHILLIPS: I'm sorry.

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

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

JUSTICE KAGAN: Mr. Phillips --

MR. PHILLIPS: -- and in a circumstance

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

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

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

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

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

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

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

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

right.

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

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

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

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

(Laughter.)

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

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

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

MR. PHILLIPS: Right.

CHIEF JUSTICE ROBERTS: But the agency can?

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

MR. PHILLIPS: Right, because --

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

MR. PHILLIPS: Well, it also depends on

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

JUSTICE KAGAN: Correct.

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

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

JUSTICE ALITO: They can still bring a suit --

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

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

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

under those --

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

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

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

MR. PHILLIPS: No, no.

CHIEF JUSTICE ROBERTS: Agency that --

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

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

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

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

JUSTICE SCALIA: Under the --

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

State law.

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

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

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

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

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

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

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

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

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

told me earlier if Congress --

MR. PHILLIPS: Because Congress --

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

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

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

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

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

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

JUSTICE KENNEDY: Well, Justice Scalia's

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

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

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

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

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

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

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

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

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

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

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

If there are no further questions, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Phillips.

Ms. Schwartz, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF KARIN SCHWARTZ,
ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

Thank you, Your Honor.

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

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